

# CHINA REGULATORY UPDATES

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July 2014



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## ANTI-MONOPOLY / 反垄断

### MOFCOM Prohibited a Concentration of Three Shipping Giants

#### 商务部禁止三大航运企业经营者集中

On June 17, 2014, MOFCOM announced its disapproval over a proposed establishment of a limited partnership internet center in England and Wales by A.P. Muller - Maersk, MSC Mediterranean Shipping Company S.A. and CMA CGM S.A. to establish a long-term operation alliance on East-West trades (called the *P3 Network*), which was previously approved by the EU and US anti-trust counterparts. It is the second concentration that has ever been prohibited since the *PRC Anti-Monopoly Law* took effect in 2008.

MOFCOM believes that such a transaction will form a tight combination that will significantly strengthen the market power of the parties (*the aggregate capacity of the*

*parties on the Asia-Europe container liner transportation market will reach up to 46.7%*), further raise the entry barriers and squeeze existing competitors, so that it will seriously restrict and eliminate healthy competitions in the market concerned. Since the parties failed to propose remedial plans to effectively deal with the above concerns, MOFCOM decided to prohibit this concentration.

It looks quite likely that this proposed transaction has been prohibited mainly because of various deal specific considerations to this individual case. Based on this case alone, it is hard to conclude that MOFCOM is tightening up its AML review standards when investigating business concentration cases.

2014年6月17日，商务部发布公告对丹麦穆勒马士基航运、地中海航运公司以及法国达飞海运集团公司3家航运企业拟在英格兰和威尔士设立一家有限合伙制网络中心的经营者集中反垄断审查案做出禁止决定，这是《反垄断法》自2008年施行以来商务部禁止的第二例经营者集中案件。

商务部评估认为，由于本次集中完成后，交易方将形成紧密型联营，增强交易方的市场控制力（在亚洲至欧洲航线集装箱班轮运输市场合并运力份额高达46.7%），将大幅提高相关市场的集中度并进一步推高相关市场的进入壁垒，并可能挤压其他竞争者的发展空间，因此本次集中可能具有排除、限制竞争效果，申报方亦没有提出有效解决竞争问题的救济方案。鉴于上述，商务部决定禁止此项经营者集中。

### MOFCOM Amended Notification Guidance for Business Concentrations

#### 商务部修订经营者集中申报指南

On June 6, 2014, the Anti-Monopoly Bureau under the MOFCOM released on its website the *Notification Guidance on the Concentration of Business Operators* (the "Guidance"), which has introduced major amendments to the original version publicized on January 5, 2009. In particular, the Guidance has elaborated certain important concepts in addition to the procedural rules applicable to concentration of relevant business operators. For example, the Guidance explicitly explained that the concept of control also includes joint

control, in addition to the traditional sole control, and when determine whether or not a business operate controls another, the relevant parties may take into account such factors as the voting mechanism, historical attendance and voting results of the relevant shareholders' meetings, the composition and voting mechanism of the board of directors and the board of supervisors, and the appointment and dismissal of other senior managers.

2014年6月6日，商务部反垄断局在其网站上发布了《关于经营者集中申报的

指导意见》（“《意见》”），对2009年1月5日发布的原《意见》进行了较大修订，在原来偏重程序性规定的基础上增加了对经营者集中相关概念的进一步阐述。值得关注的是，《意见》明确了经营者集中所指的控制权除单独控制权外，还包括共同控制权，并列出了判断经营者是否通过交易取得其他经营者的控制权应考虑的因素（包括但不限于经营者股东大会的表决事项、表决机制及其历史出席率和表决情况；经营者董事会或监事会的组成及其表决机制；经营者高级管理人员的任免等）。

## CAPITAL MARKET / 资本市场

### CSRC Adopted ESOP Guidance Applicable to Listed Companies

#### 上市公司员工持股计划指导意见出台

On June 20, 2014, CSRC officially issued the *Guidance on the Trial Employee Stock Ownership Plan of Listed Companies* ("Guidance"), to implement State Council's relevant requirements to promote the healthy development of the mainland capital market.

