# 美国律师协会反垄断法部以及国际法部
# 有关
# 《国务院关于经营者集中申报的规定（征求意见稿）》的意见

美国律师协会反垄断法部以及国际法部（统称“**各部**”）*谨就《国务院关于经营者集中申报的规定（征求意见稿）》（“**征求意见稿**”）[1]呈交如下意见。本文表述的观点是代表各部联名提交的，未经美国律师协会代表大会或执委会批准，因此不应视为美国律师协会的意见。

各部欢迎并赞赏国务院法制办公室所发《<国务院关于经营者集中申报的规定（征求意见稿）>公开征求意见的通知》（“**通知**”）及公布征求意见稿这一举措所体现的面向公众、集思广益的透明度和公开性。各部认识到，通知和征求意见稿反映了中国持之以恒地培育竞争法体系的努力。这一体系既顺应全球竞争政策的主流，也适合中国的特殊需要。

**摘要**

各部欢迎征求意见稿中所采用的以当地联结点作为申报交易的要求，这充分地体现了与国际惯例相一致的特点。在本意见中，各部重点探讨征求意见稿中与国际竞争网络（“ICN”）的建议不相一致或在可行性或可操作性方面使人有所担心的若干问题。[2] 各部

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* 起草本意见的工作组成员是 Nathan G. Bush、陈懿华、Dorothy Fountain、Robin Kaptzan 及 Mark D. Whitener，撰稿时采纳了郑建韩,韩亮, Abbott B. Lipsky, Jr , Ethan Litwin, James F. Rill, Lester Ross 和 Robert S. Schlossberg 的意见。本文所表述的意见未必反映工作组成员所属专业机构的观点或看法。

1 征求意见稿刊布于中国政府网站http://www.gov.cn/gzdt/2008-03/27/content_930438.htm。各部的意见以征求意见稿的非正式译文为依据。

2 各部假设，其它法规将针对竞争审查中的实体性问题和其它程序性问题，并期待有机会就该等规定草案

掌握有关美国法律的精深专业知识，熟谙反垄断/竞争法，尤其熟谙国际上反垄断/竞争法有关并购审查的条文。各部提出本意见时，乃以上述经验和ICN所采用的《并购申报和审议程序的指导原则和推荐做法》[3]（“**推荐做法**”）为依据。

本意见首先关心的是申报起点或事件的相关要求。就与中国有关的申报而言，澄清以下内容是有利的，即确定是否达到申报起点时，仅计入在中国被收购的企业或资产的营业额。申报的市场占有率标准应该删除。各部建议，应明文允许凭签署意向书进行申报。征求意见稿以“成为…第一大有表决权的股份或者资产的持有者”作为“取得控制权”的标准，过于宽泛。

其余关心的是关于申报审查期限和审查程序，需要提交申报的相关材料，保密商业材料的对待以及未满足申报起点的交易等相关问题。征求意见稿第十一条有关要求补交材料的权力和补交材料期限的规定可能不够明确，可能造成不应有的延误。征求意见稿第四条允许国务院反垄断执法机构要求进行本可豁免的申报，可能造成法律上的不确定性，各部建议删除。有关对敏感商业信息按保密资料处理的规定，需就如何确定是否需要保密处理及这一处理的性质作出更具体的规定。最后，有关所有申报材料均使用中文的要求过于宽泛。

**申报起点：与中国具有联结点**　　就与中国具有联结点这一问题而言，应进一步澄清仅有被收购的业务或资产在中国产生的收入应在计算申报起点时予以考虑。其营业额与

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发表意见。

[3] 见《国际竞争网络指导原则》和《国际竞争网络并购申报推荐做法》，网址：http://www.internationalcompetitionnetwork.org/media/archive0611/icnnpguidingprin.htm http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf。ICN的推荐做法并无约束力，却反映了国际竞争执法机构有关这一领域最佳实践的共识。诸多国家/地区已经并将继续在建立其并购审查体系时与ICN的推荐做法看齐。

征求意见稿第三条项下申报起点相关的“参与集中的所有经营者”，就出售方而言，有待明确的是，究竟是实施集中时被收购的特定企业或资产还是整个出售方集团。各部建议第三条应该澄清，为确定是否达到该条项下的标准而将“参与集中的出售方经营者”明确界定为实施集中时被出售的特定企业或资产[4]。上述界定符合ICN的推荐做法，对确保贯彻征求意见稿关于申报与中国具有联结点的原则非常重要。若无这一界定，则向没有在华相关业务的出售方集团收购完全非中国的企业，亦需遵守申报规定。

各部欢迎如下规定，即“其中至少两个经营者”在中国境内的营业额均超过 3 亿元人民币。但是，被收购企业是否必须属于“两个经营者”之一尚不明确。ICN的推荐做法规定，上述两家经营者之一应为被收购企业，各部建议第三条应明确这一点[5]。

**申报起点：市场占有率标准**　　各部建议关于市场占有率标准的申报测试应予以删除。征求意见稿第三条第（三）款规定，“将导致参与集中的经营者在中国境内相关市场的占有率超过 25%”的集中需要申报。ICN提出反对以市场占有率为起点设定依据的明确建议，因为其依据的标准无法客观量化；市场的界定可能复杂而困难，其结果往往大有争辩余地[6]。因而，根据市场占有率设定起点，会增加确定是否需要申报之机制的不确定性和不可预测性。

