谨呈于中华人民共和国商务部条约法律司反垄断调查办公室

美国律师协会（American Bar Association）反垄断法部与国际法部

关于《外国投资者并购境内企业反垄断申报指南》之评论意见

美国律师协会的反垄断法部门与国际法部门（The Section of Antitrust Law and the Section of International Law of the American Bar Association，以下简称「两部门」或「我们」）在此谨向贵部提出我们对于《外国投资者并购境内企业反垄断申报指南》（以下简称「申报指南」）之评论意见[1]。我们了解该指南将用于处理《关于外国投资者并购境内企业的规定》（以下简称「外资并购规定」）中与竞争法有关之问题。本评论意见只代表两部门对此一指南的见解。本评论意见尚未经过美国律师协会代表大会（House of Delegates）或执事会（Board of Governors）的认可，因此不应被视为代表美国律师协会全体的政策立场。提出此一评论意见的动机，是出于两部门长期以来对全球各地，包括中华人民共和国在内，反垄断法与竞争法执法情况的关注。

我们相信，总体而言，商务部这次发布的申报指南是极有裨益的。在进一步澄清贵部在处理《外资并购规定》中有关竞争法律的问题时所采用的程序和政策，将有助于《外资并购规定》更有效的执行和遵守。本评论意见的目的在于鼓励并支持《申报指南》与《外资并购规定》的顺利执行。

[1] 本评论意见是针对 2007 年 3 月 9 日公布于商务部条约法律司网站的版本，http://tfs.mofcom.gov.cn/aarticle/bb/200703/20070304440611.html.

《申报指南》阐明了在《外资并购规定》下，与申报程序、信息提供要求与申报时间相关之具体问题。我们同时也高兴地看见贵部于《申报指南》第七条中关于该指南灵活性的立场，以及贵部关于将在未来视执行情况和实际工作需要进行适时修订的说法。为了能以最快速度提供有益评论意见，我们仅于本评论意见中提出《申报指南》内最关键的几个问题。随着《申报指南》的执行与及在《外资并购规定》下申报程序相关经验的累积，我们也期望将来能进一步提供可兹提高申报程序行政效率的对于《申报指南》其他部份的其他意见。

一、提高申报时间的灵活性有助于《申报指南》的实施

在《申报指南》中，可能存在一些关于在何时必须申报的疑点与矛盾，贵部可予以澄清。比方说，《外资并购规定》虽然仅针对「外资并购」，但在《外资并购规定》与《申报指南》中，似乎额外创设了「境外并购」此一分类，但并没有对此名词加以定义。两部门无从得知是否有任何可适用的定义说明「境外并购」，故我们建议贵部在《申报指南》中对「境外并购」加以定义、或者说明该名词定义之参考来源。此外，在《外资并购规定》与《申报指南》中，究竟交易双方需达成何种程度的共识时才算是构成「并购方案」。对我们而言，这并不是一个具有一般公认法律意义的名词。同样地，我们也不明白何谓「境外并购方案」的「所在国」，特别是对那些涉及跨国企业且面对多重反垄断申报要求的交

易而言。

此外，《外资并购规定》与《申报指南》中规定，对于境外并购的申报，必须(1)在对外公布并购方案之前提出，或者(2)在向报其他国竞争法主管机构提出反垄断申报的同时提出。但这一规定未说明在上述两个时间点中，究竟是以较早或较晚者为准。实际上，不论是哪种解释，都可能引发某些问题。如果必须于两者中较早的时间点申报，可能会造成逻辑上与商业上的问题。交易各方当事人可能会发现，在确定的协议签署之前或之际，在对外公布的同时提出申报是极为困难的。这是因为在确定的协议达成之前，交易各方通常限制交换那些对提出反垄断申报所必需的商业机密信息。而且，如果要求在公布交易计划时便提出申报，即使确定的协议尚未达成，此类申报可能会让反垄断调查办公室、以及交易各方白费工夫，因为交易各方可能终于无法达成并购协议。从另一方面而言，如果只要求于该两时间点中较晚者申报，对那些各方当事人决定不对外公布的交易而言，就无所谓于交易达成前必须申报的要求。同样的，如果以两者中较晚的时间点为准，那么若是交易所在国并未要求提出申报的话，那么该交易也就没有必要在中华人民共和国内申报。

