

## Ministry of Commerce Announcement [2011] No. 53

### Regulations of the Ministry of Commerce on the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors

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The Ministry of Commerce has made improvements to the Interim Regulations of the Ministry of Commerce on Relevant Issues Related to the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (Ministry of Commerce [2011] No. 8) to form the Regulations of the Ministry of Commerce on the Implementation of Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors [the “Regulations”] based on extensive solicitation of public comments and in accordance with the Notice of the General Office of the State Council Concerning the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (*Guo Ban Fa* [2011] No. 6) and applicable laws and regulations with respect to foreign investment. The Regulations are hereby promulgated and shall enter into force as of September 1, 2011.

Ministry of Commerce of  
the People’s Republic of China  
August 25, 2011

### Regulations of the Ministry of Commerce on the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors

#### Article 1

In regard to a foreign investor’s merger and acquisition [“M&A”] of a domestic enterprise that falls within the scope of M&A security review specified in the Notice of the General Office of the State Council Concerning the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, the foreign investor shall file an application with the Ministry of Commerce for M&A security review.

If the M&A is carried out by two or more foreign investors, they may jointly or may designate one of the investors (hereinafter referred to as the “Applicant”) to file an application with the Ministry of Commerce for M&A security review.

#### Article 2

When competent local commerce authorities handle applications for M&A transactions in accordance with the Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, the Certain Regulations on Changes to the Equity Interests of the Investors of A Foreign-Invested Enterprise, the Interim Regulations on Investment in China by Foreign-Invested Enterprises, and other relevant regulations, if [the concerned M&A

transactions] fall within the scope of security review while the applicants fail to file applications with the Ministry of Commerce for M&A security review, the competent concerned local commerce authorities shall temporarily suspend handling of the applications, require the applicants to file applications for M&A security review in writing with the Ministry of Commerce within five working days, and report the relevant circumstances to the Ministry of Commerce.

### **Article 3**

In regard to M&A of domestic enterprises by foreign investors, when relevant State Council departments, national-level industry associations, enterprises in the same trade or upstream and downstream enterprises deem that an M&A security review is necessary, they may propose that the Ministry of Commerce conduct an M&A security review, and submit explanations on relevant circumstances (including basic information on the M&A transaction and specific impacts on national security). The Ministry of Commerce may require the interested parties to submit relevant explanations. Where [the M&A] falls within the scope of M&A security review, the Ministry of Commerce shall within five working days submit the proposal to the ministerial panel. When the ministerial panel deems it necessary to conduct an M&A security review, the Ministry of Commerce shall, in accordance with the ministerial panel's decision, require the foreign investor to file an application for M&A security review pursuant to these Regulations.

### **Article 4**

Before filing an official application with the Ministry of Commerce for M&A security review, the Applicant may request a discussion with the Ministry of Commerce on procedural issues concerning its M&A of a domestic enterprise to communicate relevant circumstances in advance. Such discussion by appointment is not a mandatory procedure for filing an official application. The discussion does not have binding force or legal force, and may not serve as the basis for filing an official application.

### **Article 5**

An applicant shall submit the following documents when filing an official application with the Ministry of Commerce for M&A security review:

- (1) Written application for M&A security review and description of the circumstances of the M&A transaction, signed by the Applicant's legal representative or authorized representative;
- (2) Notarized and duly certified proof of identity or proof of registration certification and creditworthiness certification documents of the foreign investor; certified proof of identity of the legal representative, or written power of attorney issued by the foreign investor and certified proof of identity of the authorized representative thereof;
- (3) Explanation of the circumstances of the foreign investor and its affiliated enterprises (include its actual controller and parties acting in concert), and explanation of relationships with the governments of relevant countries;
- (4) Explanation of the circumstances of the target domestic enterprise, its articles of association, business license (photocopy), audited financial statements for the previous year, organizational structure chart before and after the M&A, and explanation of the circumstances of the enterprises invested in by the target enterprise with business licenses (photocopies) of such enterprises;
- (5) Contract, articles of association, or partnership agreement of the foreign-invested enterprise

to be established after the M&A, and list of members of the board of directors thereof appointed by the shareholder, and such senior managers to be engaged as the general manager and the partners;

(6) In the case of an M&A involving an equity transfer, the equity transfer agreement or the agreement on subscription by the foreign investor for an increase in capital of the domestic enterprise, resolutions of the shareholders' or shareholders' general meeting of the target domestic enterprise, and the relevant asset evaluation report shall be submitted;

