

Comparing FTZ's Offshore Investment Policy and MOFCOM's New Rules

By David Yu and Kevin Huang

Since the State Council officially approved the *Overall Plan for the China (Shanghai) Pilot Free Trade Zone* on 27 September 2013, a number of innovative policies for offshore investment have been published for the Shanghai Free Trade Zone ("FTZ"). These include the *Measures Governing the Filing of Offshore Investment Projects in the China (Shanghai) Pilot Free Trade Zone* and the *Measures Governing the Filing of Offshore Investment by Enterprises in the China (Shanghai) Pilot Free Trade Zone* (collectively, "FTZ Measures").

As a result of this, regulations relating to offshore investment at a national level are gradually being updated. Following National Development and Reform Commission's ("NDRC") promulgation of the *Measures Governing the Approval and Filing of Offshore Investment* on 8 April 2014, the Ministry of Commerce has published the new *Measures Governing Offshore Investment* ("New Measures") on 6 September, which have substantially revised the previous relevant rules. The New Measures are consistent with the FTZ Measures in many ways, and are better in some respects. In the context of these measures, does offshore investment by enterprises in the FTZ still offer more advantages than offshore investment made outside the zone?

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郭建良: (86 21) 3135 8756
Publication@llinkslaw.com

If you would like other Llinks publications, please contact:

Roy Guo: (86 21) 3135 8756
Publication@llinkslaw.com

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MOFCOM's New Measures

Superiority of existing FTZ Measures. Prior to the publication of the New Measures, enterprises outside of the FTZ were still governed by MOFCOM's 2009 *Measures Governing Offshore Investment*, under which a prior approval regime was adopted for overseas investment by enterprises. For projects involving a particular nation, region, industry or quota, the set-up of offshore special purpose companies, and the interests of a number of countries, the authorities were required to consult with the embassies or consulates of the foreign country for their comments. Approval of these projects could take up to one and a half months.

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Following the New Measures, however, procedures in the FTZ appear to have been streamlined. The approval regime is retained, but the scope of its application has been reduced to cover only those projects involving a particular country, region or industry, as well as the establishment of offshore special purpose companies and interests in a number of countries or regions. Quota restrictions have been removed. Moreover, a filing system is adopted for offshore investment projects which fall beyond the scope of approval in the FTZ. Under this system, enterprises are required to submit compliance documents for review within five working days, and, if approved, they will receive a Certificate for Offshore Investment by Enterprises for carrying out the offshore investment. The exception is for those cases where filing is not possible. Procedures within the FTZ are more convenient than those outside of the FTZ.

Amendments to the New Measures. The New Measures have introduced substantial revisions to the procedures, which are even more innovative than the FTZ Measures. Under the New Measures, the scope of the approval has been significantly reduced by removing quota restrictions and the need to establish offshore special purpose companies. They only regulate the approval of projects involving sensitive countries, industries and regions, as well as those projects that may impact the interests of a number of countries or regions. The time needed for approval of these projects has been cut to 20 working days, accordingly.

The New Measures place emphasis on the filing procedures, supplemented by approval formalities. A filing system is introduced for offshore investment projects beyond the scope of approval. As long as there are no circumstances that render an enterprise unable to make a filing, the enterprise is just required to submit a prescribed Offshore Investment Filing Form and a copy of its business license. It may then receive a Certificate of Offshore Investment by Enterprise within three working days. Compared with the FTZ Measures, the filing procedures and time limitations are far less onerous.

FTZ's Superiority

More efficient, with closer convergence between departments. While the New Measures no longer require approval or filing by other departments, offshore investment projects by enterprises outside of the FTZ may still be subject to filing or approval by the NDRC. The NDRC's various requirements for quotas on offshore investment, submission of documents and assessment of specific situations will inevitably affect the efficiency of approving or filing offshore investment project applications by enterprises.

In comparison, two different set of rules govern the FTZ, according to the actual situation. However, companies seeking offshore investment can successfully complete formalities within five working days, as long as they fully comply with the legal requirements. It is relatively efficient because of the adoption of a model which centralizes the acceptance of applications and the issuance of certificates.

Relevant supporting policies must adapt to the changes. The New Measures have been published, but the supporting policies are still not clear. Supporting rules should be introduced as soon as possible in order to truly implement the procedures on a unified basis. Alternatively, the procedures should be streamlined in order to avoid companies outside of the FTZ still being required to obtain approval or filing from a number of departments. As a result of such a lengthy approval and filing process, there is a risk that companies may miss the opportunity to make overseas investment and enter M&A projects.

In comparison, the FTZ has already handled some cases that saw far shorter approval or filing times, indicating that the various supporting measures for the FTZ Measures are currently operating well.

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Forex formalities are more convenient. On 28 February 2014, the Shanghai Branch of the State Administration of Foreign Exchange issued the *Implementing Rules for the Support of Imposing Foreign Exchange Control in the China (Shanghai) Pilot Free Trade Zone*. These rules have broadened the channel for handling the registration of direct investment in foreign exchange by delegating to banks the power of registering enterprises' offshore investments in foreign exchanges, making it more convenient for enterprises to carry out offshore investments.

Leading Innovation

The FTZ has played an active role in leading the way in China with this experimental model, in order to accelerate economic development and reform, as well as strengthen international free trade. With the introduction of the New Measures, the superiority of the policy for enabling enterprises in the FTZ to file offshore investment projects is diminishing. However, since the FTZ is at the forefront of these relatively innovative policies, its superior position as an offshore investment platform through the introduction of various innovative policies remains a key focus.

Contact Details

If you would like to know more information about the subjects covered in this publication, please feel free to contact the following people or your usual Links contact.

Shanghai	
David Yu Tel: (86 21) 3135 8686 David.Yu@linkslaw.com	Charles Qin Tel: (86 21) 3135 8668 Charles.Qin@linkslaw.com
Ming Zhang Tel: (86 21) 3135 8777 Ming.Zhang@linkslaw.com	Peiming Yang Tel: (86 21) 3135 8787 Peiming.Yang@linkslaw.com
Beijing	
Charles Qin Tel: (86 10) 8519 2266 Charles.Qin@linkslaw.com	

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