我们鼓励反垄断调查办公室考虑采取一个让交易各方对有善意交易达成共识之后提出申报的机制[并适用于《外资并购规定》下所有交易]。这可以容许各方(1)自行判断交易发生的可能性,以此进而判断是否已达到应向反垄断调查办公室、与其他竞争法有关主管部门提供所要求的具体信息的程度，(2)从交易各方取得完成申报所需的各项信息，与及(3)

分析任何可能影响竞争之问题[2]。

这样的机制仍然可以让反垄断调查办公室有审查某项交易案的竞争问题的恰当机会，因为只有在反垄断调查办公室在申报后的审查期限内完成交易审查之后，交易才能完成。

二、初始审查期限应予以缩短

《申报指南》第四条中将初始审查期限定为三十个「工作日」。在不涉及中华人民共和国境内竞争问题，并且无须进一步审查或进一步提出初始申报范围以外信息的情形下，这一期限似乎显得过长，并可能不必要地延迟交易的完成。我们鼓励贵部考虑将初始申报的审查期限从三十个工作日缩减为三十个自然日，这也将与许多主要国家审查期限的规定相一致。《外资并购规定》的第二十五、二十六及第五十二条采用了「日」而非「工作日」。我们了解，根据《行政许可法》的规定，「日」一般解释为「工作日」而不是自然日。但是，《外资并购规定》第五十二条仅规定反垄断审查须在「九十日」之内完成。根据上述理由，我们建议《申报指南》将等候审查期限改为三十个自然日，如此仍符合《外资并购规定》的要求。

[2] 此一做法与「国际竞争网络组织」（International Competition Network, ICN）的「兼并申报程序建议规范」（Recommended Practices for Merger Notification Procedures）III.A.相符：「应允许交易各方当事人证明有善意向完成确认交易之时，通报其并购计划。」

三、《申报指南》应允许提前结束审查期限

同样基于上述理由，反垄断调查办公室应允许经初步审查就能通过的交易各方当事人申请而获得提前终止审查期限。同样地，在延长审查流程中的交易各方亦应被允许申请提前终止九十日的延长审查期限。而一旦完成对该交易案的竞争性调查之后，反垄断调查办公室应有权视情况立刻终止审查期限。

四、要求提供的信息应基于反垄断调查办公室进行竞争情况分析之需要

《申报指南》目前要求的内容可能会要求交易各方就许多复杂问题提供大量信息。举例来说，这些信息包括第三条第八款的相关市场界定，第三条第十一款的相关市场供应结构与需求结构情况，以及第三条第十二款，涵盖多个子项，要求对从事市场竞争分析时各项议题有关的完整信息，这些信息包括市场进入障碍、知识产权、许可，及其它横向与纵向协议的内容等。

许多需要在《外资并购规定》下申报的并购交易，其与中华人民共和国境内的关连一般而言极为有限，这是因为《外资并购规定》第五十一及第五十三条中的申报标准适用于当只有并购一方当事人在中华人民共和国境内有实质性存在时（资产、营业额、外商投资企业所有权）。此外，即使交易各方当事人均在中国境内因为有实质性存在而必须提出申报，但各方当事人之间可能并无竞争关系，并且该交易并不影响中国市场竞争状况。对于