在确定其各自的市场占有率时，交易双方必须首先界定“相关市场”。界定相关市场（就多数集中而言是多个相关市场）往往需要进行复杂的经济分析。确实，在众多并购审

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4　申报时出售方提交的材料也应仅涵盖出售的特定企业或资产。

5　推荐做法 I(B)意见 3 和 I(C)意见 3。

6　ICN 建议，申报起点应仅以可客观量化的标准为依据，诸如资产和销售额。征求意见稿第三条第（一）和（二）款以可客观量化的营业额作为标准，符合上述建议做法。采用可客观量化的标准有助于提高并购审查程序的确定性和效益，因为根据其掌握的日常业务进程中编制的财务记录，交易双方可便捷地确定其营业额和资产。

查程序中，相关市场的界定通常是最复杂和最具争议的环节。界定相关市场往往需要并非交易双方容易获得的商业数据。尤其是，交易双方无从获取有关其竞争对手销售额的可靠数据。在敌意交易的情况下，购买者通常不具备拟收购业务的相关市场份额数据。因此，在必须确定是否进行申报时，无从确定相关市场的规模和大小及交易双方的市场占有率。各部因而建议删除第三条第（三）款。

但是，如仍保留基于市场占有率的起点规定，则各部建议，至少明确第三条第（三）款的规定，仅在下述情况下要求申报，即(1)“集中将导致某一经营者的相关市场占有率增加[X]%或以上，并且导致该经营者拥有 25%或更高比例的市场占有率” – 也就是说，双方在中国同一市场相互竞争，并且(2)集中将导致在中国收购人民币[Y]营业额或人民币[Z]资产的业务[7]。否则，即便只有一方在中国相关市场开展业务并且交易仅影响很小的资产和营业额，交易亦需申报。在中国并无相互竞争的交易双方，其交易对中国产生明显效应的可能性极小。仅造成一方（而非双方）在中国进行最低限度竞争的交易同样如此。因而，对上述交易进行审查决无必要，且与ICN推荐做法有关实质性本地关联的条文背道而驰。否则，即便不可能造成明显的竞争效应，达到 25%市场占有率的经营者也可能需要进行交易申报。各部建议的修正仅要求造成市场占有率实质性增加并且涉及重大数量的商业的交易进行申报[8]。

**申报触发事件**　　各部建议应明确允许根据所签署的意向书进行申报。据各部了解，按照 2006 年生效的《关于外国投资者并购境内企业的规定》（“**外国投资者并购规定**”），双方可经签署意向书后进行所需申报。征求意见稿并未明确规定双方可在签署意

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7　第三条的原意可能是竞争导致市场占有率增加 25%以上。如果如此，则应明确这一意向。

8　并且，如果征求意见稿第 4 条以某种形式被保留下来，从而允许反垄断执法机构调查根据第 3 条不需要申报的交易，那么就更少有担心该等修正会导致某些具有反竞争影响的交易未被审查。

向书后即进行申报。允许根据意向书进行申报与 ICN 推荐做法和众多国家/地区的惯例相一致，有助于及时审议和完成拟议交易，并可与其他国家/地区对同一交易所进行的平行审查进行相互印证。各部建议，法规定稿应明确允许这一做法。

**控制权的定义**　　征求意见稿所包含的将“成为其他经营者第一大有表决权的股份或者资产的持有者”视为拥有“对其他经营者的控制权”的界定过于宽泛。征求意见稿第二条第（三）款具体界定了“取得对其他经营者的控制权”这一概念。第二条第（三）款的大多数规定与其它国家/地区的惯例大体一致。上述国家/地区均规定，发生“控制权变更”时需进行交易申报。但是，第二条第（三）款还规定“成为其他经营者第一大有表决权的股份或者资产的持有者”即可视为取得对其他经营者的“控制权”。这可能意味着，仅仅收购少数的、明显非控制性股份的交易会因为没有其他更大的股东而被视为取得“其他经营者的控制权”。许多公司（尤其是公众上市公司）的第一大股东，其所持表决股比例可能不足5%。无论如何，第二条第（三）款其余部分已包括了少数股东实际取得“其他经营者的控制权”或者”能够对其他经营者施加决定性影响”的可能。而且，第二条第（三）款还可理解为包括了由于某一大股东出售股份可能致使另一并无参与交易的股东 成为“第一大有表决权的股份持有者”的情况[9]。

各部认为这一条款应予删除或至少加以修订，规定仅在按照第二条第（三）款所述其它标准取得实际“控制权”的情况下适用，或仅在收购方成为第一大股东而且通过交易持有被收购企业相当比例的表决股 – 例如 25-30% -- 的情况下适用。

