



China Regulatory Updates

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ANTI-MONOPOLY / 反垄断

MOFCOM Issued Measures Dealing with Failure to File Concentration of Business Operators

商务部就未依法申报的经营者集中出台处理办法

MOFCOM has recently issued the *Interim Measures on Investigating and Handling the Failure to File Concentration of Business Operators* (the "Interim Measures"), according to which, with respect to a concentration of business operators conducted against applicable anti-monopoly related laws and regulations, MOFCOM may impose a fine up to RMB0.5 million, as well as order the suspension of such concentration, or a proper disposal of the shares or assets involved in a timely manner, or a divestiture of certain business in a limited period, or other necessary measures in order to restore related matters to their status prior to the concentration. The Interim Measures have taken effect as of February 1, 2012.

Compared with the draft for comments issued in June 2011 (please refer to our July 2011 issue of *China Regulatory Updates for details*), the Interim Measures make it clear that MOFCOM will review and investigate a suspected business concentration through two investigation stages, i.e., preliminary investigation and further investigation. The preliminary investigation is aiming to determine whether the suspected deal should have been but failed to be filed with MOFCOM in accordance with applicable anti-monopoly laws and regulations. If a suspected concentration is deemed by MOFCOM as a "need-to-be-filed" case through the preliminary investigation, the business operators concerned should suspend such concentration and MOFCOM will conduct a further investigation to assess whether such concentration has or may have the effect of eliminating or restricting competition in the relevant market. The Interim Measures also clarify the time limits for the aforesaid two investigation stages (i.e., 60 days and 180 days (which are longer than the time periods applicable to the MOFCOM's review of normal business concentration filings) upon MOFCOM's receipt of all required filing documents and materials).

The Interim Measures have provided a legal basis for MOFCOM to investigate and handle concentration of business operators conducted against applicable laws. It is said that since the implementation of the *PRC Anti-Monopoly Law*, MOFCOM has dealt with 382 business concentration cases by the end of 2011, of which, 1 case was forbidden, 10 were approved with conditions and the rest were approved unconditionally. So far there has not been any reported case under which MOFCOM has dealt with any business concentration that has failed to be filed with MOFCOM according to applicable laws.

商务部于近日正式发布了《未依法申报经营者集中调查处理暂行办法》(“暂行办法”),规定如果经营者未依法申报而实施集中的,商务部可以根据具体情况,对其处 50 万元以下的罚款,并可责令停止实施集中、限期处分股份或者资产、限期转让营业等措施恢复到集中前的状态。《暂行办法》已于 2012 年 2 月 1 日起施行。

与去年 6 月发布的征求意见稿(请参见本所 2011 年 7 月期《中国法律更新》)相比,《暂行办法》明确了,对于任何一项涉嫌未依法申报的经营者集中而言,商务部将根据相关交易的具体情况,分初步调查和进一步调查两步对其进行调查。初步调查主要是用于确定涉嫌的交易是否属于需要申报而未申报的经营者集中行为。如某项交易在初步调查后被认定为属于应当申报而未依法申报的经营者集中的,相关经营者应暂停实施相关集中,而商务部将对该项集中开展进一步调查,以判定被调查的交易是否具有或者可能具有排除、限制竞争的效果。此外,根据《暂行办法》也对初步调查和进一步调查的时限做出了明确的规定,即该等调查应分别在商务部收到相关申报材料后的 60 日和 180 日内完成(前述时限比一般的经营者集中审查时间更长)。

《暂行办法》的出台为商务部调查处理未依法申报的经营者集中案件提供了明确的立法依据。据报道,自《反垄断法》实施以来,截至 2011 年底,商务部已经审结 382 起经营者集中案件,其中禁止 1 起、附条件同意 10 起,其余的均为无条件同意。目前还没有商务部处理未依法申报的经营者集中的公开报道。

QFII / 合格境外投资者

Taxes Applicable to QFIIs' Profits Soon to Be Clarified

QFII 境内证券投资所得税草案已定

It is recently reported that the Chinese government is considering imposing enterprise income tax against Qualified Foreign Institutional Investors (QFIIs) on their profits derived from their securities investments within China. The draft regulation is in the process of soliciting internal comments and is not yet publically available for the time being.

As China's existing tax laws and regulations fail to clarify the taxation applicable to the profits derived from QFII's securities investments within China, the uncertain tax scheme remains a major concern of QFIIs over a long period of time and creates great difficulties in valuating QFIIs' performance and repatriating their profits out of China.

In accordance with the *PRC Enterprise Income Tax Law* and its implementing rules, QFIIs are likely to be required to pay enterprise income taxes for the profits derived from their securities investment within China at a rate of 10% in most cases or 25% on some exceptional occasions (e.g., *QFIIs are deemed as resident PRC tax payers by competent government authorities*). As the draft regulation has not been publically released yet, it still remains unknown as to the applicable deductible items, minimum taxable amount, retroactivity, application of relevant tax treaties and other major aspects of this new policy. All these unclear issues are expected to be clarified when the draft regulation is officially released for public comments or when the formal regulation is promulgated.