上述任一种情形（尤其是在仅有买方于中国境内有实质性存在时），我们建议，将应提供信息的范围不超出在澄清该交易并不对中国境内市场竞争状况产生显著影响的范围。

我们对贵部在《申报指南》第五条中设置申报前协商机制的规定表示赞赏。但是，由于某些不确定因素──例如申报交易的案件数量、特点，与交易各方当事人的规模，除非申报前商谈是真正选择性而非事实强制性的，反垄断调查办公室可能会受累于大量申报前协商的请求，导致大部份的申报前协商要求成为例行公事，而形同实质上免除了申报要求。有鉴于此，我们建议反垄断调查办公室考虑采取两阶段的处理模式，根据该种模式，所有符合申报要件的交易仅须提供基本信息，而对那些从基本信息中显示有可能存在对市场竞争状况有重大影响的交易，才采用协商程序与更高的信息提供要求。全世界已有许多国家采用某种版本的两阶段申报程序[3]。

五、交易各方当事人将受惠于更多关于审查过程及分析方式的指导

我们鼓励反垄断调查办公室考虑发布更多的指导文件，以协助交易各方当事人了解对《外资并购规定》下申报的交易所采用的分析方法与处理程序。有两个特定领域值得特别关注：第一个是关于反垄断调查办公室对申报交易所作市场竞争分析的实体内容。这点在

[3]详见国际竞争网络组织，《并购申报程序的建议规范》（Recommended Practices for Merger Notification Procedures），IV.B.：「并购审查系统应对那些对市场竞争不具显着影响的申报交易，提供加速审查和通过的程序机制。」

中国尤其重要，因为中国目前尚未出台普遍适用的竞争法。因此，能够让交易各方当事人用以研究贵部将如何审核并购交易的、由有关主管机构发布的先例或分析资料并不多。在其它国家里，大多是在积累了大量以竞争法处理市场集中问题的实践经验之后，才推出类似的指南，而这种作法一般认为是非常可取的[4]。我们想要指出，虽然这种实体指南极有价值，但因《外资并购规定》中规定的交易审批刚启动未久，于此际起草发布实体性的指南可能为时过早。我们建议贵部在积累相当的审查经验之后，再提出类似的实质内容指导方针。

其次，贵部已经对某些已申报交易的审批问题展开听证。某些国家会采取数种不同形式的听证程序，以评估各方提供的证据与论点，同时亦允许对特定交易之市场竞争分析有不同见解的各方有一个说明的机会。大多数的国家均制定出一套完整的程序，以规范听证的时间、提供证人与证据的权利，以及其他与时限、审批相关的问题，使得各方当事人均有一清晰明确的预期。若使用听证程序审批根据《外资并购规定》申报的交易成为常态，反垄断调查办公室可考虑采取一套规则及惯例，以规范此类听证会举行的时间、内容与其他程序问题。这种程序指南甚为重要，我们在此恳请贵部考虑在可预见的将来制定类似的

[4] 例如说，美国联邦司法部与联邦贸易委员会联合制订的《横向并购指南》（Horizontal Merger Guidelines），原文于http://www.usdoj.gov/atr/public/guidelines/hmg.htm; 欧盟的《根据「控制企业集中度之理事会规范」下横向并购评估指南》，原文链接于
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0205(02):EN:NOT，以及澳大利亚消费者与竞争委员会的「并购指南」，原文参见下列链接：
http://www.accc.gov.au/content/item.phtml?itemId=719436&nodeId=6e73f1879b8d082ddc0c0531fd622654&fn=Merger%20Guidelines.pdf.

