

## **Summary of recent delegations by the Ministry of Commerce**

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Recently, the Ministry of Commerce of the People's Republic of China ("MOFCOM") issued a series of circulars to conditionally delegate the approval authority of relevant industries to provincial MOFCOM. This article sets forth a brief summary of these circulars and the industries involved.

### **1. Relevant circulars**

- (1) *Circular of the Ministry of Commerce on Further Simplifying and Standardizing the Administrative Approval of Foreign Investments* (Shang Zi Han [2008] No.21, "**Circular 21**")
- (2) *Circular of the Ministry of Commerce on Approval Issues of the Approval, Examination and Administration of Some Foreign Investment Enterprises for Service Industry by Provincial Administrative Departments for Commerce and the National Economy & Technology Development Zones* (Shang Zi Han [2009] No.2, "**Circular 2**")
- (3) *Circular of the Ministry of Commerce on Relevant Issues of the Approval, Examination and Administration of Some Foreign Investment Enterprises for Service Industry by Provincial Administrative Departments for Commerce and the National Economy & Technology Development Zones* (Shang Zi Han [2009] No.6, "**Circular 6**")
- (4) *Circular of the Ministry of Commerce on Further Improving the Work of Examination and Approval of Foreign Investment* (Shang Zi Han [2009] No.7, "**Circular 7**")
- (5) *Circular of the Ministry of Commerce on Delegating the Right of Examination and Approval of the Establishment of Investment Companies by Foreign Investors to Lower Administrative Authorities* (Shang Zi Han [2009] No.8, "**Circular 8**")
- (6) *Circular of the Ministry of Commerce on Items of Examining and Approving Foreign Investment in Venture Capital Enterprises and Venture Capital Management Enterprises* (Shang Zi Han [2009] No.9, "**Circular 9**")

### **2. General principles regarding the examination and approval of establishment and change of foreign invested enterprises (the "FIEs")**

#### **Original Authority of Examination and Approval**

Pursuant to the State Council's *Decision on Investment System Reform*, projects in "encouraged" or "permitted" categories of a total investment amount (inclusive of capital increase) exceeding USD100,000,000 is subject to approval of the National Development and Reform Commission ("NDRC"). Projects in "restricted" categories of a total investment amount (inclusive of capital increase) exceeding USD50,000,000 is subject to approval of

central NDRC.

Establishment of and changes in respect of FIEs with a registered capital of USD100,000,000 or below in the “encouraged” or “permitted” categories, and with a registered capital of USD50,000,000 or below in the “restricted” categories, articles of association, contracts and major changes as specified by law (capital increase and decrease, equity transfer, merger and acquisition) of large-scale foreign-invested projects, are subject to approval of the MOFCOM. Foreign-invested projects other than the foregoing are subject to approval of local government in accordance with applicable laws and regulations.

### **Current Authority of Examination and Approval**

Pursuant to Circular 21:

- a Approval for non-material change in respect of FIEs originally approved by MOFCOM is delegated to provincial MOFCOM, such as the change in the name of a FIE, name of the FIE’s investors, place of business within the same city, the size of the board of directors, the operation term in accordance with law. The provincial MOFCOM shall file the copies of approval letter and the approval certificate with MOFCOM.
- b Pursuant to the State Council’s *Decision on Investment System Reform*, approval for changes in respect of FIEs with a registered capital of USD100,000,000 or below in the “encouraged” or “permitted” categories, and with a registered capital of USD50,000,000 or below in the “restricted” categories originally approved by MOFCOM is delegated to provincial MOFCOM (excluding foreign-invested investment companies, and FIEs subject to special regulations, special industry policies and national macroeconomic control).

Pursuant to Circular 7, approval for establishment, capital increase and change of articles of association/ contracts of FIEs (including foreign-invested stock companies), which were originally subject to the MOFCOM approval, fall within the “encouraged” categories and do not require comprehensive balance to be carried out by the State, is delegated to the relevant provincial MOFCOM.

## **3. Industries subject to special regulations**

### **(1) Sino-foreign joint venture medical institutions, Sino-foreign cooperative medical institutions**

#### **Original Authority of Examination and Approval**

Pursuant to Section 5 of *Interim Measures on Administration of Sino-Foreign Joint Venture Medical Institutions and/or Sino-Foreign Cooperative Medical Institutions* effective on July 1, 2000, the Ministry of Health and MOFCOM shall be respectively in charge of the examination and approval of the establishment and change of Sino-foreign joint venture medical institutions and/or Sino-foreign cooperative medical institutions.

