Statement of

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Regarding

ENFORCEMENT OF THE ANTIMONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA:

Effects on U.S. and Global Business – Issues and Prospects

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INTRODUCTION

I am honored by your invitation to appear before the Subcommittee on the important questions involving the recent enactment and first steps taken to enforce the broad-based competition law of the People's Republic of China, known as the Antimonopoly Law (AML). I understand that the Subcommittee is interested primarily in how these developments affect United States business. This presentation represents only my personal views, based on my individual understanding and experience. This testimony does not represent the views of Latham & Watkins LLP or any of its clients, or of any other individual or institution for that matter, although such views may unintentionally coincide.

As you can see from the biography submitted to Subcommittee staff counsel, I've spent my entire career as an antitrust lawyer and have experienced the full force of the unprecedented expansion of antitrust law around the world during the last quarter-century. The year that I graduated from law school, 1976, was the same year that the Hart-Scott-Rodino Act created the world's first premerger notification system. At that time and for the previous eighty-six years, antitrust law enforcement was an activity almost completely confined to the United States. Today, there is serious antitrust enforcement in over 100 jurisdictions throughout the world, including all major trading nations. Although the United States still has by far the longest and most extensive record in all forms of antitrust enforcement, other jurisdictions are rapidly gaining on us. They are adopting more severe penalties and remedies, increasing the scope and power of their procedural options both for government agencies and private litigants, and banding together in more creative forms of bilateral and multilateral enforcement cooperation.[1] To my knowledge this spectacular expansion in antitrust coverage is unprecedented in its speed and impact, compared to any other field of law. It has led to an enormous expansion in the cost and complexity of antitrust compliance for U.S. and other global businesses, and it has created

[1] The scope and speed of these developments is traced in two articles, Abbott B. Lipsky, Jr., *To the Edge: Maintaining Incentives for Innovation After the Global Antitrust Explosions*, 35 Georgetown J. Int'l L. 521 (2004), and Abbott B. Lipsky, Jr., *The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?*, 26 Fletcher Forum of World Affairs 59 (2002).

dramatic growth in the study of legal, economic and policy issues related to competition, and in the practice of antitrust law in all its forms.

RAPID IMPLEMENTATION OF AML MERGER ENFORCEMENT

China's antitrust rules were a long time in gestation, dating back at least to the early 1990's, but when the law was finally enacted in 2007, there was no time wasted in implementation. Within a very short time after China implemented its merger review process under the new AML, the responsible Chinese government agency, the Ministry of Commerce (known by its acronym MOFCOM), was conducting in-depth merger investigations and blocking or placing significant conditions on transactions involving major firms based in the United States and in other jurisdictions. By contrast, the European Union did not have a mandatory merger notification and approval process in place until 1990 – more than forty years after European competition rules were first adopted in the Treaty of Rome, which created the EU's first main predecessor, the European Economic Community. So, while China came a bit late to the antitrust "party", it finds itself seated near the head of the table.

In principal we should welcome China's arrival among the antitrust community enthusiastically. Particularly for a great nation with such an important place in the history of civilization, China's enactment of a competition law represents an important symbolic endorsement of free markets, competition, economic progress and the spirit of enterprise – ideas shared by the United States and other nations that we regard as sympathetic to our basic traditions. At a time when even our own nation's basic commitment to those ideals has been brought into question by some, China's embrace of antitrust law makes us realize how far the world has traveled from the era when the main danger to civilization was thermonuclear conflagration and the key international confrontations involved the profoundly conflicting economic visions of two feuding geopolitical blocs. As we begin to consider in detail how the implementation of China's AML is affecting U.S. and other businesses, we need to maintain the broader perspective so that the gauge and temper of our concern is not misconstrued as the early beginnings of any fundamental quarrel.

UNIQUE FEATURES OF AML IMPLEMENTATION

Among a variety of unique features of the AML and its legal and economic context, China is attempting to implement a complex, multiparty allocation of antitrust enforcement authority. While the merger review authority is lodged within the Antimonopoly Bureau of MOFCOM, authority over anticompetitive agreements and abusive conduct by dominant firms is divided between the National Development and Reform Commission and the State Administration for Industry and Commerce according to a distinction between price and non-price conduct. While the line between price and non-price conduct is familiar to antitrust lawyers from the United States and other jurisdictions, I am not aware that it has ever been used as the key means to divide enforcement responsibility between different antitrust enforcement agencies. There is also an Antimonopoly Commission at a higher policy level that coordinates the operations of the three main enforcement agencies and reports on antitrust matters to the State Council, the senior administrative authority of China's central government. The AML also provides possibilities for AML enforcement authority to be delegated to provincial or even municipal authorities in some circumstances.

