# CHINA
# REGULATORY UPDATES

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October 2017

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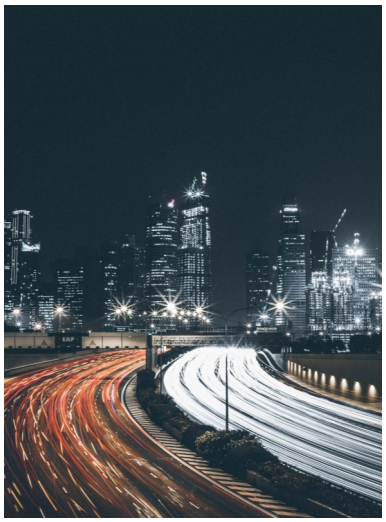

## ANTI-MONOPOLY / 反垄断

### MOFCOM Plans to Amend the *Measures for the Examination of Concentration of Undertakings*
### 商务部拟修订《经营者集中审查办法》

2017年9月8日，商务部发布了《经营者集中审查办法（修订草案征求意见稿）》（“《征求意见稿》”），向社会公开征求意见。《征求意见稿》在2009年以来关于经营者集中的一系列办法、规定和指导意见的基础上，进一步细化了经营者集中的相关概念和判断标准，其中值得注意的是：

(i) 将部分收购纳入经营者集中的范围：《征求意见稿》规定，经营者取得其他经营者能够在市场上经营且产生营业额的财产、业务、权利等组成部分，属于经营者集中。这意味着除常见的股权并购交易外，对其他经营者组成部分的收购（如品牌，许可权等）也可能需要进行经营者集中申报。

(ii) “控制权”的界定仍较为笼统：《征求意见稿》对“控制权”的界定基本沿用了《关于经营者集中申报的指导意见》（“《指导意见》”）的思路，规定了确定经营者是否取得对其他经营者的控制权或者能够对其他经营者施加决定性影响，应以交易协议和经营者章程等法律文件为主要依据，列举了判断是否取得控制权的考量因素。但是，《征求意见稿》未能对投资交易中常见的小股东的哪些否决权可构成“控制权”作出明确规定（*如对重大投资具有否决权是否应为考量因素*），该等模糊性为审查机关的评判留下了自由裁量的空间。

(iii) 首次明确了“参与集中的经营者”的范围：《征求意见稿》明确了五种情形下参与集中的经营者的认定标准：

| # | 构成经营者集中的主要情形 | 参与集中的经营者 |
|---|---|---|
| 1. | 经营者合并 | 合并各方 |
| 2. | 经营者取得对其他经营者的单独控制，或者对其他经营者由共同控制转变为单独控制 | 取得单独控制的经营者和目标经营者 |
| 3. | 经营者取得对其他经营者组成部分的单独控制 | 取得单独控制的经营者和其他经营者的组成部分 |
| 4. | 经营者新设合营企业 | 共同控制新设合营企业的经营者 |
| 5. | 经营者取得对其他既存经营者的共同控制 | 交易完成后共同控制既存经营者的所有经营者和既存经营者。<br>但既存经营者原由另外的经营者单独控制，交易完成后此经营者对既存经营者由单独控制转变为共同控制的，交易完成后共同控制既存经营者的所有经营者为参与集中的经营者，既存经营者不是参与集中的经营者 |

On September 8, 2017, the PRC Ministry of Commerce (or MOFCOM) released the draft amendments to the *Measures for the Examination of Concentration of Undertakings* (the “Draft Amended Measures”) for public comments. Based on a series of regulations, guidelines and implementing measures on concentration of business undertaking promulgated since 2009, the Draft Amended Measures further clarified certain concepts and examination criteria on business concentrations. Noteworthy revisions proposed by the Draft Amended Measures include, among others:

(i) Acquisition of business components will be considered as *concentration of undertakings*: According to the Draft Amended Measures, acquisition of other business undertaking’s assets, businesses, rights or any other type of components that are workable in the market and can generate business turnovers shall also be considered as a *concentration of undertaking*, which means that in addition to the most common forms of equity acquisition, merger and acquisition of brand names, franchise rights of other undertakings, among others, may become subject to anti-monopoly filing as well.

