



《未依法申报经营者集中调查处理暂行办法》（征求意见稿）公开征求意见

“Preliminary Regulations on the Investigation & Treatment of Failure to Report Concentration of Undertakings” (Opinion Solicitation Draft) Now publicly seeking comments

为规范对达到申报标准但未依法申报的经营者集中的调查处理，根据《中华人民共和国反垄断法》和《国务院关于经营者集中申报标准的规定》，商务部拟制定《未依法申报经营者集中调查处理暂行办法》。现对《未依法申报经营者集中调查处理暂行办法》（征求意见稿）公开征求意见，意见反馈截止日期为2011年6月23日。

In order to regulate the investigation and treatment of the failure to report the concentration of undertakings beyond the reporting legal threshold, in accordance with “The PRC Anti-Monopoly Law” and “Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings”, the Ministry of Commerce, or MOFCOM, plans to issue “Preliminary Regulations on the Investigation & Treatment of Failure to Report Concentration of Undertakings”. Presently, public comments are solicited on “Preliminary Regulations on the Investigation & Treatment of Failure to Report Concentration of Undertakings” (Draft for comment solicitation), with a deadline for public comments set on June 23rd of 2011.

未依法申报经营者集中调查处理暂行办法 (征求意见稿)

Preliminary Regulations on the Investigation & Treatment of Failure to Report Concentration of Undertakings” (Draft for comment solicitation)

第一条 为规范对达到申报标准但未依法申报的经营者集中的调查处理，根据《中华人民共和国反垄断法》（以下简称《反垄断法》）和《国务院关于经营者集中申报标准的规定》（以下简称《规定》）的有关规定，制定本办法。

Article 1: In order to regulate the investigation and treatment of the failure to report the concentration of undertakings beyond the reporting legal threshold, in accordance with “The PRC Anti-Monopoly Law” (hereinafter, “Anti-Monopoly Law”) and “Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings” (hereinafter, “State Council Provisions”), the following regulations are promulgated.

第二条 商务部负责对未依法申报经营者集中的调查处理工作。商务部根据工作需要，可以委托省级商务主管部门协助调查本地区内的未依法申报经营者集中。

Article 2: MOFCOM is responsible for the investigation and treatment of the failure to report the concentration of undertakings beyond the reporting legal threshold. According to the need, MOFCOM

may delegate to provincial level Commerce departments to assist in the investigation of illegal non-reporting of the concentration of undertakings within the provincial jurisdiction.

第三条 本办法所称未依法申报经营者集中，是指经营者集中达到国务院规定的申报标准，经营者未依照《反垄断法》的规定事先向商务部申报而实施的集中。

Article 3: The illegal non-reporting of the concentration of undertakings refers to cases where the level of concentration has reached the level defined by the State Council's Reporting Standard, but the business operators still fail to report such concentration to MOFCOM as required by the Anti-Monopoly Law prior to the act of concentration.

第四条 商务部依法对涉嫌未依法申报经营者集中进行调查。对涉嫌未依法申报经营者集中，任何单位和个人有权向商务部举报；商务部应当为举报人保密。举报采用书面形式，并提供举报人和被举报人基本情况、涉嫌未依法申报经营者集中的相关事实和证据等内容的，商务部应当进行必要的调查。

Article 4: MOFCOM shall conduct investigations on suspected illegal non-reporting of the concentration of undertakings. Any organization or individual may report such suspected illegal non-reporting; their identity shall be kept confidential by MOFCOM. When a reported case is in writing to offer basic background of the suspected and the reporting parties, along with relevant facts and evidence of the suspected illegal non-reporting, MOFCOM shall conduct necessary investigations.

第五条 在立案前，商务部应当对举报人提供的相关事实和证据进行核实。

Article 5: Prior to establishing an investigation case, MOFCOM shall verify the facts and evidence offered by a reporting party.

第六条 对存在未依法申报重大嫌疑的经营者集中，商务部应当立案调查，并书面通知被调查的经营者。本办法所称被调查的经营者，是指《经营者集中申报办法》第九条所规定的申报义务人。

Article 6: For a concentration case of undertakings under substantial suspicion of illegal non-reporting, MOFCOM shall establish a case to investigate, and notify the investigated business operators in writing. The investigated business operators refer to the parties with a duty to report under Article 9 of "Regulations on the Reporting of the Concentration of Undertakings".

第七条 被调查的经营者应当在立案通知送达之日起十五日内，向商务部提交与被调查交易是否属于经营者集中、是否达到申报标准、是否已实施且未申报等有关文件、资料。

Article 7: An investigated business operator shall submit, within 15 days of the receipt of the written notice of an established investigation case, related documents and materials showing whether the transaction under investigation is a concentration of undertakings, whether the concentration has

reached the legal reporting threshold, and whether the transaction has already been completed without reporting, to MOFCOM.

第八条 商务部应当自收到被调查的经营者依据本办法第七条提交的文件、资料之日起六十日内，对被调查的交易是否属于未依法申报经营者集中进行调查。

属于未依法申报经营者集中的，商务部应进行进一步调查，并书面通知被调查的经营者。

被调查的经营者应当自收到商务部书面通知之日起三十日内，按照《经营者集中申报办法》的规定向商务部提交申报文件、资料。尚未完成集中的，经营者应当停止实施集中。

Article 8: MOFCOM shall, within 60 days of receiving the documents submitted by the investigated business operators under Article 7, commence investigating whether the investigated transaction falls under the illegal non-reporting case of the concentration of undertakings.

If the investigated transaction is found to be a case of illegal non-reporting of the concentration of undertakings, MOFCOM shall conduct further investigations, and notify the investigated business operators in writing.

