

MOFCOM unveils the new rules on outbound investments

The Ministry of Commerce (MOFCOM) has recently revised its regulations on outbound investment. This marks the continuing effort of China in gradually overhauling its outbound investment regime since 2013, aiming to streamline administrative procedures and facilitate more Chinese enterprises in "going abroad".

Background

The State Council started the overhaul by issuing the Notice Regarding the Issuance of the Catalogue of Investment Projects Subject to Government Approval (2013 Catalogue), which establishes overriding principles to reform the approval/filing regime of outbound investments. In April 2014, the National Development and Reform Commission (NDRC) issued the Administrative Measures on Approval and Filing of Outbound Investment Projects (NDRC Measures), making the first move to reduce its administrative powers on and streamline the approval/filing procedures of outbound investments. On 6 September 2014, MOFCOM promulgated the Administrative Measures on Outbound Investments (New MOFCOM Measures), which will take effect on 6 October 2014 to replace the existing version issued in 2009 (Old MOFCOM Measures). These policy initiatives feature a significant shift in the regulatory paradigm of Chinese outbound investments, essentially reducing the approval-based regime for outbound investments to a filing-based regime.

While our previous briefing issued in June 2014 ¹(see the following link) provided a high level analysis of the NDRC Measures, this briefing focuses on the implications of the New MOFCOM Measures and its interaction with the NDRC Measures under the new regulatory paradigm.

¹ [CC Client Briefing-China relaxes outbound direct investment rules](#)

Establishing a filing-based regime

The provisions of the New MOFCOM Measures contemplate a largely filing-based regulatory regime. This is illustrated by the fact that only outbound investment applications in "sensitive countries and regions" and "sensitive industries" will require approval by central MOFCOM. All other outbound investments will only be subject to a filing requirement, irrespective of the investment amount.

"Meaning of sensitive countries and regions" and "sensitive industries"

Compared to the NDRC Measures, the New MOFCOM Measures adopt slightly different definitions for "sensitive countries and regions" and "sensitive industries":

	NDRC Measures	MOFCOM Measures
"Sensitive countries and regions"	Countries and regions with which China has not established diplomatic relationships	
	Countries and regions subject to <i>international sanctions</i>	Countries and regions subject to <i>United Nations' sanctions</i>
	Countries and regions undergoing wars, riots, etc.	Countries and regions which MOFCOM may specify where necessary.
Sensitive industries	Basic telecommunication, cross-border hydro-resources development, large-scale land development, media, and main electricity transmission line and grid will be tightly monitored.	Industries which produce or develop products or technologies that are restricted from export by the Chinese government, as well as industries that involve the interests of more than a single country (region).

In light of the above discrepancies, when choosing the destination and sector for outbound investment, the Chinese investor must consider both the NDRC Measures and the New MOFCOM Measures and gain a clear understanding of applicable approval/filing requirements. Given the level of generality of these definitions, however, specific advice or confirmation from legal counsels and authorities (where possible) should be sought on a case by case basis.

Streamlined approval and filing procedures

Level of authority

- the approval authority lies with central MOFCOM
- the provincial level offices of MOFCOM may only conduct a preliminary review of outbound investments as delegated by central MOFCOM, which retains the ultimate approval authority; and
- outbound investment applications of centrally-administered enterprises (**Central Enterprises**), whether subject to filing or approval, must first be made with central MOFCOM. In contrast, outbound investment applications of other enterprises must first be submitted to the provincial level offices of MOFCOM, and if the nature of the application so requires, further forwarded to central MOFCOM for approval.

Timing of Submission

The New MOFCOM Measures do not provide a clear timing as to when the investor should submit an outbound investment application for approval or filing. With respect to applications for filing, the New MOFCOM Measures do not require the submission of the relevant transaction agreements. It therefore appears that the investor may attend to the filing procedures anytime, whether before or after the execution of the transaction agreements. With respect to applications for approval, however, since transaction documents are required as part of the submission package, it is logical to assume that such applications may only be submitted following the execution of the transaction documents relating to outbound investment.