**审查期限**　　征求意见稿第 11 条规定的关于提供申报补充文件和自收到上述申报

[9] 例如，第一大股东可能向若干买家出售其股份，使第二大股东自然成为第一大股东，根据征求意见稿，上述新的第一大股东亦可能需要进行申报。

文件起的审查期限会产生不确定性以及不正当延期的潜在风险。反垄断法（“**反垄断法**”）明确规定集中申报的审查期限 – 初步审查三十日（第二十五条），进一步审查九十日（第二十六条），上述九十日期限期限可在特殊并经规定的情况下予以延长，但最长应不超过六十日（第二十六条）。上述条款给予经营者确定的预期，即其拟议交易将在三十日内或最长不超过一百八十日获得批准。但是，征求意见稿第十一条却可能允许无限期延长这一期限。快速初步审查机制也存在不确定性。

反垄断法第二十四条和征求意见稿第十一条[10]提及在提交文件“不完备”时需补交材料。初步审查的期限自收到补交材料之日起计算[11]。这一单一的审查期限计算方法可能会影响反垄断法规定的期限，既造成不确定性也导致不应有的延误。以美国的实践为例，如果不完备申报的缺陷是微小的，则应维持初始审查的原定期限。

下述事实加重了各部的担心，即因不完备而进行补充申报的次数似乎没有任何限制，致使审查时间严重不确定，可能导致反垄断执法机构不在反垄断法具体规定的期限内出具意见并完成审查。各部建议，授权反垄断执法机构一次性要求补交材料。

征求意见稿第十一条规定，“国务院反垄断执法机构应当及时告知经营者需要补交的文件、资料，并明确补交文件、资料的期限”。“及时告知”的本意似乎是指“在初步审查期限内告知”，而非任何延长审查期。与此相应，第十一条似有必要就此加以澄清。各部

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[10] 第十一条涉及按照反垄断法第二十五条第（二）款进行的初步审查。各部假设，提及第二十五条第（二）款，本意是指第二十五条第一段及其有关三十日初步审查的规定。

[11] 征求意见稿第十二条涉及“事实发生实质性变化”时进行申报和补交材料，并规定自收到补交材料之日起重新开始计算初步审查期限。各部认为，上述政策可能适用于事实发生实质性变化，导致与原定交易不同的新交易的情况。但是，各部还注意到，反垄断法第二十六条规定，“有下列情形之一的，反垄断执法机构可延长前款规定的审查期限[超过九十日]...，但最长不得超过六十日：...（三）经营者申报后有关情况发生重大变化的。”因此，征求意见稿似乎与反垄断法不相一致，因为第十二条允许期限完全从头计算。

认为，在第十一条中规定告知经营者“补交材料的期限”，既无必要也很可能于事无补。双方完全有迅速补交材料的动力。如若不然，反垄断执法机构只需发出集中禁止令，以经营者未充分披露必要信息为禁止理由即可解决问题[12]。

征求意见稿第十四条规定，反垄断执法机构应建立快速初步审查机制。这一快速审查机制明显是作为反垄断法第二十五条项下初步审查的一部分，而且该种快速审查机制应少于三十日初步审查期限内完成。因此，各部建议，条例应就上述问题予以明确[13]。

各部假设，反垄断法和征求意见稿项下的“日”应指“日历日”，相对于外国投资者并购规定项下现行的基于“工作日“的时限计算，这是一个值得欢迎的变化。各部建议，征求意见稿应就此予以澄清。

**要求进行本可豁免的申报** 征求意见稿第四条授权反垄断执法机构要求经营者就可能免予申报的交易进行申报，这造成了潜在的法律不确定性。各部建议删除此项授权。征求意见稿第四条授权反垄断执法机构要求经营者就其认为“可能产生排除、限制竞争效果的”的集中进行申报，即使上述交易未达到本规定第三条规定的申报标准，也应暂不成交。第四条可能对集中造成严重的不确定性，因为双方可能直至预定交割前一刻才得知，主管机构已决定要求申报并暂停原本无需申报的并购成交。而且，取决于第四条规定的适

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12 同样，征求意见稿第十二条也无需要求经营者将任何实质性变化“及时告知”反垄断执法机构。经营者完全有尽快告知的动力。各部建议，条例规定，如果经营者因故无法满足主管机构的要求，应接受对无法提供特定记录或数据加以解释的不合规声明。美国自 1978 年开始实施并购前申报制度迄今，一直沿用上述做法。相关法令、法规及表格可登录http://www.ftc.gov/bc/hsr/hsrbook.shtm查询。此外，在美国还可随时撤回申报，而各部建议根据反垄断法采纳这一做法。

13 鉴于申报通常需要提交大量材料，各部建议，应在采纳快速审查程序的同时，考虑采纳两种层面的申报。为确定并购是否“将明显导致取消或限制竞争”而通常需要的提供少量材料的申报，将既使反垄断执法机构以简明扼要的方式获得必要信息，又减轻经营者申报准备工作的负担。加拿大卓有成效地采纳了上述简明和详尽申报程序，即除非加拿大竞争局确定需进行详尽申报，否则只要求等候期较短的简明申报。

用频率，该条款还有可能削弱第三条规定的申报起点的影响力。鉴于第四条潜在的法律不确定性的，该规定与主张设定明确而易于理解的申报起点的ICN建议做法相左。[14]

