

China's MOFCOM Issues Interim Rules on National Security Review of Foreign Acquisitions

On March 5, 2011, the Chinese Ministry of Commerce's ("MOFCOM's") interim rules implementing the new Chinese security review mechanism for foreign acquisitions of Chinese enterprises (the "Interim Rules")¹ entered into force. The Interim Rules were issued on March 4, 2011 and will remain in force until August 31, 2011. MOFCOM invites public comments until April 10, 2011. The speedy adoption and implementation of the new security review regime may reflect Chinese frustration over U.S. security reviews of proposed foreign investments by Chinese companies.² The European Union is also reportedly considering introducing a security review regime for foreign acquisitions, apparently in response to concerns about potential Chinese investments in Europe.³

I. THE INTERIM RULES

The Interim Rules provide guidance on MOFCOM's implementation of the State Council's national security review scheme, which was established by the Notice on Establishing a Security Review Mechanism regarding Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the "Notice").⁴

A. THE SECURITY REVIEW NOTIFICATION

The Interim Rules set out the materials required for a notification, including an application, transaction information, financial statements, a discussion of the relationship

¹ See <http://www.mofcom.gov.cn/aarticle/b/c/201103/20110307432771.html?2733198897=1175213509>.

² See, e.g., <http://www.reuters.com/article/2011/02/21/us-china-usa-huawei-idUSTRE71K2IT20110221> and <http://blogs.wsj.com/in-charge/2011/03/07/china-u-s-aviation-deal-faces-scrutiny/tab/print/>.

³ See, e.g., <http://online.wsj.com/article/SB10001424052748704893604576200521425783048.html>.

⁴ The Notice was issued on February 3, 2011 and came into force on March 5, 2011. For a detailed review of the Notice, please refer to our alert memorandum, which is available at http://www.cgsh.com/chinas_state_council_issues_notice_on_national_security_review_of_foreign_acquisitions/.

between the foreign investor (including affiliates) and its government, and agreements pertinent to the transaction.

B. PROCEDURE AND TIMING

A foreign investor may request a pre-filing consultation with MOFCOM, but such a consultation is limited to “procedural issues” regarding the transaction.⁵ Once a notification is submitted, there is no limit on the time that MOFCOM may review it before confirming that the notification is complete. For 15 working days after MOFCOM accepts the notification as complete, the notifying parties cannot implement the transaction while MOFCOM determines whether the transaction falls within the scope of the security review regime. If MOFCOM determines that the transaction is not in scope, the parties may proceed to implement the transaction, provided that other necessary approvals have been received.

If MOFCOM decides that the transaction is in scope, within five working days it will refer the matter to the inter-ministerial joint committee (the “Committee”) established by the Notice, and the Committee will determine whether the transaction will affect national security. Generally, the Committee’s review can last up to 30 working days, but if the Committee determines that a transaction will trigger a national security concern, the review will enter a special review process that can last up to 60 working days.⁶ When the Committee does adopt its decision, MOFCOM will inform the applicant(s) within five working days. If the Committee decides that the transaction will have no impact on national security, the parties may proceed to apply for other approvals necessary for foreign investment.⁷

If the Committee considers that a transaction may impact national security, the parties may not implement the transaction until they adjust the transaction, file a new

⁵ See Article 3 of the Interim Rules.

⁶ According to the Notice, the Committee’s national security review is divided in two phases, the general review process (30 working days) and the special review process (60 working days). In case of disagreement among the Committee members, the matter will be submitted to the State Council, which will not be subject to a deadline. For a detailed review of the Notice, please refer to our alert memorandum, which is available at http://www.cgsh.com/chinas_state_council_issues_notice_on_national_security_review_of_foreign_acquisitions/.

⁷ See Article 6.1 of the Interim Rules. The applicant may then apply for foreign investors M&A review and other M&A approvals according to various foreign investment regulations.

application and receive approval.⁸ In addition, a transaction that has not been notified may be unwound if the Committee finds that it “has significantly impacted or may significantly impact national security.”⁹

II. CONCLUSION

The Interim Rules describe the applicable procedures under China’s new national security review regime, but they remain vague in a number of aspects. In particular, the limitation of pre-notification consultations to “procedural” aspects could be interpreted as excluding one of the main topics acquirers would normally wish to discuss in a pre-consultation phase; *i.e.*, whether the transaction is subject to notification.

As with the Notice, the rules do not discuss the relationship between national security review and merger control review. Presumably, the two review procedures will be conducted in parallel.¹⁰

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition in the “Practices” section of our website at <http://www.clearygottlieb.com>.

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⁸ See Article 6.2 of the Interim Rules.

⁹ See Article 6.3 of the Interim Rules.

¹⁰ See, e.g., <http://www.antimonopolylaw.org/article/default.asp?id=2855>.

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