Second, the enforcement mechanisms associated with conduct other than mergers, acquisitions and other structural transactions are still much less developed and less frequently exercised (so far as public information reveals) than the merger authority wielded by MOFCOM. While there have been a few reported investigations and cases involving price-fixing agreements or other types of anticompetitive conduct outside the merger sphere, the resolution of these cases does not always clearly rest on the AML alone, but often involves reliance on other Chinese statutes that can be used to regulate competitive conduct, such as the Price Law. You may be aware of commentary on the NDRC proceedings involving an alleged price increase by the Chinese Instant Noodle Association, which is sometimes used to provide an example of this tendency to involve multiple sources of law in the pursuit of specific cases involving market practices. But in general there is an intense contrast between enforcement of the merger rules – which look very much like the merger notification and approval processes of other familiar jurisdictions – and the enforcement of other rules. But there is no doubt that these other rules are coming into focus and will soon be tested by specific enforcement initiatives. Both SAIC and

NDRC have issued interim rules that will govern AML enforcement efforts under their jurisdiction.

A third important feature characterizing implementation of the AML is the substantial range of unknown variables that must be considered in predicting the likely enforcement intentions of the Chinese agencies that have responsibility under the AML. The Chinese took advantage of many opportunities to examine antitrust laws in jurisdictions in Asia and throughout the world, including Europe and the United States, in the long period of study and legislative work that led to the enactment of the AML. They relied on Chinese and foreign academics, and had extensive discussions with private lawyers from other jurisdictions, officials from government antitrust enforcement agencies in other nations and non-Chinese professional groups such as the American Bar Association Section of Antitrust Law. But the system developed by the Chinese, while based almost entirely on recognizable precedents from other jurisdictions, is uniquely Chinese.

The specific content of the AML provisions and the structure of the Chinese AML enforcement agencies are in some respects the least of the differences between Chinese antitrust enforcement and competition law as it is experienced in other parts of the world. The Chinese AML occurs within a broader economic, political and institutional context that is unfamiliar to U.S. business firms and other companies that participate in the global economy. China still bears many fundamental and unmistakable signs of its heritage, which included a lengthy period of heavy reliance on the ideology and practical instruments of central planning. This is manifested by a persistent legacy of government involvement in Chinese businesses and a certain pattern of governmental and economic structure. Importantly, the judicial system, which has played such a critical role in placing limits and imposing structure on U.S. antitrust enforcement, does not appear to play such a significant role in China at the moment, although the possibility that it could play a major role in the future is evident. This is in part due to differences in the role of judicial processes in China and in the position of the courts in the Chinese government structure, as compared with jurisdictions like the U.S.

ADJUSTING TO THE DYNAMICS OF AML IMPLEMENTATION

With so many elements of the Chinese AML and its enforcement structure shrouded in uncertainty and subject to a broad range of potential outcomes, it becomes extremely difficult to predict how U.S. business operations that come in contact with China might be affected by AML enforcement. Some significant part of this uncertainty is attributable to the usual breaking-in period that any new legal structure experiences. There are so many dynamic elements of Chinese law, policy, and economic patterns, however, that the uncertainties associated with the AML are compounded to an extent. Of course uncertainty is always a burden and a threat to business, whether U.S. businesses or other businesses that seek to benefit from the enormous opportunities that are clearly present in China.

There can be no serious question that U.S. businesses and others will benefit enormously from enhanced clarity in the rules and institutions of AML enforcement (including substantive rules, procedures and remedies), from an increased emphasis on the interpretation and application of competition law to maximize the productivity and social wealth-creating capacity of the economy, from a clear and consistent separation between the implementation of competition law and the implementation of other policies that are in tension or conflict with the wealth-maximization objectives of competition law (such as protection of domestic firms or industries, export promotion and protection of small and medium-sized businesses) and from a clear commitment to the placement of productive resources in business institutions that lack government ownership, government financing, government management, and other forms of government participation. The same could be said of almost any other jurisdiction -- and I specifically include the United States itself in that statement. The challenges of AML enforcement, however, offer some particularly interesting challenges that will require sustained effort and consistent advocacy by earlier travelers down the road of market institutions and competition-law enforcement.

HOW CONGRESS CAN HELP

There is a very rich menu of specific activities that Congress and the other branches of government can undertake to advocate approaches that would help clear the path for U.S. and other businesses to participate vigorously and productively in the ongoing transformation of China and the world economy. There are many individuals and institutions involved in dialogue with and advocacy before Chinese authorities, seeking to clarify and rationalize substantive and procedural rules, and to make sense of the institutional pattern formed by the AML against the backdrop of other influential Chinese government entities. Many bar and business groups – the U.S. Chamber of Commerce, the United States Council on International Business, the American Bar Association (through its Section on Antitrust Law and Section in International Law), to name just a very few – contribute to dialogue with the Chinese antitrust agency officials. U.S. antitrust officials have frequently traveled to China for meetings with enforcement agency officials and have just as frequently hosted their Chinese colleagues here in the U.S.

Congress should support the development of a coherent U.S. government approach to the issues presented by implementation and enforcement of the AML. It should provide resources for advocacy of that approach before appropriate Chinese officials and government bodies, so that the voice of the United States is heard clearly by the audiences in China that concern themselves with competition and related spheres of economic and legal policy. There are always institutional opportunities and options to consider in pursuit of these broad objectives. I would be happy to assist the Subcommittee in identifying and assessing some of those options.

Again, thank you for the honor of inviting me to appear. I will be pleased to answer any questions.