

## **New Rules of PRC Ministry of Commerce Facilitate PRC Outbound Investment<sup>1</sup>**

*By Lawrence GUO and Yang WANG, 8 April 2009*

The PRC Ministry of Commerce (“MOFCOM”) issued *the Measures on Administration of Outbound Investment* (hereinafter “**New Measures**”) on March 16, 2009, which will take effect on May 1, 2009. The New Measures will supersede the currently effective rules issued by MOFCOM in 2004. In the New Measures, the MOFCOM delegated the verification authority for PRC outbound investment projects within certain thresholds to provincial verification authorities, and simplifies the verification application process and review standards. Practically speaking, we expect that the New Measures would significantly facilitate more outbound investments by Chinese companies, both State-owned and privately owned.

We delineate important changes in the New Measures below.

### **1. Verification power delegation to provincial level authorities**

According to the New Measures, MOFCOM will delegate the power to verify most of PRC outbound investments to provincial level verification authorities. Under Article 6 of the New Measures, MOFCOM will retain the power to verify the following outbound investment project proposals:

- (a) investments made in countries that have no diplomatic relationship with PRC;
- (b) investments made in some particularly regulated countries or regions (a list of which is to be formulated by MOFCOM and the Ministry of Foreign Affairs);
- (c) an investment made by a PRC company amounting to USD100 million or more;
- (d) investments involving the interests of more than one country (or region); and
- (e) investments in which an offshore “special purpose vehicle” is to be set up. A “special purpose vehicle” is defined to be an offshore company established by a Chinese company for purposes of seeking an indirect listing of the business conducted by the Chinese company in China.

For an outbound investment proposal outside of the foregoing scope of projects, if the Chinese company intending to make an outbound investment is directly or indirectly owned by the central governments, such an investment proposal should be verified by MOFCOM without a substantial review according to a simplified verification procedure.

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<sup>1</sup> The Chinese version of this article follows the English version.

Furthermore, all other outbound investment projects initiated by companies owned by local governments or private individuals could be verified by the provincial level verification authority (which may be known as the provincial commerce bureau, the provincial foreign economic and trade commission, or other such names). For instance, a proposed investment by a Chinese company located in Jiangsu Province of USD80 million in a foreign country (e.g., Germany) can be verified by Jiangsu Provincial Department of Foreign Trade and Economic Cooperation.

Applying for verifications from provincial level verification authorities could be relatively easier and faster, because local verification authorities usually are more responsive and willing to grant verifications. In comparison, MOFCOM's verifications are difficult to obtain because there is much more scrutiny by different departments within MOFCOM and fewer incentives to grant verifications in a timely manner.

**2. The standard of the substantial review by the verification authorities is significantly reduced.**

The New Measures expressly set out that an enterprise making an outbound investment shall be solely responsible for the economic and technical feasibility of its outbound investment project. In other words, the verification authorities shall not review the economic and technical feasibility of an outbound investment project. Instead, the New Measures provides that the verification authorities, either MOFCOM or the provincial level verification authorities shall refuse to grant a verification for an outbound investment project if it:

- (a) jeopardizes the national sovereignty, security and social public interests of the PRC, or violates Chinese laws and regulations;
- (b) harms the relations between the PRC and relevant countries (or regions);
- (c) may contravene the international treaties to which China has acceded; or
- (d) involves technologies or goods the export of which is prohibited by the PRC.

**3. Verification application procedures for most outbound investments are simplified.**

The New Measures simplify, to certain extent, the verification application process for outbound investment and reduce the documentation required for application of the verification. For an outbound investment project proposal that meets one of the following instances, the applicant should submit a written application together with other documentation to the provincial level verification authority:

- (a) An outbound investment to be made by a PRC company involving an amount between USD10 million (inclusive) and USD100 million.

- (b) An outbound investment in resources or mineral ores industries;
- (c) An outbound investment that needs to solicit business investors within the PRC.

For investment project proposals to be verified by MOFCOM or the provincial authorities, a verification decision should be made within 15 working days, excluding however the time required for soliciting the opinions of the economic and commerce department within the relevant embassy of the PRC in the relevant country.

For projects not meeting the foregoing instances, an applicant is required only to fill out and submit an Application Form of Outbound Investment without other documentary requirements to the provincial level verification authorities. Provided that the application form is completed and conforms to legal format requirements, the applicant will obtain the verification within three working days. The opinions of the economic and commerce department in the relevant embassy of the PRC in the relevant country are not required for such projects.

Outbound investment verification granted by MOFCOM or a local verification authority shall lose its validity if the proposed outbound investment is not completed within two years after the issuance of the verification.

