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The Evolution of Chinese Merger Notification Guidelines: A Work in Progress Integrating Global Consensus and Domestic Imperatives

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I. INTRODUCTION

Competition laws worldwide have been developing at a rapid pace for the past several decades, spurred by technical assistance and recommendations from a diverse collection of organizations including the Organisation for Economic Co-operation and Development (OECD),¹ the United Nations Conference on Trade and Development (UNCTAD),²

1. *See generally* Organisation for Economic Co-operation and Development, <http://www.oecd.org> (last visited Sept. 24, 2009). The OECD, founded in 1961, describes itself as a membership organization of thirty nations dedicated to collecting economic information and supporting economic growth, employment, improved living standards, trade, and development. *Id.* (follow “About OECD” hyperlink). With respect to antitrust principles, the organization states:

Well-designed competition law, effective law enforcement and competition-based economic reform promote increased efficiency, economic growth and employment for the benefit of all. OECD work on competition law and policy actively encourages decision-makers in government to tackle anti-competitive practices and regulations and promotes market-oriented reform throughout the world.

Id. (follow “By topic” hyperlink; then follow “Competition” hyperlink).

2. The United Nations Conference on Trade and Development (UNCTAD) includes research and technical assistance in the fields of competition and consumer protection in its programs of economic development. *See generally* U.N. Conference of Trade & Dev., Competition Law and Policy, <http://www.unctad.org> (last visited Sept. 17, 2009). The antitrust activities include:

UNCTAD provides competition authorities from developing countries and economies in transition with a development-focused intergovernmental forum for addressing practical competition law and policy issues.

Every year, UNCTAD hosts the Intergovernmental Group of Experts on Competition Law and Policy for consultations on competition issues of common

the International Competition Network (ICN),³ and the World Trade Organization (WTO).⁴ Following this lead, a large and growing number of jurisdictions, recently joined by The People's Republic of China (PRC),⁵ have chosen to adopt their own antitrust laws and institute enforcement regimes. Antitrust law, also referred to as competition law (European Union) and antimonopoly law (China), comprises a number of distinct types of trade restraints. These include: horizontal agreements,⁶ defined to cover both hard core cartels⁷ and other pro-competitive price

concern to member States and informal exchange of experiences and best practices, including a Voluntary Peer Review of Competition Law and Policy.

UNCTAD is also engaged in technical cooperation with countries seeking capacity-building and technical assistance in formulating and/or effectively enforcing their competition law.

UNCTAD has developed a Voluntary Peer Review mechanism as part of its technical cooperation activities.

UNCTAD is a depository of international competition legislations, the Model Law on Competition and the United Nations Set of Principles on Competition.

Id. (follow "Programmes" hyperlink; then select "Competition and Consumer Policies" hyperlink).

3. Int'l Competition Network (ICN), <http://www.internationalcompetitionnetwork.org> (last visited Sept. 17, 2009).

4. World Trade Org. [WTO], Interaction Between Trade and Competition Policy, http://www.wto.org/English/tratop_e/comp_e/comp_e.htm (last visited Sept. 11, 2009). The World Trade Organization first raised competition policy in 1996 in connection with the Singapore Ministerial Conference and established a working group to assess the relationship of trade and competition policy. The working group considered issues including capacity building support for developing countries' competition enforcement, fundamental competition principles, and international cooperation. Work proceeded until the Cancun Ministerial Conference (2003), when no consensus was reached on issues including competition, and the General Council decided in the July 2004 Package (adopted August 1, 2004) that with respect to the

[r]elationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.

WTO Gen. Council, WT/L/579, § 1(g) (Aug. 1, 2004), *available at* http://www.wto.org/English/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.

5. China passed the Anti-Monopoly Law (AML), the first comprehensive antitrust law of general application, on August 31, 2007, with an effective date of August 1, 2008. Anti-Monopoly Law (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (P.R.C.), *available at* http://www.fdi.gov.cn/pub/FDI_EN/Laws/GgeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf.

6. U.S. Dep't of Justice & the Fed. Trade Comm'n, Horizontal Merger Guidelines (issued Apr. 2, 1992, revised Apr. 8, 1997) [hereinafter U.S. DOJ/FTC, Horizontal Merger Guidelines], *available at* <http://www.usdoj.gov/atr/public/guidelines/hmg.pdf> (discussing antitrust analysis of horizontal agreements).

7. *See, e.g.*, Scott D. Hammond, Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program (Mar. 26, 2008) (unpublished presentation at

and nonprice cooperation agreements;⁸ vertical price-related distribution restraints, including resale price maintenance,⁹ nonprice restraints,¹⁰ and tying arrangements;¹¹ monopolization;¹² and mergers.¹³

Among these antitrust issues are areas characterized by worldwide, general consensus, as well as others that are marked by divergent views in different jurisdictions. For example, while there is widespread agreement that horizontal cartels are harmful and should be prohibited,¹⁴ there is less agreement on the precise contours of where the outside boundaries lie. For instance, there is disagreement as to whether the appropriate enforcement mechanism should comprise strictly governmental agency or also provide private rights of action, and whether criminal or civil remedies are appropriate. There is far less consensus with respect to modern vertical restraints and distribution rules.¹⁵ Monopolization, or abuse of a dominant position, represents another substantive area where there is general agreement at the margins but some divergence about other significant but not central issues, that is, whether and under what circumstances competition law can deal with

the 56th Annual Spring Meeting, ABA Section of Antitrust Law), *available at* <http://www.usdoj.gov/atr/public/speeches/232716.pdf>. Hard core cartels are frequently prosecuted criminally by jurisdictions that have criminal enforcement power including the United States. *See id.* at 1. Eleven criminal defendants were fined \$100 million or more between 1996 and 2007, and more than 150 individuals since 2000 have completed or are in the process of serving terms of imprisonment in connection with criminal antitrust prosecutions. *Id.* at 5, 12.

8. *See, e.g.,* *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23-24 (1979); *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 759-62 (1999).

9. *See, e.g.,* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 891-94 (2007).

10. *See, e.g.,* *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 42-43 (1977).

11. *See, e.g.,* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9-11 (1984).

12. *See, e.g.,* *Verizon Comm'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415-16 (2004).

13. *See, e.g.,* *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 718 (D.C. Cir. 2001); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1070 (D.D.C. 1997).

14. *See, e.g.,* WORKING GROUP ON CARTELS, INT'L COMPETITION NETWORK, DEFINING HARD CORE CARTEL CONDUCT: EFFECTIVE INSTITUTIONS, EFFECTIVE PENALTIES 9-16 (2005), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf.

15. *Compare, e.g.,* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007), *with* Commission Regulation 2790/1999, Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, 1999 O.J. (L 336) 21, 23 ("Article 4 The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties . . .").

oligopolistic market structures¹⁶ and where, precisely, the boundary lies between successful competition and unlawful dominance.¹⁷ These three areas, however, have one similarity: the law prohibits restraints of trade, and the relevant prosecutor, or, in jurisdictions that have created private rights of action, the private plaintiff, is required to prove that the restraint harms competition.

The law regarding mergers and acquisitions falls into a different category of antitrust enforcement in several respects. Most significantly, modern merger statutes speak in predictive terms; mergers may be prohibited if they “tend to substantially restrict competition” in a properly defined relevant market and may be blocked before consummation. In a globalizing world, many large transactions cross borders and thus are subject to review by more than one government antitrust agency. In addition, acquisitions may involve key national industries, and may touch upon national security interests or national champion status. Finally, government enforcement agencies investigating proposed mergers do not have the luxury of lengthy investigations; time is of the essence in a proposed merger, and failure to prohibit a transaction before it is consummated makes any future challenge as difficult as “unscrambling eggs.”¹⁸

This Article analyzes merger review across different regimes, with particular focus on China, the newest jurisdiction that has adopted a comprehensive competition law of general application. China adopted

16. Compare *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139-40 (2d Cir. 1984) (stating that oligopoly behavior is not an unfair method of competition under FTC Act §5 where no agreement or conspiracy was found), with *Joined Cases C-395 & C-396/96 P, Compagnie Mar. Belge Transp. SA v. Comm’n*, 2000 E.C.R. I-1365, paras. 36, 42, 48 (discussing collective dominance), and *Discussion Paper of the Directorate General for Competition on the Application of Article 82 of the Treaty to Exclusionary Abuses* paras. 44-47 (Dec. 2005), available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> (“For collective dominance to exist under Article 82, two or more undertakings must from an economic point of view present themselves or act together on a particular market as a collective entity. . . . [T]he existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position. . . . Undertakings in oligopolistic markets may sometimes be able to raise prices substantially above the competitive level without having recourse to any explicit agreement or concerted practice. . . . Indeed, they may be able to co-ordinate their behaviour on the market by observing and reacting to each other’s behaviour.”).

17. Compare *United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001), cert. denied, 534 U.S. 952 (2001), with *Case T-201/04, Microsoft v. Comm’n*, 2007 E.C.R. II-3601.

18. *Staples*, 970 F. Supp. at 1091 (“The strong public interest in effective enforcement of the antitrust laws weighs heavily in favor of an injunction in this case, as does the need to preserve meaningful relief following a full administrative trial on the merits. ‘Unscrambling the eggs’ after the fact is not a realistic option in this case. . . . [T]he Court finds that it is extremely unlikely, if the Court denied the plaintiff’s motion and the merger were to go through, that the merger could be effectively undone and the companies divided if the agency later found that the merger violated the antitrust laws.”).

its first comprehensive Anti-Monopoly Law (AML) of general application on August 30, 2007, effective August 1, 2008. This Article is divided into five Parts: Part II analyzes the Chinese AML as it pertains to mergers.¹⁹ Part III examines the pre-merger notification guidelines for foreign acquisitions issued by the Ministry of Commerce and other governmental agencies on March 8, 2007,²⁰ and the “legislative history” of the pre-merger notification thresholds, which went through two successive drafts and significant amendments between March and August, 2008. Part IV addresses international benchmarking. Part V examines key unanswered questions and issues in the guidelines. Finally, Part VI concludes.

II. CHINESE ANTI-MONOPOLY AND MERGER LAWS

A. *Chinese Anti-Monopoly Law*

After more than a dozen years of drafting, China adopted its first antitrust law of general application on August 30, 2007.²¹ The AML became effective on August 1, 2008.²² The statute follows the substantive format of the majority of competition laws, dealing separately with agreements in restraint of trade, monopolies or abuses of dominant positions, and mergers or concentrations.²³ The language of these substantive provisions borrows heavily from articles 81 and 82 of the Treaty Establishing the European Community;²⁴ however, it cannot be known whether actual practice and enforcement will diverge from the European precedent in advance of the subsequent legal developments in Chinese antitrust law.²⁵ Articles 1 and 4 of the AML, however, suggest

19. A detailed comparative analysis of the merger laws of selected jurisdictions follows in a companion article.

20. Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (promulgated by the Ministry of Commerce, Aug. 8, 2006, effective Sept. 8, 2007), translation available at http://www.marketavenue.cn/upload/policy/Policy_134.htm.

21. Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (P.R.C.), translation available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf.

22. *See id.*

23. *See id.* art. 13 (monopoly agreements), arts. 17-18 (abuse of dominant market position), arts. 20-31 (concentrations).

24. *See* Treaty Establishing the European Community, Nov. 10, 1997, arts. 86-87, 1997 O.J. (C 340) 3.

25. A detailed analysis of these sections is beyond the scope of this Article. For a general introduction to and summary of the Chinese AML, see Yong Huang, *Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law*, 75 ANTITRUST L.J. 117 (2008); Bruce M. Owen et al., *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231 (2008); Xiaoye Wang, *Highlights of China's New Anti-*

that the interpretation may differ in some important respects. Article 1 provides that “[t]his law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, [and] promoting the healthy development of the socialist market economy,” while article 4 empowers the central government to promulgate and implement “competition rules which accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system.”²⁶ The pre-merger notification guidelines discussed in this article are the first of these rules to have been published, and it is anticipated that other guidelines in the merger area, and potentially other substantive and procedural issues, may be forthcoming.²⁷

The identity and constitution of government agencies that will be responsible for enforcement are not delineated in the statute. However, it appears likely that in time there will be multiple agencies with enforcement duties. The preexisting competition laws have been enforced by three government agencies: the Ministry of Commerce (MOFCOM) has responsibility for concentrations, the National Development and Reform Commission (NDRC) has enforcement responsibilities over the cartels and agreements articles, and the State Administration of Industry and Commerce (SAIC) has a bureau with an antimonopoly division.²⁸ In addition, regulators of important sectors of the Chinese economy currently have authority over competitive issues in their sectors. For example, the Ministry of Information Industry (MII) is responsible for competition regulation in the telecommunications sector.²⁹ The regulated sector of the economy could become increasingly important as key firms in regulated industries seek to compete globally and engage in mergers.³⁰ Accordingly, if this allocation of authority

Monopoly Law, 75 ANTITRUST L.J. 133 (2008); Zhenguo Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 ANTITRUST L.J. 73 (2008); ADRIAN EMCH & QIAN HAO, THE NEW CHINESE ANTI-MONOPOLY LAW—AN OVERVIEW (2007), available at <http://ssrn.com/abstract=1030451>.

26. Anti-Monopoly Law arts. 1, 4.

27. Xinzhu Zhang & Vanessa Yanhua Zhang, *The Anti-Monopoly Law in China: Where Do We Stand?*, 3 COMPETITION POL’Y INT’L 184-85 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1075428 (follow “Download” hyperlink; then follow “New York, USA” hyperlink).

28. *Id.* at 189-90.

29. *Id.* at 190.

30. See, e.g., *China Unicom Unveils Details of Merger with China Netcom*, CHINA DAILY, Aug. 7, 2008, http://www.chinadaily.com.cn/china/2008-06/02/content_6729822.htm; *China Orders 6 Telcoms To Merge Their Assets*, N.Y. TIMES, May 26, 2008, at C6, available at <http://www.nytimes.com/2008/05/26/business/worldbusiness/26telecom.html>; *China Begins Revamp of Its Telcom Sector*, NYTIMES.COM, May 23, 2008, <http://www.nytimes.com/2008/05/>

continues, it can be predicted that MOFCOM would be responsible for concentrations, and the SAIC would have responsibility for the abuse of dominance articles of the AML.

Enforcement multiplicity is not unknown in the international antitrust community, with the American experience representing one of the more complex and diffuse systems. Federal antitrust laws are enforced by both the United States Department of Justice Antitrust Division and the Federal Trade Commission, which possess some overlapping and some distinct authority.³¹ Outside the realm of official enforcement, American antitrust laws include a private right of action for those injured in “business or property,”³² suffer “antitrust injury,”³³ and have sufficient standing to bring them within the causal requirements of the statute³⁴ to recover treble damages³⁵ or equitable relief.³⁶ Finally, State Attorneys General are empowered to bring antitrust actions for treble damages and injunctions on behalf of the governmental entities they represent when those entities were injured as purchasers,³⁷ as *parens patriae* on behalf of their natural person citizens,³⁸ and for equitable relief on behalf of the hazardous interest of the state economy.³⁹

However, the potential result of a trifurcation of enforcement responsibilities in China would be more complex and challenging. The

23/technology/23iht-chimobile.1.13157837.html?r:1; Tan Wei, *China Telcom Could Possibly Merge with China Unicom While China Mobile Could Merge with China Netcom, Source Says*, FINANCIAL TIMES, Aug. 14, 2007, <http://www.ft.com/cms/s/2/75c1b2c8-4b2e-11dc-861a-0000779fd2ac.html>.

31. The Justice Department is responsible for enforcing the Sherman Act while the FTC's mandate is found in the Federal Trade Commission Act, Federal Trade Commission Act § 5, 15 U.S.C. § 45 (2006). There are distinctions at the margins: the DOJ has criminal authority while the FTC is limited to civil and administrative remedies under the FTC Act, 15 U.S.C. §§ 45, 57b. There is some authority in dicta to suggest that “unfair methods of competition” under FTC Act section 5 may be broader than the antitrust laws with respect to the requirement of a “contract, combination or conspiracy” of Sherman Act section 1. *FTC v. Cement Inst.*, 333 U.S. 683, 721 n.19 (1948). However, the Commission subsequently rejected this dicta. *Interim Report on the Study of the FTC Pricing Policies*, S. REP. NO. 81-27, at 62-63 (1949). *But see* E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 139-40 (2d Cir. 1984).

32. Clayton Act § 4, 15 U.S.C. § 15; *see also* *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

33. *See* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

34. *See* *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983).

35. Clayton Act § 4, 15 U.S.C. § 15.

36. *Id.* § 16, 15 U.S.C. § 26; *see also* *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986).

37. *See* *Georgia v. Pa. R.R.*, 324 U.S. 439, 452 (1945); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 395-96 (1906).

38. Clayton Act § 4A, 15 U.S.C. § 15c.

39. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 263-64 (1972) (finding that a state may sue for injunctive relief but not for damages for harm to the general economy).

key competitive issues identified in the AML—agreements, monopolization (abuse of dominance), and mergers (concentrations)—are inherently related and cannot easily be separated in an investigation or enforcement proceeding. A collective abuse of dominance investigation and action, for example, necessarily includes proof of agreements or “joint dominance” in restraint of trade.⁴⁰ A single-firm abuse of dominance case must necessarily include proof of anticompetitive abusive tactics, potentially including, for example, vertical agreements in restraint of trade or other anticompetitive behavior.⁴¹ Issues of market definition are critical to both concentration and dominance theories, investigations, and enforcement actions.⁴² The expertise required can efficiently be assembled in a single agency, and the potential necessity of duplication may be unduly complex and inefficient, especially at the early stages of interpretation and enforcement of a new statute.

B. Chinese Merger Law

The AML statutory provisions on mergers, referred to as “concentrations,” also appear to be drawn from the European Union Merger Regulation,⁴³ but the statute and guidelines, discussed below, share a strong resemblance to U.S. doctrine developed through common law cases on the subject.⁴⁴ AML chapter IV, comprising articles 20 through 31, details the mandatory pre-merger notification process, investigation procedure, procedure for promulgating decisions and for appeals, and substantive standard to be applied. Article 28 provides:

Where a concentration has or may have [the] effect of eliminating or restricting competition, the Anti-monopoly Authority under the State Council shall make a decision to prohibit the concentration. However, if the business operators concerned can prove that the concentration will bring more positive impact than negative impact on competition, or the

40. *See, e.g.*, Case 78/70, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG*, 1971 E.C.R. 487, paras. 14-19.

41. *See, e.g.*, *LePage's, Inc. v. 3M*, 324 F.3d 141, 144 (3d Cir. 2003) (exclusionary conduct); *United States v. Microsoft Corp.*, 253 F.3d 34, 58, 106-07 (D.C. Cir. 2001); Case C-62/86, *AKZO Chemie BV v. Comm'n*, 1991 E.C.R. I-3359 (predatory pricing); Case 27/76, *United Brands Co. v. Comm'n*, 1978 E.C.R. 207, paras. 159-161, 182-183, 193-194 (refusal to deal).

42. *See, e.g.*, *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 359 (2d Cir. 1995) (merger case); *Microsoft Corp.*, 253 F.3d at 81 (monopoly case).

43. Council Regulation 139/2004, 2004 O.J. (L 24) 1-22 [hereinafter EC Merger Regulation].

44. *See supra* notes 33-34, 36-37, 39, 41-42 and accompanying text.

concentration is pursuant to public interests, the Anti-monopoly Authority under the State Council may decide not to prohibit the concentration.⁴⁵

The section appears to share the approach of section 7 of the Clayton Act, which prohibits mergers “where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”⁴⁶ This standard is predictive and concerned with the probable effects of proposed mergers and does not require the relevant enforcement agency⁴⁷ to wait until after the anticompetitive effects of a transaction have occurred to challenge the proposed acquisition.⁴⁸ However, there appear to be important differences between the two substantive standards. While U.S. law requires a “substantial” harm to competition or tendency to create a monopoly, the Chinese section speaks in terms of two alternative standards. First, a transaction is invalid if it *actually* eliminates competition.⁴⁹ Because the Anti-Monopoly Authority is empowered to challenge a merger before it has been consummated, the elimination standard could be intended to cover only mergers that extinguish competition, that is, a merger in a two-firm market that would result in a monopoly. The alternative test prohibits mergers that “may . . . restrict competition.”⁵⁰ It is not yet clear whether this standard is even stronger than the U.S. “may substantially lessen competition” standard, thus permitting the Chinese Enforcement Agency to challenge a

45. Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68, ch. IV, art. 28 (P.R.C.), translation available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf.

46. Clayton Act § 7, 15 U.S.C. § 18 (2006).

47. Most merger challenges are brought by the Department of Justice, Antitrust Division, or the Federal Trade Commission. In addition, there is a private right of action that enables any person who has been injured in “business or property” to sue. Clayton Act § 4, 15 U.S.C. § 15. Historically, however, most cases have been filed by the government agencies responsible for enforcing the statute. *But see* *Consol. Gold Fields v. Minorco, S.A.*, 871 F.2d 252, 254-55 (2d Cir. 1989). State attorneys general have been more active in challenging proposed mergers pursuant to their authority to represent their natural person citizens either as *parens patriae*, Clayton Act § 4A, 15 U.S.C. § 15c, or on behalf of the state, *Georgia v. Pa. R.R.*, 324 U.S. 439 (1945), seeking injunctive relief under Clayton Act section 16, *California v. Am. Stores Co.*, 495 U.S. 271, 274-75 (1989), or on behalf of the general interest of the state economy, *Hawaii v. Standard Oil of Cal.*, 405 U.S. 251, 252-54 (1972).

48. *Brown Shoe Co. v. United States*, 370 U.S. 294, 296 (1962).

49. Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (P.R.C.), translation available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf.

