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MOFCOM Streamlines Regulatory Approvals for Outbound Investments

April 2009

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The Ministry of Commerce (“MOFCOM”) of the People’s Republic of China (“PRC” or “China”) promulgated the *Rules for the Administration of Outbound Investments* (境外投资管理办法, the “New Outbound Rules”) on March 16, 2009.

The New Outbound Rules will take effect from May 1, 2009, replacing two existing MOFCOM regulations in this area (“Existing Outbound Rules”), namely the Rules on Approval Matters Regarding Outbound Investments (关于境外投资开办企业核准事项的规定), which became effective on October 1, 2004, and the Rules on Approval Matters Regarding Investments made by Mainland Enterprises in the Hong Kong and Macao Special Administrative Regions (关于内地企业赴香港、澳门特别行政区投资开办企业核准事项的规定), which became effective on August 31, 2004.

In comparison with the Existing Outbound Rules, the New Outbound Rules significantly ease the approval requirements and simplify procedures for outbound investments — reflecting a policy decision to promote outbound investments by PRC companies amid the global financial crisis.

The New Outbound Rules contemplate that most proposed outbound investment transactions will be reviewed by MOFCOM or its provincial counterparts (“Provincial MOFCOM”) within three (3) working days from the date of submission through filing of an application form available online. MOFCOM has delegated approval authority over most proposed transactions to Provincial MOFCOM while MOFCOM will retain authority over larger transactions as well as transactions falling within certain designated categories as discussed further below.

Under the *Interim Measures for the Administration of Examination and Approval of Outbound Investment* (境外投资项目核准暂行管理办法), which became effective on October 9, 2004, the National Development and Reform Commission (“NDRC”) has exercised parallel approval authority with MOFCOM over outbound investments. NDRC is reportedly contemplating similar regulatory changes to facilitate outbound investment approvals.^[1] It will be interesting to observe the interaction between MOFCOM

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and NDRC with respect to the outbound investment approval process in light of the New Outbound Rules.

Key points under the New Outbound Rules include:

Scope of Application

- The New Outbound Rules apply to “outbound investments,” which refer to the following activities engaged in by enterprises incorporated in China^[2] (“Chinese Investor”) that either:
 - 1. establish non-financial enterprises offshore; or
 2. acquire ownership, control or management rights in existing offshore non-financial enterprises.^[3]

Approval Delegation and Procedures

Outbound Investment Amount	MOFCOM Approval
Less than US\$10 million	Provincial level, 3 working days, one-page application form
Greater than or equal to US\$10 million and less than US\$100 million	Provincial level, 20-30 working days, application documents
US\$100 million and above	Central level, 30-40 working days, application documents

- *Outbound Investments Requiring Central MOFCOM Approval*

According to Article 6 of the New Outbound Rules, outbound investment projects that fall into the following categories are subject to approval from MOFCOM in Beijing:

1. outbound investment into a country that has no diplomatic relations with China;
2. outbound investment into certain designated countries or districts (list of such designated countries or districts to be determined and published by MOFCOM together with Ministry of Foreign Affairs);
3. outbound investment where the Chinese Investor’s investment amount is greater than or equal to US\$100,000,000;
4. outbound investment that involves interests in multiple countries / districts; or
5. establishment of special purpose vehicle offshore for purpose of making roundtrip investments.

Based on Articles 11, 13 and 15 of the New Outbound Rules, MOFCOM’s review process for the foregoing projects may take approximately 30-40 working days, upon completion of which MOFCOM will issue to the Chinese Investor either a certificate approving the outbound investment or a written notice denying approval.

The term “special purpose vehicle” used in Article 6(5) above is defined in Article 37 of the New Outbound Rules as “an overseas company directly or indirectly controlled by an onshore enterprise for the purpose of realizing an overseas listing of the rights and interests actually owned by such onshore enterprise in a domestic company.” Based on research to date, it appears that an offshore investment vehicle established by a Chinese Investor for the purpose of making purely offshore investments should not fall into the scope of this definition. However, the scope of the definition remains to be confirmed in practice, and as the definition’s language suggests, existing restrictions imposed on SPV establishment for proposed so-called round-tripping restructuring transactions under the Measure regarding Acquisition of Domestic Enterprises by Foreign Investors (Notice 10), which became effective September 8, 2006, will of course continue to apply.

- *Outbound Investments Requiring Provincial MOFCOM Approval*

Pursuant to Article 7 of the New Outbound Rules, outbound investment projects that fall into the following

categories are subject to approval from Provincial MOFCOM:

1. outbound investment where the Chinese Investor's investment amount is greater than or equal to US\$10,000,000 and less than US\$100,000,000;
2. outbound investment involving energy or mineral resource projects; and
3. outbound investment that requires soliciting other onshore companies to make outbound investments (需在国内招商);

Based on Articles 11, 14 and 15, Provincial MOFCOM's review process for the foregoing projects may take approximately 20-30 working days, upon completion of which Provincial MOFCOM will issue to the Chinese Investor either a certificate approving the outbound investment or a written notice of disapproval.

- *Other Outbound Investments*

Pursuant to Articles 8 and 16 of the New Outbound Rules, for outbound investments that do not require MOFCOM or Provincial MOFCOM approval (according to the thresholds described above), the Chinese Investor need only file a one-page application form (which will be available from a public "information service system" to be established by MOFCOM).

A printed copy of the application form must be filed with MOFCOM or Provincial MOFCOM^[4] with the review process to be completed within three (3) working days. If the application form is complete and in compliance with requisite format (符合法定形式), a certificate of approval is to be issued upon completion of the review process within this short timeline.

Criteria of Review

The New Outbound Rules do not expressly provide for any quantitative or qualitative criteria governing the approval vetting process.

However, Article 8 of the New Outbound Rules lists four categories of outbound investments that will not be approved by MOFCOM/Provincial MOFCOM:

1. outbound investment that threatens the country's national sovereignty, security or social public interests, or is in violation of PRC laws and regulations;
2. outbound investment that harms the relationship between China and the relevant country (district);
3. outbound investment that might lead to violation of international conventions to which China is a contracting party; and
4. outbound investment that involves technology or commodities that are prohibited from exportation.

Finally, the New Outbound Rules clarify that the technological and/or economic feasibility of the outbound investment project are the Chinese Investor's own responsibility and correspondingly beyond the scope of MOFCOM's review.

Footnotes

^[1]http://www.21cbh.com/HTML/2009-3-17/HTML_LVANH9BE6NWA.html

^[2] Companies incorporated in Hong Kong and Macao Special Administrative Regions and Taiwan are excluded.

^[3] Outbound investment involving offshore financial enterprises is subject to separate regulations promulgated by the China Banking Regulatory Commission, the China Insurance Regulatory Commission and the Chinese Ministry of Finance.

[4] Only a limited group of “centrally-managed” state-owned companies will be required to file the application form with MOFCOM. A list of such companies is available on MOFCOM’s website. For other companies, the application form may be filed with Provincial MOFCOM.