

# 中国公司境外并购投资监管

The Regulatory Aspects Of Outbound Investment By Chinese Companies

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近几年来，中国企业越来越多地开始关注并参与境外投资。据商务部报告，2009年中国对非金融部门的境外投资达433亿美元，比2008年增加了6.5%。其中并购交易占40.5%。据观察家预计，随着中国企业家信心增强，2010年中国境外投资将有40%左右的增幅。中国政府有关部门从2004年开始也陆续制定实施了一系列有关境外投资的政策法规。与原有的法律、政策文件相比，新政新规对境外投资采取鼓励的态度，放松了原有的一些限制，并着眼细节，更具可操作性。在现行法律法规的框架下，中国企业走出国门进行境外投资需要经过几道政府审批登记程序，包括国家发展改革委、商务部、外汇管理局及其在地方的分支机构。

## Background

The Ministry of Commerce (“MOC”) has reported that in 2009, China’s outbound investments in non-financial sector reached US\$43.3 billion, accounting for a 6.5% increase from 2008. Of all the outbound investment, mergers and acquisitions (“M&A”) transactions account for 40.5%. In natural resources area (mainly petroleum, natural gas and ferrous metals), China’s total outbound

investment in 2008 was US\$5.82 billion. In 2009, a single outbound investment in natural resources – acquisition by China Petroleum and Chemical Corporation, or Sinopec, of Addax Petroleum Corporation – had a deal value of C\$10.3 billion (approximately US\$8.8 billion).

Observers predict a 40% jump in China’s outbound investments in 2010 as Chinese large and smaller entrepreneurs as well as general Chinese companies become more confident. The Chinese government also has formulated various policies and regulations to facilitate Chinese companies make cross-border investment.

While the prospect of outbound investment becomes more positive, companies should not overlook the complexity in successfully concluding an outbound investment. The key factors in every M&A transaction, such as adequate due diligence, management integration, labor and contract management, intellectual property rights and corporate governance all become more complex in a cross-cultural context.

In order to mitigate the risks attached to these challenges, formulating a comprehensive M&A strategy throughout the project is especially important. Chinese investor should conduct comprehensive legal, financial and environmental due diligence on the target company or assets to identify potential risks and, subject to the due diligence findings, incorporate protections into the relevant definitive agreements.

Although China has largely relaxed its control on outbound investment, all such investment must still go through the review and approving process of various governmental authorities. This article focuses on the regulatory aspect, a basic yet vital part, of outbound investment by the Chinese companies, and provides an introduction of the relevant approving authorities and their review and approving procedures.

## Current Legal framework for Outbound Investment

Various recently formulated policies and regulations have worked

together to provide detailed procedures with respect to filing and approving requirements. Under the current legal framework, three authorities are responsible for reviewing and approval the relevant aspects of an outbound investment: (i) National Development and Reform Commission (“NDRC”) and State Council; (ii) the MOC and (iii) the State Administration of Foreign Exchange (“SAFE”). If the potential investor is a state-owned enterprise, State-owned Assets Supervision and Administration Commission (“SASAC”) will also need to be involved in the review and approving procedures.

Regulations formulated by both NDRC and MOC have a wide scope of application in terms of the type of outbound investment. Although phrased differently, approvals of both authorities need to be obtained for all proposed outbound investment which aims at obtaining ownership interest, controlling interest, management power or other related interest.

### Review by NDRC

The current NDRC approval regime is provided by two regulations, both issued by NDRC itself. The two regulations are (i) Interim Measures for the Administration of Examination and Approval of Outbound Investment Projects (“Decree No.21”), dated October 9, 2004 and (ii) NDRC Notice on Improvement of the Administration of Outbound Investment Projects (“NDRC Notice”), dated June 8, 2009. Decree No.21 regulates the full aspects with respect to submission, review and approval of a proposed outbound investment project. NDRC Notice, formulated almost five years later, details the initial filing procedure of one type of outbound investment under Decree No.21 – M&A projects and projects involving bidding, which are either in the industry of exploration and development of natural resources such as crude oil or mine with an investment amount of US\$30 million or more; or investment in the other industries with an investment amount of US\$10 million or more (the “Major Projects”).

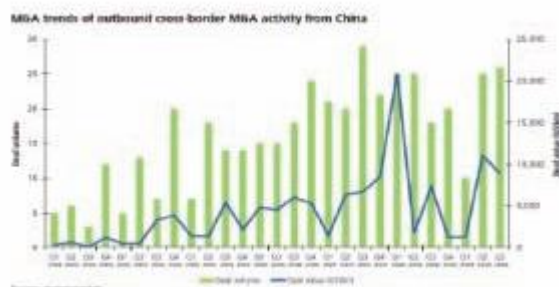
According to Decree No.21 and NDRC Notice, depending on the investment amount and industry of investment, one of the three levels of approving authority would be involved in reviewing and approving the proposed outbound investment.

