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## China's Temporary 'CFIUS' Implementing Regulations

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China's national security regulations with respect to foreign mergers and acquisitions (the Notice Concerning Establishment of the Security Review System on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors) entered into effect on March 5 and have been discussed in an earlier [client alert](#). The Ministry of Commerce (MOFCOM) as administering agency has since issued the Temporary Regulations on the Implementation of Matters Concerning the Security Examination System for Foreign Mergers and Acquisitions of Domestic Enterprises (the 'Temporary Implementation Regulations'). Their temporary nature is clear as they are in effect only until August 31, by which time presumably experience will have been obtained, a dedicated office for review of national security-related transactions will have been established, and permanent implementing regulations can be promulgated.

The Temporary Implementation Regulations address the formalities of the filing and examination processes. The acquirer under Article 1 submits the application for review to MOFCOM itself rather than the local commerce bureau/commission. This procedure is consistent with that applicable to anti-monopoly reviews. As applications for approval of foreign investment transactions with investment of less than \$300 million are submitted to the local commerce bureau/commission and are not elevated to MOFCOM, the

local authorities are instructed under Article 2 not to accept for investment approval any transaction which falls within the preview of a national security review unless an application has been filed for such review. The broad scope of the underlying national security regulations indicates that there may be considerable potential for overreach in this regard.

The formalities of a filing under Article 4 go beyond those of an anti-monopoly filing:

- (1) signed application and explanation of the transaction;
- (2) notarized and authorized certificate of incorporation and statement that the submitted materials are truthful; and ID of the legal representative (head) of the acquirer or his/her authorized representative;
- (3) explanation of the foreign investor and its affiliates including relationships with relevant governments;
- (4) explanation of the circumstances of the acquirer together with its articles of association, duplicate of its business license, most recent annual financial statements, pre- and post-closing organization chart and explanations with duplicate of the business licenses of the enterprises in which investment is to be made;
- (5) post-closing corporate documents and list of directors, general manager and/or partners;
- (6) if a share purchase, the share purchase or capital increase agreement with shareholder approval resolutions and appraisal report;
- (7) if an asset acquisition, the asset purchase agreement and appraisal report;
- (8) explanation of voting rights and control of such important matters as management, finance, personnel and technology to be obtained by the foreign investor; and
- (9) such other documents as MOFCOM may require.

Some of the above items duplicate foreign investment approval and anti-monopoly review requirements and some, e.g., the appraisal report, would not appear to be relevant to a national security review.

With respect to timing, as with respect to anti-monopoly and other procedures in China, the clock does not start until the application is deemed complete and ready for review. Under Article 5, MOFCOM then has 15 business days to review the application and an additional 5 working days to convene the inter-ministerial review committees if it deems such further review necessary. That committee, whose composition may vary based on the affected industry, has an additional 15 working days to review the application. If MOFCOM has not notified the applicant in writing after the 15th (in total, 35th) working day after the clock has started, the national security review has been concluded and the investment review may proceed. This review period is longer than the 30 calendar days, Phase I anti-monopoly review period.

Conversely, under Article 6, MOFCOM has 5 working days after receipt of the inter-ministerial review committee's report to notify the applicant whether the transaction presents no national security issue, requires modification to proceed or, in case of a major impact on national security, may not proceed.

Under Article 8, the applicant, State Council departments, national trade associations, other companies in the industry, and upstream and downstream companies may submit comments. MOFCOM submits such comments to the inter-ministerial review committee which may instruct MOFCOM to require the foreign investor to submit a national security review application. Thus, the application requirement is not voluntary.

In practice, the Temporary Implementation Regulations have already created considerable uncertainty and delay in the approval of foreign investment projects. We understand that local commerce commissions/bureaus in some localities are directing the parties in routine foreign M&A transactions, even in industries not subject to the national security regulations, to report the transactions to MOFCOM for national security review, thus returning approval authority even on small transactions from local governments back to the central government.

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