50. *See id.*

transaction that *insubstantially* lessens competition.⁵¹ That position appears to be less likely in light of the remainder of article 28. In a departure from the American form of antitrust statutes that are broad, general, and constitution-like in language,⁵² article 28 implicitly refers to U.S. case developments, as well as the EU merger regulation, and creates a rule of reason balancing test⁵³ with Chinese characteristics.⁵⁴ Justice Breyer, concurring in part in *California Dental Ass'n v. FTC*,⁵⁵ enunciated a clear statement of both the substantive issues and burden-shifting in a modern American rule of reason case:

I would break that question down into four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?⁵⁶

Article 28, similarly, places the burden on the merging firms to perform the competitive balancing test and demonstrate that the benefits to competition obviously outweigh the harm.⁵⁷ Although it is not clear whether the “obvious” standard refers to the quantum of evidence, that is,

51. See SECTIONS OF ANTITRUST LAW, INTELLECTUAL PROP., & INT’L LAW, AM. BAR ASS’N, JOINT SUBMISSION ON THE PROPOSED ANTI-MONOPOLY LAW OF THE PEOPLE’S REPUBLIC OF CHINA 24 (2005), available at http://www.abanet.org/intlaw/committees/business_regulation/antitrust/chinacommentantimonopoly.pdf (recommending that “substantial” harm to competition be the standard for then-article 30 of the AML, which prohibited concentrations that “may lead to creation or strengthening of dominant market positions as well as elimination or restriction of market competition”).

52. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933).

53. Anti-Monopoly Law art. 28. Article 28 provides:

Where a concentration has or may have effect of eliminating or restricting competition, the Anti-monopoly Authority under the State Council shall make a decision to prohibit the concentration. However, if the business operators concerned can prove that the concentration will bring more positive impact than negative impact on competition, or the concentration is pursuant to public interests, the Anti-monopoly Authority under the State Council may decide not to prohibit the concentration.

54. AML article 1 states, “This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the instruments of consumers and social public interest, [and] promoting the healthy development of the socialist market economy.” *Id.* art. 1. Article 4 provides, “The State constitutes and carries out competition rules which accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system.” *Id.* art. 4.

55. 526 U.S. 756, 780 (1999) (Breyer, J., concurring). The majority recognized that “rule of reason” analysis is a sliding scale, requiring an inquiry meet for the case, but left the substantive content of the test and relevant burdens of proof of that inquiry for future cases to develop.

56. *Id.* at 782.

57. Anti-Monopoly Law art. 28.

clear and convincing rather than a simple preponderance standard, or the substantive measure, that is, an “obvious” benefit may be a very substantial benefit far outweighing the threatened harm, the anticipated Guidelines will hopefully clarify.

The legal analysis employed in reviewing proposed mergers is set forth in article 27 of the AML and includes issues familiar to a student of the American and European Commission Horizontal Merger Guidelines⁵⁸ and controlling cases.⁵⁹ The five relevant factors to be evaluated by the Chinese merger enforcement agency are: the market shares and power of the merging firms, concentration in the relevant market, the effects of concentration on entry and “technological progress,” the effects of the market concentration on consumers and competitors, and the impact on “national economic development.”⁶⁰ Finally, “other elements” may be considered; but most importantly, the AML requires that these enumerated factors be considered because they have an effect on the “market competition.”⁶¹ Thus, arguably, only competitive concerns are relevant to the review.⁶² Pared to its essence, the evaluation requires *first*, definition of the relevant market; *second*, identification of the market participants; *third*, calculation of market concentration; *fourth*, consideration of the likely competitive effects of the transaction on consumers, and firms; and *fifth*, likelihood of entry. Several of the relevant factors remain to be explained in the Guidelines and applied in practice. It is possible to interpret the “influence . . . on technological progress” factor as referring to an *arguable* effect on competition in the market, since competition is traditionally recognized as serving the goal of efficiency. Similarly, it is possible to interpret the “influence . . . on national economic development” factor as *arguably* expressing competitive market ideals. However, the precatory language of AML General Provisions articles 1 and 4, if deployed as part of the legal

58. U.S. DOJ/FTC, Horizontal Merger Guidelines, *supra* note 6; European Comm’n, *Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings*, 2004 O.J. (C 31) 5-18 [hereinafter *EC Horizontal Merger Guidelines*].

59. *See, e.g.*, Case T-342/99, *Airtours v. Comm’n*, 2002 E.C.R. II-2585, paras. 59, 195; *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713-14 (D.C. Cir. 2001); *FTC v. Staples, Inc.*, 970 F.3d 1066, 1072-73 (D.D.C. 1997).

60. Anti-Monopoly Law art. 27.

61. *Id.*

62. *Id.* This is an important qualifier, and it is premature to predict precisely how the analysis of article 27 will be deployed in practice because no substantive Merger Guidelines have been issued nor have any proposed concentrations been decided under the AML at this writing. Whether or not considerations *unrelated* to competition are relevant in antitrust analysis has long been resolved in the negative in the United States. *See, e.g.*, *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1987).

analysis of the Chinese agency, could bring noncompetition and noneconomic considerations into merger analysis and decision making.

On the other hand, the AML specifically excludes one noneconomic factor in the merger review undertaken by the Anti-Monopoly Authority. Any national security issues presented by the participation in a transaction of a foreign investor must be determined “in accordance with the relevant State provisions.”⁶³ Clearly, national security issues may be presented, but the AML drafters chose to segregate this review from the economic analysis of the merger.⁶⁴

The article 27 list of factors is not unlike the stepwise analysis of the U.S. Horizontal Merger Guidelines, which requires *first*, a definition of the relevant product and geographic markets; *second*, identification of the market participants and their market shares; *third*, calculation of the market concentration using the Hirschman-Herfindahl Index (HHI); *fourth*, analysis of the predicted competitive effects of the merger in terms of unilateral and coordinated effects; *fifth*, consideration of the relative ease of entry; and finally, determination of whether one of the parties satisfies the criteria for raising a failing firm defense.⁶⁵

Beyond the general substantive antimerger provision, the remaining articles of AML chapter IV are dedicated to the new pre-merger notification requirement, a description of the investigatory process under that regime, and the standards and procedures for decisions on pending notifications.

Article 21 of the AML requires “business operators” to file a pre-merger notification to the Anti-Monopoly Authority⁶⁶ in all transactions

63. Anti-Monopoly Law art. 31.

64. This is consistent with the practice under United States antitrust law, in which the appropriate enforcement agency, the FTC or DOJ Antitrust Division, engages in the competitive analysis while a Congressional Committee is charged with assessment of potential national security considerations.

65. See U.S. DOJ/FTC, Horizontal Merger Guidelines, *supra* note 6, § 5; *EC Horizontal Merger Guidelines*, *supra* note 58, art. VIII.

66. Anti-Monopoly Law art. 21. This agency, to be established by the State Council, is defined in article 10 as the agency responsible for enforcing the AML. The Enforcement Agency will also have authority to designate “corresponding agencies” in the twenty-three provinces; the five autonomous regions of Guangxi, Inner Mongolia, Ningxia, Tibet, and Xinjiang of China; and the four Chinese municipalities directly under the central government (Beijing, Chongqing, Shanghai, and Tianjin) to enforce the AML. The Anti-Monopoly Bureau was established in August 2008 by the Ministry of Commerce and has responsibility over pre-merger notification, investigation, and merger enforcement. Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Ministry of Commerce of the People’s Republic of China (Feb. 2009), available at <http://www.abanet.org/antitrust/at-source/09/02/Feb09-SourceFull2-26f.pdf>. The delegation clause of article 10 does not appear to be akin to antitrust enforcement under American-style federalism, in which the states are empowered to enforce their own state antitrust laws. State Attorneys General are authorized to bring actions on behalf of their natural person

that result in “concentration” by merger or acquisition of “control”⁶⁷ and that meet the threshold to be set by Agency Guidelines. There is a statutory safe harbor for concentrations, as opposed to mergers that result in the acquisition of control, above which pre-merger filings are not required.⁶⁸

Once the required notification documents have been filed by the relevant parties⁶⁹ and are complete, the Anti-Monopoly Authority has thirty days to make a preliminary investigation.⁷⁰ The notification is deemed “not filed,” and the time period does not begin to run until the submission is complete.⁷¹ Consistent with practice in the United States, if the thirty-day period expires without any further action by the Chinese Anti-Monopoly Authority, the transaction is effectively deemed not to be

citizens as *parens patriae* under federal antitrust law by Sherman Act section 4A, 15 U.S.C. § 15(c) (2006), on behalf of the state as a purchaser under Sherman Act sections 4 and 16, *Georgia v. Pa. R.R.*, 324 U.S. 439 (1945), and on behalf of the general economy of the state for equitable relief, *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972). In no sense do the Antitrust Division of the United States Department of Justice or the Federal Trade Commission “empower” the state enforcement officials to act, nor do federal agency representatives supervise or control them. There has been, however, ongoing consultation and cooperation in investigations and litigation between state and federal antitrust enforcement agencies.

67. The definition of “control” is an area of concern raised by some commentators on the AML. They questioned whether the definition was sufficiently clear to give notice to affected firms. See SECTIONS OF ANTITRUST LAW, INTELLECTUAL PROP., & INT’L LAW, *supra* note 51. Specifically, “control” is not independently defined in article 20, which refers to acquisition of “control . . . by virtue of acquiring their equities or assets” (article 20(2)), and used in the context of “possibility of exercising decisive influence on other business operators by virtue of contact or any other means.” Anti-Monopoly Law art. 20(3).

68. The essence of the safe harbor provision is to exempt firms from filing if the transaction in question is a concentration and not acquisition of majority control. Specifically, if one firm already holds at least fifty percent of the voting rights of the others in the transaction or if another firm, not participating in the concentration at hand, already controls at least fifty percent of the “voting rights of every other business operator whether of the equity or the assets.” Anti-Monopoly Law art. 22.

69. Article 23 states that the “business operator” must submit the required notification and documents without designating which firms are responsible. *Id.* art. 23. The first and second drafts of the proposed Guidelines identified which firms to a transaction must, or may, file. See discussion *infra* Part III.A-B. This provision, however, was omitted from the final Notification Thresholds. See discussion *infra* Part III.B.3.

70. Anti-Monopoly Law art. 25. The waiting period for preliminary review in the United States pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, Clayton Act § 7A, is thirty days after receipt of the pre-merger notification materials, and fifteen days for cash tender offers. 15 U.S.C. § 18a (2006). The European Union Merger Regulation decisions finding the notified transaction not within the scope of the Regulation or compatible should be made by no later than twenty-five working days following a completed filing of the pre-merger notification materials (extended to thirty-five working days in some circumstances defined in the Regulation). Decisions under articles 8(1) to 8(3) are required to be made a maximum of ninety working days after proceedings have been initiated, or 104 working days in cases involving commitments from the parties. EC Merger Regulation, *supra* note 43, art. 10.

71. Anti-Monopoly Law art. 24.

prohibited and the parties are permitted to complete their transaction.⁷² This “file and wait procedure” is contrary to the process of the EU Commission, which is required to publish a decision either clearing or prohibiting every proposed transaction subject to the pre-merger notification requirement.⁷³ If the Anti-Monopoly Authority deems further investigation to be necessary, it has up to another ninety days from the date of such a decision.⁷⁴ This ability to conduct a second-stage investigation follows the practice in the United States and the EU; however, the AML statute omits significant details of the process and fails to address whether or not the Agency may order the parties to produce additional documents and information. The second-request practice in the United States and Europe is found in their respective statutes, and the standard format of the request for documents and other practical advice for parties is widely disseminated by the agencies.⁷⁵

The investigation may be extended for a final sixty-day period with the consent of the parties, or if the materials previously submitted are deemed “inaccurate and [in] need [of] further verification,” or if things have “significantly changed after declaration.”⁷⁶ These latter conditions are not explained in the AML but apparently are determinations to be made at the discretion of the Anti-Monopoly Authority. There is no provision in the AML for such determinations to be reviewed or contested. If either time period—the ninety-day further review or sixty-day final extension—expires without action by the Anti-Monopoly Authority, the parties may implement their transaction.⁷⁷ Again, this follows U.S. practice, under which the relevant agency does not “approve” a transaction, but rather declines to challenge it, and contrasts with European practice, which requires affirmative approval or prohibition of every notified transaction. If, however, the Anti-Monopoly Authority determines to prohibit a notified transaction or attach conditions to approval, it must publish its decision.⁷⁸ This requirement of publication likely will be among the most beneficial results of the AML for scholars of Chinese antitrust law, especially if the published decisions

72. *Id.* art. 25.

73. EC Merger Regulation, *supra* note 43, art. 8.

74. Anti-Monopoly Law art. 26.

75. *See, e.g.*, ANTITRUST DIV., U.S. DOJ, MERGER REVIEW PROCESS INITIATIVE (2006), available at <http://www.usdoj.gov/atr/public/220237.pdf>; FTC, Premerger/Hart-Scott-Rodino Premerger Notification Program, Statute, Rules and Formal Interpretations, <http://www.ftc.gov/bc/hsr/hsrbook.shtm> (last visited Sept. 20, 2009).

76. Anti-Monopoly Law art. 26.

77. *Id.*

78. *Id.*

include the Agency's reasoning and analysis. Although the American practice of nonopposition to a concentration transaction without opinion is efficient, following the European Commission practice of publication of approvals would be instructive, especially in the initial years of merger law development in China.

The AML provides for three different determinations on a pre-merger notification: the Anti-Monopoly Authority may permit the transaction to proceed, prohibit it, or permit it with "restrictive conditions."⁷⁹ If the decision is to prohibit or permit with conditions, the decision must be published.⁸⁰ This publication requirement adds to the transparency of merger review and decision making. By adding to the published law under the AML, it can promote consistent, well-reasoned decisions useful to the legal and business community.

The contents of the required notification are briefly listed in article 23 of the AML, and more complete requirements are identified in the first and second drafts of the Notification Guidelines but omitted from the final Notification Thresholds.⁸¹ Briefly, the notification is required to include a "declaration paper," the agreement, the previous year's audited financial and accounting reports of "the business operators involved in the concentration," and an "explanation[] on the effect of the concentration on the relevant market competition."⁸² The competitive effects explanation potentially requires a significant analysis, starting with the definition of the relevant market(s), identification of competitors and their market shares, HHI calculations, entry analysis, and an economic analysis of the predicted competitive effects of the transaction. The article also authorizes the Enforcement Agency to require production of "other documents and materials" to facilitate its investigation.⁸³

III. CHINESE PRE-MERGER NOTIFICATION RULES

A. *Foreign Acquisitions*

The first set of pre-merger notification regulations were adopted prior to, and independent of, the Chinese AML and applied to acquisitions of Chinese enterprises by foreign investors (Foreign M&A

79. *Id.* art. 29.

80. *Id.* art. 30.

81. *See* discussion *infra* Part III.

82. Anti-Monopoly Law art. 23(2).

83. *Id.*

Rules, Filing Guidelines).⁸⁴ The statute, entitled Provisions on the Takeover of Domestic Enterprises by Foreign Investors,⁸⁵ contained articles requiring pre-merger notifications for certain acquisitions of domestic Chinese firms by foreign investors.⁸⁶ Pursuant to these Foreign M&A Rules, the Antitrust Investigation Office of the Department of Treaty and Law of the Ministry of Commerce issued Guidelines for the required pre-merger notifications.⁸⁷ Though limited in scope, they nevertheless bear a familial relationship to the AML pre-merger notification guidelines that followed two years later. Several versions of the Guidelines were made available in draft form by MOFCOM, and interested parties were invited to consult on the substance of the Filing Guidelines with the Antitrust Investigation Office with the goal of “improving the work for antitrust review.”⁸⁸ Interested groups and organizations, including the American Bar Association, Sections of Antitrust Law and International Law, filed comments and recommendations on the draft with the Ministry.⁸⁹

84.

[The] 2006 Revisions to the Merger & Acquisition Rules: introduced separate requirements for foreign acquisitions of Chinese firms that “result in actual control by the foreign investor” and “involve key industries.” MOFCOM may act to block, modify or unwind unreported transactions with actual or potential “material impact” on the “economic security of the State.”

Zhu Zhongliang, Challenges and Opportunities—Implementation of China’s Anti-Monopoly Law (Apr. 4, 2008), <http://www.abanet.org/intlaw.spring08/materials/ZhuChallengesandOpportunities0804.pdf>. Zhu Zhongliang is the Deputy Division-Chief of the Anti-Monopoly Investigation Office, Department of Treaty & Law of the Ministry of Commerce of PRC.

85. Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (promulgated by the Ministry of Commerce, the State-Owned Assets Supervision & Admin. Comm’n of the State Council, the China Secs. Regulatory Comm’n, the State Admin. for Indus. & Commerce, the State Admin. of Taxation, and the State Admin. of Foreign Exchs., Aug. 8, 2006), translation available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/MinisterialRulings/P020061128374924214111.pdf.

86. *Id.* arts. 51-54.

87. See SECTION OF ANTITRUST LAW & SECTION OF INT’L LAW, AM. BAR ASS’N, COMMENTS ON THE GUIDELINES ON ANTITRUST FILINGS FOR MERGERS & ACQUISITIONS OF DOMESTIC ENTERPRISES BY FOREIGN INVESTORS 1 (2008), available at <http://www.abanet.org/antitrust/at-comments/2007/03-07/comm-PRC.pdf> (commenting on the draft version issued March 26, 2007).

88. Letter from Shang Fa Jingzheng, Antitrust Investigation Office of the Ministry of Commerce of the People’s Republic of China, Notice of Meeting and Guidelines for Antitrust Filing for Merger and Acquisition of Domestic Enterprises by Foreign Investors (Mar. 8, 2007) (on file with author).

89. This discussion of the Filing Guidelines is based on a translation of the Chinese Draft Guidelines that was previously posted at the MOFCOM Web site. The translation used in this Article was provided by Squire, Sanders & Dempsey LLP and was used by the ABA Sections in preparing and submitting their comments on the draft guidelines (on file with author).

Although this first set of Filing Guidelines was directed to foreign acquisitions of domestic (Chinese) firms, it is an apparent predecessor to the draft Pre-Merger Notification Guidelines and final Merger Notification Thresholds promulgated under the AML and likely served as a useful opportunity for the Chinese drafters to both analyze competitive issues inherent in some mergers and determine whether and in what circumstances it is appropriate to investigate a proposed transaction.⁹⁰ There is general consensus that most mergers do not produce sufficient market power to produce anticompetitive effects unilaterally or collectively and are therefore either competitively neutral or pro-competitive.⁹¹ Accordingly, a sophisticated government agency responsible for merger enforcement must develop a framework to distinguish at the outset those transactions that may be competitively problematic from those that are not, and must then dedicate the limited agency time and resources to those transactions that raise significant competitive concerns. These first Filing Guidelines, however, did not make that distinction on its face, requiring every foreign acquisition to file a pre-merger notification before the transaction could go forward. Were these Filing Guidelines adopted as part of an antitrust law, that legislative choice could be questioned. However, the Foreign M&A Rules—the enabling authority for the Filing Guidelines—were not solely a competition statute but were significantly concerned with foreign investment.⁹² Therefore, the starting point of universal review can be laid at the door of a government concern other than competition. Nevertheless, these Filing Guidelines served an additional substantial purpose, that is, that of focusing the drafters' judgment on what kinds of information would be most useful to make a *competition* assessment of a transaction.

90. "Abolishment of Discriminative Measures: Once AML comes into effect on August 1, 2008, the Merger & Acquisition Rules (2006) will be abolished and replaced by the new implementing regulation consistent with the AML and not limiting [sic] to the M&A of Chinese firms by foreign investors." Zhu, *supra* note 84.

91. See, e.g., U.S. DOJ/FTC COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 1 (2006), available at <http://www.usdoj.gov/atr/public/guidelines/215247.pdf>; David L. Meyer, Deputy Assistant Attorney Gen., U.S. DOJ, Merger Enforcement Is Alive and Well at the Department of Justice, Remarks at the ABA Antitrust Section Fall Forum (Nov. 15, 2007) (transcript available at <http://www.usdoj.gov/atr/public/speeches/227713.pdf>).

92. Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (promulgated by the Ministry of Commerce, the State-Owned Assets Supervision & Admin. Comm'n of the State Council, the China Secs. Regulatory Comm'n, the State Admin. for Indus. & Commerce, the State Admin. of Taxation, and the State Admin. of Foreign Exchs., Aug. 8, 2006), translation available at <http://www.fdi.gov.cn/pub/FDI.EN/Laws/GeneralLawsandRegulations/MinisterialRulings/P020061128374924214111.pdf>.

The framework of the Filing Guidelines will be familiar to scholars versed in the pre-merger notification rules of the United States⁹³ and the European Union,⁹⁴ although there are important distinctions and omissions in form and substance. While the general intent of the Filing Guidelines can, perhaps, be intuited based on an understanding of U.S. and European substantive merger guidelines, cases, and scholarly commentary, there are two essential problems with any such effort at interpretation. First, the Chinese legal system is largely a civil law-type system, according primary deference to the actual language of the statute.⁹⁵ In civil law systems, the optimum interpretation can be found only on the face of the statute or, alternatively, by certification from a trial judge to senior judges for an opinion on a contested meaning. Second, waiting for any such statutory construction would defeat the purpose of speedy pre-merger notification and ill-serve merging parties. The structure of the Filing Guidelines was as such: *first*, they clarified the obligation to file and identify which firms are responsible; *second*, they stated the time line for submission of pre-merger information and materials; *third*, and most importantly, they identified required and optional information; and finally, they described the investigation and review process.⁹⁶

The Filing Guidelines first set a deadline for filing and identified the party or parties required to make the filing.⁹⁷ The acquiring (or “merging”) firm was primarily responsible for making the required filing in the first instance; however, the Filing Guidelines provided that the other party to the transaction “may” also file, depending on the “specific circumstances of the individual case.”⁹⁸ The circumstances relevant to the decision to file by the other party were not defined in the Filing Guidelines. Firms entering into the transaction were given the option of filing individually or jointly, but this section did not acknowledge that there may be important disincentives to filing jointly, nor did it identify information that may or may not be shared by merging firms before the transaction had been consummated. Before a merger, competing firms were prohibited from sharing information of competitive significance on

93. U.S. DOJ/FTC, Horizontal Merger Guidelines, *supra* note 6.

94. *EC Horizontal Merger Guidelines*, *supra* note 58.

95. Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1 (2006).

96. See Guidelines for Antitrust Review Filing for Merger and Acquisition of Domestic Enterprises by Foreign Investors (Draft for Comments) (promulgated by the Ministry of Commerce, Mar. 8, 2007).

