

China Regulatory Updates

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1. PRC Foreign-Related M&A Rules Slightly Revised

On July 23, 2009, the PRC Ministry of Commerce (“MOFCOM”) released its amendments to the *Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (the “M&A Rules”). In addition to the minor revisions of certain wordings in the M&A Rules, the amendments have effectively subjected the M&A Rules to the *Regulations of the State Council on the Declaration Threshold for Concentration of Business Operators* (the “Concentration Rules”) with respect to the anti-monopoly examination in connection with foreign-related M&As. As a result, the old provisions in the M&A Rules on anti-monopoly examination are out of effect and the anti-monopoly declaration and examination in connection with all foreign-related M&As should comply with the *PRC Anti-Monopoly Law*, the Concentration Rules and other relevant supporting regulations.

2. Guidelines for Determining “Relevant Markets” Used in Anti-Monopoly Examination Released

The Anti-Monopoly Bureau (“AMB”) of the PRC MOFCOM has recently published the *Guidelines of the State Council’s Anti-Monopoly Commission on the Determination of “Relevant Markets”* (the “Guidelines”), setting out principles and methods to determine the scope of “*relevant markets*” with reference to the prevailing international practices and domestic conditions. The release of the Guidelines may contribute to the foreseeability and transparency of the anti-monopoly examination process.

The Guidelines provide that practically the definitions of both the product market and the geographic market are involved and the relevant markets should be determined based on an overall consideration with respect to the nature, purpose and price of the underlying product and the geographic area of substitutable products. In certain cases, due consideration should also be given to the timeliness, intellectual property right, technical market and creative markets. Substitutability is the main factor that influences the judgment on the sizes of the relevant markets and should be measured by, among others, the customers’ demands of the functional purpose, quality recognition, price acceptance and accessibility of the underlying product.

The Guidelines state that, instead of the internationally recognized “hypothetical monopolist test” (also known as the “SSNIP-Test”), the AMB will mainly adopt the traditional demand/ supply substitutability analysis method on a prior basis despite of its strong subjectivity when determining the “*relevant markets*”.

3. Detailed Rules Released on the Calculation Method of Business Turnover of Financial Business Operators for the Purpose of Declaration for Concentration

On July 15, 2009, the PRC MOFCOM, the People's Bank of China, China Securities Regulatory Commission, China Banking Regulatory Commission ("CBRC") and China Insurance Regulatory Commission jointly promulgated the *Calculation Method of Business Turnover Related to the Declaration for Financial Business Operator Concentration* (the "Method"), which will come into effect 30 days after issuance.

The Method has set forth the components of turnover of banking financial institutions, securities firms, futures companies, fund management companies and the turnover calculation formulas of the above entities as well as insurance companies for concentration declaration purpose. The provisions governing the banking financial institutions under the Method should also be applicable to financial asset management companies, trust companies, finance companies, financial leasing companies, auto financing companies, currency brokerage companies and other financial institutions approved by CBRC.

4. Implementing Rules for Food Safety Law Promulgated

The State Council promulgated the *Implementing Regulations for the PRC Food Safety Law* (the "Food Regulations") on July 20, 2009. The Food Regulations have become effective upon its publication and specified the implementing provisions under the *Food Safety Law* as follows:

First, the Food Regulations emphasize that the food manufacturers and operators should be the leading responsible parties for food safety and have: (i) further clarified the safety management duties to be assumed by food manufacturers; (ii) set up sales record system for food wholesalers; and (iii) specified the safety management duties to be undertaken by catering service providers.

Second, in order to ensure the performance by local governmental authorities of their roles in food safety supervision, the Food Regulations have: (i) strengthened local governments' responsibility to improve the coordination system of food safety supervision; (ii) specified the governmental authorities that are responsible to formulate food safety risk monitoring plans and food safety standards; and (iii) reinforced the coordination and cooperation among various governmental departments in the course of food safety supervision.