与此相应，各部谨此建议删除第四条。或者，如果保留第四条，各部建议建立如下机制，即由并购双方主动申报未达到第三条规定的申报起点的交易。而且，如果保留第四条，各部还建议提高第三条规定的申报起点，因为反垄断执法机构有权要求未达到上述起点的集中交易进行申报。[15]而且，应明确第四条仅适用于有限的情况。如果保留第四条，各部建议，该条款修订为"…国务院反垄断执法机构有理由认为可能产生排除、严重限制竞争效果的"。各部认为，通过向并购双方和利益相关的第三方（诸如客户和竞争对手）明确第四条仅适用于存在*实质*性妨碍竞争的担忧的情况，上述修订有助于多少增强法律上的确定性。此外，各部恳请确定如下假设，即：交易成交后，第四条无论如何不应再予以适用。[16]

**对敏感商业信息的保密处理**　　各部欢迎目前在征求意见稿中对某些需要进行保密处理的情形予以明确和有力的承认。然而，相关对敏感商业信息的保密处理的条款需要进一步的细化，包括如何决定适用该等处理方式的程序以及该等处理方式的性质。

征求意见稿第十三条规定，在下述情况下对提交的材料按保密资料处理：(1)如果经营者申请按保密资料处理；和(2)国务院反垄断执法机构认为保密申请有正当理由。尤其是，国务院反垄断执法机构必须对交易机密进行保密。无论如何，主管机构应建立严格的保密程序规范。只要主管机构确定保密申请有正当理由，即可要求提供相关材料的非保密性概要。

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14　参见 ICN 建议做法第 II.A 款和征求意见稿第一条。

15　提高征求意见稿第三条规定的起点可能适宜，因为采用人民币 3 亿元的营业额和人民币 17 亿元的营业额作为申报起点的金额相对于中国的经济规模微不足道。

16　如果各部的假设不正确，第四条在交易完成后仍然适用，则应在第四条中明确，其运用于上述情况并不意味着交易成交不再有效。

各部认为，第十三条仍有改进余地，可通过若干澄清而真正发挥效力。首先，应该明确申请保密待遇的标准和程序。如能举例说明被视为保密的材料类型将是十分有帮助的。其次，反垄断执法机构提供保密待遇的程序应明确而透明。例如，保密待遇可包括反垄断执法机构不得向其它政府部门披露。第三，除非需要公布上述信息，否则无需提供保密材料的非保密性概要。

根据哈特—斯科特—罗迪诺反托拉斯改进法，在美国，联邦反垄断机构收到交易申报的信息，以及所有与申报有关的材料和关于所申报交易的调查均是保密的。政府不会确认关于申报事实的存在除非交易一方已公开公布审查的消息并且政府被要求就公司的公告予以确认。保密处置亦同时适用于提供给政府的并非属于集中交易一方的相关人的材料。这种严格的保密机制的唯一例外是国会对于该等交易的调查，即调查机构启动对于交易的诉讼或该交易在等待期间内被提前终止。就在等待期间内被提前终止的交易而言，唯一的公布事项为该交易被提前终止。

在其他情况下，美国的实践是，除非并直至确定其并非保密材料，双方指定为保密的材料应获得保密待遇。而且，美国通常规定，如拟披露据称保密的材料，应事先通知其材料将被披露的经营者，使经营者有足够时间对披露提出异议并就披露决定提出上诉。

如果不在第十三条中作出类似澄清，则各部力促在反垄断执法机构为执法第十三条而设定的程序中澄清以上内容。否则，各部认为，拟通过第十三条实现的保密将无法充分实现。至少，第十三条应要求反垄断执法机构公布其就保密申请和保密待遇作出决定的标准及程序。

**翻译**　各部认为要求所有申报文件均提供翻译件的要求过于宽泛。征求意见稿要求提交交易协议和其他支持性文件，而且要求所提交的所有文件均应使用中文。外国投资者

并购规定项下和其它国家/地区的现行做法是提供交易协议和其他支持性文件的本国语概要，审批机构有权要求提交个案的补充译文。这一做法可节省多数情况下并无必要的全文翻译冗长文件的时间和开支。

**结论**

各部希望上述建议有所助益。如有机会在中国进一步培育其竞争法体系的进程中提供任何有益的其它协助，不胜欣幸。

2008 年 4 月 11 日

**Joint Comments of the American Bar Association's**
**Section of Antitrust Law and Section of International Law**
**on**
**Draft for Comments of the State Council Regulations on Notifications of Concentrations of Undertakings**

The Section of Antitrust Law and the Section of International Law (together, the "Sections")[*] of the American Bar Association respectfully submit these comments on the Draft for Comments of the State Council Regulations on Notifications of Concentrations of Undertakings ("Comment Draft").[1] The views expressed herein are being presented jointly on behalf of the Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be considered as representing the policy of the American Bar Association.

The Sections welcome and appreciate the transparency and openness to public input reflected in the Notice Concerning the Solicitation of Public Opinions with Respect to the State Council Regulations on Notifications of Concentrations of Undertakings Issued by the Legislative Affairs Office of the State Council ("Notice") and the publication of the Comment Draft. The Sections recognize that the Notice and the Comment Draft reflect China's continuing commitment to develop a competition law regime that is within the mainstream of global competition policy and tailored to China's needs.