规范。

结论

我们对贵部给予我们提供评论意见的机会表示赞赏。我们了解稍后将由全国人民代表大会通过并生效的《反垄断法》将取代《外资并购规定》中关于竞争审查的规定，而在《反垄断法》生效之前，贵部有意制定《反垄断法》的相关施行细则。《外资并购规定》中相关规定的废止将可确保外国投资者在相关交易中不致遭到差别待遇，并且避免此类交易所适用的法律要求互相矛盾的情况。总而言之，我们期待将来能有机会向拟议中的施行细则提出建言，并敦促贵部对于此细则考虑本评论意见中所提出之各项问题，特别是细则与市场集中度有关的部份。

日期：2007 年 3 月 20 日

BEFORE THE MINISTRY OF COMMERCE
PEOPLE'S REPUBLIC OF CHINA

DEPARTMENT OF TREATY AND LAW
ANTI-MONOPOLY INVESTIGATIONS OFFICE

COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW

ON THE

GUIDELINES ON ANTITRUST FILINGS FOR MERGERS & ACQUISITIONS OF DOMESTIC ENTERPRISES BY FOREIGN INVESTORS

The Section of Antitrust Law and the Section of International Law of the American Bar Association (collectively, the "Sections" or "we") respectfully submit these comments on the Guidelines on Antitrust Filings for Mergers & Acquisitions of Domestic Enterprises by Foreign Investors ("Filing Guidelines").[1] We understand that these Filing Guidelines will be used in connection with the implementation of the competition law aspects of the Rules on Mergers With and Acquisitions of Domestic Enterprises by Foreign Investors (hereinafter "Foreign M&A Rules"). The views expressed are being presented on behalf of the Sections only. These views have not been approved by the House of Delegates or the Board of Governors and, accordingly, should not be construed as representing the policy of the ABA. These comments are submitted pursuant to the Sections' continuing interest in the enforcement of antitrust and competition rules worldwide, including the PRC.

We believe that as a general matter it is very helpful that MOFCOM has issued these Filing Guidelines. Clarification of the procedures and policies followed by MOFCOM in implementing the competition aspects of the Foreign M&A Rules will allow more effective implementation of and compliance with the Foreign M&A Rules. These comments are intended to encourage and support the successful implementation of the Filing Guidelines and the Foreign M&A Rules.

The Filing Guidelines address a number of specific issues that arise with regard to procedure, information requirements and timing of notifications to be submitted under the Foreign M&A Rules. We also welcome the statement in Section VII regarding the flexibility of the Filing Guidelines and MOFCOM's intention to adjust the provisions of the Filing Guidelines as may become appropriate in light of future experience. In the interest of providing helpful comments in the most expeditious manner possible, we have limited these comments to the most critical issues raised by the Filing Guidelines. As they are implemented and as experience is gained with the notification process under the Foreign M&A Rules, we hope to provide additional comments on other elements of the Filing Guidelines that prove important to the efficient administration of the notification process.

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[1] These comments relate to the version available at http://tfs.mofcom.gov.cn/aarticle/bb/200703/20070304440611.html on March 9, 2007.

1. The Filing Guidelines Would Benefit From Flexibility in the Timing of Notification

The Filing Guidelines appear to contain certain ambiguities and inconsistencies as to the timing by which a filing must occur that could be clarified. For instance, while the Foreign M&A Rules are focused solely on "Foreign M&A," both the Foreign M&A Rules and the Filing Guidelines seem to create a further distinction for "extraterritorial M&A," but do not define that term. The Sections are unaware of any applicable definition of "extraterritorial M&A," and suggest that MOFCOM consider providing the definition of this term or a reference to the source of that definition in the Filing Guidelines. In addition, it is unclear in both the Foreign M&A Rules and the Filing Guidelines what level of understanding between the parties constitutes a "plan of the M&A transaction." That is not a term with a commonly understood legal meaning for us. Similarly, we are not clear what will be deemed the "country where proposed transaction takes place," particularly for transactions involving multinational corporations and requiring multiple antitrust filings.

