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The State Council's Issuance of the "Several Opinions of the State Council on Further Improving the Use of Foreign Capital"

By David Yu and Nicholas Lou

On 6 April 2010, the State Council issued the *Several Opinions of the State Council on Further Improving the Use of Foreign Capital (No.9 2010)* ("Several Opinions"). On 14 April 2010, the State Council Information Office held a press conference ("Press Conference"), in which Zhang Xiaoqiang, Assistant Director of the National Development and Reform Commission and Ma Xiuhong, Vice Minister of the Ministry of Commerce introduced the main content of, and relevant situation surrounding, the Several Opinions.

The Several Opinions puts forward relevant guiding opinions in terms of improving the quality and level of foreign capital utilization, and the ways to make it better serve technological innovation, upgraded industries, and balanced development among the different regions, etc.

Foreign Investment Areas

The *Industrial Guidance Catalogue of Foreign Investments* ("Guidance Catalogue") is an important document guiding the direction of foreign investments in China. The Guidance Catalogue was initially promulgated by the State Council in 1995 and has been revised four times in accordance with the situation and needs of China's economic development. The latest version was revised in 2007. The Several Opinions looks to revise the Guidance Catalogue again according to China's current economic development needs, and to further revise the *Industrial Catalogue for Foreign Investors in the Midwest Zone* in accordance with the amendments to the Guidance Catalogue.

According to the Several Opinions and the Press Conference, the amendments in the Guidance Catalogue will mostly be embodied in the "Two Restrictions, Four Encouragements" policy, which means restricting projects falling into the "two highs" (i.e. high pollution and

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high energy consumption) and "one expensive" (i.e. consumption of resources) category, limiting low level and production over-capacity projects, and encouraging the development of strategically burgeoning industries, services industries, high-tech innovation industries, new energy, energy-saving and environmental-friendly industries.

Meanwhile, with the promulgation of the Several Opinions, China will further encourage the increase of investments and the shift of foreign investments to mid-western China, as well as provide supportive policies to the foreign investments shift to Mid-western China with opening up policies and by using preferential enterprise income tax policies, etc.

Hence, the Several Opinions puts forward new guidance for encouraging and controlling foreign investment industries and regions. However, the specific contents shall be subject to the updated "Guidance Catalogue" and the *Industrial Catalogue for Foreign Investors in the Midwest Zone*.

Ways of Utilizing Foreign Investments

The Several Opinions puts forward guiding opinions on the ways of utilizing foreign investments (including overseas-funded mergers and acquisitions, overseas listings and foreign private equity funds, etc.)

➢ Overseas-funded Mergers and Acquisitions

We note that, on the one hand, the Several Opinions actively encourages foreign investments to participate in the reorganization, reform, mergers and acquisitions, and restructuring of domestic enterprises via equity participation or merger; on the other hand, the Several Opinions also emphasizes implementing anti-monopoly inspections in line with laws and regulations to speed up the establishment of a safety inspection system for overseas-funded mergers and acquisitions.

Holding an attitude towards encouraging overseas-funded mergers and acquisitions, the Several Opinions also seeks to carry out the anti-monopoly inspections and to accelerate the establishment of the safety inspection system of overseas-funded mergers and acquisitions. It is therefore expected that the relevant inspection procedures will be further supplemented and improved.

➢ Overseas Listings

The Several Opinions seeks to encourage qualified enterprises to list overseas in order to make sufficient use of overseas capital markets. This does not necessarily constitute an unbarring of the restrictions on overseas listings by domestic enterprises under the existing laws, regulations and policies (including but not limited to the *Regulation of a Foreign Investor in the Merger or Acquisition of a Domestic Enterprise*). But, at the least, the Several Opinions is a sign that more and more domestic enterprises will seek overseas listings in the future to make sufficient use of overseas resources while improving their own competitiveness. Whether the relevant authorities are likely to further revise the existing regulations will be a topic of great concern to the market.

- Foreign Private Equity Funds

At present, the RMB private equity funds in China have become more and more active and attractive. The Several Opinions sets out to encourage foreign investors to establish venture capital investment enterprises, and actively use private equity investment funds. Hence, the Several Opinions may further promote the promulgation of relevant legislations and policies, including the improvement of the establishment and exit mechanisms of foreign private equity funds, which is a topic of great concern to investors.

Authority for Approval and Procedures of Foreign Investments

- Authority for Approval of Projects

Along with the relevant notices to delegate the authority for approval of foreign investments promulgated by the Ministry of Commerce throughout 2009, the Several Opinions increases local governments' authority for approval of projects within the "encouraged" or "permitted" categories of foreign investments from USD 100 million to USD 300 million. This is a significant delegation of the authority for approval of foreign investments, unequivocally demonstrating China's supportive attitude of the projects within the "encouraged" or "permitted" categories of foreign investments.

However, we also note that the Several Opinions does not delegate the authority for approval of foreign investments in regard to the projects within "restricted" categories — the authority for approval of local governments at the provincial level for "restricted" projects remains at USD 50 million.

- Contents and Procedures under Examination and Approval

The Several Opinions looks to adjust the contents under examination and approval, simplify the approval procedures, minimize the scope for examination and approval, and increase the transparency of the approval process. This will improve the efficiency of foreign investment approval to a large extent and better mobilize the enthusiasm of foreign investments. The ensuing improvement from supporting measures issued by the relevant authorities based on the principles and requirements of the Several Opinions will be a topic of great anticipation in the market.

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