



China Regulatory Updates

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Connotation of "Han Yi"

- ▶ *Standardization*
- ▶ *Unique player in the PRC legal service market*
- ▶ *Simplicity, but always with a focus on key points and attention to details*

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- ▶ *Professionalism*
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MOFCOM Issues Interim Provisions on National Security Review for Foreign-Related M&A Transactions

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■ PRIVATE EQUITY

NDRC Specifies Guidelines to Facilitate PE Filings

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M&A

MOFCOM Issues Interim Provisions on National Security Review for Foreign-Related M&A Transactions

Shortly after the promulgation of the *Circular on Establishment of National Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* by the State Council last month (the "Circular"; for more details of the Circular, you may refer to our March 2011 issue of *PRC Regulatory Updates*), MOFCOM recently issued the *Interim Provisions on Matters regarding Implementation of the National Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (the "Interim Provisions"), clarifying certain issues related to the national security review mechanism for mergers and acquisitions of domestic enterprises by foreign investors. The Interim Provisions came into force on March 5, 2011 and will expire by August 31, 2011. Highlights of the Interim Provisions include:

1. Application Shall Be Made by Foreign Investors. If a foreign investor acquires a domestic enterprise that is subject to M&A security review as specified by the Circular, it shall apply to MOFCOM for such a review. If the acquisition is to be made by two or more foreign investors, they may jointly or appoint one of them to apply to MOFCOM for M&A security review. If the relevant department under the State Council, any national trade association, enterprise in the same industry or upstream or downstream enterprise deems that an intended foreign related acquisition should be subject to national security review, they may so propose to MOFCOM and submit relevant supporting information.
2. Review Obligations of Local MOFCOM Offices. With respect to any foreign related M&A deal submitted to a local MOFCOM office for approval pursuant to the *Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors*, the *Provisions on Equity Change of Investors of Foreign Invested Enterprises* and/or other applicable laws and regulations, if the applicant does not apply to MOFCOM for an M&A security review when such deal falls within the relevant scope of M&A security review, the local MOFCOM office should request the applicant to apply to MOFCOM

for such a review and report the situation to MOFCOM before further examining the M&A deal application.

In addition, the Interim Provisions provides in more details the procedures, review decisions and other issues concerning the M&A security review. The following issues should also be noted:

- (a) Many important issues are not clarified. For examples, with respect to the scope of the review, the Interim Provisions did not specify and it is still unclear as to the definition or scope of enterprises that are "related to national security or national defense security". In terms of the type of transactions, the Interim Provisions did not specify either as to whether "the actual controlling right may be acquired by foreign investors" provided under the Circular includes the situation where foreign controlling shareholders intend to further enhance controlling positions in their joint ventures and etc.
- (b) As is different from the quite common practice previously that a draft for comments would be issued first, followed by the promulgation of official documents, this time MOFCOM seeks public comments at the same time with the promulgation of the Interim Provisions. The public may propose their comments and suggestions to MOFCOM on or prior to April 10, and MOFCOM will track and assess the implementation of the Interim Provisions and will make improvement thereof after taking into consideration the public comments and suggestions. The Interim Provisions will expire at the end of this August, which is in existence for approximately five months only. Seeking comments for effective regulations is not a usually-seen practice, which probably indicates that MOFCOM is quite cautious about national security review of foreign-related M&As and is trying to strike a balance between China's national security and the nation's continuing attraction of foreign investments. Upon expiry of the Interim Provisions in August, MOFCOM is very likely to make amendments thereto

based on public comments and feedbacks from its local counterparts.

OUTBOUND INVESTMENT

NDRC Delegates Approval Authority on Chinese Enterprises' Overseas Investments

NDRC recently issued the *Circular on Making Efforts to Delegate Approval Authority on Overseas Investment Projects*, according to which the approval authority over any overseas investment project to be made by local Chinese enterprises with their proposed investment amount of less than USD300 million (in case of resource development) or less than USD100 million (in case of non-resource development) is delegated to the provincial level's NDRC offices. For enterprises under central government's direct administration making the above-mentioned overseas investment, they may decide at their own discretion and file with NDRC. Overseas investment with Chinese parties' aimed investment amount of USD300 million or more (in case of resource development) or of USD100 million or more (in case of non-resource development) should still be subject to central NDRC office's approval.

For special overseas investment cases (such as investment to be made in countries that have not established diplomatic relations with China, countries subject to international sanction, or countries or regions that are in war or are

experiencing civil disorders, or projects involving basic telecommunications operation, trans-boundary water resource development and utilization, large-scale land development, power mains, news and medias and other special and sensitive industries), however, central NDRC office's approval is required anyway regardless of the proposed amount of investment. In order to better track such projects, any overseas resource development project with Chinese parties' investment between USD30 million and USD300 million and non-resource development project with Chinese parties' investment between USD10 million and USD100 million are required to be registered and filed with the central NDRC office before the provincial NDRC offices may grant approvals.

This NDRC circular is promulgated at a time when an increasing number of Chinese enterprises are expanding into overseas markets and their overseas investments are growing rapidly in size. The delegation of approval authority by NDRC is expected to not only streamline the government's approval procedures, but also to facilitate Chinese enterprises' decision-making process.

PRIVATE EQUITY

NDRC Specifies Guidelines to Facilitate PE Filings

Following the promulgation of the *Circular on Further Regulating the Development and Filing Administration Work for Equity Investment Enterprises in Pilot Places* (the "Circular"; for more introductions, you may refer to our March 2011 issue of *PRC Regulatory Updates*) last month, NDRC issued a series of guidelines and standard documents in connection with the registrations and filings of PE funds on March 21, 2011 (the "Guidelines"), to facilitate the relevant registration and filing administration work in the pilot places.

Compared with the Circular, there are some

noteworthy points under the Guidelines, including, among others:

- (i) **Scope of Mandatory Filings Narrowed.** Pursuant to the Circular, all PE funds registered with SAIC offices at the pilot places with a size of RMB500 million or larger should complete a mandatory filing with NDRC. The Guidelines specified that, if such PE funds have paid-in capital of not more than RMB100 million, they will not be subject to mandatory filings.

- (ii) Certain Requirements Specified. As to the requirement under the Circular that “PE funds should be placed to specific investors with certain risk recognition and assumption capabilities”, the Guidelines suggest that the minimum capital commitment by a single investor to a PE fund should not be less than RMB10 million. Further, the Guidelines also specified that no nominee shareholding arrangement is permitted in PE fund investment, to address the requirement under the Circular that “investors should make capital commitment to the PE fund by the monetary capital legally obtained by them”.
- (iii) FOF Qualified for Filing. The Guidelines provided a form balance sheet for PE funds that includes an item of “the investments of the PE funds in other PE funds”, which may suggest that fund of funds or FOF is also qualified to file with NDRC.

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