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CHINA'S NEW DRAFT ANTI-MONOPOLY REGULATIONS

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On August 12, 2009, China's primary anti-monopoly pricing enforcement agency, the National Development and Reform Commission (NDRC), announced a three-week comment period for new draft regulations for the Anti-Monopoly Law of 2008 (AML). During this recently concluded comment period, the business and legal communities voiced concern regarding certain vague provisions in the draft regulations and raised questions as to how strictly the new regulations will be interpreted and implemented.

Specifically, Article 5 of the draft regulations states that overt and explicit agreements are not the only means by which companies can be held liable for price fixing. Additionally, the draft regulations suggest that the NDRC may find collusion among companies by inference based on "other coordinated practices between two or more business operators. . . which have the effect of excluding or restricting competition with regard to price." Although the draft regulations require some element of communication between companies in order to prove price fixing, it is unclear what level and content of communication is necessary. Moreover, a literal reading of the draft regulations suggests that similar or parallel behavior alone can create a presumption of price fixing between two or more companies. This presumption creates a burden that businesses must rebut in order to prove that they have not engaged in any coordinated, monopolistic behavior. Chinese legal experts have suggested that this burden might chill competition, if applied strictly.

Commentators welcomed Article 17 of the draft regulations, which clarifies a long-standing concern in the AML regarding pricing. The original law failed to define what constitutes unfairly high or low price. The draft regulations clarify that

pricing will be analyzed according to several factors, including whether the goods are being sold at "substantially" above or below cost. However, the draft regulations fail to define how cost shall be measured, and do not set forth express exceptions in the event a company may need to sell below cost under certain circumstances.

In general, the draft regulations were welcomed as helpful clarifications to the existing enforcement framework, providing businesses with additional insight into how monopolistic behavior will be regulated in China. In anticipation of the NDRC adopting the final regulations, companies should give careful consideration to adopting appropriate compliance programs to avoid any potential AML violations.

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