According to the Guidance, the ESOP amount for all the employees and each employee shall not be higher than 10% and 1% of the outstanding shares of the company, while any ESOP holding period shall be at least 12 months. Employees may use salary or

other legally obtained incomes, and shares to be used in ESOP could be newly issued or repurchased by the company or gifted by existing shareholders. Note that compared with the draft interim measures issued almost two years ago (*see the 2012 September issue of our China Regulatory Updates for a brief introduction of such draft*), the Guidance has relaxed such requirements as the source of fund, source of stocks, methods for management, among others. The Guidance also stipulates the

applicable implementation procedures, information disclosure requirement and relevant measures to deal with insider trading activities.

A few companies have tried to adopt relevant ESOPs after the release of the draft rules. The Guidance is likely to help promote more public companies introduce their ESOP plans, but with incomplete supporting documents (such as tax incentives) and the current trial status, the real effect of the Guidance will remain to be seen.



2014年6月20日，中国证券监督管理委员会（“证监会”）正式发布了《关于上市公司实施员工持股计划试点的指导意见》（“《指导意见》”），以落实国务院为促进资本市场健康发展而提出的相关要求。

根据《指导意见》，员工持股计划所持有的股票总数累计不得超过公司股本总额的10%，单个员工持股不得超过1%，同时员工持股计划的持股期限不

得少于12个月；相关资金可以来自员工薪酬或以其他合法方式筹集，所需本公司股票可以来自上市公司回购、认购非公开发行股票、公司股东自愿赠予等合法模式。与2012年8月4日证监会发布的《上市公司员工持股计划管理暂行办法（征求意见稿）》（*相关内容请参见本所2012年9月刊China Regulatory Updates*）相比，《指导意见》在资金和股票来源、管理方式等方面均有所放宽。《指导意见》还就员工持股计划的

实施程序、信息披露及内幕交易防控等问题作出了规定。

员工持股计划作为企业鼓励其员工长期持有本公司股票的一种有效方式，在征求意见稿出台后已有若干上市公司先行先试。《指导意见》的正式出台应有助于规范和推动上市公司的员工激励机制；但考虑到目前还处于试行阶段以及相关配套措施（比如税收优惠措施）还不完善，其对于上市公司员工持股的实际促进作用仍有待观察。

## CSRC Circulated Rules to Implement the Shanghai-Hong Kong Stock Connect 证监会细化“沪港通”规定

Following a joint announcement by CSRC and the Securities and Futures Commission of Hong Kong to establish a pilot mutual stock market access between mainland China and Hong Kong (the so-called *Shanghai-Hong Kong Stock Connect*, see 2014 May issue of our *China Regulatory Updates* for a brief introduction), on June 13, 2014, CSRC circulated the *Several Provisions on the Pilot Program of Shanghai-Hong Kong Stock Market Connect* (the “Provisions”), to specify such implementing details as the relevant duties and responsibilities of the supervisory agencies and service

intermediaries (including the Shanghai Stock Exchange, the Stock Exchange of Hong Kong Ltd. and relevant stock trading service companies), issues related to RMB as the clearance and settlement currency, and etc. The Provisions further require that, based on the relevant principles under the joint announcement, in each domestic listed company, a single offshore investor shall not hold more than 10% shares of such company, and the aggregate shareholding ratio for all offshore investors shall not exceed 30%.

继2014年4月10日证监会和香港证券及期货事务监察委员会发布“沪港通”《联合公告》（*相关介绍可参见本所2014年5月刊China Regulatory Updates*）之后，证监会于6月13日出台了《沪港股票市场交易互联互通机制试点若干规定》，主要明确了各监管主体、服务提供机构（包括上海证券交易所、香港联合交易所及证券交易服务公司等）开展“沪港通”业务分别应当履行的职责及清算交收方式、交收货币为人民币等相关事项，并在《联合公告》的交易限制基础上进一步明确单个境外投资者对单个境内上市公司的持股比例不得超过10%，所有境外投资者持有单个上市公司合计不得超过30%。

