

October, 2011

**PRC Trademark Law** (Revision Draft for Comments) (中华人民共和国商标法[修订草案征求意见稿]), released by the Legislative Affairs Office of the State Council.

Compared to the current PRC Trademark Law, the draft Trademark Law Revision ("draft law") introduces the following substantial and procedural changes:

- Substantial changes
  - Under the current Trademark Law, only visually perceptible signs, including words, figures, letters, numbers, three-dimensional signs, color combinations, and combinations of these can be registered as trademarks. Under the draft law, sounds can be registered as trademarks, and a single color can also be registered in addition to color combinations.
  - Under the current Trademark law, only well-known trademarks registered in China enjoy cross-class protection; while under the draft law, considerably distinctive trademarks that have already had a certain degree of influence in the market may also enjoy cross-class protection.
  - To eliminate trademark squatting, under the draft law trademark applications filed with the PRC Trademark Office may be rejected if they are identical or similar to a prior user's trademark that had been used on the same or similar goods in China, and the applicant is aware of the prior user's trademark due to business relationships, contacts, regional relationships or other relationships with the prior user.
- Procedural changes
  - Currently, only Chinese applicants (either natural persons or entities) can make trademark applications online, while foreign applicants must file their applications in writing. Under the draft law, to make foreigners' trademark applications more efficient, foreign applicants may also apply for trademark registration online, and in writing as before.
  - Under the current Trademark Law, if applicants intend to apply for a trademark to be used on goods or services under several classes, several applications must be filed separately under each class. Under the draft law, applicants can file one application to register a trademark under all the concerned classes.
  - Under the current Trademark Law, anyone can oppose a trademark registration during the three-month publication period. Under the draft law, only holders of prior rights or interested parties can file an objection with the Trademark Office. Although the term "interested party" is not defined under the draft law, it is considered that the aim of this change is to prevent trademark applicants from making *mala fide* objections.



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- Under the current Trademark Law, applicants have 15 days to decide whether to appeal to the Trademark Review and Adjudication Board for a review process if an application is rejected. Under the draft law, applicants have 30 days to make that decision, which is considered more reasonable than the 15-day period.

*Date of issue: September 1, 2011. Deadline for submitting comments: October 8, 2011.*

**Interim provisions on assessing the impact of concentration of business operators on competition** (关于评估经营者集中竞争影响的暂行规定) (the "Interim Provisions"), issued by the Ministry of Commerce ("MOFCOM")

Under China's Anti-Monopoly Law, merger and acquisition ("M&A") transactions that could result in a change in control of a business operator, regardless of whether the parties involved are located in China, must be notified to MOFCOM for merger review if the parties involved meet certain thresholds. If MOFCOM considers the concentration resulting from a transaction could eliminate or restrict competition, it may decide to block the transaction. However, if the parties involved can prove that the positive effects of a proposed concentration outweigh the negative impacts, MOFCOM may decide to allow the transaction to proceed, but, on occasion, it may impose restrictive conditions to reduce any negative impacts.

Although the Anti-Monopoly Law outlines the relevant facts that MOFCOM should consider when conducting anti-monopoly merger reviews, there has been no clear regulative guidance on how MOFCOM should conduct the merger review since the Anti-Monopoly Law came into force on August 1, 2008, until the release of the Interim Provisions, which establish MOFCOM's approaches for merger review.

Under the Interim Provisions, MOFCOM will consider issues in line with the "theories of harm" established under mature competition law jurisdictions to evaluate the anticompetitive effects; that is, MOFCOM will consider the unilateral effects, coordinated effects, and vertical and conglomerate effects of mergers.

The Interim Provisions also establish analytical tools for MOFCOM to assess pre-transaction and post-transaction market-concentration levels, namely, HHI (Herfindahl-Hirschman Index) and CRN (Industry Concentration Index).

The Interim Provisions set out positive effects that parties involved in the concerned mergers may try to prove to MOFCOM; i.e., the positive effects of the transaction outweigh the negative effects.

Notably, MOFCOM considers the public interest and the healthy development of related industry when it conducts its anti-monopoly merger review, giving it broad discretion.

*Date of issue: August 29, 2011. Effective date: September 5, 2011.*

**Opinions on supporting enterprise mergers, acquisitions, and reorganizations by standardizing registration of enterprise mergers and divisions** (Draft for public consultation) ("Draft Opinions") (关于规范公司合并分立登记支持企业兼并重组的意见), issued by State Administration for Industry and Commerce ("AIC")

The Draft Opinions consolidate merger and division registration requirements and procedures established in other relevant laws to give companies a clearer and more comprehensive guide on merger and division registration.

Under the Draft Opinions, registration of mergers and divisions of Chinese domestic companies are governed solely by the Draft Opinions, and registration of mergers by Chinese domestic companies and foreign invested

enterprises ("FIEs") and divisions of FIEs resulting in surviving or newly incorporated Chinese domestic companies are governed by the Draft Opinions and other relevant laws, such as the PRC Company Law, Administrative Regulations on Company Registration, and Rules on Mergers and Divisions of FIEs.

Under the Draft Opinions, the following issues must be decided by merger or division agreements and go through the relevant registration procedures:

- The amount of registered capital and paid-in capital of the surviving company or newly incorporated company resulting from a merger or division.
- The percentage of capital contribution and the amount of subscribed or paid-in capital of the shareholders, subject to approval where appropriate.
- The plan for the contribution of the unfulfilled capital amount before the merger or division. The contribution of the unfulfilled capital amount must be completed within the time limit fixed before the merger or division.
- The disposal of a merged or divided company's branch companies.
- The disposal of a merged or divided company's equity in other limited liability companies.

*Date of issue: August 29, 2011. Deadline for submitting comments: August 29, 2011.*

**Notice on the enterprise and individual income tax exemption on interest income derived from bonds issued by the local government** (Cai Shui [2011] No. 76) (关于地方政府债券利息所得免征所得税问题的通知), issued by State Administration of Taxation ("SAT") and Ministry of Finance ("MOF")

Interest earned from purchasing local government bonds issued in 2009, 2010 and 2011 do not accrue enterprise income tax and individual income tax.

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