

Topics in Chinese Law

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Post-M&A Rules Offshore Restructuring for Private Equity and Venture Capital Investments in China

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Since the 1990s, thousands of Chinese businesses have been restructured offshore to facilitate private equity and venture capital investment and to prepare such companies for an offshore listing (e.g., in Hong Kong or the U.S.) or a trade sale outside the jurisdiction of the PRC regulatory authorities. Such offshore restructurings are also known as "round trip investments," "red-chip structures" or "inversion transactions." In a typical offshore restructuring, a PRC resident (natural or legal person) will establish or control an offshore holding company in the Cayman Islands, British Virgin Islands or Hong Kong, and use this offshore holding company to acquire or control their affiliated PRC business by direct acquisition, captive contractual arrangement or other alternative arrangement. This is deemed a round trip investment by the PRC government because the PRC shareholders end up receiving shares in an offshore holding company that directly or indirectly owns or controls the interest in their original domestic target company, which thereafter becomes a subsidiary or controlled affiliate of the offshore holding company.

However, the PRC government over time has become increasingly uncomfortable with such offshore structures and has issued several regulations in recent years

that have made it difficult to complete such restructurings.

Increasingly Difficult PRC Legal Environment

SAFE Circulars 75 and 106

After some early regulatory missteps, in October 2005, the State Administration of Foreign Exchange, or SAFE, issued the *Notice on Issues Relating to the Administration of Foreign Exchange in Fund-Raising and Return Investment Activities of Domestic Residents Conducted via Offshore Special Purpose Companies*, or SAFE Circular 75, to regulate "round trip investments." SAFE Circular 75 requires PRC residents to register with the local SAFE before establishing or controlling any offshore special purpose company with assets or equity in a PRC company for the purpose of an offshore equity financing. Failure to comply with SAFE Circular 75 can result in the offshore parent company's PRC subsidiary being prohibited from distributing profits out of China and from engaging in any other foreign exchange transactions, as well as both administrative and criminal liabilities



under PRC laws for violation of foreign exchange rules.

In May 2007, SAFE issued Circular No. 106, or SAFE Circular 106, as guidance for the implementation of SAFE Circular 75. SAFE Circular 106 sets forth more detailed procedures and additional requirements for SAFE Circular 75 registrations of round trip investments, including (i) requiring the submission of three years of financial statements of the domestic target company in the round trip investment, which both Beijing and Shanghai SAFE have interpreted to mean that the domestic target company must have a three-year operating history, and (ii) clarifying that even "green-field" investments by PRC residents through an offshore holding company (i.e., where no existing PRC assets or businesses are involved) are also subject to SAFE Circular 75 registration.¹ Essentially, after SAFE Circular 106, any onshore investment by an offshore holding company which is established or controlled by a PRC resident is subject to SAFE Circular 75 registration. Not only are these requirements burdensome for many investments, but even if an applicant can meet the requirements, the process of completing SAFE Circular 75 registrations also continues to be unpredictable, time-consuming and costly.

M&A Rules and MOFCOM Guidance

On September 8, 2006, China started to implement the *Regulation on Mergers and Acquisitions of Domestic Companies by Foreign Investors*, or the M&A Rules, presenting an additional obstacle to offshore restructurings. Under the M&A Rules, approval of the Ministry of Commerce of the People's Republic of China, or MOFCOM, is required for all sizes of round trip investments whereby a domestic target company is to be

acquired by an offshore holding company formed or controlled by the domestic target company's PRC resident shareholder, or affiliated round trip acquisitions, ushering in a higher level of scrutiny of such offshore restructurings. Article 11 of the M&A Rules specifically provides that such central MOFCOM requirements shall not be circumvented through domestic investment by a foreign-invested enterprise, or an FIE, or through other means. Article 15 of the M&A Rules further requires the parties to an acquisition to represent whether any affiliation exists between them, and, if both parties to an acquisition are under the de facto control of the same person, the parties shall disclose to the examination and approval authority the de facto controller, and shall explain the purposes of the acquisition and whether the valuation results for the acquired equity or assets are at fair market value. Article 15 of the M&A Rules further emphasizes that the parties to an acquisition may not circumvent the foregoing requirements through the use of trusts, nominee structures or other means. Since the promulgation of the M&A Rules in 2006, almost no such offshore restructurings have been approved by MOFCOM.² This has hindered many offshore restructurings, which transactions were previously very common prior to the M&A Rules.