(ii) Interpretation of “*control*” remains not clear enough: The Draft Amended Measures basically followed the interpretation of “control” as defined under the *Guiding Opinions on Filing of Concentration of Undertakings*, stipulating that when determine whether a business operator gains control of or is able to make decisive influence on any other business undertaking, provisions of the underlying legal documents such as the transaction agreements and the articles of association of the business undertaking shall be considered as most important evidences. The Draft Amended Measures also listed some other factors that should be taken into consideration as well. However, it is not specified if a minority shareholder’s veto rights in terms of a business entity’s significant investment decisions or otherwise will be deemed as any type of “*control*”, leaving controversies in practice.

(iii) The scope of the business operators in a *concentration of undertaking* is clarified for the first time: The Draft Amended Measures specifies the scope of business operators that are involved in a *concentration of undertaking* under the following five circumstances:

| # | Scenarios | Business operators in the *concentration of undertaking* |
|---|---|---|
| 1. | Merger of undertakings | All business operators that involve in the merger |
| 2. | Acquiring single control of other undertakings, or changing from the joint control to single control of other undertakings | The business operator that acquires the single control and the target business operator |
| 3. | Acquiring single control of components of other undertakings | The business operator that acquires the single control and the target components of the other business operator |
| 4. | Establishment of joint venture | The business operators that acquire the joint control of the newly-established joint venture |

本次《征求意见稿》总结了以往的审查经验，对实务操作中存在的相关问题作出了解答，但仍有部分问题有待进一步明确，我们将持续关注正式文件的出台。

| | | |
|---|---|---|
| 5. | Acquiring joint control of other pre-existing undertakings | All business operators that acquire the joint control of the pre-existing business operator and the pre-existing business operator itself; *provided* that where the pre-existing business operator was under single control by another business operator and such single control becomes a joint control after the transaction, then all the business operators that jointly control the pre-existing business operator post-transaction, but excluding the pre-existing business operator itself |

The Draft Amended Measures reflected some review and examination experiences of MOFCOM in the past anti-monopoly practice, while still left a few controversial issues to be further addressed or otherwise clarified. We will continue monitoring any major development in this regard going forward.

## M&A / 并购

### CSRC Issues New Standards on Material Assets Restructuring by Listed Companies
### 证监会公布上市公司重大资产重组新准则

2017年9月22日，中国证监会发布了《公开发行证券的公司信息披露内容与格式准则第26号——上市公司重大资产重组（2017年修订）》（“《准则》”），《准则》从简化信息披露、规范重组行为及提高交易透明度等角度对2014年版本的《准则》进行了进一步细化，其中值得注意的是：

(i) 简化重组预案披露内容，缩短停牌时间：《准则》明确上市公司在重组预案中无需披露交易标的的历史沿革及是否存在出资瑕疵或影响其合法存续的情况等信息，具体信息可在重组报告书中予以披露；不强制要求在首次董事会决议公告前取得交易需要的全部许可证书或批复文件，仅需在重组预案及重组报告书中披露是否已经取得，但如未取得应当进行风险提示；对中介机构在预案阶段的尽职调查范围进行了精简，仅需针对“重组预案已披露的内容”。

(ii) 限制、打击“忽悠式”、“跟风式”重组：为防止控股股东发布重组预案后在股价高位退出并终止重组的方式进行套利，《准则》要求重组预案和重组报告书中应披露：上市公司的控股股东及其一致行动人对本次重组的原则性意见，及控股股东及其一致行动人、董事、监事、高级管理人员自本次重组复牌之日起至实施完毕期间的股份减持计划；上市公司披露为无控股股东的，应当比照前述要求，披露第一大股东及持股5%以上股东的意见及减持计划；在重组实施情况报告书中应披露减持情况是否与已披露的计划一致。

(iii) 明确“穿透”披露标准，提高交易透明度：为防范“杠杆融资”可能引发的相关风险，针对

On September 22, 2017, the China Securities Regulatory Commission (or CSRC) issued the *Standards on the Contents and Formats of Information Disclosure by Companies Publicly Offering Securities No.26 - Material Assets Restructuring by Listed Companies (revised in 2017)* (the “Standards”). Based on its 2014 version, the Standards further streamlined requirements for information disclosure, enhanced regulations on restructuring by listed companies, and promoted stock trading transparency. Highlights of the Standards include, among others:

