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## **M&A Regulatory Approval Notes**

**April 2009**

**MMLC Group**

In addition to approvals that may be required under China's Anti-Monopoly Law, the following are the major approvals also required in a M&A transaction involving Chinese assets or shares:

### **(1) Foreign Entity Buying a FIE in China**

In the case a foreign entity plans to buy a FIE in China, it shall first be approved by the Chinese NDRC, the relevant laws and regulations are Article 3 and Article 4 of "***Interim Measures for the Administration of Examining and Approving Foreign Investment Projects (Issuance Date: 2004.10.09; Agency: National Development and Reform Commission)***".

According to the “***Classification of the Catalogue of Industries for Guiding Foreign Investment (Issuance Date: 2007.12.01; Agency : Ministry of Commerce, State Development and Reform Commission)***”, the application report of a project of the encouraged and permitted industries with a total investment of 100 million U.S. dollars or more or of the restricted industries with a total investment of 50 million U.S. dollars or more shall be subject to the examination and approval of the NDRC, of which the application report of a project of the encouraged and permitted industries with a total investment of 500 million U.S. dollars or more and the restricted industries with a total investment of 100 million U.S. dollars or more shall be subject to the examination and approval of the NDRC, and then be reported to the State Council for verification. And a project of the encouraged and permitted industries with a total investment of 100 million dollars or less and of the restricted industries with a total investment of 50 million dollars or less shall be subject to the examination and approval of a regional development and reform department, while a project of the permitted industries shall be subject to the examination and approval of a regional development and reform department.

According to “***Interim Provisions on the Takeover of Domestic Enterprises by Foreign Investors (Issuance Date: 2006.09.08; Agency : Ministry of Commerce, State Asset Supervision and Administration Commission, China Securities Regulatory Commission, State Administration of Taxation, State Administration for Industry and Commerce, State Administration of Foreign Exchange)***”, a foreign purchaser may also need to get an assessment, because the parties to a takeover shall determine the transaction price on the basis of the assessment result of the equities to be transferred or of the assets to be sold, which is given by an asset assessment institution. The parties to a takeover may agree on an asset assessment institution lawfully established within China. A common international assessment method shall be adopted for the asset assessment. It is prohibited to divert any capital abroad in any disguised form by transferring any equities or selling assets at a price which is obviously lower than the assessment result.

## **(2) Foreign Entity Buying a SOE in China**

In the case a foreign entity plans to buy a foreign entity buying a SOE in China, it shall first be approved by the Chinese NDRC as described in the aforesaid term (1)

And according to “***Interim Provisions on the Takeover of Domestic Enterprises by Foreign Investors (Issuance Date: 2006.09.08; Agency : Ministry of Commerce, State Asset Supervision and Administration Commission, China Securities Regulatory Commission, State Administration of Taxation, State Administration for Industry and Commerce, State Administration of Foreign Exchange)***”, where a foreign investor intends to obtain the actual controlling power of a domestic enterprise it plans to take over, and if any important industry is concerned, or if it has an impact on or may have an impact on the national economic security, or it will lead to the transfer of the actual controlling power of a domestic enterprise which holds a famous trademark or China Time-honored Brand, the parties concerned shall file an application with the MOFCOM. If the foreign investor concerned fail to do so, but its takeover has had or may have a serious impact on the national economic security, the MOFCOM may, jointly with the relevant departments, demand the parties concerned to terminate the transaction or transfer the relevant equities / assets or take other effective measures to eliminate the takeover’s impact on the national economic security.

What's more, in accordance with the “***Interim Measures for the Supervision and Administration of State-Owned Assets of the Enterprises (Issuance Date: 2003.05.27; Agency : State Council)***”, the State-owned assets supervision and administration authorities shall decide on the assignment of State-owned equity in their Funded Enterprises. Where the assignment of all the State-owned equity or the assignment of part of the State-owned equity would result in the State no longer having the controlling interest in the enterprise, it shall be reported to the people's government at the same level for approval.