**Executive Summary**

The Sections welcome the provision in the Comment Draft of local nexus requirements

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[*] The members of the Working Group that drafted these comments are Nathan G. Bush, Yee Wah Chin, Dorothy Fountain, Robin Kaptzan, and Mark D. Whitener, with comments from Thomas Cheng, Michael Han, Abbott B. Lipsky, Jr., Ethan Litwin, James F. Rill, Lester Ross and Robert S. Schlossberg. The views expressed herein do not necessarily reflect the views or opinions of the professional organizations with which the members of this Working Group are affiliated.

[1] The Comment Draft was posted on the website of the Chinese Government at http://www.gov.cn/gzdt/2008-03/27/content_930438.htm. The Sections' comments are based on unofficial translations of the Comment Draft.

for notification of transactions that are substantially consistent with international norms. In these comments, the Sections focus on several aspects of the Comment Draft that remain inconsistent with the recommendations of the International Competition Network ("ICN") or otherwise raise concerns regarding practicality and operability.[2] The Sections have substantial expertise in the laws of the United States, and have substantial familiarity with antitrust/competition law, particularly as it relates to merger control, internationally. The Sections' comments draw upon this experience and upon the *Guiding Principles and Recommended Practices for Merger Notification and Review Procedures* ("Recommended Practices")[3] adopted by the ICN.

The first area of concern relates to the thresholds or events that trigger the notification requirements. The China nexus for notification would benefit from clarification that only revenues of acquired businesses or assets in China may be considered for purposes of the notification thresholds. The market share test for notification should be deleted. The Sections suggest that the filing of notification based upon the execution of a letter of intent be expressly permitted. The inclusion in the Comment Draft of "becoming the largest shareholder or asset holder" as a means of "acquiring control" is overbroad.

The other areas of concern relate to the time period and process of review of the notification, the materials to be submitted with the notification, and the treatment of confidential business materials and of transactions that fall under the thresholds for notification. The provisions of Comment Draft Article 11 relating to the power to require the filing of additional

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[2] The Sections assume that other regulations will address the substantive and other procedural aspects of the concentration competitive review process, and would welcome the opportunity to submit comments on drafts of such regulations.

[3] *See International Competition Network, Guiding Principles* and *International Competition Network, Recommended Practices for Merger Notification Procedures, available at* http://www.internationalcompetitionnetwork.org/media/archive0611/icnnpguidingprin.htm http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf. The ICN Recommended Practices are nonbinding, but they reflect a consensus of the international competition enforcement community as to the best practices in this area. Numerous jurisdictions have conformed, and continue to conform, their merger review systems to the ICN Recommended Practices.

information and the time period of review where such information is filed may create uncertainty and the potential for undue delay. Comment Draft Article 4, permitting the anti-monopoly enforcement authority under the State Council to require notification of transactions which otherwise would be exempt, creates potential for legal uncertainty, and the Sections suggest its deletion. The provisions relating to confidential treatment of sensitive business information need further specification, both in the processes of determining the applicability of such treatment, and the nature of such treatment. Finally, the requirement for translations of all submissions is overbroad.

**Notification Thresholds: China Nexus** The China nexus for notification would benefit from clarification that only revenues of acquired businesses or assets in China may be considered for purposes of the notification thresholds. It is unclear whether the "undertaking to the concentration" whose revenues are relevant to the notification thresholds in Article 3 of the Comment Draft is, in the case of the seller, the specific business or assets being acquired in the concentration, or the entire seller group. The Sections recommend that Article 3 be clarified to expressly define the "selling undertaking to the concentration" for the purposes of the determinations to be made under that article, as only the specific business or assets that are being sold in the concentration.[4] This definition is consistent with ICN Recommended Practices, and is important to ensure that the principle of China nexus in the Comment Draft is implemented. Without such a definition, the acquisition of an entirely non-Chinese business from a seller group that has unrelated activities in China could be subject to the notification requirement.

The Sections welcome the requirement that "each of at least two undertakings" has a PRC turnover exceeding RMB 300 million. However, it is unclear whether the acquired

[4] The information to be provided in notifications by the seller also should relate only to the specific business or assets being sold.

business must be included as one of the "two undertakings". ICN Recommended Practices provide that one of these undertakings should be the acquired undertaking, and the Sections suggest that Article 3 be clarified to make that explicit.[5]

**Notification Thresholds: Market Share Test** The Sections urge that the market share test for notification be deleted. Article 3(3) of the Comment Draft requires notification of concentrations which "result in the Chinese market share of the undertakings to the concentration reaching 25%." The ICN expressly recommends against market share-based thresholds because they are not based on objectively quantifiable criteria; market definition can be complex and difficult, often producing debatable results.[6] Thus reliance on market share thresholds increases the uncertainty and unpredictability of the need to notify.

For transaction parties to determine their own market shares, they must first determine the "relevant market." Defining the relevant market (and, with respect to many concentrations, multiple relevant markets) often requires complicated economic analysis. Indeed, defining relevant markets often is the most contentious and complex aspect of many merger review proceedings. Defining the relevant market often requires commercial data not readily available to the transaction parties. In particular, transaction parties will often not have access to reliable data on the sales of their competitors. In the case of hostile transactions, the buyer may not have relevant market share data regarding the business to be acquired. Consequently, parties may not be able to determine the scope and size of the relevant markets and their market shares at the time the determination whether to notify must be made. Accordingly the Sections recommend

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[5] Recommended Practice I(B) Comment 3, and I(C) Comment 3.