据报道,有关部门拟对合格境外机构投资者(QFII)境内证券投资盈利开征企业所得税,目前相关征税草案已在内部征求意见中(草案尚未正式公开)。

中国目前的税收法律法规并未明确就QFII的境内证券投资所得的税收问题作出规定,税收问题的不确定性是长期困扰QFII的一项重大问题,导致QFII在计算其经营业绩和汇出利润时均面临很大困难。

根据中国《企业所得税法》及其实施细则,QFII可能需就其境内证券投资所得按10%的税率缴纳企业所得税;在一些特殊情况下(如其被认定为境内居民纳税人等情况),也可能适用25%的税率。至于具体如何征收、损失能否抵扣、交易多大数量的股票要交税、新政策是否溯及既往以及税收协定的适用等实践中常见的敏感问题,则尚待草案及相关规定的正式发布。

SECURITIES / 证券市场

CSRC Publishes IPO Review Process for the First Time

证监会首次披露发审流程

On February 1, 2012, CSRC released for the first time its review processes of IPO applications, according to which companies that plan to launch IPOs on main board, small and medium enterprise board and ChiNext board will need to go through about 10 procedures (mainly including application acceptance, Q&A meeting, feedback meeting, pre-disclosure, preliminary review meeting, IPO review meeting, post-meeting matters, IPO approval and etc.) before they could get CSRC's final approvals for their proposed IPOs. Meanwhile, CSRC has also firstly published full lists of IPO applicants (including such basic information as applicant's name, business nature, aimed board, sponsor, accounting firm, legal counsel, review process and etc) that will be updated weekly according to CSRC. Based on the disclosed lists, there are more than 500 IPO applications (including those aimed at main board, small and medium enterprise board and ChiNext board) under CSRC's review process as of the end of January 2012. All of the above measures are seen as part of

2012年2月1日,证监会首次公开了其审核主板、中小板和创业板发行股票的全过程,包括受理、见面会、问核、反馈会、预先披露、初审会、发审会、封卷、会后事项、核准发行等10个主要环节;同时,证监会也首次公布了目前IPO在审企业的名单(包括各企业的名称、行业、上市地、保荐机构、会计师、律师事务所、审查情况等多项基本信息),并将每周进行更新。根据上述公布的名单,截至2012年1月底,主板、中小板和创业板共有超过500家企业的IPO正在排队审核中。上述举措标志着发行审核的公开性和透明度向前迈进了一大步。

CSRC's efforts to improve the country's IPO transparency level.

CSRC has also recently issued the *Circular on Adjusting Pre-Disclosure Time and Other Relevant Matters*, according to which from February 1, 2012, the IPO pre-disclosure should be made before the kicking off of preliminary review procedure (instead of five days before the IPO review meeting as previously required), bringing the pre-disclosure procedure 30 days forward on average. This means that an IPO applicant and its intermediary agencies will need to face even more challenges from and supervision by the public before a successful IPO.

与此同时，证监会于日前发布了《关于调整预先披露时间等问题的通知》。根据该通知，自2012年2月1日起，申请IPO的企业的信息预披露时间由原来的发审会前5天提前到了初审会之前。由此，发行人及其中介机构接受公众监督的时间平均至少延长1个月左右。

ChiNext Listed Companies Required to Disclose Dividend Distribution Information by CSRC's Draft New Policy

证监会分红新政剑指创业板

CSRC has recently initiated to revise its *No. 30 Rules on Substance and Format of Information Disclosure Applicable to Listed Companies- Substance and Format of Annual Reports of ChiNext Listed Companies* and has released the draft revisions to solicited public opinions (the "Draft for Comments"). Meanwhile, in order to further regulate the ChiNext listed companies' information disclosure obligation with respect to their annual reports, Shenzhen Stock Exchange also issued the *No. 10 Memorandum on Information Disclosure on the ChiNext board: Relevant Issues on Disclosure in Annual Reports* (the "Memorandum 10").

日前，证监会拟对《公开发行证券的公司信息披露内容与格式准则第30号-创业板上市公司年度报告的内容与格式》的相关内容进行了修订，并向社会公开征求意见（“《征求意见稿》”）。同时，深交所也于日前发布《创业板信息披露业务备忘录第10号：年度报告披露相关事项》（“《备忘录》”），进一步规范创业板公司年报信息披露的相关事项。

Both of the above emphasize the requirements of regulatory authorities on information disclosure related to profit distribution of ChiNext listed companies, aiming to respond to the call of CSRC which urges the listed companies to pay reasonable returns to investors. For example, the Draft for Comments requires that ChiNext companies should disclose its profit distribution policy as well as information with respect to the dividends distributed, capital surplus transferred to paid-in capital and cash dividend paid in the last 3 years in their annual reports. Meanwhile, the Memorandum sets forth that the ChiNext companies shall specify in their articles of associations the forms of profit distribution, conditions and proportion of cash dividend, policy of using undistributed profits and etc. It's noteworthy that listed companies on the main board are not required to disclose dividend distribution related information in their annual report according to the similar draft for comments applicable to listed companies on the main board released by CSRC.

上述文件均突出了监管部门对上市公司利润分配方面的信息披露要求，以响应证监会督促上市公司为投资者提供合理回报的要求。举例而言，《征求意见稿》要求创业板上市公司在其年报中披露利润分配政策以及近三年的股利分配、资本公积金转增股本以及现金红利分配情况等信息；《备忘录》则要求创业板上市公司章程对利润分配形式、现金分红的具体条件和比例、未分配利润的使用原则等具体政策予以明确等。值得注意的是，在证监会已公布的主板上市公司年报披露准则征求意见稿中，则未发现上述分红信息披露要求。

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

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