97. See *id.*

98. *Id.* § 1.

the theory that, in the event of a failure of the merger,⁹⁹ the firms would remain competitors, plainly prohibited from anticompetitive horizontal agreements. Information sharing is not necessarily a violation of antitrust laws in the United States or European Union, but, depending on the market positions of the competitors and the nature of the shared information, it may lead to antitrust liability.¹⁰⁰ The Filing Guidelines permitted firms to file on their own behalf or by counsel; however, only attorneys admitted to the Chinese bar and members of Chinese law firms could participate in this filing.¹⁰¹

These Guidelines gave two unranked alternatives for the pre-merger filing deadline: “before the plan of the M&A transaction is announced to the general public” or, alternatively, “at the same time when such antitrust filing is submitted to the competent authority of the country where [the] proposed transaction takes place.”¹⁰² In complex transactions involving multinational firms, it is unclear where this locus might be. Possibilities include the jurisdiction of incorporation of the foreign firm, but other alternatives are plausible.¹⁰³

99. The failure of a transaction may be the result of a disapproval of the merger by any of the government agencies with jurisdiction to review it or for business reasons unrelated to the pre-merger approval process. Such “gun jumping” may, in some cases, lead to antitrust liability. See William Blumenthal, *The Rhetoric of Gun Jumping*, Remarks Before the Association of Corporate Counsel, Annual Antitrust Seminar of Greater New York Chapter (Nov. 10, 2005), available at <http://www.ftc.gov/speeches/blumenthal/20051110gunjumping.pdf>.

100. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435 (1978) (holding that mens rea is required in criminal antitrust prosecutions); *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 113 (1975) (holding that dissemination of price information is not a per se violation); *United States v. Container Corp. of Am.*, 393 U.S. 333, 338-40 (1969) (holding that information exchange in oligopoly characterized by excess capacity and easy entry violated section 1, but not a per se violation according to Justice Fortas, concurring); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 582 (1925) (holding that the mere exchange of information is not “an unreasonable restraint” even though information exchange, here through a trade association, “tends to stabilize that trade or business and to produce uniformity of prices and trade practice”); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 411-12 (1921) (holding that a trade association rule requiring members, accounting to one-third of production, to submit price and sales data, which was summarized and disseminated by the association, violates the Sherman Act).

101. Guidelines for Antitrust Review Filing for Merger and Acquisition of Domestic Enterprises by Foreign Investors (Draft for Comments) § I. Non-Chinese attorneys may act as advisors, but noncitizens are not permitted to be admitted to the bar in China.

102. *Id.* § II.1. A prior draft had specified two different alternatives, including, first “after the M&A agreement filing related hereto is signed, and before the M&A transaction is completed.” In transactions involving stock tender offers, the draft required that “the antitrust filing shall be made after such tender offer is announced.”

103. This ambiguity was raised in the comments submitted by sections of the American Bar Association on the Filing Guidelines. See SECTION OF ANTITRUST LAW & SECTION OF INT'L LAW, AM. BAR ASS'N, COMMENTS ON THE GUIDELINES ON ANTITRUST FILINGS FOR MERGERS & ACQUISITIONS OF DOMESTIC ENTERPRISES BY FOREIGN INVESTORS 2 (2007).

The substantive heart of the Filing Guidelines was the catalogue of materials required to be produced before any merger within the jurisdiction of the reviewing agency.¹⁰⁴ This comprehensive list included essentially ministerial information about the transaction,¹⁰⁵ identification information,¹⁰⁶ and, finally, substantive information concerning competition and any competitive effects of the proposed merger.¹⁰⁷ Section III(15) permitted the filing party to request a waiver of pre-merger antitrust review upon submission of supporting materials.¹⁰⁸

Two hard copy sets and an electronic version of the pre-merger notification documents and other materials were required, and all of the material was required in Chinese or a Chinese translation.¹⁰⁹ The Filing Guidelines recognized that some of the required information could include confidential business documents and trade secrets, so the party submitting the notification was permitted to identify sensitive

104. Guidelines for Antitrust Review Filing for Merger and Acquisition of Domestic Enterprises by Foreign Investors (Draft for Comments) §§ 2-19.

105. *Id.* § III(1) (letter accompanying the filing); *id.* § 3 (requiring a “letter of authorization” identifying the “responsible manager” of the party that files the notification or a Power of Attorney if the filing is made by an agent of the party to the transaction); *id.* § 19 (requiring signatures of each party to the transaction or its agent attesting to the authenticity of the information submitted).

106. *See id.* § III(2) (requiring the “filing party outside China” to submit notarized and authenticated documents, from a “local notary,” in transactions involving a foreign investor that “merges or acquires domestic enterprises” and “an extra-territorial M&A”). It is not clear whether the two clauses listed describe different kinds of transactions. *See also id.* § III(4) (providing basic information about the transaction including revenues worldwide and in China); *id.* § III(5) (requiring identification of all enterprises that are “affiliated” or “controlled,” directly or indirectly, by each party to the transaction); *id.* § III(6) (requiring certificates of incorporation of enterprises “set up in China” by each party to the transaction); *id.* § III(7) (requiring a description of the form of the transaction, anticipated process, and anticipated dates of relevant events in the transaction); *id.* § III(13) (requiring the transaction agreement); *id.* § III(14) (requiring audited financial statements for the past fiscal year); *id.* § III(16) (requiring information about trade associations in relevant markets); *id.* § III(17) (requiring the status of any pre-merger review in any other jurisdictions).

107. *Id.* § III(8) (requiring definition of the relevant markets); *id.* § III(9) (requiring sales and market share data of parties to the transaction for the past two fiscal years); *id.* § III(10) (requiring identification of the five “top competitors” in the relevant markets); *id.* § III(11) (requiring “supply and demand structure in relevant markets” including identification of “major enterprises” in relevant upstream and downstream markets); *id.* § III(12) (requiring identification competition in the relevant markets, including information about entry barriers, market exits, intellectual property rights, economies of scale, and horizontal or vertical cooperation agreements in the relevant markets).

108. The materials for requesting such waiver are not identified with particularity in the Guidelines.

109. Guidelines for Antitrust Review Filing for Merger and Acquisition of Domestic Enterprises by Foreign Investors (Draft for Comments) § III.

information, request confidentiality and justify the need for secrecy, and provide a separate, nonconfidential version of the material.¹¹⁰

The review process potentially involved two stages: an initial review and an extended review. The initial review could extend over thirty business days from the date of receipt of the completed materials. Similar to U.S. pre-merger review practice, if the thirty-day period expired without further “notice” then the merger may be permitted to proceed.¹¹¹ However, the review could be extended for up to another ninety business days upon simple notification from the reviewing agency.¹¹² The ninety-day time frame was an important amendment from a prior draft of the Guidelines, which provided that “the duration of the review process will then be extended depending on the specific circumstances of the transaction.”¹¹³ The change from an open-ended to a definite period was important for the predictability and transparency of the review process. Finally, the Guidelines encouraged the party that filed the materials *and* its “entrusted agent” to contact the Antitrust Investigation Office before filing the notification and to consult on important issues including request for a waiver and specific competitive information that is specified in the Filing Guidelines.¹¹⁴

It has been reported that a number of foreign investments were investigated and hearings were held, but no proposed acquisition was ever rejected under the Foreign M&A Rules Filing Guidelines.¹¹⁵ These Guidelines have now been superseded by the broader pre-merger notification and review process in the AML, but remain controlling with respect to other aspects of the Rules.¹¹⁶

B. AML Pre-Merger Notification Guidelines

1. Initial Draft¹¹⁷

The Pre-Merger Notification Guidelines drafted for adoption pursuant to the AML benefit significantly from the previous Guidelines and show important substantive and procedural developments that move the Chinese merger notification system in the direction of global

110. *Id.*

111. *Id.* § IV.

112. *Id.*

113. *Id.*

114. *Id.* § V.

115. *See* SECTION OF ANTITRUST LAW & SECTION OF INT'L LAW, *supra* note 87.

116. *See* Zhu, *supra* note 84.

117. This version of the AML Pre-Merger Notification Guidelines was the first that became available for comment among the antitrust community in March 2008. It is attached as Appendix D.

convergence.¹¹⁸ The differences between an early and late draft of these Guidelines also show important developments in the direction of workability and international convergence, albeit with Chinese characteristics.¹¹⁹

The initial draft, entitled Rules on Notification for Concentration by State Council, became available unofficially in March 2008.¹²⁰ This eighteen-article draft document initially must be distinguished from the prior Filing Guidelines, which were adopted pursuant to the authority of the Foreign M&A Rules, discussed above.¹²¹ Under the AML Guidelines, an “Anti-Monopoly Enforcement Authority for Reviewing the Concentration of Undertakings” will be established under the State Council¹²² with responsibility for reviewing proposed mergers. All transactions that meet the thresholds, discussed below, are required to file pre-merger notifications,¹²³ in Chinese translation,¹²⁴ and the penalty for failure to file, incomplete filings, or submission of “false information” is subject to the penalties established in articles 48 and 52 of the AML.¹²⁵

Article 2 establishes four alternative thresholds for notification.¹²⁶ The first two are objective, related to the size of the firms and

118. See INT’L COMPETITION NETWORK [ICN], RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES 5 (2002), available at <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf>.

119. See Huang, *supra* note 25, at 131; Yong Huang, *Chinese AML: Status & Outlook*, ABA INT’L L. SECTION (2008); WANG XIAOYE, CHALLENGES IN ENFORCING CHINESE ANTIMONOPOLY LAW (2008), available at http://www.abanet.org/iintlawspring08/materials/ABA2008springWangChallengers_In_Enforcing_Chinese_Antimonopoly_Law.pdf.

120. Rules on Notification for Concentration by the State Council (internal draft) (on file with author).

121. See discussion *supra* Part III.A.

122. The State Council, established in 1954, is the highest-ranking governing entity, headed by the Premier and comprising various subsidiary ministries and commissions. KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 79, 176-77, 238-39 (2d ed. 2004).

123. STATE COUNCIL OF THE P.R.C., RULES ON NOTIFICATION FOR CONCENTRATION OF [sic] BY THE STATE COUNCIL (internal draft) art. 2 (2008) (translation on file with author).

124. *Id.* art. 7.

125. *Id.* art. 15. These penalties include an injunction mandating that any acts to effectuate the transaction be halted and reversed plus a fine of up to ¥500,000 (AML ch. VII, art. 48), or orders to comply plus fines of up to ¥20,000 per individual and up to ¥200,000 per entity (AML ch. VII, art. 52). For “serious” violations, the penalties may be increased to ¥20,000 to ¥100,000 for individuals and ¥200,000 to ¥1,000,000 per entity plus potential criminal liability “where a crime is constituted.” *Id.* Chapters 48 and 52 are enforced by the Anti-Monopoly Enforcement Agency, an entity to be established by the State Council. It is not yet clear whether the Enforcement Agency will be a separate body from the Anti-Monopoly Enforcement Authority for Reviewing the Concentration of Undertakings, because both are to be established under the State Council, and what the relationship between such agencies will be going forward.

126. *Id.* art. 2.

specifically to their turnover within China.¹²⁷ The second two thresholds are substantive in nature,¹²⁸ effectively seeking to identify those transactions below the turnover thresholds that nonetheless would contribute to “the rising tide of concentration” in a relevant market or otherwise create a level of market power.¹²⁹ The first threshold sets the requirement for filing based on, *first*, the global turnover of all of the firms involved in the transaction and, *second*, the requirement of a nexus to China in terms of the turnover of one firm involved in the transaction.¹³⁰ The global minimum is a minimum of twelve billion yuan renminbi (¥ or RMB) for the preceding year.¹³¹ The turnover requirement for the Chinese nexus was not specified in the draft available but is expressed in terms of an increment of millions.¹³² The second threshold is expressed entirely in terms of turnover within China. This section requires a pre-merger notification of all the firms involved in the transaction that have a total turnover within Chinese territory that exceeds ¥6 billion.¹³³ The theoretical basis for these thresholds is the size of the transaction and significant relationship to China as the potentially reviewing country. In adopting these standards, China has made an appropriate choice to identify for review only those transactions of sufficient size to potentially affect competition in the national economy. Therefore, it was an important decision to also require a connection with the Chinese economy in terms of annual turnover.¹³⁴ Of more importance is the expression of the required Chinese nexus.

127. *Id.*

128. *Id.*

129. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 127 (1986); *see also* *Phila. Nat'l Bank v. United States*, 374 U.S. 321 (1963) (stating that Congress was concerned with the trends towards increasing concentration).

130. STATE COUNCIL OF THE P.R.C., *supra* note 123, art. 2.

131. *Id.*

132. *Id.* art. 2(i). The dollar equivalent of ¥12 billion, at the current exchange rate of \$1 to ¥6.83814 is \$1,760,010,795. Oanda.com, <http://www.oanda.com/convert/classic> (last visited Oct. 31, 2009) (currency conversion Web site).

133. STATE COUNCIL OF THE P.R.C., *supra* note 123, art. 2(ii). Six billion RMB, at the exchange rate of 6.83814, as of October 31, 2009, is the U.S. dollar equivalent of \$880,005,397. *See* Oanda.com, *supra* note 132.

134. One could take issue with the particular RMB amounts chosen. As a point of reference, the transaction-size threshold for notification under U.S. standards is \$260.7 million, or between \$65.2 million and \$260.7 million if one party has annual net sales or assets of at least \$130.0 million and the other party has annual net sales or total assets of at least \$13 million in 2009. *See* 15 U.S.C.A. § 18(a)(2) (2009) (revised annually). Under the EU Merger Regulation, the filing triggers are based on a combination of worldwide turnover, European turnover, and impact in a minimum number of Member States. EC Merger Regulation, *supra* note 43. Notification is required if the total worldwide turnover of all parties to the concentration is at least €5 billion and at least two parties to the EU turnover must be at least €250 million unless more than two-thirds of each party's turnover is from the same Member State. *Id.* Alternatively,

The first section requires that only one of the undertakings have the minimum turnover in China. While it is possible that, in a particular transaction, more than one firm could exceed the required minimum or that additional transaction participants may have smaller turnovers within China, the standard expressed in the Guidelines is the threshold. Assuming that a particular transaction meets only the minimum of one firm with the required turnover in China, the transaction must not necessarily result in a net change in terms of effect within China. Before the merger, there would have been, hypothetically, one firm transacting business and producing Chinese turnover, and after the transaction, there would be expected to be no change in the number of competitors, merely in the ownership of that firm.¹³⁵ Accordingly, the basis of this section appears to be primarily concerned with foreign acquisitions of domestic firms rather than with anticompetitive threats. This change of control could have important effects in terms of national security interests, for example, but the effects are not necessarily related to competition. Perhaps statutes other than the AML would be better suited to addressing these noncompetitive concerns.

The second threshold, in requiring that all of the firms involved in the transaction have a minimum nexus with the Chinese economy, is directly targeted to those mergers of a size sufficient to affect competition in the Chinese market. Here, the Chinese nexus requirement is expressed in comprehensive terms: “All the undertakings to the concentration [must] have a total turnover of more than ¥6 billion within the territory of China in the previous year.”¹³⁶ The Chinese nexus is justified and appropriate, because a state has the highest interest in enforcing competition law with respect to actions that will have a significant effect on the national economy and its consumers.¹³⁷

However, this section, at least as translated, is ambiguous. While the threshold requirement uses inclusive language—“all the undertakings”—the text appears to be targeted primarily at establishing that parties to the transaction conduct a minimum amount of business

notification is required if, among other requirements, the aggregate worldwide turnover exceeds €2.5 billion and turnover of all parties is at least €100 million in three Member States. *Id.*

135. Other commentators raised this concern. See SECTION OF ANTITRUST LAW & SECTION OF INT’L LAW, JOINT COMMENTS 3-4 (2008), available at <http://www.abanet.org/antitrust/at-comments/2008/04-08/comments-undertakingdraft.pdf>.

136. STATE COUNCIL OF THE P.R.C., *supra* note 123, art. 2(ii).

137. The American standard for extraterritorial application of the Sherman and Clayton Acts is whether the restraints of trade at issue will have a direct, substantial, and foreseeable effect on U.S. commerce. *Empagran SA v. F. Hoffmann-La Roche Ltd.*, 546 U.S. 1092 (2006); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). The relevant antitrust statute is the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6A (2006).

within China, and not that multiple parties transact Chinese business. Therefore, the language can be construed as triggering the filing requirement if the minimum RMB nexus is satisfied by fewer than “all” of the undertakings, including a sole undertaking. If this is the meaning of the section, then, as in article 2(i), discussed above, the transaction at issue may not necessarily affect competition in China.¹³⁸ It would be helpful if this section were clarified to indicate whether or not the intent was to capture transactions involving multiple firms, all having significant turnover in China as the reviewing nation.¹³⁹

Sections (iii) and (iv) of article 2 set thresholds for pre-merger notification that are subjective and not expressed in the objectively measurable terms of sections (i) and (ii).¹⁴⁰ Section (iii) provides that a pre-merger notification must be filed when: “One undertaking involved in the concentration has acquired more than ten undertakings in the relevant industry by the way of mergeing [sic], obtaining the control, or obtaining the power to impose influence on decisive [sic] within the territory of China within one year.”¹⁴¹

This section may have been based on the substantive concern that a trend towards concentration in a relevant market may undermine competition, as found in the tradition of the legislative history of American merger law,¹⁴² which found expression in the language of section 7 of the Clayton Act itself, prohibiting mergers that “may tend” to restrain competition or “tend” to create a monopoly. Following the legislative history, early substantive interpretation, as reflected in

138. If only one party to the merger met the RMB threshold while the turnover of all of the others was not “within the territory of China,” then the transaction would simply change the corporate structure of the firm undertaking with turnover in China, but not affect competition. Substituting one firm for another is relevant for corporate and securities law issues, but does not increase the concentration within a market.

139. The American Chamber of Commerce of the People’s Republic of China (AmCham-China) identified this issue in its comments, filed with the State Council on February 27, 2008 (on file with author).

140. STATE COUNCIL OF THE P.R.C., *supra* note 123, art. 2(iii).

141. *Id.* art. 2(i)-(ii).

142. The Supreme Court summarized the legislative history: first “was a fear of what was considered to be a rising tide of economic concentration in the American economy.” In addition, government studies reported on concentration and these were

cited as evidence of the danger to the American economy in unchecked corporate expansions through mergers. Other considerations cited . . . were the desirability of retaining “local control” over industry and the protection of small businesses. Throughout the recorded discussions may be found examples of Congress’ fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.

Brown Shoe Co. v. United States, 370 U.S. 294, 315-16 (1962).

reported cases, also emphasized the goal of merger enforcement as halting a trend towards concentration in economic sectors of the economy.¹⁴³ However, in the United States, this concern about trends towards concentration was expressed in the context of the determination of whether a *particular transaction* likely would restrain competition. The American and European pre-merger notification regimes eschew importing substantive standards into the requirement of pre-merger notification.

Thus, the assumed concern of the State Council about a potential rising tide of concentration is well within the historic mainstream of antitrust law. However, the majority of modern substantive analysis is focused on the economic impact of mergers and relegates consideration of noneconomic factors to the realm of prosecutorial discretion and case selection. Moreover, bringing the “trend towards concentration” into a merger notification threshold represents a novel approach to the issue. In evaluating the approach, commentators suggested that substantive merger review would more appropriately be performed in a later stage, after a potential transaction had been notified and during the investigation of the proposed merger.¹⁴⁴ This recommendation has the merit of maintaining the notification rules as uncomplicated as possible, while still recognizing the option of the reviewing agency to adopt and enforce appropriate substantive standards to evaluate a particular merger. In addition, limiting the notification thresholds to objectively verifiable criteria makes it more efficient for undertakings to, *first*, determine whether their transaction is reportable and, *second*, make the notification in a prompt and cost-effective manner.

The fourth threshold, article 2(iv), is a similarly substantive standard rather than one based on plain objective criteria. Section (iv) provides that notification must be made when “[t]he concentration will lead one undertaking involved in the transaction to have a market share of not less than 25% of the market within the territory of China.”¹⁴⁵ This threshold may draw upon the generally recognized view that excessive

143. See, e.g., *N. Sec. Co. v. United States*, 193 U.S. 197, 307-28 (1904) (expressing concern that the result of the merger would be that “the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a state distant from the people of that territory”); *Brown Shoe Co.*, 370 U.S. at 315 (“The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.”).

144. See AmCham-China, *supra* note 139; SECTION OF ANTITRUST LAW & SECTION OF INT’L LAW, *supra* note 87.

145. STATE COUNCIL OF THE P.R.C., *supra* note 123, art. 2(iv).

concentration may give a firm market power to raise prices and restrict output.¹⁴⁶ The substantive merger Guidelines of the United States Department of Justice and Federal Trade Commission, as well as the Guidelines of the European Commission, use measures of concentration as the starting point to evaluate whether or not a merger should be challenged or prohibited; however, proof of a particular share of a relevant market is important but insufficient evidence that a merger likely will harm competition.¹⁴⁷

Next, the Guidelines provide that the Anti-Monopoly Authority may require that the parties to a proposed merger file a pre-merger notification even if the transaction does not meet the stated thresholds. The standard for such an extra-threshold demand is whether “the reviewing authority . . . is reasonably of the opinion that the concentration of undertakings may result in elimination or restriction of competition.”¹⁴⁸ One may reasonably presume that the authors of the draft Guidelines were concerned that a merger of anticompetitive significance might be below the thresholds for filing pretransaction notification. Clearly, such a consideration is not purely hypothetical for several reasons. First, the AML is the first antitrust law of general application in China, and the authors of the Guidelines have no prior experience with the task of establishing appropriate notification thresholds. In addition, the Chinese economy is growing rapidly, so there may have been a concern that the thresholds would become outdated before they could be amended to reflect change in economic circumstances.¹⁴⁹ Finally, China is geographically vast and there are potentially many small, isolated geographic markets beyond the reach of rapid transportation of products and services where a merger below the filing thresholds could give rise to market power that would not be ameliorated by entry or arbitrage. These concerns are valid; however, the need to adopt guidelines that are transparent and predictable to the

146. However, it should be stressed that, although market share and total concentration is relevant to a determination of market power, it is not decisive. See *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963) (holding that a merger is presumptively illegal upon proof of high and increased market share). But see *United States v. Gen. Dynamics, Inc.*, 415 U.S. 486 (1974) (cautioning that market share data may not necessarily represent the actual, or predicted future, market power of a firm). In addition, facts relevant to a particular industry or market, such as easy entry, may also belie the assumption of power implied by apparently overwhelming market share. See, e.g., *United States v. Waste Mgmt., Inc.*, 743 F.2d 976 (2d Cir. 1984).