[6] The ICN recommends that notification thresholds be based exclusively on objectively quantifiable criteria, such as assets and sales. Article 3(1), (2) of the Comment Draft follows this recommended practice by relying on the objectively quantifiable criterion of turnover. Use of objectively quantifiable criteria promotes certainty and efficiency in the merger review process, because transaction parties can readily determine their turnover and assets based on financial records in their possession maintained in the ordinary course of business.

the deletion of Article 3(3).

Should the market share threshold nevertheless be retained, however, at a minimum the Sections suggest that Article 3(3) be clarified to require notification only (1) "where a concentration will cause an increase of [X]% or more in the market share in a relevant market of one undertaking and will result in such undertaking having a market share of 25% or more" -- that is, that both parties compete in the same market in China, and (2) that concentration will result in the acquisition of businesses with turnover of [Y] RMB or assets in China of [Z] RMB.[7] Otherwise, a transaction could be notifiable even where only one party is active in the relevant market in China and only a small amount of assets or turnover is affected. Transactions involving parties that do not compete in China are exceedingly unlikely to have appreciable effects in China. The same is true for transactions in which one party (and not both) provides only *de minimis* competition in China. Thus, review of such transactions is unnecessary and runs counter to the ICN Recommended Practices regarding material local nexus. Otherwise, an undertaking with 25% market share could need to notify transactions even though an appreciable competitive impact is unlikely to result. Similarly, it would be disproportionately burdensome to require notification of a transaction that involves only a small amount of assets or turnover. The proposed revision would require notifications only of transactions causing meaningful increases in market shares and involving significant volumes of commerce.[8]

**Notification Triggering Event** The Sections suggest that the filing of notification based upon the execution of a letter of intent be expressly permitted. The Sections understand that, under the 2006 Provisions on Acquisition of Domestic Enterprises by Foreign Investors

[7] Article 3 may in fact be intended to require that the concentration result in an increase in market shares to a level exceeding 25%, in which case this intent should be made explicit.

[8] Moreover, if Comment Draft Article 4 is retained in some form that allows the anti-monopoly enforcement authority to investigate transactions that are not subject to notification under Article 3, then there is even less concern that such a revision will result in an anticompetitive transaction being unexamined.

("Foreign M&A Provisions"), it is possible for parties to file the required notification based upon the execution of a letter of intent. The Comment Draft does not expressly provide that the parties may file a notification upon the signing of a letter of intent. The ability to file on a letter of intent would be consistent with ICN Recommended Practices and the practice in many jurisdictions, and would facilitate the timely review and completion of proposed transactions, and corroboration with other jurisdictions undertaking parallel reviews of the same transaction. The Sections suggest that the final regulations expressly allow such a practice.

**Definition of Control** The inclusion in the Comment Draft of "becoming the largest shareholder or asset holder" as a means of "acquiring control" is overbroad. Article 2(3) of the Comment Draft specifically clarifies the concept of "acquiring control over undertakings." Most provisions of Article 2(3) are consistent with practices of other jurisdictions that define reportable transactions in terms of a "change of control." However, Article 2(3) also includes in the definition of an acquisition of "control" over another undertaking simply "becoming the largest shareholder or asset holder" of that undertaking. This could mean that an acquisition of "control" includes a transaction in which a minority, clearly non-controlling, shareholding is deemed to be acquired, simply because there are no other, larger shareholders. In many companies, particularly publicly listed companies, the largest shareholder may hold less than 5% of the voting securities. In any event, transactions in which a minority shareholder actually does acquire the ability to "control" or "exercise decisive influence" over the company are already covered by the other clauses of Article 2(3). Moreover, Article 2(3) may be construed to cover situations where sales of shares by one large shareholder may cause another shareholder to "become the largest shareholder" without participating in the transaction.[9]

[9] For example, the largest shareholder may sell its holdings to several buyers, leaving the next largest shareholder to become the largest shareholder. Under the Comment Draft, this new largest shareholder may be required to file notification.

The Sections believe that this provision should be eliminated, or at least modified to provide that it applies only if "control" is, in fact, acquired under other criteria stated in Article 2(3), or modified to provide that it only applies if the acquiring party becomes the largest shareholder and as a result of the transaction holds at least some significant percentage -- *e.g.*, 25-30% -- of the voting shares of the acquired undertaking.

**The Time Period for Review** The provisions of Comment Draft Article 11 relating to the power to require the filing of additional information and the time period of review where such information is filed may create uncertainty and the potential for undue delay. The time periods for review of a notification of concentration are stated in the Anti-Monopoly Law ("AML") – 30 days for initial review (Article 25), 90 days for a further review (Article 26), with the possibility of an extension of up to an additional 60 days beyond that 90-day period under specific, defined conditions (Article 26). These periods provide undertakings with assurance that their proposed transaction will be approved within 30 days or in no more than 180 days. However, Article 11 of the Comment Draft may allow unwarranted extensions of this timetable. There is also uncertainty relating to the expedited initial review mechanism.