Also, the Foreign M&A Rules and the Filing Guidelines provide that for an "extraterritorial M&A" the filing must be made: (1) before the transaction is publicly announced or (2) at the same time as of the filing with other competition authorities of an antitrust filing, without stating whether it is the earlier or later of these two dates. Actually, either interpretation of this provision could lead to certain problems. If filing must occur on the earlier of the two dates, that may present logistical and commercial problems. Parties who publicly disclose a proposed transaction prior to or upon execution of a definitive agreement might find it difficult to file a notification simultaneously with the public announcement because prior to a definitive agreement they often limit the exchange of the type of confidential business information that would be necessary to prepare the filing. Moreover, if notification is required when a proposed transaction is announced, even though a definitive agreement has not been executed, such notification could result in a wasted effort for the Anti-monopoly Investigations Office ("AMO"), as well as for the parties if ultimately the parties do not reach an agreement. Conversely, if filing were required only on the later of the two dates, no pre-closing notification would be required for those transactions in which the parties decide not to publicly announce the transaction. Likewise, if the later of the two dates governed, then there would be no filing obligation in the PRC for a transaction that did not require filing in the country where the proposed transaction takes place.

We encourage the AMO to clarify the Foreign M&A Rules and consider a system in which the parties have discretion to file after the time they form a good faith intent to consummate a specific acquisition. This permits the parties to: (1) make a judgment as to when the likelihood of a transaction becomes sufficiently strong as to justify approaching AMO and other competition authorities to begin to satisfy specific information requirements; (2) have access to the information from all parties necessary to complete the notifications; and (3) analyze any competition issues that may be presented.[2]

[2] This approach would be in accord with the ICN's Recommended Practices for Merger Notification Procedures III.A: "Parties should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction."

Such a system would still achieve the goal of an appropriate opportunity for the AMO to review the transaction for competitive issues, because the transaction cannot be completed in any event until the AMO has reviewed the transaction within the waiting period following the notification.

2. The Initial Waiting Period Should be Reduced

The initial waiting period is specified as thirty business days under the Filing Guidelines. Section IV. In transactions that raise no PRC competition issues and do not require additional review or information beyond that contained in the initial notification, such a time period seems excessive and may unnecessarily delay closing. We encourage MOFCOM to consider changing the maximum initial waiting period from thirty business days to thirty calendar days, which is consistent with the waiting periods in many major jurisdictions. Articles 25, 26 and 52 of the Foreign M&A Rules refer to "days," not "business days." We understand that, under the Administrative Licensing Law, "days" is generally to be interpreted to mean "business days" and not "calendar days". However, Article 52 provides only that the competition review be completed within "90 days". For the reasons we state here, we suggest that the Filing Guidelines specifically provide instead for "30 calendar days" which would still be consistent with the requirements of the Foreign M&A Rules.

3. The Filing Guidelines Should Allow Early Termination of the Waiting Periods

For the same reasons stated above, for transactions cleared during the initial review, the AMO should allow parties to request and receive early termination of the thirty-day period. Similarly, parties that are subject to extended review should be permitted to request early termination of the ninety-day period. Once the AMO has completed its investigation of the competitive implications of the transaction, there should be discretion to bring any waiting period to an immediate end.

4. Information Requirements Should Be Based on the AMO's Need for the Information to Conduct a Competitive Analysis

As currently drafted, the Filing Guidelines potentially require the parties to submit a large amount of information regarding many complex issues. These include, for example, Sections III.(8) – relevant markets, III.(11) – description of supply structure and demand structure, and III.(12) – which itself contains numerous subheadings calling for comprehensive information potentially relevant to a wide variety of issues affecting competitive analysis, including barriers to entry, intellectual property, licensing and other horizontal and vertical agreements, etc.

Many transactions that will trigger the notification provisions of the Foreign M&A Rules will have a very limited nexus with the PRC, because the filing thresholds contained in Article 51 and Article 53 apply to transactions where only one party has a substantial PRC presence (through assets, turnover, or FIE ownership). Also, many transactions

involving two parties with substantial PRC presences will require notification, even though the parties have no significant competitive relationship and the transaction will have no competitive impact in the PRC. For either type of transaction (especially where only the buyer has a substantial PRC presence), we suggest there is no need for any information beyond that which is needed to clarify that there is no potential for significant competitive impact in the PRC.