#### **Current Authority of Examination and Approval**

Pursuant to *Supplemental Regulations II to Interim Measures on Administration of Sino-Foreign Joint Venture Medical Institutions and/or Sino-Foreign Cooperative Medical Institutions* effective on January 1, 2009: (1) service providers from Hong Kong and Macao may establish wholly foreign owned clinics in Guangdong province and there is no restriction on its total investment; (2) there is no restriction on the total investment of the clinics established in Guangdong province by service providers from Hong Kong and Macao in the

form of equity joint ventures and cooperative joint ventures, and there is no restriction on the investment proportion of the parties; (3) with respect to the clinics established by service providers from Hong Kong and Macau in Guangdong province in the form of wholly foreign owned enterprises, equity joint ventures, or cooperative joint ventures, the Guangdong provincial health authority shall be in charge of the examination and approval of the establishment and practice registration of these clinics, and the Guangdong provincial MOFCOM shall be in charge of the examination and approval.

Pursuant to Circular 6, the establishment of and changes in respect of Sino-foreign joint venture medical institutions and/or Sino-foreign cooperative medical institutions with a total investment of USD 50,000,000 or below shall be subject to the approval of provincial MOFCOM and shall also be subject to pre-approval of the Ministry of Health.

## **(2) Auction enterprises**

### **Original Authority of Examination and Approval**

Pursuant to Section 22 of *Measures on Administration of Auction* effective on January 1, 2005, MOFCOM shall be in charge of the examination and approval of Auction Operation Licenses and the establishment of and change in respect of foreign-invested auction enterprises.

### **Current Authority of Examination and Approval**

Pursuant to Circular 6, the establishment of and changes in respect of foreign-invested auction enterprises with a total investment of USD 50,000,000 or below shall be subject to the examination and approval of provincial MOFCOM.

## **(3) Books, newspapers and journals distribution enterprises**

### **Original Authority of Examination and Approval**

Pursuant to Section 6 of *Measures on Administration of Foreign Invested Books, Newspapers and Journals Distribution Enterprise* effective on May 1, 2003, the General Administration of Press and Publication (the "GAPP") and MOFCOM shall be in charge of the examination and approval of the establishment of and changes in respect of foreign-invested books, newspapers and journals distribution enterprises.

Pursuant to *Supplemental Regulations to Measures on Administration of Foreign Invested Books, Newspapers and Journals Distribution Enterprises* effective on May 1, 2007, where a sole service provider from Hong Kong or Macau opens over 30 stores in mainland China, which engage in distribution of books, newspapers and journals under different brands and from different suppliers, such provider may become a controlling shareholder, provided that its equity interest shall not exceed 65%.

### **Current Authority of Examination and Approval**

Pursuant to Circular 6, the establishment of and changes in respect of foreign-invested books, newspapers and journals distribution enterprises with a total investment of USD 50,000,000 or below shall be subject to the examination and approval of provincial MOFCOM and shall also be subject to the approval of the GAPP.

## **(4) Sino-foreign cooperative audio-video product wholesale enterprises**

### **Original Authority of Examination and Approval**

Pursuant to Section 11 of *Measures on Administration of Sino-Foreign Cooperative*

*Audio-Video Product Distribution Enterprises*, the Ministry of Culture ( the “MOC”)shall be in charge of the project approval of Sino-foreign cooperative audio-video product wholesale enterprises and issuance of Audio-Video Product Business License; MOFCOM shall be in charge of the examination and approval of establishment of and changes in respect of Sino-foreign cooperative audio-video product wholesale enterprises.

#### **Current Authority of Examination and Approval**

Pursuant to Circular 6, the establishment of and changes in respect of Sino-foreign cooperative audio-video product wholesale enterprises with a total investment of USD 50,000,000 or below shall be subject to the examination and approval of provincial MOFCOM and the central GAPP.

#### **Notes: the examination and approval authority of Sino-foreign cooperative audio-video product retail and rental enterprises:**

Pursuant to Section 15 of *Measures on Administration of Sino-Foreign Cooperative Audio-Video Product Distribution Enterprises*, the provincial MOC shall be in charge of the project approval of Sino-foreign cooperative audio-video product distribution enterprises engaging in retail an rental business and issuance of Audio-Video Product Business License; the establishment of and change in respect of Sino-foreign cooperative audio-video product retail and rental enterprises shall be subject to the examination and approval of provincial MOFCOM

### **(5) Foreign-invested non-oil-gas mineral exploration enterprises**

#### **Original Authority of Examination and Approval**

Pursuant to Section 6 and Section 9 of *Measures on Administration of Foreign-invested Mineral Exploration Enterprises* which became effective on August 20, 2008, the establishment of and changes in respect of foreign invested non-oil-gas mineral exploration enterprises in the “restricted” categories shall be subject to the approval of MOFCOM upon obtaining consent from the Ministry of Land and Resources .

