



PRC Law Newsflash
11 March 2009

Draft Administrative Measures for Overseas Investment
Released for Public Opinion

Introduction

On 7 January 2009, the Ministry of Commerce (**MOFCOM**) released the *Draft Administrative Measures for Overseas Investment* (**Draft Measures**) for public opinion until the end of January 2009.

Key Amendments/Developments

The Draft Measures propose the following key changes to the current overseas investment regime:

1. Expanded Approval Scope

Existing System

According to the current overseas investment laws (**OIL**), MOFCOM is responsible for approving overseas investments where they are undertaken by the following entities:

- central state-owned enterprises, generally referring to those supervised by the State-Owned Assets Supervision and Administration Commission (**SASAC**); and
- any PRC enterprise with investments in those countries not listed in the appendix to the OIL.

For those overseas investments which do not fall within the above categories, the approval authority lies with MOFCOM's provincial bureaus.

New System

Under the Draft Measures, the present system administered under OIL would be overhauled. Specifically, any investments abroad that meet any of the following 5 criteria must secure MOFCOM's approval, namely those:

- made in those countries that have not established diplomatic relations with the PRC;

- made in those countries (or regions) with high security risks;
- amounting to US\$ 100m or more;
- involving cross-border infrastructure construction; or
- aimed at establishing offshore special purpose vehicles (**SPV**).

2. Investment Amount

The Draft Measures specify that the investment amount is an important factor in determining the investment's approval authority. However, they do not explain or clarify whether MOFCOM or its local arms will remain the approval authority where an increase in an existing overseas investment of less than US\$ 100m causes it to surpass the US\$ 100m mark.

Additionally, the Draft Measures provide that investment amounts of between US\$ 10m and 100m are to be approved by MOFCOM's provincial bureaus. However, they are silent as to whether overseas investments of less than US\$ 10m would still be subject to any approval requirements.

3. Relaxing Supervision over SPVs?

As for SPVs, MOFCOM's approval is currently required for Chinese enterprises intending to establish such entities, regardless of whether the SPVs are incorporated for the purpose of an offshore listing. However, the Draft Measures clarify that offshore SPVs refer to those that are directly or indirectly controlled by Chinese enterprises to undertake offshore listing of domestic companies. At this stage, it is unclear whether the current practice will be revised as a result of such clarification, *i.e.*, will MOFCOM's approval no longer be required for the establishment of SPVs which are not incorporated for the purpose of an offshore listing?

4. Approval Authorities Harmonized

Apart from MOFCOM, the National Development and Reform Commission (**NDRC**) and the State Administration of Foreign Exchange (**SAFE**) are involved with overseas investments. At present, the approvals of the NDRC and MOFCOM are not properly integrated, particularly at the local level. For instance, certain overseas investments only require MOFCOM and SAFE approvals, but not NDRC.

From our understanding of the Draft Measures, the legislators have attempted to integrate the respective roles of the relevant authorities by stipulating that the approvals or filing documents from other governmental agencies must be included in the approval application package submitted to MOFCOM. Hopefully, this will result in a clearer demarcation of the roles and responsibilities of the relevant authorities as well as provide certainty and transparency in the application process.

5. Clarification on Penalties

The Draft Measures have also clarified the penalties that apply to an overseas

investment's approval application, an issue silent in the OIL. These penalties include MOFCOM's rejection of further applications, for up to a year, from any enterprise that has submitted an application with false information as well as revoking the "relevant documents". However, the term "relevant documents" has not been defined.

The penalties that apply to approval authorities and officials are also stipulated under the Draft Measures. They include provisions allowing for a suspension request to be submitted should an approval authority fail to perform the necessary approval or supervision procedures in accordance with the Draft Measures. In addition, officials could face administrative sanctions should they abuse their authority.

TAL Commentary

Although the Draft Measures mark a significant improvement in China's international investment regulatory framework, they are far from clear or complete and remain in draft form released for public opinion. Indeed, given the short consultation period, we are unsure if and to what extent the Draft Measures have been properly reviewed and considered by the relevant interested parties, so that most if not all of the unclear and incomplete areas could have been thoroughly addressed by the authorities.

The global financial crisis has certainly brought attractive investment opportunities for cash rich Chinese companies to invest abroad. In keeping with such development, the Chinese government should look to consolidate and clarify the existing laws on outbound investments so as to facilitate or even fast-track investment approvals for Chinese entities looking to urgently close deals overseas.

* * *

This newsflash was authored by Lin Dongsheng, edited by Tan Joonho and Shalini Asnani.

We trust that you will find our newsflash both timely and informative. If you have any questions on these subjects or any other area of PRC law, please contact:

- Jesse T H Chang (jthchang@transasialawyers.com);
- Philip Qu (pqu@TransAsiaLawyers.com);
- Kevin Guo (kguo@TransAsiaLawyers.com); or
- Elaine Huang (ehuang@TransAsiaLawyers.com).

Beijing

Suite 2218 China World Tower 1
1 Jianguomenwai Avenue
Beijing 100004, China
Tel: (86 10) 6505-8188
Fax: (86 10) 6505-8189 / 98

Shanghai

Unit 1101 Platinum
233 Tai Cang Road
Shanghai 200020, China
Tel: (86 21) 6141-0998
Fax: (86 21) 6141-0995 / 6

This newsflash is for informational purposes only and does not constitute legal advice. Use of this newsflash does not create an attorney-client relationship between TransAsia Lawyers and the reader. Readers should contact appropriate legal counsel for advice on any particular issue. Entire content copyright is owned by TransAsia Lawyers. Reproduction and distribution of this newsflash in whole or in part without the written permission of TransAsia Lawyers is expressly prohibited.

This newsflash may have been sent via e-mail. We cannot guaranty the completeness of messages transmitted by e-mail, and will not be responsible for any modification made to this message after sending by us.

Uploaded on 11.03.2009

© 2009 TransAsia Lawyers