

## **MOC and PBOC Promulgated Detailed Guidelines on RMB Inbound Direct Investment**

On October 12, 2011, the Ministry of Commerce (the “MOC”) promulgated the *Circular on Several Issues on Direct Investment by Cross-border RMB* (*Shang Zi Han [2011] No. 889*) (the “MOC Circular”). The MOC Circular took effect on the same day. One day later, the People’s Bank of China (the “PBOC”) issued the *Measures of Administration of RMB Settlement Business for Foreign Direct Investment* (the “PBOC Measures”). Both, the *MOC Circular* and the *PBOC Measures* clarify some uncertainties on foreign direct investment by using cross-border Renminbi (“RMB”).

1. According to the *MOC Circular*, foreign investors may use so-called “offshore RMB” to make direct investment in mainland China.
  - a) For the purpose of the *MOC Circular*, the term “offshore RMB” covers:
    - (1) any RMB the foreign investor obtained through cross-border RMB trading settlement;
    - (2) any RMB the foreign investor duly obtained from dividend distribution, share transfer, capital decrease, liquidation or advance recovery of its investment from its foreign invested enterprise(s) in China and such RMB have been remitted abroad to the foreign investor; and
    - (3) any RMB the foreign investor obtained abroad through other legal channels, including but not limited to RMB obtained through issuance of RMB bonds or stocks abroad, etc.
  - b) Such offshore RMB cannot be used directly or indirectly for investment in securities and financial derivatives or entrustment loans. However, foreign investors may use them to participate in private placements and share transfers by agreement in domestic listed companies.
  - c) The *MOC Circular* also delegates the current authority for approval of investment through offshore RMB from the MOC to its local counterparts in accordance with the current regulations on authority for approval of foreign investment. The following projects are exempted and still need to be submitted to the MOC:

- (1) Projects with an investment amount of RMB 300 million or above;
- (2) Investments in industry sectors, such as financing security, financial leasing, small amount credit financing and auction;
- (3) Investment in foreign invested holding companies or foreign invested venture capital or equity investment enterprises; and
- (4) Investment in key industries under the State macroeconomic policies, such as cement, steel, electrolytic aluminum and ship-building industries.

In any of the above cases, verification shall be sought from the MOC before its local counterpart issues the approval on the relevant investment project.

- d) Furthermore, according to the *MOC Circular*, foreign investors shall additionally submit the following documents to the competent examination and approval authority for approval of investments with offshore RMB:
  - (1) evidence on the source of its offshore RMB;
  - (2) statement of the use of such RMB capital; and
  - (3) standard Information Sheet on Cross-border RMB Direct Investment.

The approval letter and the Certificate of Approval of the approved foreign invested enterprise will show that its capital contribution is made in offshore RMB and the corresponding RMB contribution amount.

2. The *PBOC Measures* apply to the RMB settlement business of banks in respect of direct investment by foreign investors, including investment by using both onshore and offshore RMB.
  - a) According to the *PBOC Measures*, if the registered capital of a foreign invested enterprise (“FIE”) is contributed in RMB, such FIE shall register with the local branch of the PBOC within 10 working days after issuance of its Business License. Furthermore, in case of any corporate changes in such FIE, it shall report the same to the local branch of the PBOC within 15 working days after completion of the relevant registration or recordal with the competent Administration for Industry and Commerce.

- b) The FIE shall also open a specific RMB capital account with the bank for the RMB to be contributed by its foreign investor as capital contribution. The banks are entrusted by the PBOC to supervise and verify the use of the RMB registered capital by the FIE in accordance with the current regulations on use of registered capital by FIEs.
- c) In case a foreign investor uses RMB to acquire the equity interests held by the Chinese shareholder(s) in a domestic company or an FIE, the Chinese seller(s) must open a designated RMB share transfer account or RMB acquisition account to receive the purchase price.
- d) The PBOC Measures also restate that the total amount of the loans (regardless whether denominated in RMB or foreign currencies) to be taken out by an FIE from abroad is limited to the difference between its total amount of investment and registered capital. In case an FIE takes out a loan in RMB from abroad, it shall open a RMB deposit account with the bank for the loan proceeds. The banks are entrusted by the PBOC to supervise and verify the use of such RMB loan by the FIEs.

The *MOC Circular* and the *PBOC Measures* provide more detailed guidelines for foreign investors on how to apply for approval of their equity investment in mainland China by cross-border RMB. However, it remains to be seen whether the local counterparts of the MOC and the PBOC in all jurisdictions will timely be aware of and implement these regulations. Furthermore, as the company registration authority, i.e. the Administration for Industry and Commerce, also plays an important role in registering equity investments by foreign investors, it is expected to also specify its own requirements on registration of foreign investment by cross-border RMB.

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