(i) Simplified contents of restructuring proposal disclosure and shortened required time period of stock trading suspension: The Standards stipulated that in terms of restructuring proposal disclosure, the listed companies are not required to disclose such information that may affect the valid existence of the underlying target as historical development, defect in capital contribution and etc. Instead, this type of information can be disclosed later in the full-blown restructuring report. Besides, listed companies are not required to obtain all necessary licenses or approvals prior to the announcement of the first board resolutions, but should disclose the relevant information in the restructuring proposal and the final restructuring report, along with adequate risk warnings if they fail to obtain any license or approval. The Standards also nailed down the scope of due diligence by intermediary agencies at the proposal forming stage to the contents that have already been disclosed in the restructuring proposal.

(ii) Proposed measures to eliminate and clamp down on bogus restructurings and restructurings merely to follow any trend: To prevent the controlling shareholders from arbitrage by selling shares at higher price following the announcement of a bogus restructuring plan, the Standards required that listed companies should disclose in the restructuring proposal and in the restructuring report: (A) the principle opinions of the controlling shareholders and parties acting-in-concert with respect to the proposed restructuring; and (B) the schedule and plans of the controlling shareholders, parties acting-in-concert, directors, supervisors and senior management team members of the listed companies to sell their shares concerned during the period from the date on which the stock trading is resumed to the date when the restructuring is

近几年来并购重组中涉及交易对方（尤其是合伙企业以及“三类股东”）的穿透披露的尺度问题，《准则》首次明确：

(a) 交易对方为合伙企业的，应当穿透披露至最终出资人，同时还应披露合伙人、最终出资人与参与本次交易的其他有关主体的关联关系；

(b) 交易完成后合伙企业成为上市公司第一大股东或持股5%以上股东的，还应当披露最终出资人的资金来源，合伙企业利润分配、亏损负担及合伙事务执行的有关协议安排，本次交易停牌前6个月内及停牌期间合伙人入伙、退伙等变动情况；及

(c) 交易对方为契约型私募基金、券商资产管理计划、基金专户及基金子公司产品、信托计划、理财产品、保险资管计划、专为本次交易设立的公司等，比照对合伙企业的上述要求进行披露。

本次修订最为重要的部分无疑是针对并购重组中交易对方的披露标准，这对实践中各类“通道”资金参与上市公司并购重组造成了一定的影响，对交易对方的出资来源提出了更高的要求。

completed. Where any listed company claims that it has no controlling shareholder, it shall cause its largest shareholder as well as any shareholder holding 5% or more of its shares to disclose their principle opinions and stock reduction plans by following the abovementioned requirements. In addition, the listed companies shall disclose in the restructuring implementation report whether the shares are sold in accordance with the announced plans.

(iii) Clarified requirements on look-through disclosure to promote trading transparency: To prevent risks associated with leveraged financing, the Standards, based on CSRC's experiences in recent years, specified for the first time the requirements on "look-through shareholders" in the context of counterparty disclosures, especially with respect to partnerships and several special types of shareholders in the mergers, acquisitions and restructurings:

(a) Where the counterparty is a partnership, the listed company shall disclose such counterparty's ultimate capital contributor(s), as well as any related party relationship between its partners, ultimate capital contributor(s) and other parties involved in the transaction;

(b) Where a partnership becomes the largest shareholder or a shareholder holding 5% or more shares of a listed company post transaction, the listed company shall also disclose the source of funding of the ultimate capital contributor(s), any agreement with respect to the arrangement of profit distribution, loss sharing and execution of the partnership affairs of the partnership, and any change like new partners entering into or existing partners withdrawing from the partnership within six months before the suspension date of the deal and the whole suspension period; and

(c) Where the counterparty is a private contractual fund, a broker's asset management scheme, a special fund account and a financial product issued by a subsidiary of a fund management company, a trust plan, a wealth management product, an insurance asset management plan or a special purpose vehicle, the disclosure shall be made in accordance with the aforementioned requirements on partnerships as well.

Obviously, the requirements on disclosure of transaction counterparties seem to be the most important part of the revised Standards, which would mean a higher review standard for the source of funds of the transaction counterparty and may therefore impact M&As and restructurings of listed companies involving *channel funding* and the like.



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