On December 23, 2008, MOFCOM issued a *Foreign Investment Examination and Approval Management Guidance Handbook*, or the MOFCOM Guidance. Although the MOFCOM Guidance does not have the force of law, it represents the most recent views of MOFCOM on these matters and is expected to be followed in practice. Among other things, the MOFCOM Guidance clarifies certain important issues relating to the application of the M&A Rules. The MOFCOM Guidance specifically clarifies that the M&A Rules do not apply to the

acquisition of an FIE. The MOFCOM Guidance also provides that MOFCOM will only accept applications for approval of affiliated round trip acquisitions under the following two circumstances: (i) the offshore acquiror is a "listed" company; or (ii) the offshore acquiror (a) has been duly approved for its formation, (b) has actual operations, and (c) will fund the round trip investment or acquisition out of its own profits.

The specific reference to the above two types of affiliated round trip acquisitions suggests that MOFCOM is now open to considering reverse merger (or back-door listing) transactions by listed companies as well as business consolidation acquisitions by approved offshore operating companies. However, the second type of transaction listed above might not be meaningful to private equity and venture capital investors as most of such investments involve offshore special purpose vehicles, or offshore SPVs, that are newly formed for the purpose of the offshore restructurings. In addition, as further discussed below, affiliated round trip acquisitions utilizing a reverse merger or back-door listing may also be less than ideal for private equity or venture capital investments in China. Finally, apart from these two limited exceptions, the vast majority of affiliated round trip acquisitions will continue to be prohibited by MOFCOM.

PRC Securities Law and CSRC Rules

Although the China Securities Regulatory Commission, or CSRC, generally has jurisdiction under PRC laws over the direct or indirect overseas listings of PRC enterprises,³ CSRC had not exercised such jurisdiction for several years prior to the M&A Rules. CSRC re-asserted its jurisdiction over overseas listings of offshore SPVs with the promulgation

of the M&A Rules. At the time, many market participants interpreted this to mean that CSRC would start to more strictly implement the PRC laws and regulations related to the direct or indirect overseas listings of PRC enterprises. Article 40 of the M&A Rules requires offshore SPVs formed for the purpose of acquiring PRC domestic companies and controlled by PRC individuals or enterprises, to obtain the approval of CSRC prior to listing their securities on an overseas stock exchange. In addition, on September 21, 2006, CSRC published on its official website a notice specifying the documents and materials that are required to be submitted for obtaining such CSRC approval. So far, it is generally understood by the market that, despite the related PRC laws and regulations, the overseas listings of offshore SPVs arising from offshore restructurings completed prior to the effective date of the M&A Rules (i.e. September 8, 2006) will not require CSRC approval while the overseas listings of offshore SPVs arising from offshore restructurings completed after the effective date of the M&A Rules will generally require CSRC approval. This CSRC approval requirement effectively blocks the offshore IPO exits of the offshore SPVs arising from offshore restructurings completed after the effective date of the M&A Rules, and, therefore, makes offshore restructurings completed after the effective date of the M&A Rules less attractive to private equity and venture capital investors.

Offshore Structures for Post-M&A Rules Restructurings

Do these restrictions mean that the days of offshore financings and listings of PRC companies are numbered? Not necessarily. Despite these restrictions, we continue to see private equity and venture capital investors utilizing a number of different transaction structures to

consummate their investments through offshore holding vehicles. In these cases, the investors and the target company and its shareholders have determined that the benefits of restructuring offshore outweigh the risks and complexity of doing so.

