

China

Announcement No. 53 of 2011 of the Ministry of Commerce of the People's Republic of China Concerning the Provisions of the Ministry of Commerce for the Implementation of the Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors (2011)

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The year indicated in brackets after the title of the law refers to the year of publication in the Official Gazette or, when this is not available, the year of adoption of the law.

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Contents

Ministry of Commerce of the People's Republic of China 2011-08-25

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September 8, 2011

Article 1

Where the merger and acquisition of a domestic enterprise by a foreign investor is subject to the merger and acquisition security review ("M&A security review") as specified in the Circular of the General Office of the State Council on Establishment of the Security Review System for the Merger and Acquisition of Domestic Enterprises by Foreign Investors, the foreign investor shall file an application for M&A security review with the Ministry of Commerce.

Where two or more foreign investors jointly make a merger or acquisition, an application for M&A security review may be filed with the Ministry of Commerce by all the foreign investors, or by one foreign investor designated by all the investors (hereinafter referred to as "applicant").

Article 2

Where local departments in charge of commerce have received a merger or acquisition application in accordance with the Provisions for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors and the Several Provisions on the Alteration of Investors' Equities in Foreign-Invested Enterprises, and the Interim Provisions Regarding Domestic Investment by Foreign-Invested Enterprises, if the merger and acquisition is subject to the M&A security review but the applicant does not file an application for M&A security review with the Ministry of Commerce, such local departments shall suspend the processing of application and shall require the applicant to file an application for M&A security review with the Ministry of Commerce in writing within 5 working days and shall report the relevant information to the Ministry of Commerce at the same time.

Article 3

Where a foreign investor merges with or acquires a domestic enterprise and the departments concerned under the State Council, national industry associations, enterprises in the same industry, or upstream or downstream enterprises believe that a security review needs to be conducted of such merger or acquisition, they may make proposals for an M&A security review to the Ministry of Commerce and submit explanations with regard to the circumstances in question (including basic information on the merger or acquisition transaction and details with regard to the impact that such transaction will have on national security), and the Ministry of Commerce may request interested parties to submit relevant explanations. Where the transaction is subject to M&A security review, the Ministry of Commerce shall submit its recommendations to the Ministerial Panel within 5 working days. Where the Ministerial Panel believes that the M&A security review is indeed necessary, the Ministry of Commerce shall, based on the decision of the Ministerial Panel, require the foreign investor to file an application for M&A security review pursuant to these Provisions.

Article 4

Before filing a formal application with the Ministry of Commerce for M&A security review, the applicant may file a consultation request with the Ministry of Commerce regarding procedural issues related to its merger with or acquisition of a domestic enterprise and communicate relevant information in advance. The pre-filing consultation is not a necessary procedure for submitting a formal application, and the consultation does not have a legal and binding effect and shall not be treated as the basis for submitting a formal application.

Article 5

The applicant shall submit the following documents when filing a formal application for M&A security review with the Ministry of Commerce:

- (1) An application letter for M&A security review and a description of the transaction signed by the legal representative or the authorized representative of the applicant;
- (2) The foreign investors' identity certificates and certificates of registration, as well as credit certifications, notarized or authenticated in accordance with law; the legal representative's identity certificate or the foreign investors' powers of attorney issued to their authorized representative, and the authorized representative's identity certificate;
- (3) A description of the foreign investors and their affiliates (including their actual controlling persons and persons acting in concert), and their relationship with the relevant national governments;
- (4) A description, as well as the articles of association, business license (photocopy), audited financial statements of the previous year, and the pre- and post-merger or acquisition organization charts of the domestic enterprise to be merged or acquired, as well as a description and the business license(s) (photocopy) of enterprises in which it has invested;
- (5) The contract, articles of association, as well as list of the board members to be appointed by the parties, and the general manager, partners, and other senior managerial personnel of the proposed post-merger or acquisition foreign-invested enterprise;

- (6) In cases of stock-based mergers and acquisitions, the stock transfer agreement or the agreement providing for the foreign investor's subscription to the capital increase of the domestic enterprise, the domestic enterprise's shareholders' resolutions and resolutions from a general shareholders' meeting, as well as relevant asset evaluation reports;
- (7) In cases of asset-based mergers and acquisitions, the resolutions containing the consent of the domestic enterprise's governing authority or holder(s) of assets to the sale of the assets, asset sales agreement (including a list of the target assets and their status), information on all parties to the agreement(s), as well as relevant asset evaluation reports;
- (8) Explanation of the impact that the voting rights to be enjoyed by the foreign investor after the merger or acquisition will have on the implementation of shareholders meetings resolutions, board resolutions, and partnership affairs, as well as explanations of other circumstances that will result in a transfer of actual control of matters such as operational decision-making, finance, personnel and technology to foreign investors or their domestic or overseas affiliates, as well as agreements and documents relating to the aforementioned circumstances;
- (9) Other documents as required by the Ministry of Commerce.

