The Ministry of Commerce Relaxes Foreign Investment Approval Thresholds

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The Ministry of Commerce (MOFCOM), China's main foreign investment regulatory authority, promulgated several new policies in March 2009 to relax foreign investment approval thresholds and delegate a substantial portion of its approval authority to local commerce bureaus or commissions. These new policies constitute a fresh effort by MOFCOM to maintain and attract foreign investment in China amidst the global financial crisis.

These new policies substantially reduce, simplify or even eliminate several approval requirements with respect to foreign direct investment and M&A transactions in China. Local commerce bureaus/commissions now have greater authority to approve foreign investment projects without the need to report to the central government, which substantially shortens and simplifies the approval process and reduces transaction costs.

The new policies include:

(a) MOFCOM has delegated full approval authority with respect to the establishment, increase/decrease of registered capital, amendment of joint venture contracts or articles of association and other changes to foreign-invested enterprises ("FIEs") under the "encouraged" category (under the Catalogue Guiding Foreign Investment by Industry) to provincial-level commerce bureaus/commissions and State recognized special economic zones;

(b) MOFCOM has delegated full approval authority with respect to M&A transactions by foreign investors or FIEs of Chinese domestic companies with a transaction value of USD100 million or less (for projects in the "encouraged" and "permitted" categories) or USD50 million or less (for projects in the "restricted" category) to provincial-level commerce bureaus/commissions and State recognized special economic zones;

(c) For FIEs previously approved by MOFCOM, any subsequent changes thereto (except for changes requiring approval by the National Development and Reform Commission (NDRC) at the central government level or involving transfers of controlling interests from Chinese parties to foreign parties) are now subject only to approval by provincial-level commerce bureaus/commissions;

(d) MOFCOM has delegated its approval authority with respect to the establishment of foreign invested holding companies in China with registered capital of USD100 million or less (except for capital increases in one lump sum of USD100 million or more) to provincial-level commerce bureaus/commissions;

(e) For foreign-invested holding companies previously approved by MOFCOM, any subsequent changes thereto (except for such matters as capital increases in one lump sum of USD100 million or more or changes of shareholders) are now subject only to approval by provincial-level commerce bureaus/commissions;

(f) FIEs no longer require approval to establish branches around the country but can now do so mainly by a filing for the record with the local commerce bureaus/commissions;

(g) FIEs no longer require approval for the release of equipment/materials imported on a bonded basis from customs supervision before expiration of the mandatory supervision period; and

(h) The approval authority for certain foreign investment projects in the automotive industry has been delegated to provincial-level commerce bureaus/commissions.

These new policy changes constitute a major simplification and streamlining of government requirements for foreign investments in China which foreign investors have in the past found to be cumbersome and time-consuming. Under these policies, the approval period for a particular foreign investment project may be reduced from as long as 6-9 months to as little as 30 days. They affirm China’s general welcome to foreign investment, albeit only in those sectors previously opened to such investment and for smaller M&A transactions.

However, the delegation of extensive approval authority to provincial-level commerce bureaus/commissions may encounter a lack of experience or even a higher level of corruption at the local level in handling major foreign investment projects. As such, it may take time before these new policies are effectively implemented.

WilmerHale’s China practice group has extensive experience handling foreign direct investment, cross-border M&A, restructuring and other corporate projects involving China.

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