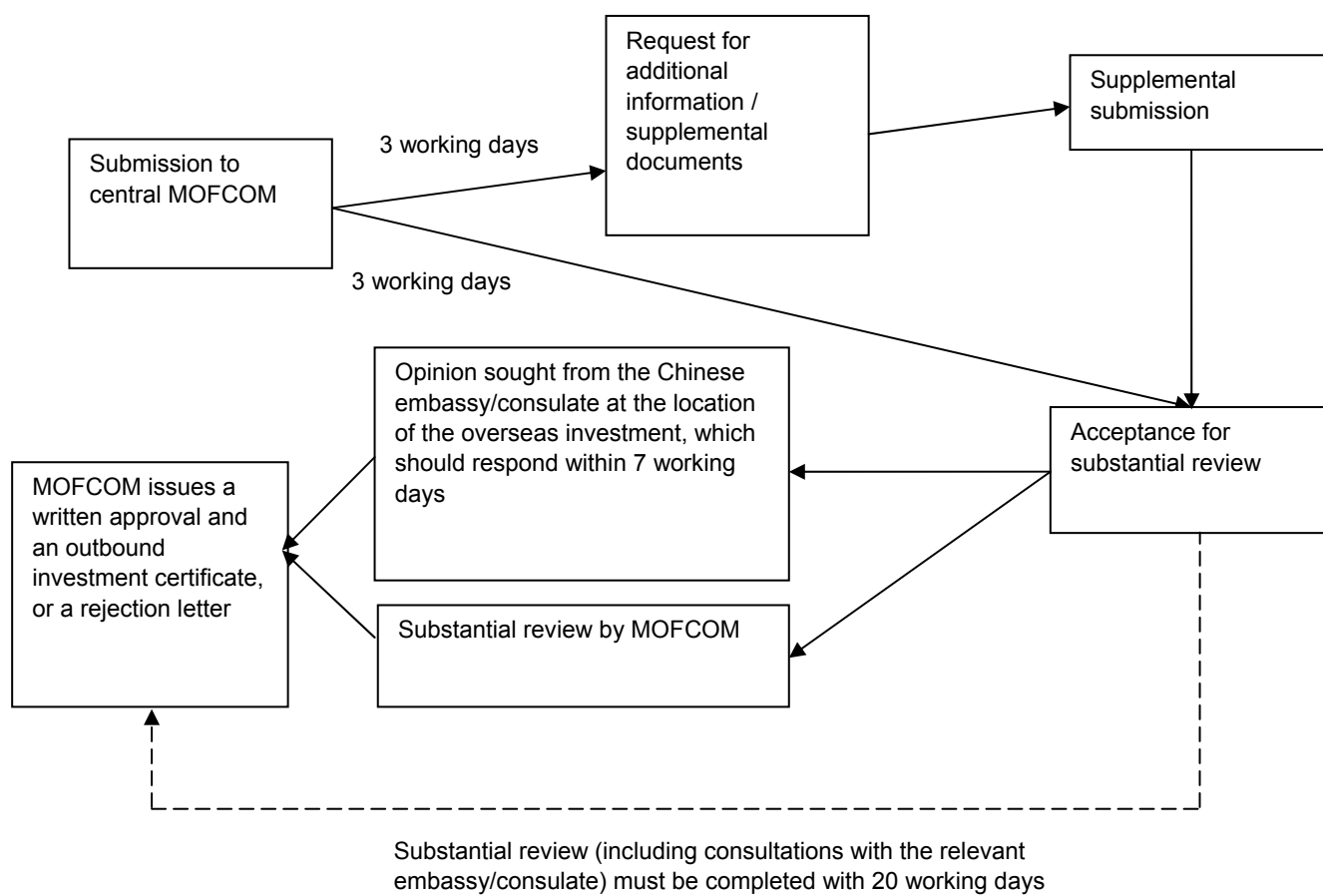
Work flow and time frame

Pursuant to the New MOFCOM Measures, all submissions for MOFCOM approval/filing should be conducted through the designated administrative system for outbound investments. The New MOFCOM Measures have also reduced the time in which relevant authorities must complete their review at different stages of the application. The diagrams below illustrate the respective procedures and timelines for an approval or a filing conducted by MOFCOM at different levels of authority.

