



PRC Law Newsflash
18 June 2009

Draft Rules Indicate Easing of Foreign Exchange Controls for Outbound Investments

Introduction

On 18 May 2009, the State Administration of Foreign Exchange (**SAFE**) issued for public opinion a long-anticipated draft of its amended *Rules for the Administration of Foreign Exchange for Outbound Investments* (**Draft Rules**). If they are formally adopted, the Draft Rules will loosen the foreign exchange controls in place under the current version of the rules (**Current Rules**, promulgated by the SAFE in 1989) and various subsequent official notices (**Notices**).

Background

Beginning from 2004, outbound investments have been encouraged by the Chinese government pursuant to its "going abroad" policy. The SAFE is one of the three key regulators of outbound investments from China (alongside the National Development and Reform Commission, or **NDRC**, and the Ministry of Commerce, or **MOFCOM**).

In support of Chinese companies "going abroad", the Notices were issued by the SAFE over the past few years to regulate the administration of foreign exchange. The Draft Rules consolidate the policies set forth in the Notices, and supplement them based on the results of regional trials undertaken by the SAFE.

Key Points

The key points proposed in the Draft Rules are summarized below:

1. Available Sources of Foreign Exchange for Outbound Investments

The Draft Rules confirm that the sources of foreign exchange permitted for use in outbound investments include: existing self-owned foreign exchange, foreign exchange loans from a Chinese bank, foreign exchange purchased with Renminbi, foreign exchange profits from outbound investments, and other unspecified foreign exchange assets.

2. Simplified Procedures for Foreign Exchange Examination

The Current Rules stipulate that the SAFE must examine the source(s) of the foreign exchange intended for use in an overseas project *before* the Chinese investor may

apply to the NDRC and MOFCOM for overall project approval, and then subsequently apply to the SAFE for outbound investment foreign exchange registration.

The Draft Rules propose changing the examination requirement into a simple post-registration procedure. This would significantly streamline and simplify the approval process for outbound investments: Chinese investors would only have to secure and report the sources of their foreign exchange after they had already successfully obtained NDRC and MOFCOM approval. It would also substantially reduce the cost and risk of foreign exchange financing.

3. Parent Company Loans to Overseas Subsidiaries Specifically Permitted

The *Rules on the Administration of Foreign Exchange* (promulgated by the State Council in 2008) state in very general terms that a non-financial entity may extend foreign exchange loans to overseas entities with the SAFE's approval. The Draft Rules specifically confirm that domestic companies are allowed to extend such loans to their overseas subsidiaries. Thus, Chinese entities would have an important new source of funds and would be able to more easily meet the ongoing capital requirements of their overseas investments.

4. Relaxation of Controls on Remitting Foreign Exchange Abroad

Chinese investors must currently obtain the SAFE's prior approval each time they remit foreign exchange abroad. The Draft Rules propose replacing these approvals with a simple registration. Specifically, investors would handle the outbound remittance of foreign exchange with a commercial bank designated by the SAFE, and on the strength of (a) their SAFE registration certificate(s) and (b) the approval document for their overseas investment project (i.e., from the NDRC and MOFCOM). The designated bank would process the remittance after checking that the submitted documents were valid and proper.

5. Use of Foreign Exchange for Up-front Expenses

The Draft Rules confirm that Chinese investors may apply to their local SAFE bureau for permission to pay up to 15% of the total outbound investment amount in the form of un-front expenses, before obtaining formal NDRC and MOFCOM approval for the project in question.

6. Relaxation on Profits Repatriation System

Finally, the Draft Rules also confirm that profits from outbound investments may be employed for further overseas investments, including re-investment in the original project.

Conclusion

The Draft Rules illustrate the SAFE's commitment to supporting China's "going abroad" policy. In addition to collating and updating the Notices and amending the Current Rules, they coincide with recent reforms by other government entities. For example, the Ministry

of Commerce (MOFCOM) recently revised and simplified its approval regime for "going abroad" projects in its *Outbound Investment Administration Regulations* (effective as of 1 May 2009).

If they are adopted, the Draft Rules would better integrate the SAFE's foreign exchange controls with the NDRC and MOFCOM's approval process. Chinese investors would also benefit from a broader range of sources for foreign exchange, and less risky and costly regulatory approval procedures. This, in turn, would enable an investor to focus more time and energy on the business aspects of the outbound investment itself.

In addition, the simplified procedures for using foreign exchange would give greater flexibility to local investors when financing their investments overseas, thereby encouraging more "going abroad" projects. To a certain extent the use of China's huge foreign exchange reserves would thereby be utilized in a more efficient and diverse manner.

* * *

This article was written by partner Kevin Guo (kquo@TransAsiaLawyers.com), together with associates Bu Jing, Pascal Jiang and Helen Sunderland.

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

<http://www.TransAsiaLawyers.com>

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 18.06.2009

© 2009 TransAsia Lawyers