147. See U.S. DOJ/FTC Horizontal Merger Guidelines, *supra* note 6, at 17; *EC Horizontal Merger Guidelines*, *supra* note 58, paras. 15-17.

148. STATE COUNCIL OF THE P.R.C., *supra* note 123, art. 2.

149. See OECD, Country Statistical Profile 2009—China, <http://stats.oecd.org/viewhtml.aspx?queryname=18182&querytype=view&lang=en> (last visited Oct. 31, 2009).

undertakings that will be obligated to follow them is also a valid consideration. The Guidelines contain another section that permits the Anti-Monopoly Authority to adjust the thresholds as circumstances require.¹⁵⁰ This flexibility should allow the Authority to carefully monitor both the economy and the notifications filed and to make adjustments to the thresholds as appropriate. Moreover, the notification Guidelines are just that, requirements of pre-merger notification. The AML does not immunize a merger that falls below the thresholds and is therefore not required to be reported. Quite the contrary: while the AML is silent on this subject, the rule in other jurisdictions is that an anticompetitive merger violates the antitrust laws and may be challenged, even after the merger has been consummated.¹⁵¹

An additional issue that is inherent in the anticipated operation of the Guidelines is the process that can trigger a nonthreshold filing. The section provides a nonexclusive list of potential complainants, including competing undertakings or industrial associations. Any of these are explicitly authorized, and even encouraged, to request that the Anti-Monopoly Authority demand a pre-merger filing from merging firms and to institute a review. Although other participants in a relevant market are likely to be experienced in market conditions, they may also have anticompetitive motives in seeking to block a merger of their competitors. If a proposed merger is likely to increase efficiency and competition, thus putting downward pressure on prices, other firms in the market will be forced to compete or lose market share. These competitors may choose to try to recruit the Anti-Monopoly Authority to hobble their potential strongest competitors rather than compete on the merits.¹⁵²

Other important questions raised by this section concern what precise criteria shall be used to make the demand for a below-threshold notification. While the Authority must hold a good faith belief that the potential merger could harm competition, the standard in the Guidelines language is imprecise. On the one hand, the Guidelines suggest that such

150. STATE COUNCIL OF THE P.R.C., *supra* note 123, art. 3.

151. *Evanston Nw. Healthcare Corp.*, F.T.C. Docket 9315 (FTC Apr. 28, 2004), 2008 WL 1991995, at *1; *Chi. Bridge & Iron*, F.T.C. Docket 9300 (FTC Oct. 25, 2001), 2001 WL 1299008.

152. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1391-92 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987) (Posner, J., writing for the majority) (“Hospital Corporation’s most telling point is that the impetus for the Commission’s complaint came from a competitor The hospital that complained to the Commission must have thought that the acquisitions would lead to lower rather than higher prices—which would benefit consumers, and hence, under contemporary principles of antitrust law, would support the view that the acquisitions were lawful.”).

investigations should be triggered only if the merger likely will eliminate competition, presumably covering situations where the merger is to monopoly. On the other, the Guidelines allow below-threshold filings to be demanded if the merger likely would restrict competition. Although this latter scenario is not defined, it clearly would catch mergers that do not produce a monopoly or, potentially, a duopoly market. In addition, there is no further limitation, for example, that competition must be “substantially” restrained, as in the language of the U.S. merger statute.¹⁵³ Addition of such qualifiers would improve the transparency of the Guidelines, permit informed analysis by scholars and practitioners, and, finally, facilitate compliance among affected firms. An alternative resolution would be to authorize, as is recognized in the AML, local enforcement agencies to be alert to potentially anticompetitive mergers and require them to report concerns to the Anti-Monopoly Authority. This way, the Authority would be in a position to monitor the state of competition throughout the country, adjust the thresholds as necessary, and institute an investigation of a pending transaction that falls below the thresholds. Although this solution would not have the effect of a mandatory delay of a potential merger, it is likely that undertakings notified of an investigation would promptly consult with the Authority even if the transaction fell below the thresholds. As a general matter, more predictability counsels increased consultation.

The Guidelines specifically permit exemptions from the notification requirement that were specified in the AML, but do not offer further guidance on the procedure for obtaining an exemption.¹⁵⁴ Article 4 of the Guidelines also appears to deal with the issue of sequential reviews by sector agencies. Because many important sectors are subject to sector regulators, this is an important issue and it will be necessary to resolve potential jurisdictional conflicts. The language in an unofficial translation is imprecise, but it appears to establish the Competition Authority as primary:

Pursuant to the relevant law(s), regulation(s), and/or rule(s), if a concentration of undertakings is subject to approval of concerned agency(s), such approval is subject to permission of the reviewing authority of concentration of undertakings *before* approving the concentration by relevant authorities. Concentration may be exempted from of [sic]

153. Clayton Act § 7, 15 U.S.C. § 18 (2006).

154. Draft 1 Guidelines article 4 provides: “Concentration of undertakings satisfying Article 22 of the AML may be exempted from filing the notification with the reviewing authority of concentration of undertakin[g]s.” STATE COUNCIL OF THE P.R.C., *supra* note 123, art. 4.

concentration of undertakings notification of concentration after approval of the review authority of concentration of undertakings.¹⁵⁵

Finally, article 3 permits the thresholds to be adjusted “according to elements such as economic development, industry policy[,] and market competition” with the approval of the State Council.¹⁵⁶ Adjustment of the objective numerical thresholds comports with general practice¹⁵⁷ and the consensus benchmarks of the International Competition Network.¹⁵⁸ The suggestion that adjustments may be made to conform with economic development and industrial policy are less clear and less clearly related to competitive issues. To the extent that “economic development” could be interpreted as suggesting protection of local firms in a market, this would bring factors irrelevant to competition into the Guidelines. It could, indeed, be inconsistent with the clearly expressed policy of the AML that administrative monopolies should not abuse their power.¹⁵⁹

In terms of process, the draft requires the filing party or parties to submit the required information by a certain deadline¹⁶⁰ and to include a Chinese translation.¹⁶¹ The required information essentially describes a complete modern economic analysis of the competitive effects of the proposed merger:

In the notification materials, the illustration of the effects ... the concentration of undertakings will impose on the competition in the relevant market shall include the definition of the relevant market and the

155. *Id.* (emphasis added).

156. *Id.* art. 3.

157. See U.S. DOJ/FTC, Horizontal Merger Guidelines, *supra* note 6, at 16-17; *EC Horizontal Merger Guidelines*, *supra* note 58, para. 15.

158. ICN, *supra* note 118, at 3-4.

159. Article 51 of the AML provides:

Where any administrative organ or an organization empowered by a law or administrative regulation to administer public affairs abuses its administrative power to eliminate or restrict competition, the superior authority thereof shall order it to make correction and impose punishments on the directly liable person(s)-in-charge and other directly liable persons. The Anti-Monopoly Authority may put forward suggestions on legal handling to the relevant superior authority.

Where it is otherwise provided in a law or administrative regulation for the handling [of] the organization empowered by a law or administrative regulation to administer public affairs [that] abuses its administrative power to eliminate or restrict competition, such provisions shall prevail.

Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68, art. 51 (P.R.C.), translation available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf.

160. STATE COUNCIL OF THE P.R.C., *supra* note 123, art. 7 (requiring that “the filing materials shall be in Chinese”).

161. *Id.*

basis for such a definition, the market shares of the undertakings and the calculating basis, important business activities of the undertakings in the relevant market, and the economic analysis of the concentration.¹⁶²

While practitioner-commentators have criticized this requirement as overly burdensome, particularly for transactions that clearly do not threaten competition,¹⁶³ the analytic goal is commendable from a scholarly point of view. The inquiry described comports well with modern economic analysis of the potential effects of proposed mergers. It asks the appropriate questions and equally importantly, does not, on its face, seek information targeted to issues unrelated to competition including, for example, potential effects on local employment that have properly been critiqued when utilized in domestic transactions.¹⁶⁴

The Anti-Monopoly Authority is required to act rapidly to review the filing documents and inform the parties of any deficiencies within three days of the filing.¹⁶⁵ Because the article does not specify the deadline in terms of "business days," the requirement could be interpreted as referring to calendar days. While such speed would be welcomed by firms eager to complete their transaction with as little delay as possible,¹⁶⁶ it seems unrealistic, especially for a new agency at the outset of its operations. Whatever the deadline chosen by the Authority, it is appropriate to have the Authority notify the parties that their filing was incomplete and demand supplementation. Failure to comply with requests to supplement the record is deemed identical to failure to file and carries penalties.¹⁶⁷ Of more concern is the effect of supplementary filings. The article appears to restart the thirty-day clock of the preliminary review period from the date of supplementation of the filing. Given the need for speed in some transactions, this apparent calculation may be a burden on firms, and, in any case, should be clarified. If a transaction is truly potentially problematic, the Authority has the option of engaging in a second-stage investigation, as provided for in the

162. *Id.* art. 6.

163. See SECTION OF ANTITRUST LAW & SECTION OF INT'L LAW, *supra* note 87 and accompanying text; SECTION OF ANTITRUST LAW & SECTION OF INT'L LAW, *supra* note 103 and accompanying text; AmCham-China, *supra* note 139 and accompanying text.

164. See, e.g., *Candy Merger Is Challenged*, N.Y. TIMES, Apr. 16, 1993, at D10; *Pittsburgh Hospital Merger of UPMC, Mercy Ok'd*, PITTSBURGHCHANNEL.COM, Oct. 16, 2007, <http://www.thepittsburghchannel.com/money/14351000/detail.html>.

165. STATE COUNCIL OF THE P.R.C., *supra* note 123, art. 8.

166. And, in fact, the AmCham-China comments praise this article. AmCham-China, *supra* note 139.

167. The penalty for failure to file, incomplete or inaccurate filings, and submission of false or inaccurate information is punishable under articles 48 and 52 of the AML. STATE COUNCIL OF THE P.R.C., *supra* note 123, art. 15.

AML.¹⁶⁸ The Guidelines obligate filing parties to notify the Anti-Monopoly Authority of any “substantial” change of facts with respect to the transaction.¹⁶⁹

Since the AML became effective on August 1, 2008, antitrust law and practice has been and will continue to be in the process of development for some time. New government agencies are in the process of being established to enforce the various provisions of the AML, additional substantive and procedural guidelines will be drafted, and expertise must be developed to implement the AML effectively. Pre-merger review is the most time-sensitive of the substantive AML sections and potentially may have an immediate effect on firms doing business in multiple jurisdictions that lack experience in dealing with the Chinese legal system. The Guidelines specifically permit firms to consult with the Anti-Monopoly Authority before filing their pre-merger notification to obtain more information about the process and requirements.¹⁷⁰ If this voluntary process is prompt and transparent, it could give important credibility to the new system of pre-merger review.

In accord with practice in other jurisdictions, the Guidelines recognize that some proposed mergers may not raise any competitive issues. In such cases, article 12 institutes a “fast track” review process, requiring the Anti-Monopoly Authority to make a prompt decision not to prohibit a proposed transaction and notify the filing parties even before the “formal written notification” is made.¹⁷¹ This is a useful provision, recognizing that most transactions are either competitively neutral or pro-competitive. In such cases, the parties should not be required to wait for the expiration of the initial thirty-day period if the Authority has made a thorough review and is satisfied that it will not lessen competition. This section, by requiring prompt notice, appears to fulfill that expectation. It is not entirely clear, however, whether the notice of termination is sufficient or if the parties are required to wait until the thirty-day period has run before closing the transaction.

Article 12 also recognizes that other proposed transactions may require further investigation and appears to contemplate a notice-and-hearing process to supplement the second investigatory phase described in the AML.¹⁷² This article does not establish a formal hearing process,

168. *Id.* art. 26.

169. *Id.* art. 9.

170. *Id.* art. 11.

171. *Id.* art. 12.

172. AML article 25 requires that the Enforcement Agency must conduct its preliminary review within thirty days of receiving a complete pre-merger notification filing and then either approve the transaction or notify the parties that it will conduct a further review. Anti-Monopoly

nor refer to any other provisions of the Chinese administrative law concerning hearings. However, it requires the agency to give the parties to the transaction the opportunity to “make statements.”¹⁷³ Other “interested parties” are also to be afforded the chance to make statements as part of this process.¹⁷⁴ The article would be clarified if it explained the administrative process in more detail for firms unfamiliar with Chinese administrative law. Important questions to be answered include whether the “statements” are to be filed in writing or made in oral testimony, whether a hearing is contemplated and the procedure for any such hearing, and whether or not such a hearing is conducted on the public record.

Finally, the Guidelines recognize that protecting the confidentiality of business secrets and establishing a professional agency are critical to the reputation and success of the pre-merger review process. These issues are divided among three separate sections of the Guidelines: article 10 permits filing parties to designate and justify confidential information in the notification papers, article 13 requires “[o]fficials of the reviewing authority” to maintain confidentiality of business secrets and information designated by the parties, and article 16 provides for liability of “officials of the reviewing authority” who disclose any such confidential information.¹⁷⁵ Article 16 is a general duty of ethical practice, creating liability for abuse of power, neglect of official duties, and graft, in addition to disclosure of secret information.¹⁷⁶ The penalties are potentially severe: officials are subject to criminal liability in appropriate cases and administrative sanctions for lesser violations.¹⁷⁷

Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (P.R.C.), translation available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf. Failure to decide within the time limit constitutes nondisapproval. *Id.*

173. *Id.*

174. *Id.*

175. STATE COUNCIL OF THE P.R.C., *supra* note 123, arts. 10, 13, 16.

176. *Id.* art. 16.

177. *Id.*

2. Revised Version¹⁷⁸

a. Process

The initial draft of the Pre-Merger Notification Guidelines, discussed above, became generally available in early March 2008.¹⁷⁹ The Notification Guidelines generated wide interest throughout the legal and business communities, and comments were filed by the American Bar Association Sections of Antitrust Law and International Law.¹⁸⁰ Largely comprising technical considerations rather than scholarly commentary, these comments focused on two areas: the timing issues, an especially important issue for clients filing in more than one jurisdiction, and consistency with the substantive standards of other jurisdictions, including the definition of “control” and thresholds for notice.¹⁸¹ The State Council evidently took the expressed interest of the international bar and scholars seriously, because it issued a formal Notice (Solicitation), dated March 27, 2008, seeking comments on specific issues that had been identified in the first draft; the Council subsequently published a second set of Guidelines that contain important amendments responsive to the filed comments.¹⁸²

b. Specific Issues Identified by the State Council

The first issue identified in the responses to the Solicitation of Comments is the definition of “control,” which is required to constitute a merger, acquisition, or other “concentration.” “Control” was required but not defined by the AML, except in the negative by inference. Article 20 of the AML defines a “concentration” either as a merger or as the acquisition of “control” over other firms either by acquisition of equities or assets *or* by gaining power to “exert a decisive influence” over other

178. The revised version of the Guidelines, along with a Solicitation of Comments from the State Council, which is used by this Article, was translated by Wilmer Hale, a global law firm with an office in Beijing. E-mail from Lester Ross (June 23, 2008) (on file with author). It is attached as Appendix E.

179. See Legislative Affairs Office, State Council of the P.R.C., Notice Concerning the Solicitation of Public Opinions with Respect to the State Council Regulations on Notification of Concentrations of Undertakings (Wilmer Hale trans., Mar. 27, 2008), *available at* http://www.abanet.org/intlaw/spring08/materials/Hale_Concerning_Solicitation_of_Public_Opinions_With_Respect_to_State_Council_Provisions_on_Notification_of_Concentrations_of_Undertakings.pdf.

180. See SECTION OF ANTITRUST LAW & SECTION OF INT’L LAW, *supra* note 103.

181. *Id.*

182. See Legislative Affairs Office, *supra* note 179.

firms by other means including contracts.¹⁸³ Comments were sought concerning the new four-part definition of the term of art.¹⁸⁴

The second key amendment, and subject of the call for comments, concerned the thresholds for filing pre-merger notification. As discussed above,¹⁸⁵ the original four thresholds adopted both an objective and subjective test to trigger the filing requirement. The first two set monetary standards, one based on worldwide turnover and the other based on turnover within China. Both of these standards also included a nexus requirement for turnover within China, but both based this China connection on the business done by one or more firms involved in the transaction, leaving the possibility that the turnover would be associated with only one firm.¹⁸⁶ The second pair of thresholds were subjective, triggered either by a trend towards concentration in the form of acquisition of at least the firms in the industry in China in a year, or acquisition of a twenty-five percent share of a relevant market.¹⁸⁷ The new draft deleted the first of these subjective tests and retained the market share test.¹⁸⁸ This draft also lowered the monetary turnover thresholds, based on a study from the Chinese Academy of Social Sciences (CASS).¹⁸⁹ The CASS monograph benchmarked the new standards on the notification thresholds in forty-eight countries as well as China's 2007 per capita GDP.¹⁹⁰ The Solicitation reiterated that the

183. Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68, ch. IV art. 20(1)-(3) (P.R.C.), translation available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf.

184. Legislative Affairs Office, *supra* note 179, § 1.1.

185. *See supra* Part III.B.1.

186. STATE COUNCIL OF THE P.R.C., *supra* note 123, art. 2(i)-(ii).

187. *Id.* art. 2(iii)-(iv).

188. *Id.* art. 2.

189. *See* Legislative Affairs Office, *supra* note 179.

190. The Chinese Academy of Social Sciences (CASS) was founded in 1977 under the authority of the State Council. Chinese Academy of Social Sciences, http://www.gov.cn/english/2005-12/02/content_116009.htm (last visited Oct. 31, 2009). Its mission is:

To promote research and to undertake and fulfill key state research projects in light of China's national conditions, economic and social development strategies and the trends; to organize academic exchange between the Academy and the foreign countries . . . in accordance with relevant policies and guidelines of the CPC and of the country; to provide information on academic and research forefront and on newly emerging theories, and provide important research papers and policy suggestions to the CPC Central Committee and the State Council; and to reflect the new trends of the academic communities.

Id.

thresholds will be adjusted based on market and other factors and notes that other countries also adjust their notification thresholds.¹⁹¹

c. Discussion

There are a number of important differences between the initial Draft and the Draft for Comment (Revised Draft). On the less important end, the original eighteen articles have been reorganized and renumbered, resulting in nineteen articles that are organized in a clearer, more orderly fashion. Expanding from the bare-bones statement of purpose, the Revised Draft states that its purpose is to “clarify norms and procedures” and standardize the pre-merger notification process.¹⁹² This signals a theme running throughout the Revised Draft: the newer version clearly responds to comments on the previous version, adopting some of the suggestions, and makes reference to international benchmarks. This apparent determination to participate more fully in the global antitrust community may point to further transparency and movement in the direction of international convergence on some issues.

New article 2 is directly responsive to commentary discussed above¹⁹³ and adds new definitions of “concentration” and “control.” “Concentration,” consistent with the same word used by the European Commission, includes mergers, acquisition of assets or equity, and other forms of nonpermanent agreements, including contracts that allow the acquirer to “exercise determinative influence” over the other firm.¹⁹⁴ “Control” is defined to include the obtainment of at least fifty percent of the equity or voteable assets or of a sufficient majority of the voting rights to “actually dominate” or elect more than half of the board of

191. Legislative Affairs Office, *supra* note 179, § 1.2.

192. STATE COUNCIL OF THE P.R.C., REGULATIONS ON NOTIFICATION OF CONCENTRATION OF UNDERTAKINGS (DRAFT FOR SOLICITATION OF OPINIONS) art. 1 (2008) (Wilmer Hale trans., on file with author).

193. See *supra* Part III.B.2.a (discussing comments on failure to define control).

194. Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68, art. 2(3) (P.R.C.), translation available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLaws andRegulations/BasicLaws/P020071012533593599575.pdf. This section is consistent with the EC Merger Regulation, Council Regulation 139/2004, 2004 O.J. (L 24) 1. Article 3(2) of this regulation provides:

Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by . . . rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

Id. art. 3(2).

directors of the acquired firm.¹⁹⁵ These definitions are important additions to the Guidelines and, by clarifying an area questioned by counsel, likely will facilitate the filing of required notifications.

The most important amendment is the filing thresholds in renumbered article 3.¹⁹⁶ Two objective criteria remain, although the RMB triggers are lowered from global turnover of ¥12 billion to ¥9 billion,¹⁹⁷ and China turnover from ¥6 billion to ¥1.7 billion.¹⁹⁸ The section promises that further guidance will be coming on calculation of turnover.¹⁹⁹ These subsections also require that “at least two such undertakings” in the transaction must have a minimum total nexus with China, defined at ¥300 million.²⁰⁰

By requiring more than a single firm with turnover within China, the new nexus requirement answers critical commentary on the first Draft and may serve to ensure that the transaction actually affects Chinese markets rather than merely working to change offshore ownership. If this interpretation is correct, then further explanation or practice may require that each of the (minimum of) two firms with Chinese turnover do not have an insignificant turnover in the country.²⁰¹ The third threshold is the twenty-five percent market share trigger, but the other subjective trigger (that requires notification in markets where there has been a trend towards concentration) has been eliminated. This amendment is a positive change that moves the thresholds towards objective criteria in accord with the global consensus.²⁰² Clear standards are likely to produce more reliable filings, because firms do not have to interpret whether or not a notification is required and give the reviewing Anti-Monopoly Authority a better understanding of merger activity in the market. The use of subjective standards such as market power can then more appropriately be considered as part of the substantive evaluation of notifications that have been filed.

195. STATE COUNCIL OF THE P.R.C., *supra* note 192, art. 2.

196. The Revised Draft, article 6, reiterates article 22 of the AML, clarifying safe harbors under which notifications are not required. *Id.* art. 6. This section is consistent with general practice, providing that increases in ownership by majority owners and transactions involving majority owned firms are not reportable.

197. *Id.* art. 3(1).

198. *Id.* art. 3(2).

199. *See* Council Regulation 139/2004 O.J. (L 24) 1. Such assistance would be consistent with the EC Merger Regulation article 5, which comprehensively defines the calculation of turnover, sources that should be considered, and alternatives that may be used to determine whether a notification must be filed. *Id.* art. 5.

200. STATE COUNCIL OF THE P.R.C., *supra* note 192, art. 3.

201. *See* SECTION OF ANTITRUST LAW & SECTION OF INT'L LAW, *supra* note 103.