Non-Major Projects should be reviewed and approved by NDRC at the provincial level. Decree No.21 has not specified the time limit within which the provincial NDRC should issue its approval or relevant opinions. The provincial NDRCs may stipulate their respective local regulations to provide such details. According to the PRC Administrative License Law, all decisions with respect to whether to grant administrative licenses must be made within twenty

business days upon the local authorities’ accepting the relevant application. Where the relevant project is particularly complex, the authority may use an additional ten business days to make its decisions. We note that that the Measures Regarding Administrative License of Shenzhen NDRC provides for the same time limit. It is not clear whether other local NDRCs have adopted the same rule.

A Major Project must be reviewed and approved by NDRC itself. Potential investors must submit their application report for the relevant projects (“Application Report”) to their respective provincial NDRCs to be forwarded to NDRC. An Application Report should include (i) project name, basic information of the investor; (ii) background information of the project and information related to overall local environment for investment; (iii) economic scale of the proposed project, main subject matter, products, target market, investment return and risk; (iv) total amount of investment, respective investment amounts by each investors, form of investment, financing plans and the amount of foreign exchange to be expended; and (v) in the context of M&A or equity interest subscription, the information of the target company. Item (v) needs to be supplemented by the requirements of NDRC Notice. The content of an Application Report, especially item (iii) and (iv), is similar to that of a business plan, which suggests that NDRC would carry out substantive review of the projects.

If the investment amount of a Major Project is otherwise equal to or above US\$200 million for natural resources projects, or US\$50 million for projects in the other industries, such Major Project shall be approved by the State Council.



Decree No.21 provides in detail the procedures regarding how NDRC should process the applications of Major Projects. The time limit for NDRC to issue its decisions is generally the same as stated above, i.e. twenty business days upon accepting the Application Report and additional ten days based on complexity of the project. The Decree No.21 allows NDRC, where necessary, to engage in

expert advisors to study the relevant major issues. Such engagement should be made within five business days upon acceptance of the Application Report. After such expertise study is completed, the advisors will produce an evaluation report to NDRC stating their opinions of the issues presented. It should be noted that the time spent by the advisors for the evaluation is not counted towards the abovementioned 20/30-day time limit and Decree No.21 has not prescribed a time line for such study and evaluation to complete. This leaves room for potential delay in the review process by NDRC. It is also evident from this procedure that the approach of NDRC's review is substantive rather than form by evaluating "necessary major issues".

An additional step is required if investment of a Major Project is made by way of M&A, being Chinese investors merging or acquiring interest in overseas companies or projects, or involves bidding process. Prior to the Application Report submission stage, investors must first submit a project information report to NDRC, the form of which is provided and maybe downloaded from NDRC's website (the "Information Report Form"). Information requested by such form includes (i) basic information of the investors, e.g. the latest gross and net assets, (ii) basic information of the target, e.g. its latest operations activities and financial fitness, (iii) status of negotiation; (iv) status and findings of legal and financial due diligence, as well as economic and technology analysis, (v) amount, form and timing of the proposed transactions; and (vi) schedule for the next step. NDRC, within seven business days upon receipt of the Project Information Form, shall either notify the relevant applicant to supplement materials or issue a Confirmation Letter. Where NDRC finds obvious material adverse factors in the project, it may make notes in the Confirmation Letter to flag such risks. The consequences for having such note in the Confirmation Letter is that NDRC, in its subsequent review of the Application Report, would adopt a more strict approach. The relevant financial institutions, e.g. banks, would also likely become more cautious in deciding its grant of credit facilities to the such projects.

NDRC Notice requires that prior to the submission of the Project Information Report, the relevant investors shall not enter into binding agreements, propose binding quotes, make application to the relevant governmental department of the destination country, or submit the formal bid. Such material work should only be carried out after the Confirmation Letter is issued and should be completed within the valid period of the Confirmation Letter. If the material work cannot be finished before the Confirmation Letter expires, investors should apply for the Confirmation Letter to be extended or, where

necessary, to re-submit the Project Information Form.

### Review by MOC

The MOC exercises parallel approval authority with NDRC over outbound investment. The sequence of applications to NDRC and MOC is indicative from the requirements of the materials to be submitted for MOC's approval, i.e. one of the application documents is "the relevant approval from other applicable governmental authorities". Since the approval from the NDRC is a pre-requisite for Chinese companies to make outbound investment, application to NDRC or its provincial branches should be made prior to the investors applying to the MOC.

