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New Trends in Overseas Investment Administration

--- Brief Overview of the Guiding Opinions on Further Guiding and Regulating the Direction of Overseas Investment

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On August 4, 2017, the *Guiding Opinions on Further Guiding and Regulating the Direction of Overseas Investment* (Guo Ban Fa [2017] No. 74) " (the "**Guiding Opinions**") was jointly promulgated, with the approval of the State Council, by the National Development and Reform Commission ("**NDRC**"), the Ministry of Commerce ("**MOFCOM**"), the People's Bank of China ("**PBOC**") and the Ministry of Foreign Affairs ("**MFA**"). The Guiding Opinions have drawn wide attention by further categorizing overseas direct investments as "encouraged," "restricted" or "prohibited" based upon the previous "negative list" for overseas direct investment. In this article, we will summarize the main content of the Guiding Opinions by comparing them to the existing principles governing overseas direct investment in light of recent trends related to the supervision of overseas direct investment.

Existing approval and filing system for overseas direct investment

On September 6, 2014, MOFCOM promulgated the *Measures for the Administration of Overseas Investment* (MOFCOM Order [2014] No. 3) ("**Administrative Measures**"), which enacted a "primary filing, supplemental approval" regulatory system for overseas direct investment, and provided that, based upon specific circumstances, overseas direct investment must be filed with or approved by the government. Under the Administrative Measures, overseas direct investment projects that are not referenced in the "negative list" need only to be filed with MOFCOM or its counterparts at the provincial level. This stipulation saw significant changes from the previous version of *Measures for the Administration of Overseas Investment* (MOFCOM Order [2009] No. 5), which set forth that all overseas direct investment projects were subject to MOFCOM approval. The Administrative Measures, for the first time, provided a "negative list" system for the administration of overseas direct investment, stipulating that overseas direct investment is negative listed and subject to approval where it

involves “sensitive countries and regions (i.e., countries that have not established diplomatic relations with China, countries that are sanctioned by United Nations)” and “sensitive industries (industries related to products and technology restricted from export by the PRC government, industries that impact the interests of a country or a region.”

In response to Administrative Measures, on December 27, 2014, NDRC promulgated an amendment to the *Measures for the Approval and Filing of Overseas Investment Projects* (NDRC Order [2014] No. 9) (“**Approval Measures**”), which stipulated that NDRC approval was required for overseas direct investment projects that “involve sensitive countries/regions and sensitive industries.” The Approval Measures further explain the definition of “sensitive industry” by stipulating that these industries include basic telecoms operations, cross-border water resource exploration and utilization, large-scale real property development, transmission lines, power grids, news media, etc., which is more specific than the definition under the Administrative Measures.

Trends in overseas direct investment supervision

Based upon the “filing-based approval plus negative list” system for overseas direct investment supervision, in late November 2016, NDRC, MOFCOM, PBOC and SAFE issued a joint statement (“Joint Statement”) which stipulated the following overseas direct investment projects would be prohibited in principle:

- a Overseas direct investments of USD \$10 billion or above;
- b The purchase or development by State-owned enterprises of large-sized real estate located outside China with Chinese investment exceeding USD \$1billion;
- c M&A and investment transactions with investment amounts of USD \$1billion or more while the target business is not among the domestic investor’s main business;
- d Foreign direct investment by partnerships;
- e Overseas direct investment to acquire or subscribe less than 10% shares of an offshore public-listed company;
- f Overseas direct investment in an offshore entity whose assets value is substantially larger than the domestic investor;
- g Domestic capital participating in privatization transactions related to the delisting of China-based offshore public-listed company;
- h Overseas direct investment by recently-established entities.

On December 6, 2016, spokespersons for the NDRC, MOFCOM, PBOC and SAFE jointly held a press conference (“**Press Conference**”) where they indicated that the regulatory

departments will “pay close attention to irrational overseas direct investment in certain industries such as real estate, hotels, theaters, entertainment and sports clubs, as well as potential risks related to large-sized investments made by domestic entities to overseas target whose business is not among such domestic investor’s main business, overseas direct investment made by limited partnerships and the phenomena of ‘investments in overseas companies with substantially heavier assets than the Chinese investor’ and ‘quick-establishment, quick-investment.’ We recommend the relevant enterprises to make investment decisions in a prudent manner.”