We appreciate MOFCOM's making available pre-notification consultation in Section V of the Filing Guidelines. However, depending on a number of variables such as the number and characteristics of the transactions notified and the size of the parties involved, the AMO could find itself burdened with many requests for consultation that lead only to a perfunctory waiver of most of the notification requirements, unless the consultations are truly optional and not in reality mandatory. Accordingly, the Sections suggest that the AMO consider creating a two-stage approach, in which only minimal information obligations are imposed on all notifiable transactions, while reserving the consultation process and the more comprehensive information requirements of the Filing Guidelines only for cases where the initial information indicates some enhanced likelihood of a significant competition issue. Some version of a two-stage notification system is in use in many jurisdictions around the world.[3]

5. Parties Would Benefit from Additional Guidance Regarding Review Process and Analysis to be Used

We encourage the AMO to consider issuing additional guidance to assist parties in understanding the procedures and methods used to analyze transactions notified pursuant to the Foreign M&A Rules. Two specific areas warrant particular attention. The first concerns the substance of the competitive analysis that the AMO applies to notified transactions. This is particularly important in the PRC because there is as yet no generally applicable competition law, so there is no extensive precedent or prior analysis released by the agency that transacting parties can study to understand how MOFCOM assesses transactions to determine whether they may be approved. Other jurisdictions have adopted such guidelines after significant experience applying their competition laws to concentrations, and the practice is generally regarded as a highly desirable one.[4] We note, however, that, while such substantive guidelines can be of great value, drafting and

[3] The ICN Recommendation IV.B. provides: "Merger review systems should incorporate procedures that provide for expedited review and clearance of notified transactions that do not raise material competitive concerns."

[4] Examples include the U.S. Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines*, available at http://www.usdoj.gov/atr/public/guidelines/hmg.htm, the European Commission's "Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings," available from links at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0205(02):EN:NOT, and the Australian Competition and Consumer Commission's *Merger Guidelines*, available at http://www.accc.gov.au/content/item.phtml?itemId=719436&nodeId=6e73f1879b8d082ddc0c0531fd622654&fn=Merger%20Guidelines.pdf.

promulgating such guidelines now may be premature given the recent commencement of review of transactions under the Foreign M&A Rules. The Sections suggest that MOFCOM defer issuance of substantive guidelines until it has the benefit of additional experience.

Second, MOFCOM has conducted hearings in connection with the review of certain notified transactions. Some jurisdictions employ hearings of various types in order to weigh evidence and arguments and to allow the presentation of opposing views on the competitive analysis of specific transactions. In most jurisdictions, a system of rules has evolved in order to control the timing of the hearing, rights to present witnesses and evidence, and other matters of timing and review, so that all parties concerned will have clear expectations. To the extent that the use of hearings becomes a regular occurrence in the review of transactions notified under the Foreign M&A Rules, the AMO could consider adopting a set of rules and practices to govern the timing, content and other procedural aspects of such hearings. Such procedural guidance is important and we urge MOFCOM to consider promulgating such procedural guidance in the near future.

CONCLUSION

The Sections appreciate the opportunity to submit these Comments. We understand that the competition review provisions of the Foreign M&A Rules will be superseded by the pending Anti-Monopoly Law ("AML") when, as expected, it is enacted by the National People's Congress and thereafter becomes effective, and that, prior to the effective date of the AML, MOFCOM intends to promulgate implementing regulations for the AML. Such repeal of the Foreign M&A provisions will ensure that there will be non-discriminatory treatment of transactions involving foreign investors, and avoid the potential for conflicting legal requirements for such transactions. In any event, we look forward to the opportunity to comment on draft implementing regulations, and urge MOFCOM to consider addressing the issues raised in these Comments in those regulations, especially as they relate to concentrations.

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