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Analysis of China's Latest Policy Guidance for Overseas Investment

By David Yu and Bernie Liu

Since the beginning of 2009, the Chinese government has made a number of adjustments to the overseas investment policies. This article is intended to analyze the latest development of China's overseas investment policies.

The recent key adjustments made by the government in connection with overseas investment include that:

- On 16 March 2009, the Ministry of Commerce ("MOFCOM") promulgated the *Measures for the Administration of Overseas Investment*, effective as of 1 May 2009 ("Circular No. 5");
- On 8 June 2009, the National Development and Reform Commission ("NDRC") promulgated the *Circular on Issues Relevant to Improving the Administration of Overseas Investment Projects* ("Circular No. 1479");
- On 9 June 2009, the State Administration of Foreign Exchange ("SAFE") promulgated the *Circular on Foreign Exchange Control Issues Relevant to Overseas Loans Extended by Domestic Enterprises*, effective as of 1 August 2009 ("Circular No. 24");
- On 13 July 2009, SAFE promulgated the *Provisions on Foreign Exchange Administration of Foreign Direct Investment by Entities in China*, effective as of 1 August 2009 ("Circular No. 30").

MOFCOM Policies

On 1 October 2004, the MOFCOM promulgated the *Provisions of Approval Matters Relevant to Investment in or Incorporation of Overseas Enterprises* ("Circular No. 16"), which provide explicit procedures for domestic enterprises which intend to make overseas investment. On 1 May 2009, Circular No. 16 was replaced by Circular No. 5, which key changes are as follows:

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➢ Designation of the Authorities Approving Overseas Investment

The MOFCOM has introduced a number of criteria to determine the authority of the MOFCOM and its local offices at provincial level such that investment in the following overseas non-financial enterprise projects continue to be approved by the MOFCOM itself and that investment in all other overseas non-financial enterprises projects are to be approved by the local MOFCOM offices at the provincial level or above.

- An overseas investment project to which the Chinese party invests in no less than USD100 million;

- Establishment of a SPV ("Special Purpose Vehicles, which was defined in Circular 10[1]");

- An overseas investment project in connection with (i) a country which does not have a diplomatic relation with China, (ii) a country specified by the MOFCOM, or (iii) the interest of more than one country or region; and

- Overseas investment made by a state-owned enterprise controlled by the central government ("Central SOE").

After the implementation of Circular No. 5, the MOFCOM regains the authority to approve certain types of overseas investment projects (including overseas investment projects to which each of the Chinese parties contributes more than USD100 million as well as overseas investment projects involving the interest of more than one country or region). However, most overseas investments made by local enterprises are to be approved by the local offices of the MOFCOM based on their authority.

➢ Adjustments to the Overseas Investment Approval Procedures

- The overseas investment approval procedures have been simplified.

  With respect to the approval procedures, the MOFCOM has introduced the fast track approval procedures, in which the documentation requirements are greatly simplified and the timing of approving overseas investment is shortened that effectively facilitates overseas investments by domestic enterprises. The fast track approval procedures as set forth in Circular No. 5 are applicable to the following circumstances:

  i. Overseas investment by Central SOEs with an investment amount less than USD100 million or overseas investment by local enterprises with an investment amount less than USD10 million; and

  ii. Overseas investment not involving the interest of more than one country or region, overseas investment not for the purpose of establishing any SPV and the target country having a diplomatic relation with China or not specified by the MOFCOM; and

iii. Overseas investment by local enterprises other than overseas investment in energy or minerals, and overseas investment requiring to attract domestic investment.

As for overseas investment to which such fast track approval procedures are applicable, the MOFCOM and its offices are required to complete the assessment within three working days after receiving the applications and issue the certificate of overseas investment in accordance with the applicable statutory requirements.

- Overseas Reinvestment by Overseas Enterprises

The MOFCOM has specified that overseas enterprises held by domestic enterprises intending to make reinvestment overseas are not required to obtain permission from the MOFCOM or its offices. Such enterprises are only required to file the relevant information with the MOFCOM or its offices within one month upon completion of the statutorily required procedures. Such policy has loosened the assessment requirements of overseas reinvestment by overseas enterprises and improved the flexibility and business efficacy of such enterprises.

