Recently, several published rules and public comments by government officials have sent a signal that the Chinese government will take certain measures to tighten its control and supervision over outbound investment by Chinese companies, especially in certain industries. Yet to be seen is whether these new rules and policies, once fully implemented, will present significant legal obstacles to outbound investment by Chinese companies. Chinese firms engaged in overseas investments need to be aware of these new trends and to prepare to adjust their strategic plans and overseas activities. At the same time, we have also seen that Chinese government is taking concrete measures to further improve the legal framework for foreign direct investment into China. Both Chinese and foreign investors may take advantage of the policy changes to adapt their respective investment strategies in response to the challenges of change.

I. Recent Rules And Policies

On November 29, 2016, the People’s Bank of China promulgated the Notification on Further Clarifications on Overseas RMB Loans by Domestic Enterprises (YinFa [2016] No. 306) (Circular 306). Circular 306 aims at restricting the arbitrage activities of companies that convert offshore RMB into hard currencies and engage in short-selling of offshore RMB, while stabilizing the RMB exchange rate. Circular 306 sets forth some new requirements, including requiring pre-approval of overseas RMB loans, requiring equity ownership between debtors and creditors, restrictions on the net outflow amount of RMB, and requirements to tighten the control over intentional breach of loan agreements. Some requirements under Circular 306 are also consistent with proposed measures that would tighten control over outbound investment by Chinese companies in certain industries, as discussed below.

Simultaneously with the publication of Circular 306, Reuters and some other news media in China also
reported that the State Administration of Foreign Exchange (SAFE) has adopted certain internal rules cutting the maximum amount of overseas repatriation by companies established in China (including both domestic companies and foreign invested enterprises) down from USD 50 million to USD 5 million, requiring pre-approval with the SAFE for all overseas transfers by companies established in China of USD 5 million or more under capital accounts. These internal rules not only set forth new restrictions over offshore investment by Chinese companies, but also apply to funds transferred between Chinese subsidiaries and their offshore parents and affiliated companies. We have made informal telephone consultation with the SAFE and some of its local branches regarding these new internal policies, and we cannot get any confirming or denying comments from any of the government officials we have talked to.

On December 6, 2016, officials from the National Development and Reform Commission (NDRC), the Ministry of Commerce, the People’s Bank of China and the SAFE, in a press conference (Press Release), stated that the government “will support domestic companies that have the ability and opportunity to make real and legal outbound investment and to participate in projects relating to China’s ‘One Belt and One Road’ strategy,” but that it “has also noticed some irrational investment activities in real estate, hotels, film studios, the entertainment industry and sports clubs” and “has been alerted to potential risks in association with overseas investment projects involving (a) large investment in business that is not related to the core business of the Chinese investor, (b) outbound investment made by limited partnerships, (c) investment in offshore targets that have assets value larger than the Chinese acquirers, and (d) projects that have very short investment period.” The Press Release “suggests the companies to be cautious when making outbound investment.”

Some insiders and professionals believe that Chinese government will soon publish a set of rules and regulations with concrete measures to tighten the inspection and supervision of outbound investment activities of Chinese companies, and that those rules and regulations will be broadly applied to outbound investment in all industries. It is expected that domestic examination and approving authorities of outbound investment projects will scrutinize the approval process from the perspectives of the source of the investment funds, the qualification of the domestic investment entities and the quality of the overseas target companies and/or assets, and that they will require the Chinese investors/acquirers to provide more documents supporting their investment objectives, the estimated investment returns and the rationale of the investment.

It is also worth mentioning that while tightening the control over outbound investment by Chinese companies, the Chinese government is also taking measures to lift restrictions over foreign investment into China and simplifying the examination and approving process for foreign direct investment. In September 2016, the Standing Committee of the People’s Congress made decisions to make revisions to the relevant provisions in the Wholly Foreign Owned Enterprises Law, Sino-Foreign Equity Joint Ventures Law, Sino-Foreign Cooperative Joint Venture Law, the Law on Protection of Investment from Taiwan Enterprises.
and Individuals, and some related administrative rules. Under those revisions, foreign invested enterprises (including companies invested by Taiwan enterprises or individuals) in non-restricted industries no longer have to be examined and approved by government authorities, and all such companies only need to file with the government for the record upon formation and changes. The filing for record system for foreign invested enterprises was later formalized by the Ministry of Commerce and the State Administration of Industry and Commerce under the Tentative Rules on Filing System for the Establishment and Information Change of Foreign Invested Enterprises, published on October 8, 2016. NDRC and the Ministry of Commerce also published a circular to clarify the industries in which foreign investments are still subject to special administration (the so-called “Negative List”). On December 7, 2016, the NDRC and the Ministry of Commerce issued the draft Seventh Edition of the Catalogue of Industries for Foreign Investment for public comments, which draft further cuts down the restricted industries for foreign investment from 93 categories in 2015 to approximately 60 categories.

Read more: China’s Recent Restrictions on Outbound Investments by Chinese Companies