Article 6

Where the application documents for M&A security review submitted by an applicant are complete and comply with statutory requirements, the Ministry of Commerce shall notify the Applicant in writing of its acceptance of the application.

Where a transaction is subject to M&A security review, the Ministry of Commerce shall notify the applicant in writing within 15 business days, and submit the transaction to the Ministerial Panel that is responsible for security review of mergers and acquisitions of domestic enterprises by foreign investors (hereinafter referred to as the "Ministerial Panel") for review within 5 business days following such notice.

During the 15-business-day period commencing from written notification to the applicant of the receipt of its application, the Applicant shall not carry out the merger or acquisition transaction, and the local department in charge of commerce shall not approve the M&A review transaction. After 15 business days, if the Ministry of Commerce has not notified the applicant in writing, the applicant may complete the relevant procedures in accordance with relevant state laws and regulations.

Article 7

Within 5 business days following its receipt of the written review opinion of the Ministerial Panel, the Ministry of Commerce shall provide written notification of the review opinion to the applicant (or the party concerned) and to the local department in charge of commerce responsible for administration of M&A transactions.

(1) With respect to a transaction that will not have an impact on national security, the applicant may complete the M&A transaction formalities with the relevant administrative department having corresponding administrative authority in accordance with the Provisions for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, Several Provisions for the Alteration of Investors' Equities in Foreign-invested Enterprises, the Interim Provisions for Domestic Investment by Foreign-invested Enterprises, and other related regulations.

(2) With respect to a transaction that may have an impact on national security and has not been carried out, the applicant shall terminate the transaction. The applicant shall not apply for or complete the M&A transaction without first making adjustments to the M&A transaction, amending the filing documents and undergoing review again.

(3) Where a merger with or acquisition of a domestic enterprise by a foreign investor has already produced or may produce a serious impact on national security, based on the review opinion of the Ministerial Panel, the Ministry of Commerce shall, along with relevant departments, terminate the transaction of the parties concerned or take measures such as the transfer of the equity or assets in question or other effective measures so as to eliminate the impact of such merger or acquisition on national security.

Article 8

Where an applicant amends the filing documents, cancels the M&A transaction or supplement, amend materials as required by the Ministerial Panel after the Ministry of Commerce has submitted the transaction to the Ministerial Panel for review, the applicant shall submit relevant documents to the Ministry of Commerce. The Ministry of Commerce shall, within 5 business days after receipt of the application report and relevant documents, submit such report and documents to the Ministerial Panel.

Article 9

With regard to the merger and acquisition of domestic enterprises undertaken by foreign investors, the authorities should judge whether such transaction is subject to the security review based on the essential content and actual impact of the transaction. Foreign investors shall not avoid M&A security review through any means, including but not limited to commissioned shareholdings, trusts, multi-level investments, leases, loans, contractual control, and overseas transactions.

Article 10

In any case in which an application for merger or acquisition of a domestic enterprise by a foreign investor was not submitted to the Ministerial Panel for review or the Ministerial Panel, having reviewed a submission, has determined that a proposed merger or acquisition would not have an impact on national security, but thereafter, due to changed elements such as modification of the merger, change of business activities or acquisition transaction or amendment of the relevant agreements or documents and other changes (including alteration of overseas actual controlling person), such merger or acquisition transaction become subject to security review as stipulated in the Circular of the General Office of the State Council on Establishment of a Security Review System for the Merger and Acquisition of Domestic Enterprises by Foreign Investors, the parties concerned shall cease the transaction and activities, and the foreign investor shall file an application for M&A security review with the Ministry of Commerce pursuant to these Provisions.

Article 11

Competent authorities in charge of commerce, relevant entities, and persons that participate in M&A security reviews shall assume an obligation of confidentiality with regard to state secrets, trade secrets, and other information that should be kept confidential in M&A security reviews.

Article 12

The Provisions shall take effect as of September 1, 2011.

Ministry of Commerce of the People's Republic of China 2011-08-25

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