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Provisions of the Ministry of Commerce on the Implementation of the Safety Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors

商务部实施外国投资者并购境内企业安全审查制度的规定

【Issued by】	Ministry of Commerce
【Subject】	M&A
【Promulgated on】	August 25, 2011
【Effective from】	September 01, 2011
【Source】	http://www.mofcom.gov.cn

On August 25, 2011, the Ministry of Commerce ("MOFCOM") promulgated the "Provisions on Implementing the Safety Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors" ("Provisions"). The Provisions were promulgated within 6 months after the previous "Circular of the General Office of the State Council on the Establishment of Safety Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors" (Guo Ban Fa [2011] No. 6, hereinafter "Circular No.6") dated February 3, 2010, and the "Interim Provisions of the Ministry of Commerce on Relevant Matters concerning the Implementation of the Safety Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors" (MOFCOM Announcement 2011 No.8, hereinafter "Interim Provisions") on March 4, 2011.

The highlights are listed below:

1. Review Scope

The new provisions are applicable on M&A transactions of domestic enterprises made by foreign investors according to the Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors, Several Provisions on Changes in Equities of Investors of Foreign-funded Enterprises, and the Interim Provisions on Investment in China by Foreign-funded Enterprises, where the acquired company falls into the following industries: military and related industries, key and sensitive military facility industries, enterprises related to national defence and safety, key agricultural enterprises, key energy and resources enterprises, major infrastructure enterprises, key transportation services enterprises, key technology enterprises, and major equipment manufacturing enterprises, and where the effective control in such enterprises may be acquired by the foreign investors, which means the re-investments made by FIEs are also subject to the national safety review.

2. Review Process

- a. The Joint Conference shall be established under the leadership of the State Council, and headed by the National Development and Reform Commission (NDRC) and MOFCOM. The Joint Conference, consisting of the NDRC, MOFCOM and other relevant authorities over concerned industries, conducts security reviews.

- b. Foreign investors are required to file applications with MOFCOM when making Acquisitions listed in Point 1.
- c. Besides the application by the foreign investors themselves, if relevant departments of the State Council, national trade associations, enterprises in the same industry, and upstream and downstream enterprises deem it necessary to conduct M&A safety review, they may make suggestions to the MOFCOM and submit the statement of relevant information (including the basic information on the M&A transaction and specific influences of national safety).
- d. If the local bureaus or branches of MOFCOM deem that a transaction fall within the scope of review, they shall suspend any approval process for the proposed transaction and, within 5 working days upon the suspension, request the foreign investor to file an Application with MOFCOM itself.
- e. The applicants for the proposed M&A are entitled to file a consultation application with MOFCOM regarding the procedural issues, provided that any discussions and comments made during such consultation are not legally binding and do not carry any legal effect.
- f. The application documents shall be prepared in consistence with Article 5 of the Provisions. If the proposed transaction falls within the scope of the security review, MOFCOM shall notify the applicant within 15 working days upon the acceptance of the application, whether the transaction has to be reviewed by the Joint Conference. During the said 15 working days, the transaction shall be suspended and the local bureaus of MOFCOM shall not review and approve the case. If no written notice from MOFCOM is given, the applicant may go ahead with the transaction and proceed with the relevant governmental procedures.
- g. The Provisions explicitly provide the Substantive Review Principle for the Joint Conference to determine whether a proposed transaction shall be subject to the security review: The foreign investors shall not substantially evade M&A safety review by any means, including but not limited to holding on agency basis, trust, multi-tier reinvestment, leasing, loan, control by agreement, overseas transactions, etc. Instead of merely focusing on the legal structures or forms of the transactions, MOFCOM keeps its eyes on the substance and the actual impact of M&A transactions. This provision is deemed as a practical solution provided by the authorities in the attempt to regulate the VIE structures.

For the completed transactions which have not been submitted to the Joint Conference for the security review, or the Joint Conference deems, upon review, that such transaction does not influence the national safety, and if, thereafter, such transaction falls within the scope of M&A safety review specified in the Circular 6 due to adjustment to the M&A transaction, amendments to the relevant agreements or documents, change of business activities or other changes (including the change in the actual overseas controllers, etc.), the parties concerned shall cease the relevant transactions and activities and the foreign investor shall file an application to the MOFCOM for M&A safety review according hereto.

Implementing Rules for the Interim Regulations of the People's Republic of China on Business Tax

中华人民共和国营业税暂行条例实施细则

【Issues by】	Ministry of Finance, State Administration of Taxation
【Subject】	Business Tax
【Promulgated on】	October 28, 2011
【Effective from】	November 01, 2011
【Source】	http://www.chinatax.gov.cn

To implement the requirements of the State Council to support the development of small and micro enterprises, the Ministry of Finance and the State Administration of Taxation jointly released Circular 65 on October 28, 2011, which raises the thresholds for levying business taxes on small enterprises starting from November 1, 2011.

The changes read as below:

1. The threshold of the tax payment on schedule is increased to RMB 5,000 ~ 20,000 of sales per month, while the previous threshold was RMB1,000 ~ 5,000;
2. For the payment of tax on a transaction-by-transaction basis, the threshold is increased to RMB 300 ~ 500 per time (day) of sales, while the previous threshold was RMB 100.

Implementing Rules for the Interim Regulations of the People's Republic of China on Value-added Tax

中华人民共和国增值税暂行条例实施细则

【Issued by】	Ministry of Finance, State Administration of Taxation
【Subject】	Value added Tax
【Promulgated on】	October 28, 2011
【Effective from】	November 01, 2011
【Source】	http://www.chinatax.gov.cn

The same adjustments have been also imposed to the Implementing Rules for the Interim Regulations of the People's Republic of China on Value-added Tax, together with the aforesaid changes to Business Tax, which have come into force on Nov 1, 2011.

1. The VAT threshold of sales of goods is increased into sales revenue of RMB 5,000 ~ 20,000 per month, while the former threshold was RMB 2,000 ~ 5,000;
2. For the sales of taxable services, the threshold is sales revenue of RMB 5,000 ~ 20,000 per month, while it was RMB 1,500 ~ 3,000 in the former Rules;
3. And for the payment of tax on a transaction-by-transaction basis, the threshold is now RMB 300 ~ 500 per time (day) of sales, obviously higher than the previous RMB 150 ~ 200.

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