Captive Structure

The captive structure (or "Sina-Sohu" model structure) was pioneered by the early PRC portals that are listed in the U.S. in the late 1990s, including Sina.com, Sohu.com and Netease.com. It was designed to sidestep PRC regulatory restrictions on foreign investment in China's value-added telecom services sector. Although the structure has never been officially or publicly blessed by the PRC government, the early Chinese portals were able to obtain enough unofficial comfort from the PRC Ministry of Information Industry (now known as the Ministry of Industry and Information due to a ministerial-level restructuring in early 2008) that they were able to successfully complete their initial public offerings and stock exchange listings in the U.S. using the structure. Since that time, the captive structure has become the preferred structure for China-based Internet and value-added telecom services companies seeking to attract foreign private equity or venture capital financing and to pursue offshore listings.

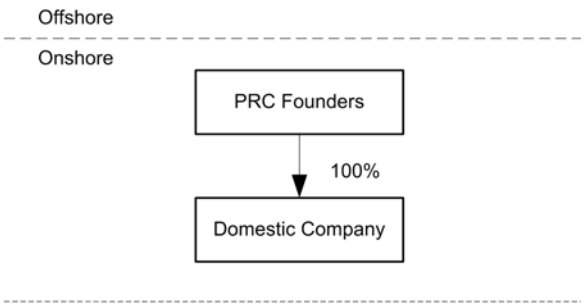
Captive structures are often used for "asset-light" companies, especially in restricted industries, where investors are reasonably comfortable with not having direct equity ownership in the PRC domestic target company, and are instead content to rely on contractual arrangements to control, consolidate and obtain the economic benefits of the domestic company. However, as PRC regulatory restrictions on offshore

financing and round trip investment evolve, captive structures have been increasingly adopted in transactions involving companies in permitted or even encouraged industries.

Under a typical captive structure, the individual PRC founders of the domestic company would form an offshore SPV, typically in the Cayman Islands or the British Virgin Islands, which would in turn form a wholly-owned subsidiary, or WFOE, in China. The WFOE would conduct business "indirectly" through the domestic company. The domestic company would remain 100% owned by the PRC founders and would hold all the required licenses and assets that can not be legally owned by or transferred to the WFOE due to PRC legal restrictions. The offshore SPV would not have any direct equity interest in the domestic company, but through a series of contractual arrangements the offshore SPV would enjoy substantially all of the economic benefits of and control over the domestic company, and would therefore be able to consolidate the financials of the domestic company into the group's overall financial statements under applicable international accounting standards. These contractual arrangements would also provide the WFOE with an exclusive option to acquire the domestic company once PRC laws allowed the WFOE to directly engage in the relevant business or acquire the domestic company. (See Diagram 1 for a typical captive structure)

Although the captive structure has never been officially or publicly blessed by the PRC government (especially by MOFCOM and CSRC from the M&A Rules and PRC securities law perspectives), many

