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PRC Government Speeds Up Process for Rule-Making Related to Pricing Monopoly to Enforce Anti-Monopoly Law

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Executive Summary

On 13 July 2010, the National Development and Reform Commission (the "**NDRC**") of the People's Republic of China ("**PRC**") published draft special regulations for soliciting public comments, *i.e.*, the *Draft Special Regulations for the Penalties on Illegal Pricing Activities during Abnormal Market Price Fluctuation Periods* (the "**Draft Special Regulations**"). These Draft Special Regulations were part of the recent efforts by the NDRC to curb price manipulation and price related monopoly activities that are prohibited under the PRC Anti-Monopoly Law ("**AML**").

On 25 May 2010, the State Administration for Industry and Commerce (the "**SAIC**") issued for public comment three draft implementing rules for the PRC AML related to prohibitions against monopoly agreements, prohibitions against abuse of market dominant positions, and prohibitions against activities eliminating or restricting competitions through abuse of administrative power.

It is apparent that the PRC anti-monopoly law enforcement authorities are strengthening their monitoring and regulation of coordinated activities and tacit collusion between

competing parties to implement any monopoly agreements, in particular price manipulation and conspiracies to fix prices.

The provisions of the above recently issued draft regulations cover routine business operations of companies doing business in or related to the PRC. It is advisable that companies that have business operations within and related to the PRC study these regulations closely and monitor developments to ensure AML compliance once these drafts become final and are formally promulgated.

Background

In accordance with the AML, the PRC State Council has designated the Ministry of Commerce (known as "**MOFCOM**"), the SAIC, and the NDRC to be the three anti-monopoly enforcement authorities. MOFCOM serves as the sole anti-monopoly review authority that is in charge of merger and acquisition control. The responsibilities for monitoring and regulating abuses of dominant market position, monopoly agreements, and abuse of administrative powers are divided between the NDRC and the SAIC. While the NDRC oversees the price-related aspects of rule-making and enforcement, the SAIC is responsible to

supervise and regulate any non-price-related aspects.

In July 2010, the NDRC fined a PRC domestic wholesaler in northern China's Jilin Province RMB1 million for organizing "The First Seminar for Green Mung Bean Markets" during which 109 wholesale companies from 16 provinces and regions acted jointly to spread fake information with the goal of increasing green mung bean prices. In March 2010, a county-level cold-storage association in Henan Province issued a notice to the members of the association to fix the price of cold-storage for garlic in the range of RMB260 to RMB320 for the particular measurement unit. The Henan counterpart of NDRC, together with the local pricing authorities, investigated this case and fined the association RMB80,000.

Through the recent cases and the circulation of the Draft Special Regulations, the NDRC is intensifying its efforts to crack down on profiteering that the PRC government fears could unleash more serious inflation.

Introduction to the Draft Special Regulations

A. Time of Application

Compared to other pricing regulations, such as the *PRC Pricing Law* and the *Regulations for Administrative Punishments of Illegal Pricing Activities*, which are broadly applicable to business transactions during the ordinary course of business, the Draft Special Regulations, after the final version is formally promulgated, will be applicable only to certain specific illegal activities during certain special times. Namely, only when abnormal fluctuations of market prices of certain important products and services (such as agricultural products for daily life, etc.) that will materially impact the public life and enterprises' production and that are subject to the approval of the governmental authorities in charge of pricing (e.g., the NDRC and the pricing bureau) and governments at the municipal and provincial levels, will such special regulations be enforced and implemented to punish the

statutory specified illegal activities.

B. Specific Prohibited Activities

The Draft Special Regulations strengthen monitoring and punishment for particular violations including the following major specific violations: (i) fabricating and circulating misleading or fake information about price hikes by business operators and other entities or individuals; (ii) hoarding of goods; (iii) forcing prices up to make exorbitant profits (i.e., the amount of difference between the purchase/product and sale prices exceeds double the same difference during the normal business transactions); and (iv) conspiring to fix or manipulate prices.

C. Punishments

Under the Draft Special Regulations, the penalties against the relevant business operators for the above-mentioned violations are up to five times of the illegal income. If there is no illegal income, the penalty will be in the range of RMB200,000 (approximately US\$29,500) to RMB2 million (approximately US\$295,000). Also, if the violations are very serious, the relevant price regulatory authorities can order suspension of the company's business and/or coordinate with the SAIC or its local counterparts to revoke the business license of the company. It is also worth noting that under existing regulations, the existing statutory punishments are only applicable to relevant business operators. Under the Draft Special Regulations, any entities or individuals that fabricate and circulate misleading or fake information about price hikes other than those related to relevant business operators are also subject to penalties in the range of RMB100,000 (approximately US\$14,706) to RMB1 million (approximately US\$147,060) for entities and RMB10,000 to RMB100,000 for individuals. If any industrial associations or other organizations organize business operators in price manipulation or conspiracy to fix/increase prices, such associations or organizations will be charged up to RMB500,000 (approximately US\$73,530). Such associations and organizations are also

subject to business license or registration revocation if the violations are serious.

If any entities or individuals refuse to submit documents/information required by the price regulating authorities, hide and destroy evidence, or create hurdles to investigations by the authorities on illegal pricing activities, the authorities can charge said entities or individuals a fine of up to RMB200,000.

D. Simplified Procedures for Investigations and Punishments

Since these Draft Special Regulations, after being formally promulgated after finalization, aim to crack down on pricing violations in certain special circumstances as described under item A. above, in an emergency the regulatory authorities are authorized to investigate and punish violations through simplified procedures, such as: immediately stopping and punishing illegal pricing activities at the source of the violations; ordering suspension of the business and placing a levy on products; undergoing notice and hearing procedures in lieu of written submissions, etc.

Observations

Since the promulgation of the AML in 2007, the three AML enforcement authorities (MOFCOM, SAIC, and NDRC) have been active in proposing and issuing new regulations and rules to implement the AML. These regulations and rules substantially clarify certain ambiguous concepts and provisions of the AML. Also, by circulating draft regulations to the public for comments,

the enforcement authorities collected comments from domestic and foreign business operators as well as business organizations. It is clear that the PRC AML enforcement authorities are paying more attention to the enforcement of the AML and the regulations and the investigations addressing violations. Furthermore, it is apparent that the PRC authorities are recently more aware of the attention other countries are giving to price fixing conspiracies and related coordinated activities, which we believe will result in an increased focus by the PRC authorities not only on PRC domestic companies but also on foreign entities in China.

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