AML Article 24 and Comment Draft Article 11[10] pertain to the submission of additional information when the filing is "incomplete." The time limit for the initial review shall be calculated from the time of receipt of the additional materials.[11] This uniform method of

[10] Article 11 refers to an initial review process pursuant to AML Article 25(2). The Sections assume the reference to Article 25(2) was intended to be to the first paragraph of Article 25 and its 30-day initial review requirement.

[11] Comment Draft Article 12 pertains to the notification and submission of additional information when there is a "material change in facts" and also provides for the re-commencement of the calculation of the time limit for initial review upon receipt of such additional information. The Sections believe that such a policy may be appropriate where a material change in facts results effectively in a new and different transaction than that which was originally proposed. However, the Sections also note that AML Article 26 provides that "[u]nder any of the following circumstances, the anti-monopoly enforcement authority under the State Council may extend the [extra 90 days] time limit stipulated in the previous paragraph…, provided that the extension may not exceed 60 days:…(3) there has been a material change to the circumstances after the notification by the undertakings." Therefore, it may appear that Comment Draft Article 12 is inconsistent with the AML, because Article 12 enables the time period to re-commence entirely.

calculating the time for review may undermine the time periods set forth in the AML. It creates uncertainly as well as the potential for undue delay. The practice in the United States, for example, is to retain the original time period for the initial review if the deficiency in the incomplete notification is minor.

The Sections' concern is amplified by the fact that there appears to be no limit on the number of times that a supplemental notification may be required to address incompleteness. This creates uncertainty as to the duration of the review process and may result in the anti-monopoly enforcement authority not rendering an opinion and concluding a review within the time frame specifically provided in the AML. The Sections recommend authorizing the anti-monopoly enforcement authority to issue no more than one request for the filing of supplemental information.

Comment Draft Article 11 provides that "the anti-monopoly enforcement authority under the State Council shall timely inform the undertakings of any documents and materials to be supplemented, as well as the time limit for submitting the supplement." It appears that "timely inform" is intended to mean to "inform within the initial review period," not during any extended review period. Accordingly, it appears appropriate to clarify Article 11 in this respect. The Sections believe that it is unnecessary, and unlikely to be useful, to provide in Article 11 that the undertakings be informed of "the time limit for submitting the supplement." The parties will have every incentive to provide the additional information expeditiously. If they do not provide the information, the anti-monopoly enforcement authority may simply issue a decision prohibiting the concentration, setting forth the reason for the prohibition as the lack of adequate disclosure by the undertakings of the necessary information.[12]

[12] Similarly, there is no need in Comment Draft Article 12 to require the undertakings to "timely inform" the anti-monopoly enforcement authority of any material change. The undertakings have every incentive to do so as soon as possible. The Sections suggest that the regulations provide for acceptance of a statement of non-

Comment Draft Article 14 instructs the anti-monopoly enforcement authority to establish an expedited initial review mechanism. It seems evident that this expedited review process is intended to take place as part of the initial review under AML Article 25, and that expedited review is to be a shortening of the 30-day time period for an initial review. The Sections suggest that these aspects be made explicit in the regulations.[13]

The Sections presume that the references to "day" under the AML and the Comment Draft mean "calendar days", which would be a beneficial change from the current business day based time limits under the Foreign M&A Provisions. The Sections suggest that this be clarified in the Comment Draft.

**Requiring Notification of Transactions Otherwise Exempt from Notification** Comment Draft Article 4, permitting the anti-monopoly enforcement authority under the State Council to require notification of transactions which otherwise would be exempt, creates potential for legal uncertainty, and the Sections suggest its deletion. Comment Draft Article 4 authorizes the anti-monopoly enforcement authority to require notifications of concentrations which it "deems may have the effect of eliminating or limiting competition in the relevant market" and to suspend their consummation even if none of the threshold tests in Comment Draft Article 3 has been met. Article 4 could create considerable uncertainty for concentrations, where

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compliance explaining why the particular records or figures could not be provided in lieu of the materials, if an undertaking, for any reason, cannot comply with the authority's request. This procedure has been used in the United States ever since the inception of its premerger notification regime in 1978. *See* 16 C.F.R. §§803.2, 803.3; Instructions to HSR Notification and Report Form. The relevant statute, regulations and forms may be found at http://www.ftc.gov/bc/hsr/hsrbook.shtm. Additionally, in the United States, a party may withdraw a notification at any time, and the Sections propose that such a procedure be adopted under the AML.