202. *See* ICN, *supra* note 118, at 29.

The Revised Draft continues to authorize the Anti-Monopoly Authority to require notifications from acquisitions that do not meet the thresholds.²⁰³ The government agency must make the decision to require underthreshold notifications based on the threat to competition. Complaints from competitors and trade associations are no longer listed as permissible justifications for this procedure. This provision does not include direction about the timing or process of such notifications and investigations. It is not specified, for example, whether transactions captured by this provision will be required to wait until after the thirty-day (or potentially full one-hundred-twenty-day) period of investigation before concluding their agreement. The risks to small transactions of unexpected merger investigations, with accompanying delay and expense, could lead them to avoid doing business in China or otherwise amend their plans to protect against unanticipated government oversight. With practical experience, the Authority may be in a position to either adjust the notification thresholds to catch problematic mergers under the current levels, or delete this section as unproductive. Article 5 authorizes the Anti-Monopoly Authority to propose amendments to the Guidelines, but the State Council must approve any changes.²⁰⁴

Article 7, clarifying former article 5, identifies the firms that must file the required notification.²⁰⁵ Firms are invited to consult with the Chinese Anti-Monopoly Authority before filing to clarify any issues about the notification or the process.²⁰⁶ In specifying that the consultation must occur “prior to filing,” the section apparently forecloses continuing consultation as the filing is prepared for the Authority or the preliminary investigation proceeds. The agency may be appropriately sensitive about any appearance of impropriety, but it could be useful for firms and Authority staff to be able to have an ongoing dialogue during the process. Firms would be able to provide the information needed to answer any questions about the transaction, and the government personnel could solve any misunderstandings about the requirements of the law.

Indeed, article 9, in listing the required elements of the notification materials, likely will generate questions from undertakings unfamiliar with the AML and legal procedure in China. This section amends and

203. STATE COUNCIL OF THE P.R.C., *supra* note 192, art. 4.

204. *Id.* art. 5. It should be noted that timeliness in promulgating Guidelines, along with opportunities to review and comment on proposed changes, will be valuable for firms subject to the AML.

205. *Id.* art. 7. All firms must file the notification jointly if the transaction is a merger, while the acquiring firm in other transactions has the duty to file.

206. *Id.* art. 8. This article is essentially identical to article 11 of the first Draft Guidelines.

seeks to clarify article 6 of the first draft Guidelines, listing particular information that must be produced. Some of the required information is objective,²⁰⁷ and other documentation requests a discussion of market definition and the competitive effects of the proposed transaction.²⁰⁸ Notifications that meet the thresholds are mandatory, and the penalties for failure to file are specified in AML article 48. These penalties include an injunction to halt any implementation of the transaction, dissolution, and fines of up to ¥500,000.²⁰⁹ The documents and materials filed must be complete and accurate. Article 10 also requires, consistent with the first Draft, that all of the “documents and materials” must be in Chinese.²¹⁰

Incomplete notifications are deemed null and must be fully supplemented within a deadline specified by the Anti-Monopoly Authority.²¹¹ A big incentive to make the original notification complete is built into the article, which provides that “the time limit for an initial review[, that is, thirty days] . . . shall be calculated from the date of receipt of all documents and materials.”²¹² Thus, apparently the clock is stopped and begins to run from zero if the original notification is defective. Similarly, if there is a “material change” in the transaction, the parties must notify the government agency. In a new provision of this article, the time period for reviewing the transaction “shall be calculated from the date of receipt by the anti-monopoly authority under the State Council of all materials evidencing the change of facts.”²¹³

A preliminary investigation period can take up to thirty days from the filing of the complete notification materials, followed by a second-phase investigation of up to ninety days, and may be extended for another sixty days,²¹⁴ for a total maximum of five months. The drafters of the

207. See, e.g., *id.* art. (3) (concerning concentration agreements); *id.* art. 9(4) (requiring audited financial reports and names and addresses of the relevant undertakings).

208. *Id.* art. 9(2).

209. *Id.* art. 16 (amending First Draft art. 15). The original draft included penalties under AML articles 48 and 52, which include fines up to ¥1 million and potential criminal penalties.

210. *Id.* art. 10.

211. *Id.* art. 11. The Revised Draft requires the Enforcement agency to inform the parties of any defect in their filing. Unlike the coordinating section in the first Draft requiring agency action within three days, the agency must act in a “timely” manner to make a preliminary review of the notification materials and inform the party that the notification is incomplete.

212. *Id.*

213. *Id.* art. 12.

214. Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68, art. 25 (P.R.C.), translation available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GenerallawsandRegulations/BasicLaws/P020071012533593599575.pdf (thirty-day preliminary review); *id.* art. 26 (ninety-day second phase investigation, potential sixty-day extension).

Revised Draft, however, recognize that extended, second-phase investigations are not required to approve most mergers and that many transactions can be cleared before the expiration of the preliminary deadline.²¹⁵ Therefore, Revised Draft article 14 expands and clarifies former article 12 by requiring the Anti-Monopoly Authority to create and use an expedited review process with the goal of making early decisions as often as possible.

The Revised Draft omits the guarantee that parties (and third parties) would be permitted to make statements and provide information during the preliminary investigation.²¹⁶ It would be beneficial if this process were included in the anticipated “expedited initial review mechanism” because openness and transparency of the process would only benefit the parties to the transaction, who could respond to issues and to the Anti-Monopoly Authority, whose staff likely will be laboring to resolve notifications with appropriate speed. The Authority is required to make a written notice to the parties, informing them of the early termination decision and allowing them to proceed with the concentration. The Revised Draft does not require the notification to be published or made available to the public. The ICN international benchmarks recommend, and U.S. and EC enforcement agencies in practice publish, notice of early terminations.²¹⁷ This information from the Chinese Authority would likely be of assistance to firms and counsel seeking to learn and master practice under the AML. The positive early termination process mitigates the potentially long period during which a transaction could be unresolved and is well within the mainstream of jurisdictions that have adopted an early termination process. It remains to be seen in practice what percentage of notifications receive early clearance or undergo second-phase investigations, and how many are actually prohibited.

Additionally, the Revised Draft collects and clarifies several disparate provisions on confidentiality.²¹⁸ Reporting firms may designate their pre-merger notification as confidential and may be required to

215. 2008 Solicitation, *supra* note 182, at I.3(6).

216. Compare STATE COUNCIL OF THE P.R.C., *supra* note 192, art. 14, with STATE COUNCIL OF THE P.R.C., *supra* note 123, art. 12.

217. ICN, *supra* note 118, at 7-9.

218. STATE COUNCIL OF THE P.R.C., *supra* note 192, art. 13. Article 13 is based on First Draft articles 10 (firms may designate information contained in the notification as confidential and shall justify the claim) and 13 (government agency officials required to maintain confidentiality of designated information and business secrets disclosed during pre-filing consultations). The liability sections, Revised Draft article 17 and First Draft article 16, remain separate because they cover violations for official corruption and neglect of duties as well as for disclosure of business secrets or confidential material.

submit a nonsecret summary of the information.²¹⁹ In a new provision, the Anti-Monopoly Authority is not bound by the designation unless it decides that the need for secrecy is reasonable.²²⁰ The Draft does not provide for consultation or negotiation before the agency makes its decision, but the process would be benefitted by such transparency and openness. The government agency and staff have a legal obligation to maintain confidentiality with respect to both the materials designated by the parties and trade secrets disclosed during the optional consultation before filing. This requirement will force the agency to maintain excellent records to ensure that confidential information, whenever obtained, is protected.

Finally, the Revised Draft promises further Guidelines, to be written by the antimonopoly commission of the State Council.²²¹

3. Final Notification Thresholds

The AML became fully effective on August 1, 2008. The final Notification Thresholds were adopted by the State Council on the same day, and became effective as of their date of promulgation.²²² This final version as promulgated is significantly abbreviated; therefore, the new title “Notification Thresholds” is a more accurate description than the more ambiguous Pre-Merger Notification Guidelines discussed above. The Notification Thresholds comprise five articles, three of which are substantive. Article 1 states that the document is promulgated in accord with the AML and with the purpose of clarifying the thresholds for pre-merger filings.²²³ Article 5 confirms that the Thresholds become effective on August 1, 2008, the date of promulgation by the State Council.²²⁴ Article 2 defines “concentration,” but has retreated completely from the efforts of the prior drafts to define “control.”²²⁵ This article simply reproduces AML article 20, so it serves as an introduction to the substantive thresholds for notification rather than a new

219. Article 13 of the Revised Draft states “Undertakings may request the anti-monopoly enforcement authority under the State Council to maintain *all* submitted documents and materials in confidence” *Id.* art. 13. This may be an inaccurate translation, because it would be preferable for the designation to protect only genuinely confidential materials.

220. *Id.*

221. *Id.* art. 18.

222. Rules of the State Council on Notification Thresholds for Concentrations of Undertakings (promulgated by the State Council of the P.R.C., Aug. 1, 2008, effective Aug. 1, 2008) Decree of the State Council of the P.R.C. no. 529 (Freshfields Bruckhaus Deringer, trans.) (on file with author).

223. *Id.* art. 1.

224. *Id.* art. 5.

225. *Id.* art. 2.

substantive contribution. Articles 3 and 4, then, are the new regulations of the merits, and these amendments are genuinely important.²²⁶ The first significant amendment was the deletion of the market share threshold, leaving only two controlling thresholds, both of which set out objective tests. These notification thresholds are now limited to objective criteria of global turnover and turnover within China. The actual RMB amounts were raised, apparently based on international benchmarks.²²⁷ Also improved is the requirement of PRC contacts for both thresholds. The prior draft thresholds had required “at least two of such undertakings” to have a minimum turnover within China. This language admitted the possibility of an interpretation that would require pre-merger notification from merging firms in which one had PRC turnover of ¥299.9 million and another had PRC turnover of ¥100,000. The final Thresholds require PRC turnover of “at least each of two undertakings” over ¥400 million. Thus, the PRC contacts of two of the firms must be more than merely de minimis. The important news is in the decision to adopt strictly objective standards. As enacted, the final subjective threshold, which had required a party to possess twenty-five percent of the relevant market in China, has been eliminated. This decisive turn to objective thresholds is in accord with the international trend, as discussed above, as well as with international benchmarks, and represents the least ambiguous method to trigger the pre-merger review process.

The second major change is found in new article 4, dealing with mergers below the notification thresholds.²²⁸ Prior drafts had permitted the enforcement agency to require a pre-merger notification and follow the other Draft procedures, including the potential for extended review and mandatory delay until after investigation in such situations. The new article simply gives the agency the power to investigate transactions below the thresholds. However, there is no indication that such transactions would be delayed during these investigations. This highly salutary development gives far more predictability and stability to the pre-merger review process in China.

On the less positive side, all of the prior articles have been deleted. While improvements could always be made, several features of the

226. *Id.* arts. 3-4.

227. Threshold 1 requires a total worldwide turnover of “all undertakings to the concentration” of ¥10 million (raised from ¥9 million) with PRC turnover of “each of two undertakings” of ¥400 million (raised from ¥300 million). *Id.* art. 3. Threshold 2 requires PRC turnover of all of the “undertakings to the concentration” of ¥2.0 billion (raised from ¥1.7 billion) with PRC turnover of “each of two” firms exceeding ¥400 million (raised from ¥300 million). *Id.* art. 4.

228. *Id.*

previous draft were instrumental to the smooth functioning of a system of notification and review: the definition of “control,” objective thresholds that trigger the duty to file, a clear list of information required to be submitted,²²⁹ the review process including procedures for early termination, confidentiality provisions and procedures for designating particular materials and information as confidential, and penalties.

IV. INTERNATIONAL BENCHMARKING

The Solicitation of Comments cites with approval various international experiences and practices in pre-merger notification and review. The most comprehensive collection of these standards and recommended procedures is found in the work of the ICN.²³⁰ In 2002, the ICN disseminated an eight-point set of Guiding Principles for Merger Notification and Review, which identifies respect for sovereignty, transparency, nondiscrimination, procedural fairness, appropriate review, coordination, convergence, and protection of confidential information as fundamental precepts.²³¹ The Revised Draft evidently has taken these principles into consideration and makes important efforts to recognize and apply many of them.

V. QUESTIONS AND ISSUES

The substantive analysis used in reviewing prospective mergers is of critical importance to the academic, legal, and corporate communities. In the first instance, substantive guidelines describing the methodology and analytic approach of the enforcement agency would be a useful first step in China’s entry into the world of merger review. Though concentrations and mergers have been subject to some legal review under preexisting Chinese law, the AML is a clean slate and the views and priorities of the enforcement entities are unknown and unpredictable. The legal standards may accrete over time if the relevant agencies publish their decisions and underlying analyses. Nevertheless, guidelines promulgating the substantive standards, even if amended as the agency

229. Alternatively, a form document would be a workable alternative. *See, e.g.*, 16 C.F.R. § 803 app. (2006), *available at* <http://www.ftc.gov/bc/hsr/P989316PMNRulesandFormalInterpretationsElectronicSubmissionofForms-Form.pdf>.

230. Since 2002, the ICN Merger Working Group has been working on guidelines and benchmarks, and has published a thirty-seven-page, multipoint set of Recommended Practices for the notification process. *See* ICN, *supra* note 118. These particular recommendations have been discussed throughout this Article wherever relevant.

231. INT’L COMPETITION NETWORK (ICN), GUIDING PRINCIPLES FOR MERGER NOTIFICATION AND REVIEW 1 (2002), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/icnnpworkinggroupguiding.pdf.

develops expertise, would be an important foundation for further consultation and learning. It is not necessary that every jurisdiction adopt identical substantive merger standards, and this Article does not insist that the Chinese Merger Guidelines simply translate the U.S. or European guidelines on the subject, but transparency is a fundamental consideration for firms that choose to compete in multiple jurisdictions.

Harmony is a value beyond clarity. Harmonization of the substantive legal rules is doubtless important to firms engaged in global competition, but it is a nontrivial step beyond simple transparency. Nations at different stages of economic development may encounter different issues and challenges as they move beyond state control and towards a market economy. The Chinese economy has been undergoing a process of “reform and opening up”²³² for the past thirty years, but still has numerous sectors controlled by state owned enterprises (SOEs).²³³ Therefore, acquisitions may increase both concentration and market competition, and may be predicted to be pro-competitive. In industries with large SOE presence, a transaction that creates a large, or even a very large, private competitor may be pro-competitive, while that would not be the case in a longstanding market economy with few publicly controlled entities. On this basis, therefore, the traditional Herfindahl-Hirschmann Index (HHI) levels may imperfectly forecast competitive risk and trigger challenges to highly beneficial transactions. Additionally, modern economic tests, including the HHI²³⁴ and Small but Significant and Nontransitory Increase in Price (SSNIP),²³⁵ may not be useful to an agency in its initial stages of organization or to an economy transitioning towards market principles and, as the AML states, “promoting the healthy development of socialist market economy.”²³⁶ Even more problematic,

232. Lieberthal, *supra* note 122, at 127 (describing the reform era beginning in the late 1970s with Deng Xiaoping’s policies and the third plenary session of the eleventh central committee of the CCP).

233. *Id.*

234. The Herfindahl-Hirschmann Index is the standard measure of market power. See The Herfindahl-Hirschmann Index, <http://www.justice.gov/atr/public/testimony/hhi.htm> (last visited Nov. 6, 2009).

235. SSNIP is used by the U.S. DOJ/FTC Horizontal Merger Guidelines as the test for a relevant market. See U.S. DOJ/FTC, Horizontal Merger Guidelines, *supra* note 6, at 16-17. The relevant inquiry is whether, in the instance of a small but significant and nontransitory increase in prices, approximately five percent for the foreseeable future (SSNIP), the buyer would turn to another substitute product. See Oystein Daljord et al., *The SSNIP Test and Market Definition with the Aggregate Diversion Ratio: A Reply to Katz & Shapiro*, 4 J. COMPETITION L. & ECON. 263, 263-64 (2008). Any acceptable substitutes would be added to the relevant market definition and the test would be repeated until the buyer accepted no more substitutes. *Id.* at 264.

236. Anti-Monopoly Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 68,

the backward-looking test promulgated by the National Association of Attorneys General (NAAG)²³⁷ is of little utility in an economy where there has been little competition in the past.

At a minimum, a neutral observer would recommend that the new enforcement agency strive to articulate and promulgate its substantive standards and procedural requirements, disseminating them to the widest possible audience. A conscientious, deliberative process promotes serious consideration of the issues analysis of international benchmarks and various national merger policies. Whether or not the agency deliberation takes place internally or invites outside commentary, the exercise of articulating principles and standards is salutary.

Finally, wide dissemination of the standards and procedures maximizes transparency and provides guidance and direction to scholars and the subjects of regulation. Further transparency would include statistics identifying the number of pre-merger notifications filed, preliminary investigations opened, in-depth investigations conducted, and challenges. These results would provide a minimum level of openness. Beyond mere numbers, however, the agency could follow the European practice of providing a written explanation of its decision on each transaction reviewed. These decisions may be published in Chinese and, to promote more understanding and compliance, in translation to English and the language of the principal place of business of any foreign firm participating in the acquisition.

art. 1 (P.R.C.), translation available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf.

237. NATIONAL ASS'N OF ATTORNEYS GEN., HORIZONTAL MERGER GUIDELINES 9 (1993), available at http://www.naag.org/assets/files/pdf/at_hmerger_guidelines.pdf. The methodology for defining relevant product markets is stated as follows:

The Attorneys General will determine the customers who purchase the products or services ("products") of the merging firms. Each product produced in common by the merging parties will constitute a provisional product market. However, if a market is incorrectly defined too narrowly, the merger may appear to be not horizontal when there may be a horizontal anticompetitive effect in a broader market. In short, the provisional product market will be expanded to include suitable substitutes for the product which are comparably priced. A comparably priced substitute will be deemed suitable and thereby expand the product market definition if, and only if, considered suitable by customers accounting for seventy-five percent of the purchases.

Actual substitution by customers in the past will presumptively establish that a product is considered a suitable substitute for the provisionally defined product. However, other evidence offered by the parties probative of the assertion that customers deem a product to be a suitable substitute will also be considered.

Id. at 24.

VI. CONCLUSION

It has been clear for some time that international organizations—the OECD, WTO, ICN, and United Nations—advocate strong national competition policy and use the substance and deployment of national antitrust law as an indicator of a state’s place in the world. Competition policy involves issues well beyond mergers, covering in addition hard core horizontal cartels, benign horizontal agreements, vertical distribution restraints, and monopolization or abuse of a dominant market position. With the adoption of the AML, China joined a growing number of jurisdictions that have adopted antitrust laws of general application, but the test of the AML will be in its application. The challenges facing new enforcement agencies are vast: organization, establishing enforcement procedures that comport with the existing Chinese legal system, allocating appropriate functions to the three entities and coordinating process and substance, and finally, but most important, setting policies and priorities. Given the choice of where to begin enforcement, an agency should weigh the destructiveness of the restraint, importance and ability to enforce, and its own proficiency or readiness to enforce the particular category of violations.

On a relative scale of harm, there is overwhelming consensus that horizontal cartels, which frequently cross national borders, are at the top of the list.²³⁸ Beyond hard core horizontal cartels, however, jurisdictions can and do differ in their approaches to other cooperative behavior, single firm conduct, and concentrations. A discontinuity has been developing on the effect of vertical restraints, with the United States taking an increasingly benign view,²³⁹ and the European Union,²⁴⁰ Japan,²⁴¹ and others²⁴² characterizing some vertical price agreements as hard core,

238. See ICN, *supra* note 118, at 15.

239. Compare *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and *United States v. Colgate & Co.*, 250 U.S. 300 (1919), and *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), with *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007), and *State Oil Co. of Cal. v. Kahn*, 522 U.S. 3 (1997).

240. Article 4(a) of Regulation 2790/1999 identifies resale price maintenance as a hard core restraint. Commission Regulation (EC) 2790/1999, art. 4(a), 1999 O.J. (L 336) 21; see Cases C-56 & C-58/64, *Consten & Grundig v. Comm’n*, 1966 E.C.R. 299.

241. Japan Antimonopoly Act declares that vertical minimum price fixing is unlawful if it has the tendency to hinder competition without a justification, unless exempted by the JFTC. Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of 1947, arts. 2(9), 19, 23(2), translation available at http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf (last visited Oct. 31, 2009). Applied, the agency has taken a per se, rather than broad-ranging rule of reason, approach. Mitsuo Matsushita, *The Antimonopoly of Japan*, in GLOBAL COMPETITION POLICY 151, 188-90 (Edward M. Graham & David Richardson eds., 1997).

242. This includes other ICN members, such as Indonesia, India, and South Africa.

nonexemptible restraints. Important differences in the legal framework²⁴³ have led different jurisdictions to adopt inconsistent standards on the threshold of illegality for dominance or monopolization. Accordingly, any state embarking on a competition enforcement project would be advised to consider priorities and establish a hierarchy of enforcement goals.

China chose to promulgate its first set of AML Guidelines on the subject of pre-merger notification. On the one hand, since the AML itself requires pre-merger notification but does not provide sufficient information to comply, guidelines are needed. On the other hand, the Commission or Agency could have paced its enforcement of concentrations. The organizational structure of three entities with separate responsibilities under the AML may complicate the priority-setting process and set up incentives for maximum activity by each as it competes for position. Additionally, given China's historic rapid economic growth and pace of mergers, including foreign investments, there may have been a need to assert enforcement power in this arena early.

Retrospectively, the experience of the AML and Guideline process has revealed notable receptivity to international commentary on the substance and procedure of merger review. The now-adopted Notification Guidelines went through several public drafts, and comments were affirmatively solicited from "all sectors of society," including domestic and foreign scholars and lawyers.²⁴⁴ Even more important, some of the amendments in the second draft are consistent with some of the comments filed by foreign counsel. Indeed the Solicitation of Comments refers to and justifies some of the proposed amendments based on a global consensus of antitrust enforcement agencies worldwide.²⁴⁵

243. Compare, for example, the U.S. rule on monopoly, requiring market shares of at least seventy percent for illegality, with EU standards on abuse of dominance, which have historically raised competitive concerns at significantly lower market shares, including, rarely, market shares under fifty percent.

244. 2008 Solicitation, *supra* note 182.

