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## New PRC Anti-Price Fixing Rules

On December 29, 2010, China’s National Development and Reform Commission (NDRC) issued the Regulations on Anti-Monopolistic Pricing Practices (“Anti-Monopolistic Pricing Regulations”) and Procedural Regulations on the Administrative Enforcement of the Regulations on Anti-Monopolistic Pricing Practices (“Procedural Regulations”). Formal implementation of the regulations will begin February 1, 2011, and constitute a further step towards clarifying China’s existing body of anti-monopoly laws and regulations.

While the general aim of the Anti-Monopolistic Pricing Regulations and Procedural Regulations is to enhance market competition, they also provide government regulators with additional measures to tackle domestic inflation pressures, which saw consumer prices rise 5.1 percent from a year earlier in November of 2010.

### The NDRC as a Key Regulator of Market Competition

The NDRC, along with the State Administration of Industry and Commerce (SAIC) and the Ministry of Commerce (MOFCOM), acts as a key regulator on market competition and prohibitions on monopolistic activities. With the former regulating agency of pricing activity’s merger into the NDRC, the NDRC is now in charge of the regulation as well as corresponding administrative enforcement on monopolistic pricing agreements, abuse of dominant market position and the administration of anti-monopolistic pricing measures, which form the main focuses of the Anti-Monopolistic Pricing Regulations and Procedural Regulations.

### The Anti-Monopolistic Pricing Regulations

#### 1. General Provisions

The Anti-Monopolistic Pricing Regulations apply to instances of monopolistic pricing in commercial activities occurring within China, as well as those occurring abroad, but have the effect of eliminating or restricting market competition domestically.

As defined by the Anti-Monopolistic Pricing Regulations, monopolistic pricing arrangements include monopolistic pricing agreements concluded between business operators, excluding or restricting market competition by business operators with dominant market positions via pricing measures, and abuses of administrative power tending to exclude or restrict competition via pricing measures by administrative agencies or organizations with administrative power over the management of public affairs.

## 2. Monopolistic Pricing Agreements

The Anti-Monopolistic Pricing Regulations defines monopolistic pricing agreements as “price related agreements, decisions or other concerted acts excluding or restricting competition.” Article 6 of the Anti-Monopolistic Pricing Regulations defines the factors which should be taken into consideration in determination “other concerted acts,” namely, consistency in pricing decisions as well as collusion among business operators in making pricing decisions.

As compared to the general prohibitions against collusive price-fixing and price adjustments contained in PRC Anti-monopoly Law (AML), the Anti-Monopolistic Pricing Regulations details in Article 7 specific instances of prohibited price-fixing and price adjustments, including:

- 1) agreements that fix or adjust the prices of products or services;
- 2) agreements that fix or adjust price ranges;
- 3) agreements that fix or adjust fees, discounts or other charges related to prices;
- 4) agreements that set agreed-upon prices as the basis for transactions with third parties;
- 5) agreements setting a standard pricing formula;
- 6) agreements which prohibit price adjustments without the consent of other contracting parties;
- 7) agreements that fix or adjust pricing indirectly through other means; and
- 8) agreements determined as monopolistic pricing agreements by the governing department of pricing under the State Council.

At the same time, the Anti-Monopolistic Pricing Regulations references the AML in providing for certain exceptions to the general prohibition against monopolistic pricing arrangements, such as agreements involving advancing technology, research, or the development of new products, improving product quality, enhancing resource conservation, environmental protection and relief efforts, or those protecting legitimate interests in foreign trade or foreign economic cooperation.

## 3. Dominant Market Undertakings Excluding or Restricting Competition through Pricing Measures

Article 17 of the AML contains a set of prohibitions applicable to market operators enjoying dominant market positions, such as the prohibition against selling products at unfairly high or low prices, selling products at below cost, refusing to deal with other market operators without justification, and exclusive dealings without justification.

The Anti-Monopolistic Pricing Regulations seeks to provide clarity to the AML by further defining the contours of these prohibitions. For example, with respect to a dominant market operator’s below cost sales, the Anti-Monopolistic Pricing Regulations provide that justifiable reasons include the disposal of fresh, live, seasonal or overstocked products, price reductions stemming from cessation of business, promotion of new products, and other justifiable reasons. With respect to exclusive dealings, the Anti-Monopolistic Pricing Regulations provide that justifications include ensuring product safety and quality, maintaining the brand’s image or improving service quality, to decrease cost or improve efficiency, and other justifiable reasons.

## The Procedural Regulations Provide Guidance in the Investigation and Enforcement of Monopolistic Pricing

The Procedural Regulations generally cover issues relating to the investigation of alleged instances of monopolistic pricing, including the investigation itself, the conclusion of such investigations, leniency rules and final determinations.

### 1. Leniency Provisions

According to Article 14 of Procedural Regulations, if a business operator actively reports instances of monopolistic pricing agreements and provide substantial evidence thereof, the administrative agency in charge of pricing activities may in its discretion, partially or fully exempt the whistleblower from punishment. The first whistleblower may be fully exempted. The second and subsequent whistleblowers may also be exempted to varying degrees.

### 2. Suspension of Investigations

A business operator under investigation for alleged monopolistic pricing may apply to suspend the investigation by submitting a written application promising to take specific measures towards remedying the alleged monopolistic pricing. Article 15 and 16 of Procedural Regulations provide specific matters which should be included in the application to suspend the investigation, including the facts related to the alleged violation, promise to take specific measures towards remedying the alleged violation, a timeline for remedial actions and other promises, as required. In particular, an investigation may be resumed if:

- 1) the business operator does not fully perform relevant undertakings as promised in the application; or
- 2) a material change occurs in the underlying factual basis in which the decision to suspend the investigation was granted; or
- 3) the decision to suspend the investigation was made based on incomplete or untrue information provided by the applicant.

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