- Approval for Overseas Investment in Specific Industries

The MOFCOM has made special rules governing the approval procedures for overseas investment in energy and mining industries in which the fast track procedures are not applicable. In the course of assessing and approving overseas investment in the energy and mining industries, the MOFCOM or its local offices at the provincial level should consult the interested domestic associations. As investment in the energy and mining industries overseas has become the most important investment made by domestic enterprises in recent years, the MOFCOM issued Circular No. 5 to tighten the supervision of overseas investment made in these industries so as to effectively control investment risks.

- Approval of Co-Investment Overseas

The MOFCOM has standardized the approval procedures for overseas investment jointly made by two or more domestic enterprises that the major shareholders are required to complete the approval procedures upon receiving the written consent from other investors. This requirement prevents double approval.

To some certain extent, Circular No. 5 has simplified the approval procedures of the MOFCOM and its offices at provincial level for overseas investment by domestic enterprises, and further implements the "Going Overseas" policy. At the same time, the MOFCOM still adopts a cautious attitude towards high value overseas investment contributed by Chinese investors or overseas investment in specific industries, countries and regions.

The NDRC Policies

In Circular No. 1479, the National Development and Reform Commission ("NDRC") has specified the preliminary procedures for overseas acquisition and bidding projects subject to the approvals of the NDRC or the State Council, and supplemented the following approval procedures:

- After examining the project information reports, the NDRC has the power to provide risk alert and strictly examine the projects for which risk alerts have been given in the approval process;
- If an enterprise fails to complete the preliminary reporting and project approval procedures in compliance with the "*Interim Measures on the Administration of Verifying and Approving Overseas Investment Projects*" and causes losses to such enterprise as a result, the NDRC will act jointly with other competent authorities to impose penalties on and investigate in the liability of the senior officers of the enterprise in question;
- Financial institutions should not provide loans for overseas investment projects if such projects have not obtained approval from the NDRC.

According to Circular No. 1479, it can be concluded that the NDRC has paid more attention to risk control of overseas investment projects.

The SAFE Policies

In order to promote and implement the "Going Overseas" policy for domestic enterprises, the SAFE promulgated Circular No. 24 and Circular No. 30 in 2009, respectively broadening the options of financing overseas subsidiaries of domestic enterprises and providing administrative support for foreign direct investment.

Circular No. 24 permits a domestic enterprise to provide its overseas subsidiary with a loan not more than 30% of the owner's equity held by the domestic enterprise. The overseas loan exceeding the aforesaid percentage must be approved by the SAFE. As the overseas loan amount made by domestic enterprises is restricted, overseas subsidiaries intend to raise funds must complete the required approval procedures for overseas investment to increase their share capital or finance themselves via other channels.

Circular No. 30 has simplified the assessment and approval procedures in respect of foreign exchange in overseas investment by domestic enterprises mainly in the following aspects:

- The foreign exchange risk assessment procedures for overseas investment have been removed, and the verification methods of the source(s) of the funds in foreign exchange for foreign direct investment have been changed from the requirement of approval before transaction to the requirement of registration upon completion of the transaction;
- The approval procedures for outbound remittance of investment funds made by domestic enterprises are replaced by the registration systems. That is a domestic enterprise which intends to make foreign direct investment is required to produce approval documents issued by the competent authority of foreign direct investment as well as the certificate of foreign exchange registration at a qualifying bank which will examine the aforesaid documents and certificate and arrange the remittance;

- Domestic enterprises are permitted to provide commercial loans and financing guaranties for their overseas subsidiaries; and

- The rules governing disposal of foreign exchange obtained from profit distribution, capital decrease, share transfer and liquidation have been specified.

Circular No. 30 greatly facilitates the foreign exchange related matters with regard to overseas investment and provides directions for the subsequent financing of overseas investment.

The above policies reflect that the Chinese government supports domestic enterprises to "Go Overseas" by simplifying and specifying the statutorily required procedures. In addition, the Chinese government takes a cautious attitude towards overseas investment, maintains the principle of careful approval of investment in specific industries, countries or specific projects and assists domestic enterprises in risk control.

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1 *Provisions for the Acquisition of Domestic Enterprises by Foreign Investors* (Circular No. 10) issued by MOFCOM on 8 August 2006.