The investigated business operators shall, within 30 days of receiving the written notification from MOFCOM, provide the documents and materials as required under “Provisions of Business Operators Reporting the Concentration of Undertakings”. If the transaction being investigated is not yet concluded, the business operators shall suspend the transaction.

第九条 商务部进行调查，可以采取《反垄断法》第三十九条规定的措施，也可以根据需要征求其他政府部门、行业协会、经营者和消费者等单位或者个人的意见。

Article 9: In the investigation conducted by MOFCOM, measures under “Anti-Monopoly Law” Article 39 may be taken, it may also request other government departments, business associations, business operators, or consumers to offer their opinions.

第十条 商务部调查未依法申报经营者集中，调查人员不得少于二人。

调查人员进行询问和调查，应当制作笔录，并由被询问人或者被调查人签字。

Article 10: In an investigation conducted by MOFCOM on the illegal non-reporting of the concentration of undertakings, there shall be at least two investigators.

For interviews and investigations, the investigators shall produce written records, which shall be signed by the interviewees or parties being investigated.

第十一条 在调查过程中，被调查的经营者、利害关系人有权陈述意见。商务部应当对被调查的经营者、利害关系人提出的事实、理由和证据进行核实。

Article 11: During the investigation process, an investigated business operator or other related parties have the right to make statements. MOFCOM shall verify the facts, reasons and evidence asserted in such statements.

第十二条 被调查的经营者、利害关系人或者其他有关单位或者个人应当配合商务部依法履行

职责，不得拒绝、阻碍商务部的调查。

Article 12: The business operators under investigation, related parties, or other related organizations and individuals shall assist MOFCOM's investigation, and may not refuse or obstruct the investigation.

第十三条 商务部按照《反垄断法》及《经营者集中审查办法》等的相关规定，评估未依法申报经营者集中是否具有或者可能具有排除、限制竞争效果。

Article 13: MOFCOM shall, in accordance with "Anti-Monopoly Law" and "Provisions for the Review of Concentration of Undertakings" and related regulations, evaluate whether the unreported concentration of undertakings possesses, or possibly possesses, the effect of eliminating or restricting competition.

第十四条 经营者违反本办法实施集中的，商务部应责令停止实施集中、限期处分股份或者资产、限期转让营业以及采取其他必要措施恢复到集中前的状态，可以处五十万元以下的罚款。

商务部依据前款进行处理时，应当考虑未依法申报行为的性质、程度、持续的时间，以及集中是否具有或者可能具有排除、限制竞争效果等因素。

Article 14: If business operators conduct a concentration transaction in violation of this statute, MOFCOM shall order the immediate suspension of the transaction, or a proper disposal of the shares or assets involved in a timely manner, or a divestiture of certain businesses, or other necessary measures in order to revert the status to the status prior to the concentration of undertakings. A fine of less than RMB 500,000 may also be assessed. In determining the corrective or punitive measures, MOFCOM shall consider the nature, degree, duration of the unreported conduct, and whether there exists, or possibly exists, the effect of eliminating or restricting competition.

第十五条 商务部在依据本办法第十四条作出处理决定前，应当将其调查结论及所依据的事实和证据告知被调查的经营者。

被调查的经营者应当在商务部设定的期限内提交书面意见；书面意见应当包括相关事实和证据。

Article 15: Before MOFCOM makes its final determination under Article 14, it shall notify the investigated business operators the investigation results and supporting facts and evidence. The investigated business operators shall submit a written opinion within the deadline set by MOFCOM; the written opinion should include relevant facts and evidence.

第十六条 商务部应当将依据本办法第十四条作出的处理决定书面通知被调查的经营者。对未依法申报经营者集中的处理决定可以向社会公布。

Article 16: MOFCOM shall notify the investigated business operators, in writing, of its final determination under Article 14. Decisions on cases of illegal non-reporting of the concentration of undertakings may be publicly announced.

第十七条 对商务部依法实施的调查，被调查的经营者拒绝或者未按要求提供有关材料、信息，或者提供虚假信息，或者隐匿、销毁、转移证据，或者有其他拒绝、阻碍等不配合调查行为的，商务部依据《反垄断法》第五十二条的规定给予处罚。

Article 17: In an investigation by MOFCOM, if an investigated business operator refuses or fails to provide requested materials or information, or provides false information, or conceals, destroys, or removes evidence, or otherwise refuses or obstruct the investigation uncooperatively, MOFCOM shall penalize the operator according to Article 52 of "Anti-Monopoly Law".

第十八条 对于必须送达被调查的经营者的书面文件，送达方式参照《中华人民共和国民事诉讼法》的有关规定执行。

商务部以公告送达方式送达的，应在商务部官方网站上公布需送达的文件。

Article 18: Where written documents must be delivered to an investigated business operator, the method of delivery shall be governed by the corresponding provisions of "Civil Procedure Law of the People's Republic of China". Where the delivery is to be achieved by public notice, the written documents shall be posted on MOFCOM's official public website.

第十九条 经营者对商务部依据本办法做出的决定不服的，可以先依法申请行政复议；对行政复议不服的，可以依法提起行政诉讼。

Article 19: If an investigated business operator does not agree with MOFCOM's decision under this law, it may request an administrative reconsideration; if the operator is not satisfied with the reconsideration, it may file an administrative proceeding.

第二十条 商务部、被调查的经营者以及其他单位和个人应当对调查过程中知悉的商业秘密和其他需要保密的信息保密，但根据法律法规规定应当披露的或者事先取得商业秘密权利人同意的除外。

Article 20: MOFCOM, the investigated business operators and other organizations or individuals shall keep confidential any trade secret and other confidential information, except where required by law to be disclosed or with advanced consent of the party having rights to the trade secret.

第二十一条 本办法自 年 月 日起施行。

Article 21: This statute is effective as of _____.