

To: Our Clients and Friends

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[MOFCOM Regulations Provide Supplemental Information on New M&A National Security Review](#)

On March 4, the Ministry of Commerce (“MOFCOM”) issued the “*Interim Regulations from the Ministry of Commerce on Matters Relating to the Implementation of the Security Review System for Merger with and Acquisition of Domestic Enterprises by Foreign Investors*” (“Interim Regulations”). The Interim Regulations will be effective for a five-month period from 5 March 2011 to 31 August 2011.

According to MOFCOM, the Interim Regulations were released in order to assist foreign enterprises with the new security review system introduced in the “*Notice Regarding the Establishment of National Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors*” (“Notice”), which became effective on 5 March 2011.

Key aspects of the Interim Regulations are summarized below:

Pre-Review Consultation

According to the Interim Regulations, applicants may apply for a consultation with MOFCOM on procedural issues relating to the merger and acquisition (“M&A”) of a domestic enterprise prior to submitting the application for a security review.

Third Party Involvement

Echoing the previous Notice, the Interim Regulations allow several third parties to request MOFCOM to initiate security reviews on M&A transactions. These include departments related to the State Council, national industry associations, and companies in the same industry or upstream and downstream companies.

The Interim Regulations also specify that local commerce authorities handling M&A transactions can make similar requests and halt the transaction process. When a local commerce authority handles the application of a M&A transaction and the transaction is within the scope of the M&A security review, but the applicant has not applied to MOFCOM, the local commerce authority can temporarily hold the transaction and require the applicant to file a written M&A security review application to MOFCOM.

Application Materials:

The Interim Regulations include a list of what foreign investors should include in the application for a security review:

- i. Application Form and Introduction:
 - the application form for the M&A security review; and
 - an introductory description of the transaction signed by the legal representative of the applicant or his authorized representative.

- ii. Foreign Investor Identification Documents
 - notarized and certified identification or certificates of incorporation, and the credit certificate of the foreign investors;
 - identification of the legal representative or power of attorney issued by the foreign investor; and
 - identification of the authorized representative.

- iii. Foreign Investor Background Information
 - an introduction to the foreign investors and its affiliates (including its actual controllers and persons acting in concert); and
 - a description of the relationship between the foreign investors and the investor's relevant national government.
- iv. Domestic Enterprise Background Information
 - an introduction to the targeted domestic enterprise;
 - the articles of association;
 - a business license (copy);
 - audited financial statements of the previous year;
 - an organization chart of the structure of the domestic enterprise before and after the M&A;
 - an introduction and business license (copy) of the enterprise's invested companies
- v. Post-Transaction Documents
 - the contract, articles of association, or the partnership agreement for the foreign invested enterprise proposed to be established after the M&A; and
 - a list of the proposed members of the board of directors, the general manager or partners, and other senior management.
- vi. Post-Transaction Control Rights
 - a statement regarding how the voting rights of the foreign investor will affect the shareholders or shareholders meetings and board resolutions after the M&A, as well as how it will influence partnership affairs;
 - an explanation regarding the circumstances that cause foreign investors to obtain actual control over the domestic enterprise's operating decisions, finances, employment and technology.
 - agreements or documents related to the above.
- vii. Other Files MOFCOM May Require

The Interim Regulations also specify certain documents applicants must submit based on the type of M&A transaction, if applicable. For M&As involving equity transactions, applicants should additionally submit:

- i. the share transfer agreement or the foreign investor's increased capital subscription agreement with the domestic enterprise;
- ii. the resolution of the shareholders' and the general meeting of shareholders of the merged domestic enterprise; and
- iii. the relevant asset appraisal report.

For M&As involving asset transactions, applicants should additionally submit:

- i. the resolution from the domestic enterprises' authority or owner agreeing to sell the assets;
- ii. the asset purchase agreement (including a list and the status of the assets to be purchased);
- iii. a statement from all parties to the agreement; and
- iv. the relevant asset appraisal report.

Security Review Procedure

Once MOFCOM deems that the applicant has submitted all necessary documents and has satisfied the legal requirements, it must notify the applicant within 15 working days that it has received the application. In this 15-day period, the applicant may not carry out the proposed M&A transaction and the local commerce authority cannot review the transaction. If MOFCOM has not notified the applicant in writing after 15 working days, the applicant may carry out the related M&A in accordance with the relevant laws and regulations.

MOFCOM will then have 5 working days to notify an inter-ministerial committee ("Joint Committee") about the transaction. Once the Joint Committee has reached a decision, the Interim Regulations specify that MOFCOM will provide a written notification of the panel's comments to the applicant, concerned parties, and the local commerce authority handling the M&A transaction within 5 working days. The decision will fall into three categories:

- **No Influence on National Security:** The applicant may conduct the M&A transaction procedures required by the relevant regulations and authorities.
- **Potential Influence on National Security:** The applicant cannot apply for or engage in the M&A transaction without adjusting the transaction, amending the application documents, and re-submitting the security review application.
- **Definite Influence on National Security:** If the M&A has already had or may have an influence on national security, MOFCOM will join with relevant departments in terminating the transactions between the parties through equity or asset transfers, or other effective measures to eliminate the influence on national security.

Impact

While the Interim Regulations provide helpful details on procedural issues related to the security review, there are still lingering concerns over the original Notice. Ambiguity remains over which specific domestic industries and sectors fall under the scope of the national security review as well as the lack of conditions that set forth “safe harbors” for businesses engaged in M&A activity.

MOFCOM has announced that it may decide to provide additional guidance after reviewing feedback from public comments and commendations received through April 10, 2011. Since the Interim Regulations are only valid until August 31, 2011, MOFCOM could also adjust the security review procedure depending on how the 5-month ‘trial run’ progresses.

Considering the unresolved questions about implementation and the ability for a range of private and public entities to initiate the review, foreign investors should closely track the developments of the relevant regulations to ensure that their M&A transactions maintain compliance.

If you have any questions, please feel free to contact us.

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