

KIRKLAND ALERT

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Trend Toward Transnational Cooperation in Antitrust Enforcement Continues with Sino-U.S. Cooperation Agreement

In the next step toward globalization of antitrust enforcement, on Wednesday, July 27, 2011, the U.S. Department of Justice's Antitrust Division and the U.S. Federal Trade Commission signed a Memorandum of Understanding with China's three antitrust agencies intended to promote enhanced cooperation and communication among the antitrust enforcement agencies of the two jurisdictions. Transnational cooperation agreements have become increasingly common in recent years, as more countries pass tough antitrust regulations and the need for consistent enforcement becomes more apparent in the global market place. With this agreement in place, agencies in the United States, China and the European Union — the world's three largest economies — can now be expected to engage in heightened cooperation in developing antitrust policies and in coordinating investigations and enforcement.

The Sino-U.S. agreement formalizes cooperation that has already been occurring between U.S. and Chinese authorities on many levels. Based on our experience with similar agreements between the U.S. antitrust agencies and competition authorities in other jurisdictions, we anticipate that this agreement will lead to increased cooperation between the two jurisdictions not only at the policy level, but also with respect to specific antitrust investigations and enforcement.

China's Anti Monopoly Law

After years in the drafting process, the Chinese Anti Monopoly Law ("AML") took effect in 2008. Despite the relatively short life of the AML, Chinese enforcement agencies have already become prominent in the global antitrust enforcement landscape, developing sophisticated investigative techniques that have been put to use in several notable antitrust investigations. In one prominent example, shortly after the AML was passed, Chinese regulators blocked a \$2.4 billion bid by Coca Cola to acquire Huiyuan Juice, China's leading fruit juice maker. This move led some parts of the global business community to question whether the AML would be used not only to address traditional competition concerns but also to further industrial policy goals.

Sino-U.S. Memorandum of Understanding

While the Memorandum of Understanding does not change the existing antitrust laws in either China or the United States, it may alter the enforcement landscape. The agreement encourages enhanced communication and information-sharing between Chinese and U.S. enforcement agencies in a variety of ways, including:

- Implementing an annual "joint dialogue" among the five signatory agencies;
- Envisioning the establishment of ad hoc working groups to explore specific topics of joint interest;
- Laying the groundwork for training programs, workshops, study missions and internships;

- Continuing the established dialogue on multilateral competition law, and on proposed changes to competition laws, regulations, rules, and guidelines; and
- Cooperating in connection with individual cases.

To facilitate the effective pursuit of these cooperative activities, the agreement provides for the development of “detailed work plans” by the signatory agencies.

Implications for the Global Business Community

The new agreement has the potential to impact positively the expansion of foreign business interests into China. In announcing the agreement, U.S. enforcement agencies cited the need for predictable transnational enforcement, consistent application of remedies and a transparent relationship with the international business community.

As transnational cooperation becomes more common, companies have seen an increase in the capabilities and assertiveness of enforcement agencies in countries where antitrust laws are new or where enforcement has been historically weak. Training and sharing of institutional knowledge by U.S. agencies with decades of antitrust enforcement experience will add to and refine China’s already sophisticated investigative resources. Furthermore, the agreement encourages information sharing, which may lead to more enforcement efforts by both countries. While the agreement notably precludes the agencies from sharing confidential information where disclosure would be prohibited by law in either jurisdiction, much cooperation can still occur. Ultimately, the Sino-U.S. cooperation agreement may also result in more expansive and more aggressive enforcement efforts by agencies in both countries, especially if it allows the U.S. to gain access to information and witnesses in China, something that has historically been considered difficult for U.S. authorities to achieve.

With that in mind, it likely makes sense for companies doing business in both the U.S. and China to prepare for additional enforcement activity, and to assume that communication between the U.S. and China may lead to more commonality in enforcement. It is also likely that conduct once considered beyond the reach of either country’s enforcement agencies may now come within their grasp. Finally, companies need to appreciate that information that may be provided to one enforcement authority now may be more readily shared with officials in other countries, which will require consistency in companies’ positions and awareness of the implications of what previously were limited disclosures.

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