The procedures for applications made to MOC is more straightforward. According to the Measures on Administration of Outbound Investment effective March, 16, 2009 (the "MOC Measures"), MOC has delegated approval authority over most proposed transactions to its provincial arms, while MOC retains authority over larger transactions and transactions under certain industries. Three types of more commonly seen investment to be approved by MOC are (i) where the investment amount by the Chinese investor exceeds US\$100 million; (ii) where the investment involves multiple jurisdictions and (iii) where an offshore special purpose vehicle will be set up for purpose of making roundtrip investment. The other two types of investment to be approved by MOC are: (i) investment in the countries/regions where China has not established diplomatic relationship, which to date is approximately 23 countries/regions; and (ii) investment in certain sensitive countries/regions the list of which is to be decided by MOC and the Ministry of Foreign Affairs. All the other investment projects should be submitted to the provincial MOCs for review and approval.

For most of the projects to be approved by the provincial MOCs, the applicants only need to submit an application form, which requires basic information of the overseas target companies to be invested and the readiness of investment capital on the Chinese investors' side. Enterprises under the direct administration of the central government shall submit the form through its headquarter to MOC and the other types of companies submit to the MOCs at provincial levels for review. Both MOC and its provincial branches should review the applications in form, i.e. whether the application forms are completely and properly filled out. Such review shall be conducted within three business days upon MOC/provincial MOC's receipt of the application form.

For three types of investment, the application materials are

required to contain more details. Such investment projects are (i) the investment amount is greater than or equal to US\$10 million but lower than US\$100 million; (ii) investment in the energy or mining industry; and (iii) investment which require soliciting other onshore companies. If a potential project falls under one of the above three categories, the investor shall submit more documents detailing the information of the potential project.

The review process by MOC would take approximately 35 - 45 working days and 20 - 30 working days for provincial MOCs. MOC will issue an Outbound Investment Certificate to investors for projects that pass the review.

Investors should promptly proceed to complete formalities at various authorities including foreign exchange, customs, banks and foreign affairs departments. If an investor fails to complete the above formalities or the necessary formality required in the destination country within two years of the date of the Outbound Investment Certificate, all the approvals including the Outbound Investment Certificate would lapse.

## SAFE Registration and Upfront Fees

Chinese investors, after obtaining approvals from the applicable NDRC and MOC, should proceed to register its outbound investment with the State Administration of Foreign Exchanges ("SAFE") in order to remit its capital offshore. Such registration should be made with the local branches of SAFE.

The SAFE-formulated Regulation of Administration of Foreign Exchange With Respect To Direct Outbound Investment by Domestic Companies, effective August 1, 2009, (the "Forex Regulation") provides detailed rules on various aspects of the use of foreign exchanges for the purpose of outbound investment. While China exercises stringent control over flow of foreign exchange under the current foreign exchange regime, the Forex Regulation serves as a practical guidance to Chinese investors.

Compared to the previous regulations and rules on foreign exchange regarding outbound investment, where the channel of capital for outbound investment is limited to the foreign exchange belonging to the investor, the Forex Regulation permits multiple capital resources from (i) foreign exchange owned by Chinese investor, including without limitation, the foreign exchange under their current account, and for foreign-invested enterprises, under their capital account; (ii) proper foreign exchange loans from domestic financial institutions; (iii) foreign exchange purchased by the investor; (iv) in kind; (v) intangible assets; and (vi) profits from outbound direct investments which

the investor has retained overseas. Rather than limiting the capital resources for outbound investment, SAFE instead controls the upper limit of the amount of foreign exchange permissible to the investors, which would be prescribed by the NDRC and registered with SAFE.

Investors, prior to obtaining the necessary approvals from the NDRC and MOC, may apply to SAFE for the use and remittance of upfront fees as necessary for the relevant outbound investment project. Three types of upfront fees are expressly permitted under the Forex Regulation: performance bond for M&A transactions, bidding guarantee for projects involving bidding and necessary start-up expenses such as market research, office and equipment lease, recruitments and services fees for overseas professional firms. All remittance of upfront fees need to be approved by NDRC as well. The amount of such upfront fees should generally not exceed 15% of the total investment amount.

If the approving procedures, upon remittance of such upfront fees, cannot be completed within six months, or (upon approval for an extension) up to twelve months, any remainder of the upfront fees in the investors' overseas account, if any, must be remitted back to the investor's foreign exchange account in China.

For profit distribution from the outbound investment, if such profits are to be remitted into China, the investors may choose to keep the foreign exchange under their current account or convert them into RMB. If an investor transfers, in whole or in part, the equity interest in its overseas subsidiary to another Chinese company, the purchase prices shall be denoted in RMB and paid within China.

## Summary

Understanding the regulatory aspect is one of the most important elements in successfully launching and completing an outbound investment project. We wish this article can give the readers an overview of to which authorities and how to apply for their plan to "go out" of the Chinese border and seize overseas opportunities. On the other hand, investors should note that an outbound investment is usually a time and energy consuming process involving numerous aspects regulatory and non-regulatory alike. Thus such projects would not be made possible without serious commitment, a strong management team with good organizational and coordination skills and leadership by the investors, together with assistance from its external specialist advisors.

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