In summary, the New Measures indicate MOFCOM's intention to encourage outbound investment by PRC enterprises. We anticipate that the New Measures will significantly facilitate outbound investments by Chinese enterprises. However, it is worth noting that MOFCOM is only one of several Chinese administrative authorities that a Chinese company making outbound investment shall approach. Depending on the type of the Chinese company, the investment industry or sector involved, the size of proposed investment and other factors, a Chinese company should also consider possible verification or registration requirements from the PRC National Development and Reform Commission (NDRC), the State Administration of Foreign Exchange (SAFE), the State-Owned Assets Supervision and Administration Commission (SASAC), and / or their local counterparts.

*Notes:*

*The Chinese version of this article follows on the next page.*

*This article is for general information purposes only. For further information on this topic please contact Lawrence Linjun Guo at Broad & Bright by email ([lawrence\\_guo@broadbright.com](mailto:lawrence_guo@broadbright.com)).*

## 商务部发布新规推进境外投资便利化

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中国商务部 3 月 16 日发布了《境外投资管理办法》(“办法”)。办法将从 2009 年 5 月 1 日起施行,取代商务部于 2004 年颁布的现行规定。在办法中,商务部将满足一定条件的境外投资项目的审批权限下放到省级商务主管部门,并简化了境外投资项目的申请和核准程序。从操作角度看,办法将极大促进包括国有企业、民营企业在内的中国企业进行境外投资。

办法在以下几个方面进行了大的修改:

### 1、核准权限下放到省级商务主管部门

根据办法,商务部将把大多数境外投资项目的审批权限下放到省级商务主管部门。商务部在办法的第 6 条中保留对以下项目的核准权:

- 1) 在与我国未建交国家的境外投资;
- 2) 特定国家或地区的境外投资(具体名单由商务部会同外交部等有关部门确定);
- 3) 中方投资额 1 亿美元及以上的境外投资;
- 4) 涉及多国(地区)利益的境外投资;
- 5) 设立境外特殊目的公司,特殊目的公司系指企业为实现其实际拥有的境内公司权益在境外上市而直接或间接控制的境外公司。

中央企业进行以上项目以外的其他境外投资,也将由商务部根据简化的核准程序进行非实质性审查。

地方企业和民营企业进行的所有其他境外投资项目都将由省级商务主管部门(主要指商务厅,对外经贸委员会等部门)进行核准。例如,一家位于江苏省的中国公司如果拟进行金额为 8 百万美元境外(例如德国)投资,将由江苏省对外贸易经济合作厅核准。

由于省级商务主管部门反应快,核准意愿较强,向省级商务主管部门申请报批相对容易和便捷。相比而言,获得商务部的核准则相对较难,因为投资项目要在商务部内部各个部门进行详细审查,而相关部门及时完成核准的动力不太大。

### 2、核准机关审查境外投资的标准降低

办法明确指出,境外投资经济技术可行性由企业负责。换句话说,审批机关

将不会审查境外投资项目的经济技术可行性。相反，企业境外投资有以下情形之一的，商务部和省级商务主管部门将不予核准：

- 1) 危害我国国家主权、安全和社会公共利益, 或违反我国法律法规;
- 2) 损害我与有关国家(地区)关系;
- 3) 可能违反我国对外缔结的国际条约;
- 4) 涉及我国禁止出口的技术和货物。

### 3、大多数境外投资项目的申请和核准程序得到简化

办法在一定范围内简化了境外投资项目的核准程序，减少了申请文件要求。对满足以下条件之一的境外投资，申请人须向省级商务主管部门提交申请书和其他一些文件：

- 1) 中方投资额 1000 万美元及以上、1 亿美元以下的境外投资;
- 2) 能源、矿产类境外投资;
- 3) 需在境内招商的境外投资。

对于由商务部和省级商务主管部门审批的境外投资项目，审批部门将在 15 个工作日内(不含征求驻外使(领)馆(经商处室)的时间)做出是否予以核准的决定。

对于以上情形以外的项目，申请人只需按要求填写并向省级商务主管部门提交《境外投资申请表》，而无须提交其他任何文件。如果申请表填写完整并符合法定形式，申请人在 3 天内即能获得核准。对于此类投资，毋须征求驻外使(领)馆(经商处室)的意见。

如果企业在 2 年内未能完成拟进行的境外投资，由商务部或省级商务主管部门向其颁发的境外投资许可证将自动失效。

总之，新的规定表明了商务部希望促进中国企业进行境外投资。我们预计办法将极大方便中国企业的境外投资。但是，值得注意的是，商务部仅仅是中国企业进行境外投资的众多审批机关之一。取决于中国企业的类型、投资的领域、投资的规模以及其他方面的因素，中国公司还需要考虑其他机关的审批或登记，如国家发改委、国家外汇管理局、国资委、财政部、银监会以及/或者省级的相应部门。

本文章的目的是提供一般信息。如果您需要了解有关本主题的更多信息，欢迎通过电子邮件垂询世泽律师事务所的郭林军律师 ([lawrence\\_guo@broadbright.com](mailto:lawrence_guo@broadbright.com))。