

China Corporate Bulletin

April 2011

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Welcome to White & Case's monthly China Corporate Bulletin. This bulletin covers recent corporate regulatory developments and news in the PRC and Hong Kong, ensuring you stay up to date on the latest market issues.

MOFCOM Implementing Rules on M&A Transactions Security Review

In the [March issue](#) of our China Corporate Bulletin, we discussed the *Notice of the General Office of the State Council on Launching Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (《国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知》) (the "**Circular 6**"), pursuant to which security review is required on mergers and acquisitions conducted by foreign investors relevant to the "national security" of China. On March 4, 2011, China's Ministry of Commerce (**MOFCOM**) issued the *Tentative Provisions of the Ministry of Commerce on Issues Related to the Implementation of the Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors* (《商务部实施外国投资者并购境内企业安全审查制度有关事项的暂行规定》) (the "**Tentative Provisions**") to provide further guidance to implement the Circular 6. Both the Tentative Provisions and Circular 6 came into effect on March 5, 2011.

The Tentative Provisions provide further details on how the national security review process is initiated including which documents need to be submitted and how the review decision is made. It is important to note that the Tentative Provisions are published on a pilot basis and are valid through August 31, 2011.

The key contents of the Tentative Provisions are summarized as follows:

- Initiation of the National Security Review

1. Application by Foreign Investors

Foreign investors acquiring domestic enterprises that fall into the scope of security review as specified under Circular 6 shall apply to MOFCOM for the security review. Joint acquisition by two or more foreign investors can jointly submit or nominate one foreign investor to submit the security review application to MOFCOM (the "**Applicant**").

When receiving an application in accordance with the *Rules for the Merger and Acquisition of Domestic Enterprises by Foreign Investors* and the *Rules for Change of Investors' Equities in Foreign-invested Enterprises*, the local branch of MOFCOM shall not accept the M&A application if the Applicant has failed to apply to MOFCOM for security review when he should. The local branch of MOFCOM shall request in writing that the Applicant submit a security review application to MOFCOM and the local branch shall report the case to MOFCOM.

Before submitting the formal M&A security review application to MOFCOM, the Applicant may apply to MOFCOM for consultation regarding the procedural issues involved in an M&A transaction. The Tentative Provisions do not define "procedural issues", however it appears to be possible for foreign investors to seek official guidance as to whether they should apply for security review at an earlier stage.

2. Application by Third Parties

If any relevant third party, including but not limited to the ministries of the State Council, national industry associations, competitors and upstream and downstream companies believe a foreign investor's acquisition of domestic companies should be subject to a security review, it may propose to MOFCOM that a security review to be conducted and relevant explanation given (including general conditions of the M&A transaction and specific impact to national security). If the deal falls into the scope of the M&A security review, MOFCOM shall submit the suggestion to the inter-ministry roundtable conference (the "**Conference**") within five working days. If the Conference considers it necessary to conduct the M&A security review, based on the decision of the Conference, MOFCOM shall request the foreign investor submit an M&A security review application as stipulated in the Tentative Provisions.

■ Documentary Requirements

The Tentative Provisions stipulate a detailed checklist of the documents to be submitted should a foreign investor consider it necessary to apply for an M&A security review. The required application documents include but are not limited to the following:

1. Application letter and transaction description of the M&A security review signed by a legal representative or authorized representative of the Applicant;

2. Notarized and authenticated foreign investor identification or registration certificate and creditworthiness certificate; identification certificate of the foreign investor's legal representative or foreign investors' power of attorney and identification certificate of the foreign investor's authorized representative.
3. Statement on the foreign investor and its affiliated enterprises (including actual controller, **persons acting in concert**), description of any ties to relevant governments.
4. Statement, articles of association, and business license of the acquired domestic enterprise, audited financial statement of the past year, organizational chart before and after the M&A, and statement and business licenses of its invested enterprises.
5. Contracts of the proposed foreign invested enterprise after the M&A, articles of association or partnership agreement, list of proposed board members appointed by the shareholders, and list of general managers or partners and other senior management team of the proposed foreign invested enterprise after the M&A.
6. If the deal is an equity acquisition deal, equity transfer agreement or subscription agreement, shareholders' resolutions of the merged domestic enterprise and related asset assessment report.
7. If the deal is an asset acquisition deal, shareholders' resolution or owner's consent on the assets transfer, asset purchase agreement, status statement on each party involved in the agreement and related asset assessment report.
8. Statement on the foreign investors' post-M&A influence in relation to voting rights in resolutions of the shareholders, board of directors and the executive of partnerships; and statement on other conditions where actual controlling rights of business decision-making, finance, personnel, technology, etc. would be transferred to foreign investors or their affiliated enterprises at home or abroad, as well as relevant agreement or documents related to the above situations.

Although the above checklist of the required application documents is detailed, there is no clue indicating the core concern of the authorities in conducting the security review, namely whether the proposed transaction will have any adverse effect on national defense or nation security.

■ Timing of the Review

The Temporary Provisions do not stipulate details on the overall timing of the review process. According to the Circular 6, MOFCOM will decide whether to refer the M&A transaction for security review by the Conference within 15 working days from its receipt of the Applicant's application. MOFCOM then shall inform the Applicant or parties to the transaction of the decision in writing within five days after its receipt of the written opinion of the Conference.

The Tentative Provisions only emphasize that the original 15-working-day time frame for MOFCOM's review of the application counts from the time that MOFCOM considers the documents submitted by the Applicant complete and issues a formal acceptance notice to the Applicant.

■ Review Decisions

For an M&A transaction that has no impact on national security, the Applicant can proceed with the M&A transaction procedures at relevant regulating departments according to relevant foreign investment laws and regulations.

For an M&A transaction that may impact national security, the Applicant shall not apply for or practice the M&A transaction unless the Applicant adjusts the transaction, revises application documents and initiates a new review.

For an M&A transaction that has already produced or may produce significant impact on national security, MOFCOM shall, according to the opinions of the Conference, terminate the transaction along with relevant departments, or transfer related equity, assets or take other effective measures to so as to eliminate the impact of the acquisition on national security.

For more information on Tentative Provisions, please visit the following Chinese language link:

<http://www.mofcom.gov.cn/aarticle/b/f/201103/20110307432771.html?3651658431=36784163>

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- Corporate/M&A Team of the Quarter (Q3)—*Financial News* 2009
- Top Tier in Global Project Finance—*Chambers Global* 2011; *Infrastructure Journal* 2010
- Winner of the Legal Innovation for Financial Services Award—*Financial Times* 2009