245. The Chinese AML was not yet effective as of the ICN Spring 2008 meeting in Kyoto, and neither the Chinese Anti-Monopoly Commission nor the Enforcement Agency were members of the International Competition Network, which is limited to government antitrust enforcement agencies. However, a professor of law at CASS attended and made a presentation on the AML. It should be noted that the ICN members are the national agencies responsible for enforcing the relevant antitrust laws, not the respective sovereign states, so there are a variety of precedents that would enable the Chinese Anti-Monopoly Commission, Enforcement Agency, or other relevant agencies to participate in ICN. For example, the State Council of the People's Republic of China, Taiwan Affairs Office:

In a different system, reviewing proposed mergers, including pre-merger notification, may not be an obvious first step for a new competition agency implementing a new antitrust law. However, the enforcement mechanism in China will involve three different government ministries, each responsible for enforcing different segments of the AML. The State Administration of Industry and Commerce will be responsible for enforcing the provisions against abuse of dominant positions, the National Development and Reform Commission will be entrusted with anticartel enforcement, and the Ministry of Commerce will have jurisdiction over the merger review provisions of the AML.²⁴⁶

MOFCOM has already begun to issue additional draft Guidelines and review proposed mergers.²⁴⁷ Emerging from a lengthy drafting process, the operative agencies appear to be moving with alacrity. Going forward, clarity, transparency, and predictability would be recommended in the refinement of the notification procedures and promulgation of substantive merger standards. The AML is indeterminate, and judicial interpretation is unavailable, so a clear articulation of the appropriate methodology and controlling legal standard is an unfinished project.

Finally, it must be observed that the process has been marked by impressive transparency and consideration of views from parties that will be affected by the merger review process. Viewing the various official drafts and public comments suggests that some of the recommendations

On the basis of the principle of one China, the Chinese Government has made arrangements for Taiwan's participation in some inter-governmental international organizations which accept regional membership in an agreeable and acceptable way according to the nature, regulations and actual conditions of these international organizations. As a region of China, Taiwan has participated in the Asian Development Bank (ADB) and the Asia-Pacific Economic Co-operation (APEC), respectively, under the names "Taipei, China" and "Chinese Taipei." In September 1992, the chairman of the council of the predecessor of the World Trade Organization (WTO), the General Agreement on Tariffs and Trade (GATT), stated that Taiwan may participate in this organization as "a separate Taiwan-Penghu-Jinmen-Mazu tariff zone" (abbreviated as Chinese Taipei) after the PRC's entry into GATT. The WTO should persist in the principle defined in the afore-said statement when examining the acceptance of Taiwan's entry into the organization. This is only an ad hoc arrangement and cannot constitute a model applicable to other inter-governmental international organizations or international gatherings.

Taiwan Affairs Office of the State Council, http://www.gwytb.gov.cn:8088/detail.asp?table=WhitePaper&title=White%20Papers%20On%20Taiwan%20Issue&m_id=4 (last visited Oct. 31, 2009).

246. Interview with Shang Ming, *supra* note 66, at 1; Zhu, *supra* note 84.

247. Interview with Shang Ming, *supra* note 66, at 1. Since its inception, MOFCOM reviewed two proposed transactions: InBev N.V./S/A.—Anheuser-Busch Co. and Coca Cola Co.—China Huiyuan Juice Group Ltd., approving the former with additional commitments and rejecting the latter. *Id.*

were adopted. Additionally, the Solicitation itself refers to the consensus-based international benchmarks of the ICN and asserts consistency with international standards. The application of the AML Notification Guidelines and additional Guidelines continues to be a work in progress.²⁴⁸

248. Other draft guidelines were issued after promulgation of the Notification Guidelines and are pending. See, for example, *Guidelines for Definition of Relevant Market (Draft)* (promulgated by the Anti-Monopoly Comm'n of the State Council, Jan. 5, 2009), *Provisional Measures on the Review of Concentrations Between Undertakings*, *Provisional Measures on the Collection of Evidence for Suspected Monopolistic Concentrations Between Undertakings Not Reaching the Notification Thresholds*, *Provisional Measures on the Investigation and Handling of Concentrations Between Undertakings Not Notified in Accordance with the Law*, and *Provisional Measures on the Notification of Concentrations Between Undertakings* (all on file with author).

APPENDIX A
(reprinted unedited)

**ANTI-MONOPOLY LAW OF THE
PEOPLE'S REPUBLIC OF CHINA**

(Wilmer Hale, trans.)

Order of the Chairman of the People's Republic of China No. 68

The Anti-Monopoly Law of the People's Republic of China was adopted by the 29th meeting of the Standing Committee of the Tenth Session of the National People's Congress of the People's Republic of China on August 30, 2007. It is now promulgated and shall enter into force from August 1, 2008.

Chairman of the People's Republic of China Hu Jintao

August 30, 2007

Anti-Monopoly Law of the People's Republic of China

(Adopted by the 29th meeting of the Standing Committee of the Tenth Session of the National People's Congress of the People's Republic of China on August 30, 2007)

Chapter I General Principles

Article 1 This Law is enacted for the purposes of preventing and prohibiting monopolistic conduct, protecting fair market competition, improving economic operating efficiency, safeguarding the legitimate interests of consumers and societal and public interests, and enhancing the healthy development of the socialist market economy.

Article 2 This Law is applicable to monopoly conduct in economic activities within the territory of the People's Republic of China.

This Law is applicable to monopoly conduct outside the territory of the People's Republic of China that eliminates or has a restrictive effect on competition in the domestic market of the People's Republic of China.

Article 3 Monopoly conduct as referred into this Law shall include:

- (1) Monopoly agreements among undertakings;
- (2) Abuse of dominant market positions by undertakings;

- (3) Concentrations of undertakings that have an eliminating or restrictive effect or may have an eliminating or restrictive effect on competition.

Article 4 The State [central government] will formulate and implement competition rules in line with the socialist market economy, perfect macro-adjustment, and refine the unified, open, competitive and orderly market system.

Article 5 Undertakings may conduct concentrations, expand operating scale and enhance market competitiveness in accordance with law through fair competition and voluntary cooperation.

Article 6 Any undertaking with a dominant market position may not abuse a dominant market position to eliminate or restrict competition.

Article 7 The State shall grant protection to a legal operating activities of undertakings in industries in which the State-owned economy occupies a controlling position and which relate to the national economy and state security and in industries in which exclusive operations and exclusive sales are conducted in accordance with law, and shall supervise and regulate the operating activities of such undertakings and the prices of their commodities and services in accordance with law to protect the interests of consumers and advance technological progress.

Undertakings in industries in the preceding paragraph shall conduct legal operations in good faith and perform strict self-discipline, accept public supervision and shall not take advantage of their controlling positions or exclusive operating or sales positions to harm the interests of consumers.

Article 8 Administrative authorities and organizations authorized by law or regulation to administer public affairs may not abuse administrative power to eliminate or restrict competition.

Article 9 The State Council shall establish an anti-monopoly commission to be responsible for organization, coordination and guidance of anti-monopoly work, including the following functions and duties:

- (1) research and propose relevant competition policies;
- (2) organize investigations and appraisals of overall market competition conditions and issue appraisal reports;
- (3) formulate and publish anti-monopoly guidelines;

- (4) coordinate enforcement of anti-monopoly administrative regulations;
- (5) such other duties as provided by the State Council.

The composition and working rules of the anti-monopoly commission of the State Council shall be provided by the State Council.

Article 10 The anti-monopoly authority undertaking the duty of enforcement of anti-monopoly regulation as provided by the State Council shall be responsible for the enforcement of anti-monopoly regulation work in accordance with the provisions of this Law.

The anti-monopoly enforcement authority under the State Council may in accordance with work requirements authorize competent departments in each province, autonomous region and municipality directly under the central government to be responsible for relevant enforcement of anti-monopoly regulation in accordance with this Law.

Article 11 Industry associations shall strengthen industry self-discipline, guide undertakings in the industry to conduct competition in accordance with law, and safeguard market competition order.

Article 12 “Undertaking” in this Law refers to any natural person, legal person or other organization that engages in the manufacture and transaction of commodities or provision of services.

“Relevant market” in this Law refers to the territorial area and scope of commodities within which undertakings compete against each other during a period or time for particular commodities or services (hereinafter “commodities”).

Chapter II Monopoly Agreements

Article 13 The following monopoly agreements among competing undertakings shall be prohibited:

- (1) fixing or changing prices of commodities;
- (2) limiting the quantity of production or sale of commodities;
- (3) dividing sales markets or raw materials procurement markets;
- (4) limiting the purchase of new technology or new equipment, or the development of new technology or new products;
- (5) jointly boycotting transactions; and
- (6) such other monopoly agreements as determined by the anti-monopoly enforcement authority under the State Council.

“Monopoly agreement” referred to in this Law shall mean any agreement, decision or concerted action that eliminates or restricts competition.

Article 14 The following monopoly agreements between undertakings and counterparties to a transaction shall be prohibited:

- (1) fixing the prices of commodities to be resold to any third party;
- (2) fixing the minimum prices of commodities to be resold to any third party;
- (3) such other monopoly agreements as determined by the anti-monopoly enforcement authority under the State Council.

Article 15 Articles 13 and 14 of this Law shall not apply to any agreement which an undertaking may prove has been reached for any of the following purposes:

- (1) upgrading technology, research and development of new products;
- (2) improving product quality, reducing costs and enhancing efficiency, unifying product specifications, standards, or engaging in a specialized division or work;
- (3) improving operational efficiency of small- and medium-sized enterprises and enhancing the competitiveness of small- and medium-sized enterprises;
- (4) achieving such societal and public interests as realization of energy conservation, environmental protection and provision of disaster relief and assistance;
- (5) coping with economic depression by moderating material decreases in sales quantities or obvious production surpluses;
- (6) protecting proper interests of foreign trade and foreign-related economic cooperation;
- (7) such other circumstances as provided by law and the State Council.

Under conditions in which Articles 13 and 14 do not apply to items (1) through (5), the undertakings shall also prove that the agreement reached will not materially limit competition in the relevant market and such agreement can enable consumers to share the benefits derived therefrom.

Article 16 Industry associations may not organize undertakings in the industry to engage in monopoly conduct prohibited under this Chapter.

Chapter III Abuse of Dominant Market Position

Article 17 Undertakings with dominant market positions are prohibited from engaging in any of the following abuses of dominant market position activities:

- (1) selling or buying commodities at unfairly high or low prices;
- (2) without valid reason, selling commodities at prices below cost;
- (3) without valid reason, refusing to trade with another party to a transaction;
- (4) without valid reason, restricting the other party to a transaction to trade only with itself or to trade only with other undertakings which it designates;
- (5) without valid reason, tying the sale of commodities or providing any other unreasonable conditions to transactions;
- (6) without valid reason, applying different prices or other transaction terms to equally placed trading partners;
- (7) such other abuses of dominant market position conduct as recognized by the anti-monopoly enforcement authority under the State Council.

Dominant market position in this Law means a market position in which an undertaking is capable of controlling the price or quantity of commodities or other trading conditions or preventing and/or affecting other undertakings' market access in the relevant market.

Article 18 A dominant market position shall be determined based on the following factors:

- (1) market share of the undertaking in the relevant market and competitive conditions in the relevant market;
- (2) ability of the undertaking to control the sales market or raw materials procurement market;
- (3) financial and technological conditions of the undertaking;
- (4) reliance of other undertakings on such undertaking with respect to transactions;
- (5) difficulty of access to the relevant market by other undertakings;

- (6) such other factors relevant to determination of a dominant market position of such undertaking.

Article 19 In case of any of the following, the undertaking may be considered to be in a dominant market position:

- (1) the share of one undertaking in the relevant market has reached $1/2$;
- (2) the joint shares of two undertakings in the relevant market have reached $2/3$;
- (3) the joint shares of three undertakings in the relevant market have reached $3/4$.

Under items (2) and (3), if any undertaking has a market share of less than $1/10$, such undertaking shall not be considered to be in a dominant market position.

For any undertaking deemed to be in a dominant market position, if there is evidence proving that such undertaking is not in a dominant market position, such undertaking shall then be deemed not to be in a dominant market position.

Chapter IV Concentrations of Undertakings

Article 20 Concentrations of undertakings refer to the following circumstances:

- (1) merger of undertakings;
- (2) obtaining control of other undertakings through acquisition of equity interests or assets;
- (3) obtaining control of or the capability to exercise determinative influence over other undertakings by contract or other means.

Article 21 Undertakings shall file an advance notification with the anti-monopoly enforcement authority under the State Council for concentrations which reach the notification standards prescribed by the State Council, and no concentration shall be implemented without notification.

Article 22 Undertakings need not file notifications with the anti-monopoly enforcement authority under the State Council in any of the following circumstances:

- (1) one of the undertakings participating in the concentration holds 50% or more of the voting rights of the equity interests or assets of the other undertakings;
- (2) 50% or more of the equity interests or assets with voting rights of each undertaking participating in the concentration are held by the same undertaking which is not participating in the concentration.

Article 23 Undertakings which file a notification of a concentration with the anti-monopoly enforcement authority under the State Council shall submit the following documents and materials:

- (1) application;
- (2) explanation of the concentration's effect on conditions of competition in the relevant market;
- (3) concentration agreement;
- (4) financial and accounting reports of the undertakings participating in the concentration for the preceding accounting year, audited by a certified public accountant;
- (5) such other documents and materials as required by the anti-monopoly enforcement authority under the State Council.

The application shall provide the names, domiciles, and scope of business of the undertakings participating in the concentration as well as the date of the concentration and such other matters as prescribed by the anti-monopoly enforcement authority under the State Council.

Article 24 If the documents and materials submitted in the notification by the undertakings are incomplete, the undertakings concerned shall supplement the relevant documents and materials within the period prescribed by the anti-monopoly implementing authority under the State Council. A notification shall be deemed as having never been filed if the documents and materials are not supplemented within the prescribed period.

Article 25 The anti-monopoly enforcement authority under the State Council shall conduct an initial review and decide whether to initiate further review and issue a written notice to the undertakings within 30 days from the date of receipt of the notification documents and materials submitted by the undertakings (submitted in conformity with Article 23). The undertakings may not implement the concentration until a decision has been made by the anti-monopoly enforcement authority under the State Council.

If the anti-monopoly enforcement authority under the State Council does not decide to conduct further review or does not make a decision before the period of time has expired, the undertakings may implement the concentration.

Article 26 If the anti-monopoly enforcement authority under the State Council decides to conduct a further review of the concentration, it shall complete the review and decide whether to prohibit the concentration of undertakings and issue a written notice to the undertakings within 90 days from the date of its decision for further review. If it prohibits the concentration, the relevant reasons shall be explained. The undertakings may not implement the transaction during the review period.

Under any of the following circumstances, the anti-monopoly enforcement authority under the State Council may extend the time limit stipulated in the previous paragraph by issuing a written notice to the undertakings, provided that the extension may not exceed 60 days:

- (1) the notifying undertakings agree to extend the time limit;
- (2) the documents and materials submitted by the undertakings are inaccurate and need further verification; or
- (3) there has been a material change to the circumstances after the notification by the undertakings.

If the anti-monopoly enforcement authority under the State Council does not make a decision before the period of time has expired, the undertakings may implement the concentration.

Article 27 The following factors shall be considered in the review of concentrations:

- (1) the market shares of the undertakings participating in the concentration in the relevant market and their ability to control the market;
- (2) the degree of concentration in the relevant market;
- (3) the effect of the proposed concentration on market access and technological progress;
- (4) the effect of the proposed concentration on consumers and other relevant undertakings;
- (5) the effect of the proposed concentration on the development of the national economy; and

- (6) such other factors that the anti-monopoly enforcement authority under the State Council deems necessary to consider for their effects on market competition.

Article 28 The anti-monopoly enforcement authority under the State Council shall make a decision to prohibit a concentration if the concentration has the effect of eliminating or restricting competition in the relevant market. However, if the undertakings can prove that the concentration's positive effects on competition are obviously greater than its adverse effects, or is in conformity with societal and public interests, the anti-monopoly enforcement authority under the State Council may decide not to prohibit such concentration of undertakings.

Article 29 If a concentration of undertakings is not prohibited, the anti-monopoly enforcement authority under the State Council may decide to impose restrictive conditions that may reduce the adverse effects of the concentration on competition.

Article 30 The anti-monopoly enforcement authority under the State Council shall timely publish to the public decisions to prohibit concentrations and decisions to add restrictive conditions to concentrations.

Article 31 With respect to mergers and acquisitions of domestic enterprises or participation by other means in concentrations of undertakings by foreign capital which impact national security, a national security review shall be conducted in accordance with relevant regulations of the State in addition to the concentration of undertakings review conducted in accordance with this Law.

Chapter V Abuse of Administrative Powers to Eliminate and Restrict Competition

Article 32 Administrative authorities and organizations authorized by law and regulation with public affairs administrative functions may not abuse their administrative powers to require, in any manner or in disguised form, undertakings or individuals to deal in, purchase or use only the commodities supplied by any undertakings designated thereby.

Article 33 Administrative authorities and organizations authorized by law and regulation with public affairs administrative functions may not abuse their administrative powers by taking the following actions to impede the free circulation of commodities between regions:

- (1) imposing discriminatory charges, implementing discriminatory charging standards or fixing discriminatory prices on commodities originating in other regions;
- (2) imposing technical requirements or inspection standards on commodities originating in other regions which differ from those on like local commodities, or adopting such discriminatory technical measures as repeated inspections or certifications of commodities originating in other regions, to restrict the entry of commodities originating in other regions into the local market;
- (3) adopting administrative licenses specifically targeting commodities originating in other regions to restrict the entry thereof into the local market;
- (4) setting up checkpoints or taking other actions to block the entry of commodities originating in other regions or the exit of local commodities; or
- (5) such other actions that impede the free circulation of commodities between regions.

Article 34 Administrative authorities and organizations authorized by law and regulation with public affairs administrative functions may not abuse their administrative powers to exclude or restrict the participation of undertakings from other regions in local tender activities by prescribing discriminatory qualification requirements or assessment standards, or by not publishing information in accordance with law.

Article 35 Administrative authorities and organizations authorized by law and regulation with public affairs administrative functions may not abuse their administrative powers to exclude or restrict investment or the establishment of branch offices in their regions by undertakings from other regions, by adopting measures according treatment unequal to those on their local undertakings.

Article 36 Administrative authorities and organizations authorized by law and regulation with public affairs administrative functions may not abuse their administrative powers to compel undertakings to pursue monopoly conduct prescribed in this Law.

Article 37 Administrative authorities may not abuse their administrative powers to formulate provisions containing content which eliminates or restricts competition.

Chapter VI Investigation of Suspected Monopoly Conduct

Article 38 The anti-monopoly enforcement authority under the State Council shall conduct investigations of suspected monopoly conduct.

All undertakings and individuals have the right to report suspected monopoly conduct to the anti-monopoly enforcement authority. The anti-monopoly enforcement authority shall maintain the confidentiality of the tipsters.

The anti-monopoly enforcement authority shall conduct necessary investigations of suspected monopoly conduct when the reports are in written form and the relevant facts and evidence have been provided.

Article 39 The anti-monopoly enforcement authority may take the following measures to investigate suspected monopoly conduct:

- (1) entering the business locations or other relevant places of the undertaking concerned to conduct inspections;
- (2) inquiries of the undertaking concerned, interested parties and other relevant organizations or individuals, and requiring them to explain the relevant circumstances;
- (3) reviewing and copying such relevant documents and materials of the undertaking concerned and interested parties or other relevant organizations and individuals as certificates, agreements, book records, business correspondence and electronic data;
- (4) sealing and holding in custody relevant evidence; and
- (5) inquiries on the bank accounts of the undertakings concerned;

The adoption of the aforementioned measures shall be reported in writing to and approved by the principal responsible person of the anti-monopoly enforcement authority and is subject to approval.

Article 40 When the anti-monopoly enforcement authority conducts an investigation of suspected monopoly conduct, the investigating officers may not be fewer than two persons and shall present their identification documents.

The investigating officers, when making inquiries and investigations, shall make a written record of the investigation to be signed by the inquirer or the investigatee.

Article 41 The anti-monopoly enforcement authority and its personnel shall keep confidential commercial secrets of which they become aware in the performance of their duties.

Article 42 Undertakings, interested parties and other relevant organizations and individuals subject to the investigation shall cooperate with the anti-monopoly enforcement authority in the performance of its duties in accordance with law, and may not refuse or impede the investigation by the anti-monopoly enforcement authority.

Article 43 Undertakings and interested parties subject to investigation have the right to express opinions. The anti-monopoly enforcement authority shall conduct verification of the facts, rationale and evidence presented by the undertakings and interested parties subject to investigation.

Article 44 After the anti-monopoly enforcement authority concludes its investigation and verification of suspected monopoly conduct and determines that it constitutes monopoly conduct, it shall make a decision for disposition in accordance with law and may publish it to the public.

Article 45 The anti-monopoly enforcement authority may suspend an investigation of suspected monopoly conduct when the undertaking concerned promises to take specific measures to eliminate the consequences caused by the monopoly conduct within the period of time recognized by the anti-monopoly enforcement authority. A decision to suspend an investigation shall specify the specific commitments of the undertaking subject to investigation.

When an investigation is suspended, the anti-monopoly investigation authority shall conduct supervision of the performance of the commitment by the undertaking. When the undertaking concerned performs the commitment, the anti-monopoly enforcement authority may decide to terminate the investigation.

If any of the following occurs, the anti-monopoly enforcement authority shall resume the investigation:

- (1) the undertaking has not performed its commitment;
- (2) the facts on which the decision to suspend the investigation was made have undergone a material change; and
- (3) the decision to suspend the investigation was made was based on incomplete or untrue information provided by the undertaking.

Chapter VII Legal Liability

Article 46 If undertakings in violation of the relevant provisions of this Law enter into and perform a monopoly agreement, the anti-monopoly enforcement authority shall order the undertakings concerned to cease and desist such act, confiscate the illegal gains, and impose fines of 1% to 10% of turnover in the preceding year. If the monopoly agreement has not been implemented, fines of five hundred thousand yuan or less may be imposed.

If an undertaking voluntarily reports the relevant circumstances of the monopoly agreement to the anti-monopoly enforcement authority, the anti-monopoly enforcement authority shall impose reduced punishment or waive punishment of such undertaking.