The State-owned assets supervision and administration authority decides on the transfer of State-owned equity of its invested enterprises. The transfer of whole or part of the State-owned equity which may result in the loss of holding position of the State in the invested enterprises shall be reported for approval to the people’s government at the corresponding level. Where any major matters of the important subsidiary enterprises established with the investment of the invested enterprises need to be reported by the invested enterprises to the State-owned assets supervision and administration authority for approval, the management measures there for shall be separately formulated by the State-owned assets supervision and administration authority of the State Council and submitted to the State Council for approval.

And per” ***“Interim Provisions on the Takeover of Domestic Enterprises by Foreign Investors (Issuance Date: 2006.09.08; Agency Ministry of Commerce, State Asset Supervision and Administration Commission, China Securities Regulatory Commission, State Administration of Taxation, State Administration for Industry and Commerce, State Administration of Foreign Exchange)”***, to purchase state-owned assets, special assessments are necessary, the takeover of a domestic enterprise by a foreign investor, which may cause the modification of any equity formed by investments to state-owned assets or transfer of the property right of state-owned assets, shall satisfy the relevant provisions on the management of state-owned assets.

So, for a State-owned entity, in addition to the general requirements and other relevant valuation regulations, the most distinct feature of a transaction involving a state-owned enterprise is that it shall also comply with the specific laws and regulations on the administration of state-owned assets. The most important regulatory documents in relation to the issues of state-owned assets in an M&A transaction are ***“Interim Measures for the Supervision and Administration of State-Owned Assets of the Enterprises (Issuance Date: 2003.05.27 Agency : State Council)”***, ***“Interim Measures for the Management of the Transfer of the State-owned Property Right of Enterprises (Issuance Date: 2004.02.01 Agency : Ministry of Finance, State Asset Supervision and Administration Commission)”***, ***“Interim Measures for the Administration of Valuation of State-owned Assets of Enterprises (Issuance Date: 2005.09.01; Agency : State Asset Supervision and Administration Commission)”*** and ***“Interim Provisions on the Utilization of Foreign Investment to Restructure State-owned enterprises (Issuance Date: 2003.01.01 Agency : State Administration for Industry and Commerce, State Administration of Foreign Exchange)”***, etc. Such interim provisions establish a framework for foreign investment in state-owned enterprises and their transformation into foreign-invested enterprises. Such interim provisions shall also apply to other types of target enterprises mentioned below if state-owned assets can be tracked in those other types of target enterprises.

### **(3) Foreign Entity Buying a Private Owned Chinese Company in China**

In the case a foreign entity plans to buy a foreign entity buying a privately owned Chinese company in China, it shall first be approved by the Chinese NDRC and MOFCOM as

described in the aforesaid term(1) and term (2), an assessment of the assets to be purchased shall also be provided as explained in item(1).

Generally speaking, in all of the above situations, if the enterprise to be taken over is a domestic listed company, it shall, pursuant to the “***Measures for the Administration of Strategic Investment in Listed Companies by Foreign Investors (Issuance Date: 2006.01.31; Agency : Ministry of Commerce, China Securities Regulatory Commission, State Administration of Taxation, State Administration for Industry and Commerce, State Administration of Foreign Exchange)***”, go through the relevant formalities in the securities regulatory institution of the State Council.

And according to the “***Anti-monopoly Law of the People’s Republic of China(Issuance Date: 2008.08.01 Agency : Standing Committee of the National People's Congress)***”, the business operators shall also declare in advance the concentration reaching the threshold of declaration prescribed by the State Council to the Anti-monopoly Law Enforcement Agency of MOFCOM.

As regards the foreign purchase of domestic enterprises or other forms of participation in concentration of undertakings by foreign investment, which involve national security, besides the concentration of undertakings engaging in examinations pursuant to the provision of this law, it shall also be engaged in national security examinations in accordance with the regulations of the State.

In addition, if the foreign purchase refers to finance, cement, machinery manufacturing, cultural field, transportation, medical, import and export commodity inspection and other such industries, it may also need the pre-examination and pre-approval of the related competent industrial departments.

Note: the “examination and approval organ” always refers to MOFCOM or the provincial commerce administrative departments; the “registration administrative organ” refers to the SAIC or its authorized local administrations for industry and commerce; the “foreign exchange control organ” refers to SAFE or its branches. However, the power of decision resides in the MOFCOM, the following two are mainly just legal proceedings.