## CSRC Launched M&A and Reorganization Rules for Companies on the New Third Board 新三板收购重组办法落地

On June 27, 2014, CSRC released the *Administrative Measures on M&A of Unlisted Public Companies* and the *Administrative Measures on Material Assets Reorganization of Unlisted Public Companies* (together, the “Measures”). Compared with the counterparts applicable to companies listed on stock exchanges, the Measures put more emphasis on simplicity, flexibility, efficiency and low cost. For example, mandatory tender offer does not apply to the unlisted public companies; payment method for assets purchase is much more flexible that could include cash, shares,

convertible bonds and preferred shares; application documents and procedures are simplified with shortened approval time limit, among others. As important parts of the legislative system for unlisted public companies, the Measures are likely to promote more M&A and reorganization activities of medium and small sized companies in particular, which would be helpful for the establishment of a multi-level capital market for the country.

2014年6月27日，证监会正式发布《非上市公众公司收购管理办法》和《非上

市公众公司重大资产重组管理办法》。与适用于上市公司的相关收购和重组管理办法相比，更加注重简便、灵活、高效和降低成本。比如，非上市公众公司不实施强制全面要约收购制度；允许重大资产重组使用现金、股份、可转换债券、优先股等多种支付手段购买资产；简化申报文件和审核程序，缩短审核期限等。作为非上市公众公司监管制度的重要组成部分，前述办法的出台应有利于规范引导中小企业的并购重组活动，构建多层次资本市场。

## SHANGHAI FTZ UPDATES / 上海自贸区要闻

### Shanghai FTZ Released 2014 Version of Negative List 自贸区发布新版负面清单，多方面扩大开放措施

On July 1, 2014, Shanghai FTZ released the *Special Administrative Measures on Entry of Foreign Investment of China (Shanghai) Pilot Free Trade Zone (2014 version)* (the “New List”), with prohibited and restricted items noticeably slimmed to 139 items from 190 items according to the 2013 version. Note that under the

negative list administrative system, foreign investments failing outside of the list will be subject to a much more simplified registration and filing requirement instead of government approvals as currently required elsewhere in mainland China. The removed prohibitions and substantially lifted restrictions include, for example,

restrictions on foreign invested online sales of ordinary commodities were removed, foreign invested medical institutions are no longer subject to a minimum investment amount or business term restrictions; in the real property sector, land development can now be conducted by a WFOE rather than only by a joint venture. With

respect to the manufacturing industry, the New List encourages high-end manufacturing involving product R&D and design (instead of the traditional labor concentrated manufacturing) .

Meanwhile, the New List has improved certain legislation techniques, including, for example, industries restricted or prohibited against both domestic and foreign fund (e.g., high energy-consuming and high-pollution manufacturing, pornography and gambling) are no longer specifically listed in the New List; the New List reorganized a few items according to a simplified classification system; the New List clarified certain items and in particular, specified the applicable restrictions for certain restricted items (e.g., investments in high-end offices,

hotels, international conference and exhibition center should be conducted only by project companies).

2014年7月1日, 上海自贸区在其网站上发布《中国(上海)自由贸易试验区外商投资准入特别管理措施(2014年修订)》(“《负面清单》”)。与2013年版负面清单相比, 新版《负面清单》规定的特别管理措施由190条缩减至139条(减少了51条), 其中因扩大开放而实质性取消或实质性放宽的条款主要集中在服务业和高端制造业领域。具体措施包括, 在批发零售业取消了对外商投资一般商品网上销售的限制, 在医疗领域取消了对外商投资医疗机构最低投资总额和经营年限的限制, 在房地产业取消了对投资土地成片开发须合资、合作的限制等。制造业开放政策中, 《负面清单》更侧重于向产品研发、设计等高端制造业引导。

此外, 新版《负面清单》在立法技术层面也进行了提高。具体表现在: 更加注重与其他法律法规的接轨, 对于内资和外资均有限制或要求禁止的行业, 不再特别罗列(比如高耗能高污染制造业和色情、博彩业等); 调整分类方式, 并据此对一些项目进行了重新归类、合并和整理; 对于2013年版清单中的部分模糊表述进行了明确(尤其明确了具体的限制措施, 比如明确投资高档宾馆、高档写字楼、国际会展中心、房地产二级市场交易的, 应以项目公司为限)。

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