If an industry association in violation of the relevant provisions of this Law organizes undertakings in said industry to enter into a monopoly agreement, the anti-monopoly enforcement authority may impose a fine of five hundred thousand yuan or less. If the circumstances are serious, the social organization registration authority may revoke the registration thereof in accordance with law.

Article 47 If an undertaking in violation of the relevant provisions of this Law abuses a dominant market position, the anti-monopoly enforcement authority shall order the undertaking to cease and desist such act, confiscate the illegal gains and impose a fine of 1% to 10% of turnover in the preceding year.

Article 48 If undertakings in violation of the relevant provisions of this Law implement a concentration, the anti-monopoly enforcement authority under the State Council shall order the undertakings concerned to cease and desist the enforcement of the concentration, dispose of the shares or assets within a period of time, transfer the business within a period of time, and take other necessary actions to restore the situation to the state prior to the concentration, and may impose fines of five hundred thousand yuan or less.

Article 49 When the anti-monopoly enforcement authority decides the specific amounts of fines set forth in Articles 46, 47, and 48 hereof, it shall consider such factors as the nature, degree and duration of the violations.

Article 50 If an undertaking engages in monopoly conduct and causes losses to others, it shall assume civil liability in accordance with law.

Article 51 If administrative authorities and organizations authorized by law and regulation with public affairs administrative functions abuse their administrative powers and engage in conduct that eliminates or restricts competition, the superior authority thereof shall order correction. The supervisors directly responsible and other personnel directly responsible shall be disciplined in accordance with law. The anti-monopoly enforcement authority may propose a legal disposition to the relevant superior authority.

If laws and administrative regulations otherwise provide for the disposition of abuse of administrative power by administrative authorities and organizations authorized by law and regulation with public affairs administrative functions which eliminate or restrict competition, the provisions thereof shall be applied.

Article 52 In case of a refusal to provide relevant materials and information, or the provision of false materials or information, or the hiding, destruction or transfer of evidence, or other conduct to refuse or impede an investigation conducted in accordance with law by the anti-monopoly enforcement authority, the anti-monopoly enforcement authority shall order correction, and may impose a fine of twenty thousand yuan or less on individuals and of two hundred thousand yuan or less on organizations. If the circumstances are serious, fines of twenty thousand yuan to one hundred thousand yuan on individuals and of two hundred thousand yuan to one million yuan on organizations may be imposed. If a crime is constituted, criminal liability shall be pursued.

Article 53 If a decision by the anti-monopoly enforcement authority in accordance with Articles 28 and 29 hereof are not accepted, an administrative appeal may first be filed in accordance with law; if the administrative appeal decision is not accepted, an administrative suit may be filed in accordance with law.

If a decision by the anti-monopoly enforcement authority other than the above are not accepted, an administrative appeal may be filed in accordance with law or an administrative suit may be filed.

Article 54 If personnel of the anti-monopoly enforcement authority abuse their powers, neglect their duties, commit malpractice or disclose trade secrets of which they become aware in the process of enforcement,

and a crime is constituted, criminal liability shall be pursued in accordance with law; if a crime is not constituted, disciplinary punishment shall be imposed in accordance with law.

Chapter VIII Supplementary Provisions

Article 55 This Law is not applicable to the conduct of undertakings which exercise intellectual property rights in accordance with applicable intellectual property rights laws and administrative regulations. This Law is applicable to the conduct of undertakings which abuse intellectual property rights to eliminate or restrict competition.

Article 56 This Law is not applicable to the cooperative or coordinative acts by farmers and rural economic organizations in such business activities as the production, processing, sale, transportation and storage of produce.

Article 57 This Law takes effect as of August 1, 2008.

APPENDIX B
(reprinted unedited)

**GUIDANCE ON ANTITRUST FILING FOR MERGER AND
ACQUISITION OF DOMESTIC COMPANIES BY
FOREIGN INVESTORS**

(Draft for Comments)

In compliance with the Regulation on Merger and Acquisition of Domestic Companies by Foreign Investors (MOFCOM Circular No. 10, 2006) jointly promulgated by MOFCOM, SASAC, State Tax Bureau, SAIC and CSRC and State Foreign Exchange Bureau on August 8, 2006, the M&A deals meeting the thresholds shall be reported to the Treaty and Law Department of MOFCOM (Antitrust Investigation Office). For convenience of filing, corresponding guidance is set forth below:

I. Applicant

Normally, applicant in antitrust filing shall be the party who's going to acquire the other party. However, depending on specific situation of the case, the applicant could be the party to be acquired as well. The applicant may make the filing in its own name, or, entrust Chinese law firm to make the filing by lawyer holding a Chinese bar.

II. Timing of the filing

The filing shall be made after the merger agreement is executed and before the M&A deals are closed. Where the offer to acquire is conducted in the securities market, the filing shall be made after the offer to acquire is published.

III. Material for the notification

The applicant shall submit written material in two sets of hard copies and one soft copy (CD-ROM preferred). Except the original attachments of the filing material or otherwise required by this Guidance, the filing material shall be in Chinese. Where the originals are in foreign language, they shall be accompanied with the Chinese translation.

The filing material shall include:

1. Application. The application shall be in brief limited to one or two sheets of A4-size paper with the signature of the applicant or its entrusted agent.

2. Power of Attorney and Lawyer's Letter. The Power of Attorney signed by the applicant and the letter issued by the agency where the entrusted agent services (usually lawyer's letter) shall be submitted.
3. The identity certification or registration certification of the applicant. The offshore applicant shall also submit the notarized and authenticated documents issued by the local notary.
4. The basic information of all parties of the M&A deal. It includes but not limited to the name of the enterprise; registration address; business scope; the form of the enterprise (company, partnership or others); the name, position and contact methods of the contact person; the revenue of all the M&A parties in the latest fiscal year (global and in China), the scale of the company, the position of the company in the industry it pertains to and the history of establishment and alteration of the company etc.
5. The name list and brief introduction of the affiliates of each M&A party. The name list shall include but not limited to:
 - a. All enterprises and individuals directly or indirectly controlling each M&A party;
 - b. All enterprises directly or indirectly controlled by each M&A party;
 - c. Except the M&A parties, all other enterprises directly or indirectly controlled by the enterprises and individuals defined in section a).

The organization chart or tables may be adopted to explain the affiliation such as the equity structure and the practical control etc.

6. The names of the FIEs established by the M&A parties in China.
7. Brief introduction of M&A transaction. It includes: nature and approach to transaction (e.g. acquisition of assets, acquisition of equity, merger, establishing joint venture, etc.), subject matter of transaction, amount of money of transaction, prospective closing date of transaction, post-closing controlling relationship among related companies (chart of corporate controlling structure can be adopted where necessary), industry or main products involved in M&A transaction, and motive, goal, or economic justification analysis of M&A transaction.

8. Definition of relevant markets. Generally, definition of relevant markets consists of definition of product markets and definition of geographic markets. Reasons shall be presented, whether relevant markets is to be defined or such definition is considered unnecessary. Where relevant product markets is to be defined, factors such as substitutability, competition conditions, price, cross price elasticity of demand, etc. shall be taken into consideration. Where relevant geographic markets is to be defined, factors such as nature and characteristics of relevant product or service, barrier to access, consumer preference, interregional significant difference in market shares or difference in actual price of enterprise, etc.
9. Sales turnover and market shares of the last two accounting years, with description of sources of data and basis for calculation.
10. Name and market shares of five largest competitors in relevant markets, as well as contact information and contact person.
11. Information of supply structure and demand structure in relevant markets, including a list of major upstream and downstream enterprises as well as their contact information.
12. Competition situation of relevant markets. Competition situation includes without limitation following elements:
 - a. Analysis of market access.
 - i. Aggregate costs of entry into market under the same scale of major existing competitors, e.g. including costs of research and development, setting up distribution system, promotion, advertisement, services, etc.
 - ii. Any statutory or factual barriers to access, such as government permits or government compulsory standards in any form, etc.
 - iii. Restrictions arising from patents, know-how, and other intellectual property rights, as well as restrictions arising from licensing such rights.
 - iv. In relevant markets, to what extent the M&A parties are licensor or licensee of patents, know-how, and other intellectual property rights.
 - v. Importance of production of relevant product in large scale.
 - vi. Situation of sources of goods, such as procurement of raw materials.

- b. Whether there exists, between operators, horizontal or vertical cooperation agreements, such as research and development agreement, agreement on assignment of patent use right, joint production agreement, specialization agreement, distribution agreement, long-term supply agreement, material exchange agreement, etc.
 - c. Situation of substitution by product import in relevant markets.
 - d. Material entry into or exit from markets in the last three years, including name and contact information of such enterprises as entering or quitting markets.
13. Merger agreement. If such agreement is in foreign language, a Chinese translation or Chinese version of important excerpts shall be submitted at the same time.
 14. Audited financial statements of last accounting year of both parties to M&A. If such statements are in foreign language, a Chinese translation or Chinese version of important excerpts shall be submitted at the same time.
 15. Situation of review of the same M&A in other countries or economies.
 16. Other issues that needs clarifying to the competent authority.
 17. Representations from all parties of this M&A case or from their entrusted agents on the truth of information filed and/ or on the accuracy of the information source.

IV. Term of Review

The M&A review period lasts for thirty (30) working days, beginning from the day of receiving complete filing materials. Upon the thirty working days period expires, if no notice of further review is received, the applicant should be deemed as having passed the review. If such notice is received, the applicant must further provide the competent authority with supplementary materials or explain the situation as per the notice, and accordingly, the review period will be extended subject to specific issues.

V. Negotiation before Filing

In order to enhance the efficiency and ensure transparency and foreseeability in the review, the Antitrust Investigation Office encourages the applicant and its entrusted agent contact unofficially with relevant

officials in MOFCOM on such matters as to the necessity of filing, identification of relevant markets, etc. Whether there is any negotiation before the filing or not, it will not affect the decision of antitrust review.

18. Time Limit and Method of Applying for Negotiation before Filing

The applicant shall apply to the Antitrust Investigation Office for negotiation one month before the official filing. The Antitrust Investigation Office will no more accept any application for negotiation within one week before the official filing. The application for negotiation before filing shall be delivered in writing to the Antitrust Investigation Office by fax (Facsimile Number: 65198905).

19. Materials to be Provided by Applicant

The applicant shall submit to the Antitrust Investigation Office relevant materials, including background information of the transaction, summary of related industries and relevant market, potential effect brought by this transaction to market competition, etc. If the applicant has no doubt whether to do the filing, they can directly provide the draft of M&A filing as the basis of negotiation and conversation. Questions as to whether to do the filing shall be brought up in the first phase of the negotiation. It is recommended by the Antitrust Investigation Office that the applicant should disclose all the related information which may affect market competition and submit materials as many as possible.

VI. Confidentiality

In case that the filing parties do not wish to have its filing information published or revealed, they shall raise confidentiality requirements while submitting materials, shortly clarifying, on each document with the need for confidentiality, the reason why they shall not be published or revealed.

VII. Filing Time and Place

The filing parties shall file with the Antitrust Investigation Office of MOFCOM during working hours of the MOFCOM. Please send any materials during 8:30AM to 11:00 AM or 1:30PM to 4:00 PM for convenience of registration and acceptance in due course.

Address of the Antitrust Investigation Office of MOFCOM: Room 3516, No.2 Dong Chang'an Street, Ministry of Commerce, Beijing.

Antitrust Investigation Office
Department of Treaty and Law
Ministry of Commerce

APPENDIX C

(reprinted unedited; underlining indicates the track changes discussed *infra* note 249)

**GUIDELINES ON ANTITRUST FILING FOR MERGER &
ACQUISITIONS OF DOMESTIC ENTERPRISES
BY FOREIGN INVESTORS²⁴⁹**

(Draft for Comments)

[Foreword omitted]

I. Filing Party

Generally, the filing party shall be the merging/acquiring party; the filing party may also be the merged/acquired party, based on specific circumstances of the individual case. Multiple parties who meet the qualifications of the filing party may choose to file jointly or separately. The filing party may file the report in its own name, or entrust an attorney duly admitted to Chinese bar in a Chinese law firm to submit a filing on its behalf.

II. Time for Filing

The antitrust filing for merger & acquisition (“M&A”) shall be made after the M&A agreement related hereto is signed, and before the M&A transaction is completed before the plan of the M&A transaction is announced to general public; filing for extraterritorial M&A shall be made before the plan of the M&A transaction is announced to general public or at the same time when such antitrust filing is submitted to the competent authority of the country where proposed transaction takes place. . If the transaction is conducted via a tender offer in the securities market, the antitrust filing shall be made after such tender offer is announced.

249. Unofficial Translation by Chia-heng Seetoo, B.A. in Economics, National Taiwan University (2000); M.B.A. in industrial economics, National Central University (2003); University of Illinois College of Law, J.D. Candidate (degree expected May 2007). This updated translation is based on the Chinese version published on PRC Ministry of Commerce website, at <http://tfs.mofcom.gov.cn/aarticle/bb/200703/20070304440611.html>, also referencing to two different translated versions, courtesy of Peter Wang of Jones Day and Amy Sommers of Squires, Sanders and Dempsey. I use track-change feature to demonstrate all differences between the MOFCOM website version and the previously circulated version. Any questions or comments are welcomed at the following email addresses: cseetoo@gmail.com; cseetoo2@law.uiuc.edu.

III. Filing Materials

The filing party shall submit the written materials in duplicate, and in addition shall make available a copy of an electronic version of the complete set of the written materials (CD-ROM is preferred). Except the originals of the appendices of the filing materials or otherwise required by the Guidelines, ~~t~~The filing materials shall be in Chinese; any original documents in foreign languages shall be accompanied by Chinese translations.

The filing materials shall include the following:

- (1) The Filing Letter. The content of the filing letter shall be clear and concise, and the appropriate length shall be one to two A4-sized pages. The filing letter shall be signed by the filing party or its entrusted agent.
- (2) Identification or the Registration Certificate of the Filing Party. When a foreign investor merges or acquires domestic enterprises, the filing party outside China shall also submit the notarized and authenticated documents issued by the local notary public; Antitrust Investigation Office may also require the filing party outside China in an extra-territorial M&A to submit the notarized and authenticated documents issued by the local notary public if necessary.

Power of Attorney and Attorney's Letter. If the filing is made by the entrusted agent, a Power of Attorney signed by the filing party and the letter issued by the intermediary institution where the entrusted agent (usually an Attorney's Letter) is located shall be submitted. Power of Attorney and Attorney's Letter submitted shall be originals.

- (3) Letter of Authorization and Reference Letter. If the filing is made by the filing party itself, the filing party shall submit letter of authorization or identification of the responsible manager. If the filing is made by the entrusted agent, a Power of Attorney or a letter of authorization signed by the filing party and a reference letter issued by the intermediary institution where the entrusted agent is located shall be submitted. Power of Attorney, Letter of Authorization and/or Reference Letter submitted shall be originals.

Identification or the Registration Certificate of the Filing Party. The filing party outside China shall also submit the notarized and authenticated documents issued by the local notary public.

- (4) Basic Information of all Relevant Parties. The recommended scope of information shall include but not limited to: name of the enterprise, place of registration, scope of business of the enterprise, form of the enterprise (corporation, partnership, or any other forms of entity); name, title, and ways of contact of the contact person; business revenues in the most recent fiscal year of all parties in the M&A (figures global and in China); scale of the corporation, the relative position in the industry of the corporation, history of incorporation and subsequent alterations, etc.
- (5) The name list and brief introductions of enterprises affiliated with each party in the M&A. It is recommended that following factors to be considered when determining Tthe scope of the name list shall include but not limited to the following:
- (a) All enterprises or individuals who directly or indirectly control each party in the M&A;
 - (b) All enterprises that are directly or indirectly controlled by each party in the M&A;
 - (c) Any other enterprises that are directly or indirectly controlled by the enterprises or individuals defined in (a), except the merging/acquiring party.
 - (d) Any other related enterprises or individuals.

An organization chart, other charts or illustrations demonstrating the ownership structures and actual controls among the above enterprises, etc. are permitted recommended, if necessary.

- (6) Names Certificates of Incorporation and Instruments of Ratification of foreign investing enterprises set up in China by each party in the M&A, (including foreign investing enterprises and domestic enterprises invested by such foreign enterprises), residential representative entities, subsidiaries, and any other entities registered in the territory of China; ;
- (7) Description of the M&A transaction. It is recommended that the following be , included: the characteristics and means of the transaction (for example, assets acquisitions, stock acquisition, merger, or joint venture enterprises), subject matter of the transaction, total amount of the transaction, the process of the M&A transaction, the estimated completion date of the M&A transaction, the control relationship among all relevant corporations (using charts to demonstrate the control structure if necessary), the industries or major products involved with the M&A transaction;

motive, purpose or analysis of economic rationality of the M&A transaction.

- (8) Defining Relevant Markets. Defining relevant markets usually includes defining product markets and defining geographical markets. Rationales for defining relevant markets or for such definition being unnecessary shall be specified. When defining relevant product markets, factors to be considered shall include, among other things, substitutability, competition conditions, prices, cross price-elasticity of demand. When defining relevant geographical markets, the nature and characteristics of relevant products or services, barriers to access, favorable treatment provided to consumers²⁵⁰, significant differences in market shares or real prices of the enterprise in different geographical markets, among other factors, shall be considered.
- (9) In most recent two fiscal years, volume of sales and market share in relevant markets for each party to the M&A transaction; the source of data and basis of calculation must also be specified, and the corresponding proof must be submitted accompanied.
- (10) Names and market shares of top five competitors in relevant markets. In order to promote the efficiency of review process, , and it is encouraged that the market shares or the respective status within relevant markets, persons of contact and contact methods of these competitors must be accompanied simultaneously.
- (11) Descriptions of the supply structure and demand structure in relevant markets, which shall include the names and contact methods of major enterprises in downstream and upstream industriesindustries; in order to promote the efficiency of review process, it is encouraged that the filing parties also submit the names and contact methods of major enterprises in downstream and upstream industries in relevant markets (emphasis added).
- (12) Status of competition in relevant markets. We recommend that Iinformation on status of competition to be provided from the following perspectivesshall include but not limited to the following:

250. In both Jones Day and Squire Sanders translations, the original language was translated as "consumer preference." However, the ordinary meaning of "you-hui" means "favor" or "favorable treatment"; in commercial language it usually means price discounts and promotional techniques like "buy one get one free." "Consumer preference" translated back to Chinese should be "xiao fe zhe pian hao," a technical term with specific meanings in the context of microeconomics.

- (a) Market entry analysis, it is recommended that such analysis made from but not limited to the following perspectives:
1. The total cost of entering the market; with the same scale of operation of currently existing major competitors. For example, costs of research & development²⁵¹, building a distribution network, promotion & advertising and services, etc.
 2. Any de jure or de facto barriers of entry;. For example, any grants of permission from the government or any form of mandatory standards required by the government.
 3. Any entry restrictions caused by patents, proprietary technology and any other forms of intellectual property rights; and any restriction generated during the course of granting such rights.
 4. In relevant markets, the situation of to what extent is each party to the M&A being a grantor or grantee of patents, proprietary technologies or other intellectual property rights;
 5. The importance of the scale of economy in the production of relevant products;
 6. Situation of channels of sources, for example, sources for raw materialsThe number and scale of competitors in relevant markets, and whether any de jure or de facto barriers of entry existed in upstream or downstream markets.
- (b) Whether Situations regarding horizontal or vertical agreements of cooperation existed between enterprises in relevant markets. For example, research & development agreements, agreements on transfer of use rights of patents, joint production agreements, agreements of specialization, distributorship agreements, long-term supply agreements and data exchange agreements, etc. Further details about the above agreements shall be provided if possible.
- (c) The situation of import substitution of products in relevant markets.

251. The Squire Sanders translation did not translate this term.

- (cd) Any major entries or exits in recent three years, which shall include the names and contact methods of entering or existing enterprises.
- (13) The M&A Agreement. If the agreement is written in foreign languages, a Chinese translation or an abstract on substantive terms in Chinese shall be attached thereto.
- (14) Audited financial statements of each party to the M&A transaction from the previous fiscal year. If such statements are written in foreign languages, a Chinese translation or an abstract on substantive terms in Chinese shall be attached thereto
- (15) Materials for requesting waiver of antitrust review. If the filing party believes that the transaction satisfies the criteria with respect to waiver of review, as stated in the Regulation on Merger and Acquisition of Domestic Companies by Foreign Investors, shall also submit materials for requesting such waiver.
- (16) Information regarding trade associations in relevant markets. This includes: whether such associations exist or not, the name of trade associations, the responsible persons and their methods of contacts for such associations.
- (17) The status of review filing of this M&A in other countries or economies foreign jurisdictions.
- (18) Other information required to be furnished to the competent authority.
- (19) Declaration signed by each party to the M&A transaction or its entrusted agent with respect to the authenticity of the reported information and/or the reliability of sources of data.

The filing materials shall be organized in a reasonable manner in order to facilitate the review process. A table of content shall be attached on top of the filing materials.

If the filing party is unable to furnish certain materials stated above, or believes that the submission of some above materials is not necessary, the filing party may raise the issue during pre-filing consultation or specify the reasons in the filing materials. The filing materials may be submitted in part or be not submitted at all, subject to the approval of Antitrust Investigation Office.

IV. Time Limit of the Review Process

The duration of the M&A review is thirty (30) business days, commencing on the date of the receipt of a complete set of the filing documents. If the filing party does not receive any further notice upon the expiration of the 30-day period, the review process shall be deemed cleared. If the filing party receives any notice for extension of review period, then the review process will be extended to the ninetieth (90th) business day. The filing party must provide any further information or furnish additional explanations to the competent authority based on the requirements in the notice; the duration of the review process will then be extended depending on specific circumstances of the transaction.

V. Pre-filing Consultation

In order to improve efficiency, ensure the transparency and predictability of the review, Antitrust Investigation Office encourages the filing party and its entrusted agent to initiate informal contact with the Office before filing, and to conduct consultation with respect to whether a filing is necessary and definition of relevant markets, among other things. A request for the pre-filing consultation shall be made as soon as possible before the formal filing. Such requests shall be faxed to Antitrust Investigation Office in writing. (FAX: 65198997). Whether there has been any pre-filing consultation or not does not affect the conclusion of the antitrust investigation.