(7) In the case of an M&A involving an asset transfer, the resolution of the ultimate decision-making body or property rights owner of the concerned domestic enterprise approving the sale of the asset, the assets purchase agreement (including the list and status of assets to be purchased), circumstances of each party to the agreement, and the relevant asset evaluation report shall be submitted;

(8) Explanation of the impact of the voting rights enjoyed by the foreign investor after the M&A with respect to resolutions of the shareholders' meeting or the shareholders' general meeting and of the board of directors, or on the implementation of partnership affairs; explanation of other circumstances that may result in the transfer of actual control rights of the concerned domestic enterprise relating to business decision-making, financial matters, human resources, technology, etc., to the foreign investor or its domestic or overseas affiliated enterprises; and the agreement or documents relevant to the foregoing circumstances; and

(9) Other documents required by the Ministry of Commerce.

#### **Article 6**

When the application documents for M&A security review submitted by the Applicant are complete and meet statutory requirements, the Ministry of Commerce shall notify the Applicant in writing of acceptance of the application.

When the M&A transaction included in the application falls within the scope of M&A security review, the Ministry of Commerce shall notify the Applicant in writing within 15 working days and, within the following five working days, file a request with the ministerial panel for security review of M&A of a domestic enterprise by foreign investors (hereinafter referred to as "Ministerial Panel") for review.

During the 15 working days after the Applicant has been notified of the acceptance of the application, the Applicant may not implement the M&A transaction, and the competent local commerce authority may not review and approve the M&A transaction. After 15 working days, if the Ministry of Commerce has not notified the Applicant in writing, the Applicant may handle the relevant procedures in accordance with relevant State laws and regulations.

#### **Article 7**

The Ministry of Commerce shall, upon receipt of the written review opinions of the Ministerial Panel, notify the Applicant (or parties concerned) and the relevant local commerce competent authority responsible for M&A administration of the same in writing within five working days.

(1) When the M&A will not impact national security, the Applicant may handle the M&A transaction procedures with the competent authority with corresponding administrative authority in accordance with the Regulations on Merger and Acquisition of Domestic Enterprises by

Foreign Investors, the Certain Regulations on Changes to the Equity Interests of the Investors of A Foreign-Invested Enterprise, the Interim Regulations on Investment in China by Foreign-Invested Enterprises, and other relevant regulations.

(2) When the M&A is likely to impact national security and the M&A transaction has yet to be implemented, the parties concerned shall terminate the transaction. The Applicant may not apply for and implement the M&A transaction before the M&A transaction has been adjusted, the application documents have been modified and it has been reviewed again.

(3) Where the conduct of a foreign investor's M&A of a domestic enterprise has already caused, or may cause, material impact on national security, in accordance with the review opinions of the Ministerial Panel, the Ministry of Commerce shall, in conjunction with other relevant departments, terminate the concerned transaction, or adopt equity or asset transfers or other effective measures to eliminate the impact of such M&A on national security.

#### **Article 8**

After the Ministry of Commerce has filed a request with the Ministerial Panel for review, if the Applicant modifies the application documents, cancels the M&A transaction, or at the request of the Ministerial Panel supplements or modifies the documents, it shall submit the relevant documents to the Ministry of Commerce. The Ministry of Commerce shall submit the same to the Ministerial Panel within five working days after receipt of the application report and relevant documents.

#### **Article 9**

In regard to M&A of domestic enterprises by foreign investors, an M&A transaction shall be determined whether it falls within the scope of M&A security review from its material contents and actual impact; foreign investors may not in any way materially circumvent the M&A security review by means including, without limitation, nominee shareholders, trusts, multi-level reinvestment, leases, loans, control by agreement or offshore transaction.

#### **Article 10**

With regard to an M&A of a domestic enterprise by a foreign investor that has not been submitted to the Ministerial Panel for review or which upon review has been deemed by the Ministerial Panel not to impact national security, if it thereafter falls within the scope of security review specified in the Notice of the General Office of the State Council Concerning the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors due to adjustment to the M&A transaction, modification of relevant agreements or documents, alteration of operating activities or other changes (including changes in the offshore actual controlling party), the parties concerned shall suspend the relevant transaction and activities, and the foreign investor shall file an application with the Ministry of Commerce for M&A security review in accordance with these Regulations.

#### **Article 11**

The competent commerce authorities, relevant units and personnel participating in the M&A security review shall have the obligation to maintain the confidentiality of state secrets, trade secrets and other information subject to confidentiality in the M&A security review.

#### **Article 12**

These Regulations shall enter into force as of September 1, 2011.