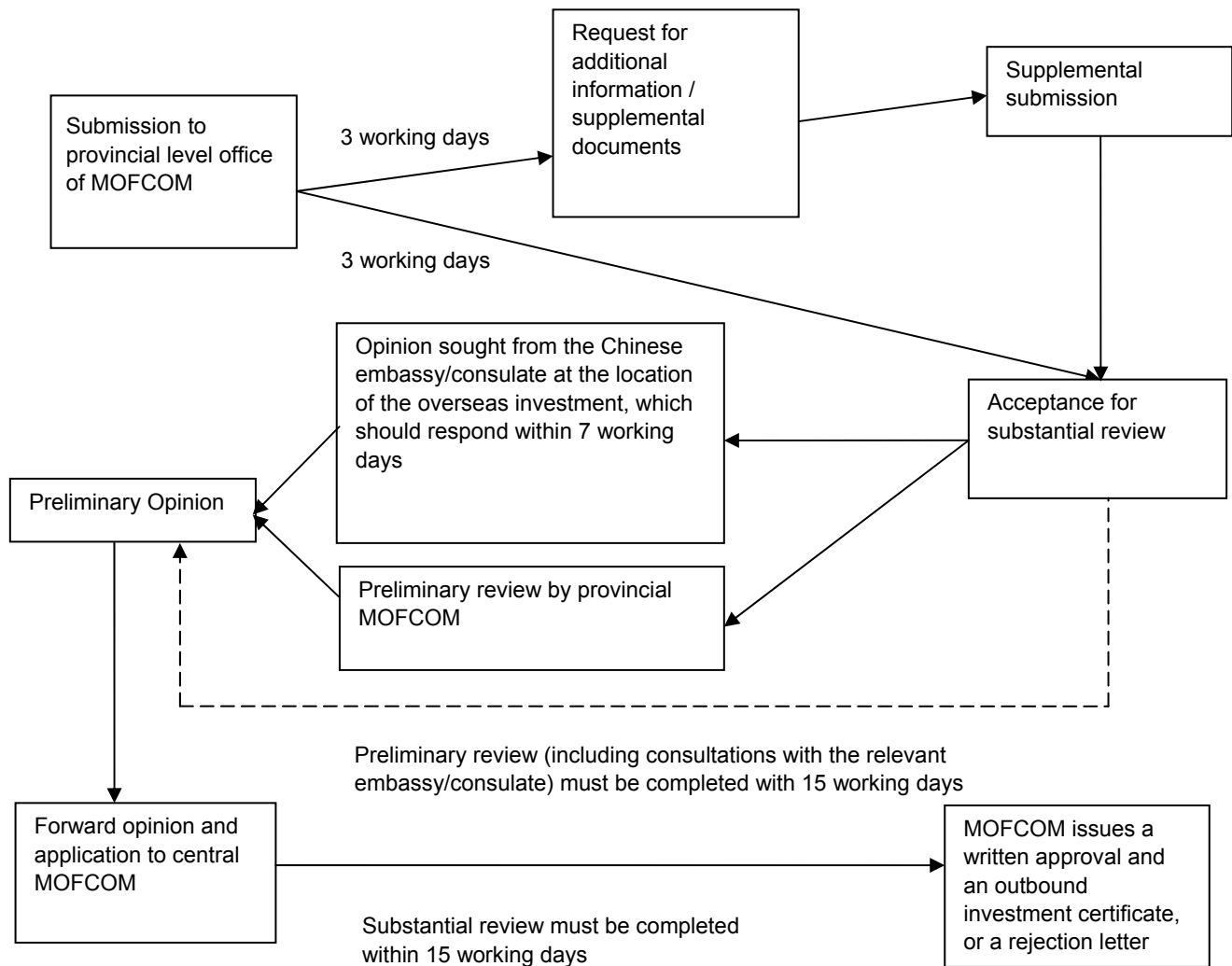
Approval process

As mentioned above, under the New MOFCOM Measures, only outbound investment applications in "sensitive countries and regions" and "sensitive industries" require central MOFCOM approval.

Where the investor of such an application is a Central Enterprise:



Where the investor of such an application is NOT a Central Enterprise:



Contacts

China/Asia

Tiecheng Yang

Partner

 E: tiecheng.yang@cliffordchance.com
Stephen Harder

Partner

 E: stephen.harder@cliffordchance.com
Tim Wang

Partner

 E: tim.wang@cliffordchance.com
Terence Foo

Partner

 E: terence.foo@cliffordchance.com
Glen Ma

Partner

 E: glen.ma@cliffordchance.com
Kelly Gregory

Partner

 E: kelly.gregory@cliffordchance.com

Americas

Evan Cohen

Partner

 E: evan.cohen@cliffordchance.com
Anthony Oldfield

Partner

 E: anthony.oldfield@cliffordchance.com

Europe

Stefanie Tetz

Partner

 E: stefanie.tetz@cliffordchance.com
Kathy Honeywood

Partner

 E: kathy.honeywood@cliffordchance.com
Paolo Sersale

Partner

 E: paolo.sersale@cliffordchance.com
Nick Fletcher

Partner

 E: nick.fletcher@cliffordchance.com
Nicholas Rees

Partner

 E: nicholas.rees@cliffordchance.com

Middle East and Africa

Nigel Wellings

Partner

 E: nigel.wellings@cliffordchance.com
Anthony Giustini

Partner

 E: anthony.giustini@cliffordchance.com
Edmund Boyo

Partner

 E: edmund.boyo@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

As is the case for all international law firms licensed in China, we are authorized to provide information concerning the effect of the Chinese legal environment, however we are not permitted to engage in Chinese legal affairs in the capacity of a domestic law firm. Should the services of such a firm be required, we would be glad to recommend one.

www.cliffordchance.com

Clifford Chance, 40th Floor, Bund Centre, 222 Yan An East Road, Shanghai 200002, People's Republic of China

© Clifford Chance 2014

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widjati & Partners in association with Clifford Chance.