In order to promote the efficiency and efficacy of pre-filing consultation, it is suggested that

(1) The time limit and means of submitting a request for pre-filing consultation

Applicants of consultation shall submit a request for pre-filing consultation to the Antitrust Investigation Office one month prior to the formal filing. Antitrust Investigation Office will not accept any request for pre-filing consultation one week before the formal filing. Such request shall be in writing and facsimiled to Antitrust Investigation Office.

(2) Documents furnished by applicants of consultation

a. Applicants of consultation shall provide relevant documents to Antitrust Investigation Office, including an introduction to the background of the M&A transaction, a general description of relevant industries and relevant markets, and potential impacts the transaction

may have upon market competition. If the applicant has no doubt about whether a filing is necessary, the draft of the M&A report can be provided to serve as the basis of consultation and discussion. Any doubts about whether a filing is necessary shall be raised during the stage of consultation. Antitrust Investigation Office recommends that all applicants of consultation should fully disclose all relevant information with respect to possible effects on market competition, and should furnish relevant documents to the fullest extent possible.

VI. Confidentiality

If the filing party does not wish its reported information being disclosed or publicized, then it shall earmark request confidentiality when submitting the documents or content thereof that requires confidentiality, and briefly state any reasons for not disclosing or publicizing confidential information. When requesting confidentiality, the applicant shall also submit a non-confidential version of the filing materials. documents in need of confidentiality.

VII. [Hours, address omitted]

The purpose of announcing this Guideline is to provide guidance and assistance to enterprises filing reviews of M&A transactions. Antitrust Investigation Office may amend this Guideline from time to time based on the requirements of applicable laws, regulations and other regulatory publication, as well as the situation of administration and the needs of implementation.

APPENDIX D
(reprinted unedited)

**RULES ON NOTIFICATION FOR CONCENTRATION OF BY
THE STATE COUNCIL**

(internal draft)

Article 1 [Purpose]

The rules are provided in accordance with *the Anti-monopoly law of the P.R.C.* (hereinafter called “AML”) for the purpose of clarifying the filling threshold and procedures and regulating the notification of undertakings.

Article 2 [Threshold for Notifying the Concentration of Undertakings]

A pre-merger notification shall be filed with the Anti-monopoly Enforcement Authority for Reviewing the Concentration of Undertakings under the State Council (hereinafter called “the reviewing authority for concentration of undertakings”), provided a concentration is characterized by any of the circumstances set forth below, and the concentration plan shall not be implemented if it is not notified:

- (i) The total global sales revenue (turnover) in the previous year of all the undertakings involved in the concentration is more than RMB 12 billion and at least one undertaking in the concentration has a turnover of more than RMB [] million within the territory of China in the previous year;
- (ii) All the undertakings to the concentration have a total turnover of more than RMB 6 billion within the territory of China in the previous year.
- (iii) One undertaking involved in the concentration has acquired more than ten undertakings in the relevant industry by the way of merging, obtaining the control, or obtaining the power to impose influence on decisive within the territory of China within one year;
- (iv) The concentration will lead one undertaking involved in the transaction to have a market share of not less than 25% of the market within the territory of China.

At the request of competing undertaking, of relevant authority or of relevant industrial association, if the reviewing authority for concentration of undertakings is reasonably of the opinion that the concentration of undertakings may result in elimination or restriction of competition, it may nevertheless require the undertakings to file a notification in

accordance with these rules, even if the criteria set forth in the preceding paragraph are not met by the concentration of the undertakings.

When calculating the turnover as mentioned in the first paragraph of this Article, all the turnovers of all the affiliates controlling or controlled by the undertaking shall be included.

The method of calculating the turnover of the undertakings in the financial and insurance sectors shall be promulgated by the reviewing authority of Concentration of Undertaking together with other relevant department(s) and agency(s) under the State Council.

Article 3 [Adjustment of the notification Threshold]

The reviewing authority of Concentration of Undertaking may adjust the threshold for notification of understanding stipulated in Article 2(i), according to elements such as economic development, industry policy and market competition. The adjustment shall be subject to approval of the State Council for implementation.

Article 4 [Exemption for Notification]

Concentration of undertakings satisfying Article 22 of the AML may be exempted from filing the notification with the reviewing authority of concentration of undertakings.

Pursuant to the relevant law(s), regulation(s), or/and rule(s), if a concentration of undertakings is subject to approval of concerned agency(s), such approval is subject to permission of the reviewing authority of concentration of undertakings before approving the concentration by relevant authorities. Concentration may be exempted from of concentration of undertakings notification of concentration after approval of the review authority of concentration of undertakings.

Article 5 [Filing Obligator]

Option 1: the notification of concentration of undertakings may be either filed collectively by all the undertakings involved in the transaction as a whole, or filed by one or several undertakings designated by all the undertakings involved in the transaction.

Option 2: Any/either undertaking involved in the concentration may file the notification in case of a merger; in case that a undertaking involved in the concentration that gets control of the other(s), or gets the decisive influence over the other undertaking (s), this undertaking shall file the notification.

Article 6 [Notification Materials]

To notify for a concentration, undertaking shall submit to the reviewing authority of concentration of undertakings the materials prescribed in Article 23 of the AML. In the notification materials, the illustration of the effects that the concentration of undertakings will impose on the competition in the relevant market shall include the definition of the relevant market and the basis for such a definition, the market shares of the undertakings and the calculating basis, important business activities of the undertakings in the relevant market, and the economic analysis on the rationality of the concentration. The concentration agreement can be a formal contract or just an agreement indicating intents or principles, or other materials which can prove the intents of the undertakings to the concentration.

Article 7 [Requirements on the notification Materials]

The notification materials submitted by the undertakings shall be in Chinese, and must be correct and complete, and shall not conceal important information or offer false information.

Article 8 [Supplementation and Correction of Materials]

Where the documents or materials submitted by the undertaking are not complete the reviewing authority of concentration of undertakings shall, within 3 days since the submission of the receipt of the materials submitted by the parties, notify the undertaking to submit supplemental materials in a prescribed period, and with in such period, the undertaking shall submit the supplemental materials, otherwise it is regarded as not been notified if the supplemental document was not submitted within the period.

Where the reviewing authority of the concentration of undertakings receives the supplemental materials from the undertaking according to the above paragraph, the preliminary reviewing period shall be calculated from the day the supplemental materials are received.

Article 9 [Facts Change of the concentration]

If there is substantial change happening to the important fact of the concentration of the undertakings after the notification of the concentration of undertakings, the undertakings should inform such change of fact in time to the reviewing authority of concentration of undertakings.

Article 10 [Confidential Information Indications]

Where the undertakings believe that the materials filed include confidential information, the undertaking shall indicate the same in the materials, and provide corresponding explanations.

Article 11 [Consultation Prior to the notification]

Before notifying for the concentration, the undertaking may consult with the reviewing authority of concentration of undertakings for information related to the notification of the concentration, and the reviewing authority of concentration of undertakings shall to facilitate the consultation process for the undertakings.

Article 12 [Fast Regime for Preliminary Review]

The reviewing authority of concentration of undertakings shall process the review with efficiency, and shall give the notifying undertaking or interested parties chances to make statements, facilitate the information communication with the notifying undertaking and interested parties.

In the preliminary review, for a concentration obviously not characterized by competition restriction or competition elimination, the reviewing authority of concentration of undertaking shall make a timely decision that there shall be no further review process to be taken, and shall, in a proper method, immediately notify the notifying undertaking of such a decision before the formal written notification is made to the undertakings.

Article 13 [Secret Keeping Obligations]

Officials of the reviewing authority of the concentration of undertakings are obligated to keep the following information confidential: the business secrets obtained in the consultation before the notification and that obtained in the materials provided by the undertaking, and information referred to as secret information explicitly by the undertaking.

Article 14 [Further Process of Review]

Where the reviewing authority of the concentration of undertakings decides to make further process of review, to the notifying undertaking the further review shall be processed in accordance with relevant rules in the AML.

Article 15 (Legal Liabilities for Failure of Notification of Concentration and for False Information)

Undertakings failing to notify a concentration where the notification is necessary, or holding back important information or submitting false information in the notification, shall be punished respectively according to Article 48 and 52 of the AML.

Article 16 (Legal Liabilities for Officials)

Officials of the reviewing authority of the concentration of undertakings abusing their power, neglecting their duties, practicing graft, or disclosing business secrets or confidential information obtained, if it is constituting a criminal offence, shall be pursued for criminal liabilities in accordance with the law. If the wrongdoing is not to the degree of constituting a criminal offence, administrative sanction shall be imposed in accordance with the law.

Article 17 (Drafting of the Detailed Guidelines)

As needed, the reviewing authority of the concentration of undertakings may make detailed guidelines on the notification in accordance with the AML and the Rules.

Article 18 (Effective Date)

These Rules shall come into effect as of August 1, 2008.

APPENDIX E
(reprinted unedited)

**NOTICE CONCERNING THE SOLICITATION OF PUBLIC
OPINIONS WITH RESPECT TO THE STATE COUNCIL
REGULATIONS ON NOTIFICATION OF
CONCENTRATIONS OF UNDERTAKINGS**

(Wilmer Hale, trans.)

Issued by the Legislative Affairs Office of the State Council

In order to further improve the transparency of legislation and raise the quality of legislation, the Legislative Affairs Office of the State Council ("LAO") now publishes the State Council Regulations on Notification of Concentrations of Undertakings (draft for solicitation of opinions) and solicits opinions from all sectors of society. The relevant issues are notified as follows:

Main contents of the Draft for which opinions are solicited

The contents of the draft for solicitation of opinions mainly provided in three respects:

1. Clarification of meanings of relevant concepts regarding concentrations of undertakings.

The Anti-Monopoly Law does not prescribe meanings with respect to "obtaining control of another undertaking" and "the capability to exercise determinative influence over another undertaking" in concentrations of undertakings. In order to enhance the practicality of relevant regulations, the draft expressly provides four particular circumstances under "obtaining control of another undertaking", and clarifies that "the capability to exercise determinative influence over another undertaking" means "to exercise determinative influence over the decision-making of production and operating policies of another undertaking". (Article 2)

2. Clarification of standards for notifications of concentrations of undertakings and their adjustment mechanism.

The draft provides three notification standards for concentrations of undertakings, where concentrations of undertakings which reach any of the following three items shall file prior notifications with the anti-monopoly enforcement authority under the State Council (Article 3). These three standards are:

- (1) global sales revenue during the previous fiscal year of all undertakings participating in the concentration exceeds Rmb 9 billion, and at least two of such undertakings' sales revenue in China during the previous fiscal year exceeds Rmb 300 million;
- (2) sales revenue in China during the previous fiscal year of all undertakings participating in the concentration exceeds Rmb 1.7 billion, and at least two of such undertakings' sales revenue in China during the previous fiscal year exceeds Rmb 300 million;
- (3) the concentration will result in an undertaking participating in the concentration occupying a greater than 25% share in the relevant market in China.

The above three notification standards provided in the draft for the solicitation of opinions shall uniformly govern concentrations of undertakings in all industries and sectors. Among of them, the first two standards use sales revenue of undertakings as parameters to make notification standards as objective and clear as possible, and easy for undertakings to understand and grasp with a clear behavioral expectation. The first standard takes into account sales revenue both globally and in China, the second standard only takes into account sales revenue in China. The third standard takes into account market share as a parameter, which supplements the first two standards. The numbers provided in the notification standards were proposed by experts from the Chinese Academy of Social Sciences in their monograph study report, which was calculated by building an economic model based on comprehensive research of notification standards for concentrations of undertakings in 48 countries and in accordance with China's per capita GDP in 2007 as well as consideration of other factors.

Because the notification standards for concentrations must be adapted to social and economic development level, market competition circumstances, industrial policy and anti-monopoly enforcement experience, and reflect fluctuations in price indices, all countries generally make adjustments with respect to notification standards for concentration of undertakings from time to time. The draft provides adjustment mechanisms with respect to notification standards for concentration of undertakings, i.e., the anti-monopoly enforcement authority under the State Council may propose amendments to notification standards in accordance with actual conditions; such amendments become effective after approval by the State Council (Article 5).

3. [The draft provides] other issues relevant to notification of concentrations of undertakings.
 - (1) Clarification of the persons responsible for notification of concentration of undertakings. The draft for solicitation of opinions provides the persons responsible for notification of concentrations of undertakings in varying circumstances, i.e., for merger undertakings, the undertakings participating in the merger shall jointly file the notification with the anti-monopoly enforcement authority under the State Council; for any undertaking obtaining control of another undertaking through the acquisition of equity interests or assets or by contract, the undertaking obtaining control rights shall file the notification with the anti-monopoly enforcement authority under the State Council (Article 7).
 - (2) Clarification of the prior consultation mechanism. The draft for solicitation of opinions provides that undertakings may consult with the anti-monopoly enforcement authority under the State Council with respect to any issue in connection with a notification prior to filing, and the anti-monopoly enforcement authority under the State Council shall provide necessary guidance to the undertakings (Article 8).
 - (3) Clarification of the requirements for documents and materials to be submitted in a notification. First, undertakings shall submit truthful and complete documents and materials, and must not submit any false information or omit any significant information; second, all documents and materials must be submitted in Chinese (Article 10).
 - (4) Expressly provide that notice shall be given for material changes. The draft for solicitation of opinions provides: if any material change occurs with respect to important facts of the concentration of undertakings after a notification has been filed, the undertakings shall timely inform the anti-monopoly enforcement authority under the State Council of the relevant circumstances (Article 12).
 - (5) Provide requirements for confidential information. The draft for solicitation of opinions provides: undertakings may request the anti-monopoly enforcement authority under the State Council to maintain all submitted documents and materials in confidence if they believe that any disclosure of such documents and materials may result in a material

- adverse impact; the anti-monopoly enforcement authority under the State Council shall keep documents and materials submitted by the undertakings in confidence if it deems the undertakings' application for confidentiality is reasonable; the anti-monopoly enforcement authority under the State Council and its personnel shall have the obligation of maintaining the confidentiality of trade secrets and other information for which confidentiality is required; the anti-monopoly enforcement authority under the State Council shall internally set up a strict confidentiality system (Article 13).
- (6) Provide an expedited initial review mechanism. Observing actual practice in various countries, the overwhelming majority of notifications of concentrations of undertakings do not require further review. In order to reduce the obligations of the parties concerned, the draft for solicitation of opinions provides an expedited initial review mechanism, i.e., the anti-monopoly enforcement authority under the State Council shall determine as early as possible not to conduct a further review with respect to any notification of a concentration which obviously will not result in the effect of eliminating or restricting competition, and timely inform the undertakings in writing (Article 14).

Other relevant issues

Relevant units and persons from all sectors of society may submit opinions for revisions with respect to the draft for the solicitation of opinions by April 12, 2008 by the following means:

1. log on to the PRC Government Legislative Information Website at: <http://www.chinalaw.gov.cn>, present your opinions with respect to the Draft through the Administrative Legislation Draft for Solicitation of Opinions Management Information System displayed on the left side of the
2. mail a letter containing your opinions to: Legislative Affairs Office of the State Council, P.O. Box 1750, Beijing 100017, and please mark "solicitation of opinions for provisions on notification of concentrations of undertakings" on the outside of the envelope.
3. By email to jzsb@chinalw.gov.cn.

Please submit your opinions by April 12, 2008.

March 27, 2008

**State Council Regulations on Notification of
Concentrations of Undertakings
(Draft for Solicitation of Opinions)**

Article 1 In order to clarify norms and procedures for the notification of concentrations of undertakings and standardize notifications of concentrations of undertakings, these Regulations are formulated in accordance with the Law of the People's Republic of China (the "Anti-Monopoly Law").

Article 2 Concentrations of undertakings refer to the following circumstances:

- (1) mergers of undertakings;
- (2) obtaining control of interests or assets;
- (3) obtaining control of or the capability to exercise d

Obtaining control of another undertaking as referred to in the previous paragraph shall include obtaining 50% or more of the equity interests or assets with voting rights of another undertaking, or becoming the owner of the largest portion of equity interests or assets with voting rights, or majority voting rights which may actually dominate another undertaking or determine the election of half or more of the members of the board of directors of another undertaking, as well as other circumstances as determined by the influence over another undertaking shall mean the exercise of determinative influence over the decision-making of production and operating policies of another undertaking.

Article 3 Undertakings shall file a prior notification with the anti-monopoly enforcement authority under the State Council for concentrations which reach any of the following standards, and no concentration may be implemented without notification:

- (1) global sales revenue during the previous fiscal year of all undertakings participating in the concentration exceeds Rmb 9 billion, and at least two of such undertakings' sales revenue in China during the previous fiscal year exceeds Rmb 300 million;
- (2) sales revenue in China during the previous fiscal year of all undertakings participating in the concentration exceeds Rmb 1.7 billion, and at least two of such undertakings' sales revenue in China during the previous fiscal year exceeds Rmb 300 million;

- (3) the concentration will result in an undertaking participating in the concentration occupying a greater than 25% share in the relevant market in China.

With respect to the calculation of sales revenue, the characterization and actual conditions of different industries and geographies must be taken into account. Detailed rules shall be formulated by the anti-monopoly enforcement authority with consultation with other relevant authorities and departments under the State Council.

Article 4 For those concentrations of undertakings which do not reach any of the standards prescribed under Article 3 but which the anti-monopoly enforcement authority under the State Council deems may have the effect of eliminating or limiting competition in the relevant market, the anti-monopoly enforcement authority under the State Council may require such undertakings to file a notification in accordance with these Regulations.

Article 5 The anti-monopoly enforcement authority under the State Council may propose amendments to notification standards in accordance with actual conditions; such amendments shall become effective after approval by the State Council.

Article 6 Undertakings need not file notifications with the anti-monopoly enforcement authority under the State Council under any of the following circumstances:

- (1) one of the undertakings participating in the concentration holds 50% or more of the voting rights of the equity interests or assets of the other undertakings;
- (2) 50% or more of the equity interests or assets with voting rights of each undertaking participating in the concentration are held by the same undertaking which is not participating in the concentration.

Article 7 For mergers of undertakings, the undertakings participating in the merger shall jointly file the notification with the anti-monopoly enforcement authority under the State Council.

For any undertaking obtaining control of another undertaking through the acquisition of equity interests or assets, the undertaking obtaining control rights shall file the notification with the anti-monopoly enforcement authority under the State Council.

For any undertaking obtaining control of or the capability to exercise determinative influence over another undertaking by contract or other means, the undertaking obtaining control of or capability to exercise determinative influence over another undertaking shall file the notification with the anti-monopoly enforcement authority under the State Council.

Article 8 Undertakings may consult with the anti-monopoly enforcement authority under the State Council with respect to any issue in connection with the notification prior to filing, and the anti-monopoly enforcement authority shall provide relevant guidance to the undertakings.

Article 9 Undertakings which file a notification of a concentration with the anti-monopoly enforcement authority under the State Council shall submit the following documents and materials:

- (1) application;
- (2) explanation of the concentration's impact on conditions of competition in the relevant market;
- (3) concentration agreement;
- (4) financial and accounting reports of the undertakings participating in the concentration for the previous fiscal year, audited by a certified public accountant;
- (5) such other documents and materials as required by the anti-monopoly enforcement authority under the State Council.

The application shall provide the names, domiciles, and scope of business of the undertakings participating in the concentration as well as the date of the concentration and such other matters as prescribed by the anti-monopoly enforcement authority under the State Council.

Article 10 Undertakings shall submit truthful and complete documents and materials, and may not submit any false information or omit any significant information. All documents and materials shall be submitted in Chinese.

Article 11 If the documents and materials submitted in the notification by the undertakings are incomplete, the anti-monopoly enforcement authority under the State Council shall timely inform the undertakings of any documents and materials required to be supplemented, as well as the time limit for submitting the supplement. A notification shall be deemed as having never been filed if the documents and materials are not supplemented within the prescribed period.

For supplemental materials and documents submitted by the undertakings in accordance with the previous paragraph, the time limit for an initial review conducted by the anti-monopoly enforcement authority under the State Council provided under Article 25(2) of the Anti-Monopoly Law shall be calculated from the date of receipt of all documents and materials

Article 12 If any material change occurs with respect to important facts of the concentration of undertakings after a notification has been filed, the undertakings shall timely inform the anti-monopoly enforcement authority under the State Council of the relevant circumstances.

If circumstances as provided in the previous paragraph have occurred, the time limit for an initial review conducted by the anti-monopoly enforcement authority under the State Council shall be calculated from the date of receipt by the anti-monopoly enforcement authority under the State Council of all materials evidencing the change of facts.

Article 13 Undertakings may request the anti-monopoly enforcement authority under the State Council to maintain all submitted documents and materials in confidence if they believe that any disclosure of such documents and materials may result in a material adverse impact.

The anti-monopoly enforcement authority under the State Council shall keep documents and materials submitted by the undertakings in confidence if it deems the undertakings' application for confidentiality to be reasonable, and may require such undertakings to submit a non-confidential summary of the documents and materials.

The anti-monopoly enforcement authority under the State Council and its personnel shall have the obligation of maintaining confidentiality with respect to trade secrets known from consultations prior to filing and in documents and materials submitted by the undertakings and information for which the undertakings expressly require confidentiality.

The anti-monopoly enforcement authority under the State Council shall internally set up a strict confidentiality system.

Article 14 The anti-monopoly enforcement authority under the State Council shall set up an expedited initial review mechanism, and determine as early as possible not to conduct a further review with respect to any notification of a concentration which obviously will not result in the effect of eliminating or restricting competition, and timely inform the undertakings in writing.

Article 15 If the anti-monopoly enforcement authority under the State Council makes a decision to further review the concentration, it shall conduct such further review in accordance with relevant provisions of the Anti-Monopoly Law.

Article 16 If any undertaking conducts a concentration of undertakings but fails to file a notification of such as required under these Provisions, penalties shall be imposed in accordance with Article 48 of the Anti-Monopoly Law

Article 17 If the staff of the Anti-Monopoly Enforcement Authority under the State Council abuse their powers, neglect their duties, commit misdeeds or disclose trade secrets or confidential information which constitutes a crime, criminal liability shall be duly pursued; if a crime is not constituted, disciplinary action shall be duly taken.

Article 18 The anti-monopoly enforcement authority under the State Council may propose detailed guidelines for the notification of concentrations of undertakings, which shall be formulated and promulgated by the anti-monopoly commission of the State Council.

Article 19 These Regulations shall enter into force as of August 1, 2008.