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Competition Policy Office
Anti-Monopoly Bureau
Ministry of Commerce
2 Dong Chang An Avenue
Beijing 100731
People's Republic of China

Supervision and Enforcement Office
Anti-Monopoly Bureau
Ministry of Commerce
2 Dong Chang An Avenue
Beijing 100731
People's Republic of China

RE: Notices of Solicitations for Comment on
(1) Draft Provisional Measures on the Notification of Concentrations between Undertakings
(2) Draft Provisional Measures on the Review of Concentrations between Undertakings
(3) Draft Provisional Measures on the Investigation and Handling of Concentrations between Undertakings Not Notified in Accordance with the Law
(4) Draft Provisional Measures on the Collection of Evidence for Suspected Monopolistic Concentrations between Undertakings Not Reaching the Notification Thresholds

Dear Sir/Madam:

The American Bar Association Sections of Antitrust Law and International Law (the "Sections") appreciate the extension of time granted to us to submit comments on these drafts of four Provisional Measures relating to the treatment of concentrations between undertakings under the Anti-Monopoly Law ("AML"). The Sections welcome and appreciate the continued transparency and openness to public input reflected in these Notices of Solicitation for Comments. Comments should help ensure the rigor and practicality of the final Provisional Measures.

These Provisional Measures should increase transparency in the implementation of the AML and standardize notifications and investigations of concentrations. The Sections believe the draft provisional measures should serve well as provisional measures that may be refined and adjusted based upon experience into final regulations.

The Sections note with appreciation that the proposed Provisional Measures address many of their Joint Comments on Draft for Comments of the State Council Regulations on Notifications of Concentrations of Undertakings (April 11, 2008) (the "Joint Comments"). The Sections nonetheless feel that some aspects of the draft Provisional Measures, specifically those relating to the notification triggering event, the concept of "control", the treatment of business secrets and other confidential information, the requirement for translations, and the treatment of concentrations that do not reach notification thresholds, may benefit from further refinement.

Notification Triggering Event. As discussed in the Joint Comments, 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 (the "Foreign M&A Provisions"), it was possible for parties to file the required notification based upon the execution of a letter of intent. The ability to file based 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 collaboration 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 Sections note with appreciation that the definition of "control" in the Draft Provisional Measures on the Notification of Concentrations between Undertakings (the "Notification Rules") no longer includes "becoming the largest shareholder or asset holder" as a means of "acquiring control". The Sections believe, however, that the definition of "control" in this measure would benefit from further clarification, in particular as to the relative importance of the factors listed in that definition.

Confidentiality. The Sections welcome the clear and strong recognition in the draft Provisional Measures 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 Sections believe that the Articles regarding the duty of confidentiality 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 MOFCOM establishes to provide confidential treatment should be clear and transparent. For example, confidential treatment may include non-disclosure by MOFCOM 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, 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.

Translations. The Sections submit that the requirement for translations of all submissions is overbroad. The draft Notification Rules require 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.

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For your convenience, a copy of the Joint Comments is enclosed. In particular, the Sections refer you to the discussion in the Chinese translation of these Joint Comments on pages 4-5 (relating to "Notification Triggering Event), 5 ("Definition of Control"), 7-8 ("Requiring Notification of Transactions Otherwise Exempt from Notification"), 8-9 ("Confidential Treatment of Sensitive Business Information"), and 9-10 ("Translations").

The Sections hope these materials are helpful and would be pleased to offer any further assistance that may be helpful as MOFCOM finalizes the Provisional Measures.

Please note that these views are being presented only on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

Sincerely,

James A. Wilson
Chair, Section of Antitrust Law

Aaron Schildhaus
Chair, Section of International Law

Enclosure