Third, the Food Regulations have set out more detailed rules for the policies as stated in the *Food Safety Law* such as conditions for the food safety risk assessment, details of the food re-inspection system and the content that should be covered by the information of food safety daily supervision.

It is generally believed that the Food Regulations will play an important and active role in the perfection of China's food safety supervision system and the establishment of a healthy and orderly food market.

5. Control over Fund-Raising by Domestic VCIEs Tightened

The PRC National Development and Reform Commission (“**NDRC**”) has recently released the *Circular on Strengthening Administration of Filings of Venture Capital Investment Enterprises and Strictly Regulating the Fund Raising Activities of the Venture Capital Investment Enterprises* (the “**VCIE Circular**”), aiming to prohibit the illegal fund-raising activities of some domestic venture capital investment enterprises (the “**VCIEs**”) under the disguise of collecting limited partnership funds or agency business.

The VCIE Circular reiterates the maximum number of investors and the minimum investment amount of a single investor as mandatorily required for domestic VCIEs by applicable regulations. VCIEs are strictly prohibited from engaging, in any form, illegal fund-raising activities in the name of investment agent or other means. According to the VCIE Circular, VCIEs that are determined to be involved in any illegal fund-raising activity will be immediately disqualified for the registration with the competent authorities and be deprived of all preferential treatments. Pursuant to the *Interim Measures on Administration of Venture Capital Investment Enterprises* issued on March 1, 2006, domestic VCIEs are required to file with NDRC or other administrative authorities designated by the local people's government. The successful filing is a condition precedent to their entitlements to relevant preferential treatments.

6. SASAC Restricts Actions of State-Owned Shareholders of Listed Companies

With a view to further regulating the actions of state-owned shareholders of listed companies, protecting the legitimate rights of investors and safeguarding the sound development of the securities market, the PRC State-Owned Assets Supervision and Administration Commission (“SASAC”) has recently issued *Several Opinions on Regulating the Actions of State-Owned Shareholders of Listed Companies* (the “Opinions”) and two supporting circulars, i.e., the *Circular on Matters Related to the Regulation of Asset Reorganizations by State-Owned Shareholders and Listed Companies* (“Circular One”) and the *Circular on Matters Related to Issuance of Exchangeable Corporate Bonds by State-Owned Shareholders of Listed Companies and Issuance of Securities by the State Controlled Listed Companies* (“Circular Two”). The major highlights of the above rules are as follows:

(a) Share transfer over prescribed limit to be approved by SASAC

In order to prevent the state-owned shareholders from selling their shares in listed companies at unreasonably low prices or in violation of relevant regulations and rules, the Opinions provide that state-owned shareholders intending to sell shares in excess of the prescribed percentage limit via securities transaction system should secure the approval from the competent SASAC offices for their share transfer plans. In addition, the Opinions also encourage listed companies to distribute dividends (such as cash dividends) to investors. State-owned shareholders should support such distribution to the extent as the listed companies’ capacity and financial position permit.

(b) Asset reorganization subject to pre-examination and approval

Circular One intensifies supervision on the reorganizations of listed companies by their state-owned shareholders and requires the state-owned shareholders to submit the relevant feasibility report to and secure approval from the competent SASAC offices at the provincial level or above, at the time when the reorganization plan has been decided but not yet submitted to the board of directors of the listed company for deliberation and adoption.

The reorganizations refer to the activities whereby the existing or potential state-owned shareholders inject assets into, purchase assets from or conduct asset swap with the listed companies and result in changes of their shareholding ratios in such listed companies.

(c) Pricing mechanism of exchangeable bonds specified

According to Circular Two, the price at which the exchangeable corporate bonds (issued by the state-owned shareholders of listed companies) can be exchanged into the listed company's shares should not be lower than the highest of such listed company's average share prices on the first trading day, the first 20 trading days and the first 30 trading days prior to the publication date of the bond prospectus.

For further information, please write us at inquiry@hanyilaw.com.

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