

## MOFCOM Issues Procedural Guidelines for National Security Review

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The China Office of the State Council recently issued a circular to launch a state-level investment review body to check that merger and acquisition deals struck by non-Chinese firms in China do not endanger “national security.” On 4 March 2011, China’s Ministry of Commerce issued the temporary procedural rules for the security review as provided in #6 Circular.

On 12 February 2011, the Office of the State Council issued a circular, No. 6 Circular of the General Office of the State Council on the Establishment of Security Review System Regarding Merger and Acquisition of Domestic Enterprises by Foreign Investors (#6 Circular), to launch a state-level investment review body to check that merger and acquisition deals struck by non-Chinese firms in China do not endanger “national security.” (View China to Scrutinize M&A by National Security for more information.)

On 4 March 2011, China’s Ministry of Commerce (MOFCOM) issued the temporary procedural rules for the security review as provided in #6 Circular. These procedural rules are described below.

### Initiation of Review

The foreign investor (Applicant) for a transaction covered by the #6 Circular shall submit an application for security review of merger and acquisition to MOFCOM. Local administrative offices of MOFCOM, during the approval process of merger and acquisitions or equity transactions covered by #6 Circular, shall temporarily stop the approval process, report the relevant information to MOFCOM and make a written request to the foreign investor, who has not already applied, to apply to MOFCOM for a security review.

Relevant departments of the State Council, trade associations, companies in the concerned industry and upstream/downstream companies may also submit suggestions to MOFCOM regarding a security review for a transaction involving a foreign investor. The concerned third party must include the basic information regarding the transaction and the specific effect the transaction will have on national security.

## Documents Requested for a Security Review

Before filing a security review application with MOFCOM, the applicant can apply with MOFCOM for discussions regarding the procedures process of the security review. The applicant shall provide these following documents:

1. Security review application and documents describing the background information of the transaction (both documents must be signed by the legal representative or authorized agent of the applicant)
2. Notarized or legally certified identification, registration certificate and credit certificate of the Applicant; identification certificate of legal representative or the agent's identification certificate along with the power of attorney agreement
3. Documents describing the background information of the Applicant and the associated company (include information of people in control and who execute on behalf of the company), and their relationship with foreign governments
4. Information of the target company of the merger and acquisition (M&A), including the company charter, business license (copy), the previous year's audited financial statements, structural chart of the company before and after the M&A, and information and business license of the acquiring/investing company
5. The articles of associations, and other contracts and agreements for new combined entity after the M&A, as well as a personnel list of the board of directors, general managers, partners and other senior executives
6. For an equity transfer M&A, the equity transfer agreement or the capital increase agreement, the target company's shareholders resolution, resolution of general assembly of shareholders and the corresponding asset evaluation report of the target company
7. For an asset acquisition, the authorized confirmation from the owner of the asset, the asset purchase agreement (including a list of assets and description), information of the transaction parties and the asset evaluation report
8. Description of the rights and power of the applicant after the M&A, especially its voting rights/influence during the shareholders meeting, board of directors resolutions and execution of partnership actions; a description of the transfer of control over business decision-making, financial, personnel and technology from a domestic company to the foreign investor or another domestic, but foreign-controlled entity; and all associated contracts and agreements for the aforementioned transfer of rights
9. Any other documents required by MOFCOM

## **The Review Process**

MOFCOM will notify the applicant if the application materials are complete. If the transaction is covered by the #6 Circular, MOFCOM will provide a written notification to the applicant within 15 working days, and within 5 working days thereafter, submit the information to the inter-ministry roundtable conference (the Conference) for review. If the applicant does not receive a written notification from MOFCOM within 15 working days, it may proceed with the M&A approval process according to the Chinese regulations.

The Conference shall within 5 days upon receiving the application from MOFCOM provide the security review notification to the applicant and the local MOFCOM office in charge of approving M&A. At this stage, the applicant may amend the application or withdraw the application through MOFCOM, and MOFCOM will within 5 working days upon receiving this request, transfer the information to the Conference.

## **Potential Implications**

According to this circular, the application for security review requires significant disclosure. The application not only requires the detailed information of the transaction and the transaction parties, but also the personal information of the individual actors to this transaction. Another issue of significance is how various concerned parties, including but not limited to competitors and trade associations, can make suggestions to MOFCOM to initiate a security review. Therefore, it is likely that for any significant transaction involving a foreign investor, an initial application for security review will be necessary.

These procedural rules are only temporary and will be effective until 31 August 2011. MOFCOM is still receiving comments from the public and may make additional revisions. MWE China Law Offices will monitor these new rules on the national security review, and provide analysis in a timely manner.

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