#### **Current Authority of Examination and Approval**

Pursuant to Circular 6, the establishment and change of foreign invested non-oil-gas mineral exploration enterprises in the “restricted” categories with total investment USD 50,000,000 or below shall be subject to the examination and approval of provincial MOFCOM.

### **(6) All kinds of non-oil-gas exploitation enterprises**

#### **Foreign-invested non-oil-gas mineral exploration enterprises**

Pursuant to *Opinions on Further Encouraging Foreign Investment in Exploration and Exploitation of Non-Oil-Gas Mineral Resources* which shall become effective on September 28, 2000, foreign invested non-oil-gas mineral exploitation enterprises shall obtain pre-approval from Ministry of Land and Resources and the approval from MOFCOM.

#### **Current Authority of Examination and Approval**

Pursuant to Circular 6, the establishment and change of foreign invested non-oil-gas mineral exploitation enterprises in the “restricted” categories with total investment USD 50,000,000 or below shall be subject to the examination and approval of provincial MOFCOM.

## **4. Special enterprises**

## **(1) Investment companies**

### **Original Authority of Examination and Approval**

Pursuant to the *Regulations on Establishment of Investment Companies by Foreign Investors* effective on December 17, 2004, MOFCOM shall be in charge of the examination and approval of the establishment of foreign-invested investment companies.

### **Current Authority of Examination and Approval**

Pursuant to Circular 8, the establishment and change of foreign invested investment companies with a registered capital of USD 100,000,000 or below (except where a single capital increase is more than USD 100,000,000) shall be subject to the examination and approval of provincial MOFCOM. Except where a single capital increase of more than USD100,000,000 and the change of the investor of foreign-invested investment companies is still subject to the approval of MOFCOM, changes in respect of foreign-invested investment companies originally approved by MOFCOM in other respects are subject to the approval of provincial MOFCOM.

## **(2) Venture capital investment enterprises and venture capital investment management enterprises**

### **Original Authority of Examination and Approval**

Pursuant to Section 8 of the *Regulations on Administration of Foreign-invested Venture Capital Enterprises* effective on March 1, 2003, establishment of foreign-invested venture capital investment enterprises shall firstly be subject to the consent of the Ministry of Science and Technology and then be subject to the approval of MOFCOM. The establishment of foreign-invested venture capital investment management enterprises shall be subject to the approval of provincial MOFCOM.

### **Current Authority of Examination and Approval**

Pursuant to Circular 9, the establishment and change of foreign-invested venture capital investment enterprises and venture capital investment management enterprises with a total investment amount of USD100,000,000 (including USD100,000,000) or below shall be subject to the approval of provincial MOFCOM and national economic and technological development zones.

## **5. Authority to examine and approve acquisitions by foreign investors**

### **Original Authority of Examination and Approval**

Pursuant to the *Provisions on the Acquisition of Domestic Enterprises by Foreign Investors* effective on September 8, 2006, except where acquisition of domestic enterprises by related parties, acquisitions provided in Section 12 (if the acquisition of domestic enterprises by foreign investors render that the foreign investors obtain the actual control right of such domestic enterprises, which also involves important industries, impact or have potential impact on national economic safety, or render the change of control right of such domestic enterprises which owns well-known trademarks or Chinese old trade names) and the acquisition of special purpose companies shall be subject to the approval of MOFCOM, the authority of examination and approval shall be determined according to the transaction price of the acquisition or the total investment amount, i.e., if one of the transaction price or total investment amount reaches or exceeds the amount with USD 100,000,000 in both

“encouraged ” categories or in “permitted” categories or the amount with USD 50,000,000 in “restricted” categories, the approval of such acquisition shall be subject to the MOFCOM.

**Current Authority of Examination and Approval**

Pursuant to Circular 6, the authority to examine and approve acquisitions by foreign investors shall be determined according to the transaction price, i.e., if the transaction price of an acquisition is USD100,000,000 or below in “encouraged” categories or in “permitted” categories, or is USD50,000,000 or below in “restricted” categories, the approval of such acquisition shall be subject to the provincial MOFCOM and national economic and technological development zones.

The above is a summary of relevant circulars issued by MOFCOM till the end of June 2009. We will continue to follow up changes (if any) to be made by MOFCOM in relation to the examination and approval authorities of foreign investments.

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