[13] In light of the considerable amount of information required in notifications generally, the Sections suggest that consideration be given to adopting two levels of notification along with the adoption of an expedited review process. A notification providing the fairly small amount of information that is normally needed to determine that a concentration "obviously will not result in the effect of eliminating or restricting competition" would enable the anti-monopoly enforcement authority to have the essential information in a concise manner while lessening the undertakings' burden in preparing the notification. Canada has adopted with beneficial effects such a short form/long form process, with a shorter waiting period for a short form notification unless the Canadian Competition Bureau decides a long form notification should be filed.

the parties may not know until shortly before the scheduled closing of a transaction that the authority has decided to require a notification and suspend closing of an otherwise non-reportable concentration. Furthermore, depending upon the frequency with which Article 4 is applied, it also has the potential for undermining the thresholds established in Article 3. With its potential for legal uncertainty, Article 4 is inconsistent with ICN Recommended Practices, which advocate clear and understandable bright-line thresholds.[14]

Accordingly, the Sections respectfully submit that Article 4 be deleted. Alternatively, if Article 4 is retained, the Sections suggest that a mechanism be established by which merging parties may voluntarily submit for review transactions that do not meet the notification thresholds of Article 3. In addition, if Article 4 is retained, the Sections suggest that the notification thresholds in Article 3 be raised, because the anti-monopoly enforcement authority will have the ability to require notification of concentrations that fall below those thresholds.[15] Moreover, it should be explicit that Article 4 will be applied only in limited circumstances. If Article 4 is retained, the Sections suggest revising it to read, "…but which the Anti-Monopoly Enforcement Authority under the State Council has reason to believe may have the effect of eliminating or substantially restricting competition…" The Sections believe that this modification would help to provide somewhat more legal certainty, by clarifying for both merging parties and interested third parties, such as customers and competitors, that Article 4 will apply only when *material* competitive concerns exist. Moreover, it would be desirable to confirm the Sections' assumption that Article 4 would in no case be applied following the consummation of a transaction.[16]

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[14] *See* ICN Recommended Practice II.A and Comment 1.

[15] Raising the thresholds in Comment Draft Article 3 may be appropriate because the RMB 300 million and RMB 1.7 billion thresholds for turnover in China are fairly small in relation to the size of China's economy.

[16] If the Sections' assumption is incorrect and Article 4 may be applied after a transaction is completed, it should

**Confidential Treatment of Sensitive Business Information** The Sections welcome the clear and strong recognition in the Comment Draft of the need for confidential treatment in certain circumstances. However, the provisions relating to confidential treatment of sensitive business information need further specification, both in the processes of determining the applicability of such treatment, and the nature of such treatment.

The Comment Draft in Article 13 provides for confidential treatment of submitted materials under certain circumstances: (1) if the undertakings request confidential treatment; and (2) the anti-monopoly enforcement authority under the State Council deems the undertakings' application reasonable. In particular, the anti-monopoly enforcement authority must maintain confidentiality as to trade secrets. In all events, the authority shall establish strict processes to maintain confidentiality. Where the authority determines that an application for confidential treatment is reasonable, it may require a non-confidential summary of the materials.

The Sections believe that Article 13 may be improved and made truly effective by several clarifications. First, the standards by and procedures under which applications for confidential treatment are to be considered should be clear. It would be helpful if examples are identified of the types of materials that would be deemed confidential. Second, the procedures that the anti-monopoly enforcement authority establishes to provide confidential treatment should be clear and transparent. For example, confidential treatment may include non-disclosure by the anti-monopoly enforcement authority to other parts of the government. Third, unless there is a need to publish such information, there should be no need for non-confidential summaries of confidential material.

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, in the United States,

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be explicit in Article 4 that its application in such circumstances does not mean that the consummation of the transaction is no longer effective.

the receipt by the federal antitrust authorities of notification of a transaction, and all materials submitted in connection with the notification and with any investigation of the notified transaction, are confidential. The government would not confirm the existence of a notification unless a party has publicly announced the notification and the government is asked to confirm the party's announcement. Confidential treatment is extended to materials provided to the government by non-parties to the concentration. The only exceptions to this strict confidentiality are in the events Congress investigates the transaction, the investigating agency commences litigation against the transaction or the transaction is granted early termination of the waiting period. In the case of early termination of the waiting period, the only disclosure is the fact that early termination has been granted.

In other situations, the United States practice is that materials designated as confidential by the parties are given confidential treatment unless and until they are determined not to be confidential. Moreover, it is customary in the United States to provide that if any disclosure is proposed to be made of materials that are claimed to be confidential, notice be given to the undertaking whose materials are to be disclosed, with adequate time for that undertaking to object to such disclosure and to appeal the determination to disclose.

If similar clarifications are not included in Article 13, then the Sections urge that they be incorporated in the processes that the anti-monopoly enforcement authority establishes to implement Article 13. Without these clarifications, the Sections believe that the confidentiality intended to be provided by Article 13 may not be fully achieved. At the least, Article 13 should require the anti-monopoly enforcement authority to publish its standards and procedures for deciding confidentiality applications and for confidential treatment.

**Translations** The Sections submit that the requirement for translations of all submissions is overbroad. The Comment Draft requires that the transaction agreement and all

other supporting documents be provided and that all submissions be translated into Chinese. Current practice under Foreign M&A Provisions, and in other jurisdictions, is for a summary of the transaction agreement and all other supporting documents to be provided in the local language, with the reviewing authority having the discretion to require additional translations on a case by case basis. This approach saves the time and expense of full translations of voluminous transaction agreements that may be unnecessary in many cases.

**Conclusion**

The Sections hope these suggestions are helpful and would be pleased to offer any further assistance that may be helpful as China further develops its competition law regime.

April 11, 2008