The Guiding Opinions

The four ministries jointly promulgated the Guiding Opinions based upon the foregoing laws and regulations to further emphasize the principles for overseas direct investment supervision. These principles include:

- a With respect to the regulatory process, the Guiding Opinions continue to stipulate a filing system as the principal means of regulating overseas direct investment, and change to an “encouraged development plus negative list” standard to determine whether to require examination or filing for projects.
- b The Guiding Opinions further refines the “negative list” by re-categorizing “investments subject to approval” and “investments subject to filing” under the Administrative Measures and Approval Measures as “encouraged investments,” “restricted investments” and “prohibited investments.” According to the Guiding Opinions, enterprises undertaking encouraged investments will receive more preferential treatment with respect to tax, foreign exchange, insurance, customs and information; the regulatory departments will supervise enterprises that undertake restricted investments so as to encourage them to act in a prudent manner, and shall provide guidance and advice to them based upon actual circumstances; the regulatory departments will take effective measures to strictly control prohibited investments.
- c The Guiding Opinions divide overseas direct investments into the following categories:
 - i. Encouraged:
 - a) Overseas infrastructure investment that will facilitate the construction of the “Belt and Road” and connect surrounding infrastructure;
 - b) Overseas investment that will facilitate the export of superior production capacity, high quality equipment and technical standards;
 - c) Overseas direct investment that will help to strengthen cooperation with overseas high-tech enterprises and advanced manufacturing enterprises (such as the establishment of R&D centers);

- d) Participate in offshore energy resource exploration and development, such as oil and gas, minerals, etc.
 - e) Mutually beneficial investment cooperation in the areas of farming, forestry, animal husbandry, fisheries, etc.;
 - f) Facilitate overseas direct investment in services sectors such as business trade, culture and logistics; support qualified financial institutions to establish branches and service networks abroad.
- ii. Restricted: mainly refers to overseas investments that are not consistent with the national diplomatic policy, the win-win opening up strategy and state macro-control policies, including:
- a) Overseas development investments in sensitive countries and regions that have not established diplomatic relations with China, or are unstable due to conflict or subject to investment restrictions in accordance with multilateral treaties or agreements concluded by China;
 - b) Overseas direct investments in real estate, hotels, theaters, entertainment industry, sports clubs;
 - c) Establishment of equity investment funds or investment platforms offshore without engaging in any specific operations;
 - d) Overseas direct development investments that utilize outdated production equipment that does not meet the national technical standards required in the country of the investment target;
 - e) Overseas direct investments that do not meet the local standards of the investment target with respect to environment protection, energy consumption and safety.
- Overseas direct investments under the first three foregoing categories are subject to the approval of the competent supervisory authorities for overseas direct investment; it is not yet clearly specified whether investments under the latter two categories are required to be approved by or filed with the relevant departments.
- iii. Prohibited: refers to overseas direct investment that will or may endanger national interests or national security, including:
- a) Overseas direct investment involving the export of core military technology and products without government approval;
 - b) Overseas direct investment involving the use of technology, know-how or products that are prohibited for export by the PRC government;
 - c) Overseas direct investment in the gambling or pornography industries;

- d) Overseas direct investments that are prohibited by international treaties concluded or acceded to by China;
 - e) Other overseas direct investments that will or may endanger national interests or national security.
- d Compared to the Administrative Measures and the Approval Measures, the Guiding Opinions:
- Expand the scope of encouraged overseas direct investment projects, and specify that the government will support overseas direct investments in this category;
 - The scope of restricted overseas direct investments are expanded to include four new types of overseas direct investments (i.e., items (2) to (5) listed under the Restricted category above), which is a change from the previous rules that generally restricted overseas investments in “sensitive countries and regions” and “sensitive industries.” The Guiding Opinions clearly stipulate that overseas direct investment in real estate, hotels, theaters, entertainment and sports clubs (i.e. item (2)), and the establishment of overseas investment platforms (i.e. item (3)) is subject to prior examination and approval requirement. This requirement reflects the regulatory principles referenced in the Joint Statement and Press Conference that the government will restrict overseas direct investment in the real estate industry, large-sized investments made by domestic entities to overseas target whose business is not among such investor’s main business, overseas direct investments made by limited partnerships, transactions in which the acquired/invested overseas target is of heavier asset compared to the parent company and so-called “quick-establishment, quick-investment” transactions.
 - Re-categorization of several “sensitive industries” involving investments subject to prior approval under the previous regulations as prohibited investments, and further refining of the list of prohibited investments.

Summary

The Guiding Opinions continue with the current principle that overseas direct investment is subject to filing administration, while also making adjustments to the existing “negative list.” The Guiding Opinions further reflect the recent changes in overseas direct investment administration trends by clearly specifying the investment industries and business models that will be subject to close supervision and strengthen the supervision of establishment of offshore private equity fund. The Guiding Opinions will further affect domestic enterprises’ decision as to their overseas investment targets and the design of investment structures.

● **Important Announcement**

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