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New Focus and New Thresholds for Chinese Outbound Investments

On March 16, 2009, China's Ministry of Commerce ("MOFCOM") issued the Measures on the Administration of Overseas Investments (the "Measures"), replacing the regulations issued in 2004. The Measures apply to investments by entities established in China in non-financial enterprises outside China.

At the heart of the Measures is MOFCOM's determination to focus the central government's caseload on large scale or politically sensitive investments and allow other applications to be approved more easily. The 2004 framework authorized provincial level MOFCOM authorities to approve investments by enterprises under the local government in certain designated countries; investments in other locations or by enterprises under the central government required national level MOFCOM approval.

Under the Measures, applicants should instead follow one of three tracks, depending on the significance of the investment. A fast track applies for investments of less than US$10 million and which do not fall into the categories requiring provincial or central approval (see below). Such applications do not require a full review and should obtain approval within three business days after submission of an application form (but not full documentation) to either a provincial or the central MOFCOM bureau. On the second track, provincial MOFCOM bureaus may approve (i) investments of between US$10 million and US$100 million; (ii) investments in energy and natural resources and (iii) investments that involve "raising external funds" (a term left undefined by the Measures) within the PRC.

Finally, central MOFCOM approval is required for investments that (i) are in an amount of US$100 million or more, (ii) involve the establishment of an overseas special purpose vehicle for the listing of PRC assets, (iii) involve the interests of several jurisdictions, (iv) are in designated jurisdictions (to be set forth in a separate list), or (v) are in jurisdictions without diplomatic relations with the PRC.

Despite the welcome clarifications and streamlining detailed above, the Measures may impose unanticipated barriers to outbound investment. For example, the Measures provide that any agreement relating to the outbound investment will only become effective once the relevant governmental approvals have been obtained and not upon execution. Careful drafting will be required to ensure that key contractual provisions retain their enforceability pending receipt of such approvals.

Written by
Peter Davies, associate
Paul, Weiss, Rifkind, Wharton & Garrison

Hong Kong Club Building, 12th Floor
3A Chater Road, Central
Hong Kong

Email: pdavies@paulweiss.com
Ph: (852) 2536-9933