Pre-financing Structure



Post-financing Structure

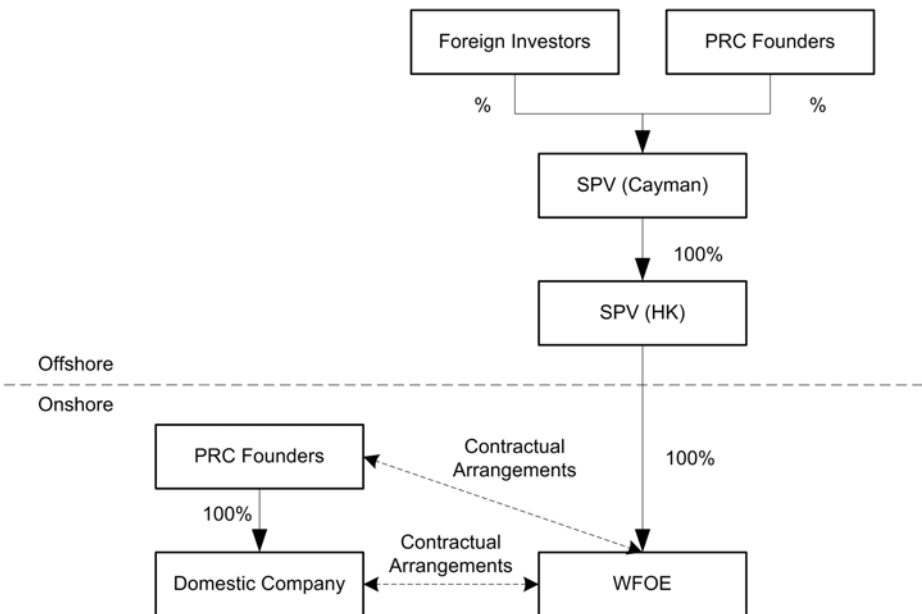


Diagram 1. A Typical Captive Structure

transactions and PRC legal practitioners have become comfortable with the structure as a way to arguably sidestep central MOFCOM approval for such offshore restructurings under the M&A Rules and the CSRC approval requirement for the offshore listings by PRC businesses. We are aware of some PRC companies that have adopted the captive structure after the M&A Rules came into effect and that successfully completed their offshore initial public offerings and listings, or that are in the process of completing their offshore listings without approvals from MOFCOM or CSRC.

The primary advantage of the captive structure is its ability to arguably

sidestep the burdensome central MOFCOM approval requirements under the M&A Rules and the ownership restrictions for foreign investment in restricted industries. The use of an offshore holding company under this structure also facilitates the ability to list the target company on an offshore stock exchange, attract foreign private equity or venture capital investments, or consummate a sale of the target company offshore with no or minimal PRC regulatory intervention.

However, the captive structure continues to have numerous inherent risks, uncertainties and disadvantages. For example, the adoption of the structure in non-restricted industries

remains relatively untested at the high-profile offshore IPO or M&A exit stage where it remains to be seen how the PRC governmental authorities, especially MOFCOM and CSRC, will react to it from the M&A Rules and PRC securities law perspectives. In addition, the contractual arrangements under the captive structure may not be as effective in providing the offshore SPV with control over the domestic company as direct ownership, which can be a major concern to investors, especially in situations where the domestic company continues to own assets material to the business or where the interests of the PRC founders and the investors in the offshore holding company are not completely aligned. Finally, the captive structure also suffers from inherent tax inefficiencies and transfer pricing risks, as well as overall complexity in administration.

Hybrid Captive-Joint Venture Structure

Under a hybrid captive-joint venture structure, on top of the typical captive structure arrangements, the offshore SPV would also form a new Sino-foreign joint venture with the domestic company into which the domestic company would contribute its crown jewel assets and business. Formation of the joint venture would, of course, be subject to standard foreign-direct investment rules and requirements for its formation, but these requirements are generally well understood and procedural in nature,

with timing and complexity of approvals being determined primarily by the nature of the industry, the size of investment and the geographic location of the venture. (See Diagrams 2-1 and 2-2 for a typical hybrid captive-joint venture structure)

The hybrid captive-joint venture structure has been viewed as being more suitable for "asset-heavy" transactions in which the foreign investors do not feel comfortable having important assets of the target remain in a domestic entity over which they enjoy no direct ownership. However, such structures are not viable for highly regulated industries where it is difficult to obtain governmental approvals for the formation of a Sino-foreign joint venture. We are not aware of any PRC company adopting the hybrid captive-joint venture structure after the M&A Rules came into effect that has successfully listed offshore, but we are aware of several private equity and venture capital transactions that adopted the hybrid captive-joint venture structure and have been advised by leading PRC law firms that the structure works from the M&A Rules and PRC securities law perspectives.

Although this structure provides the additional comfort that comes with direct ownership over the crown jewel assets and business, the formation of the new Sino-foreign

Pre-financing Structure

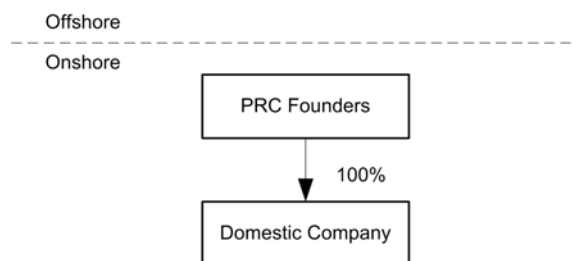
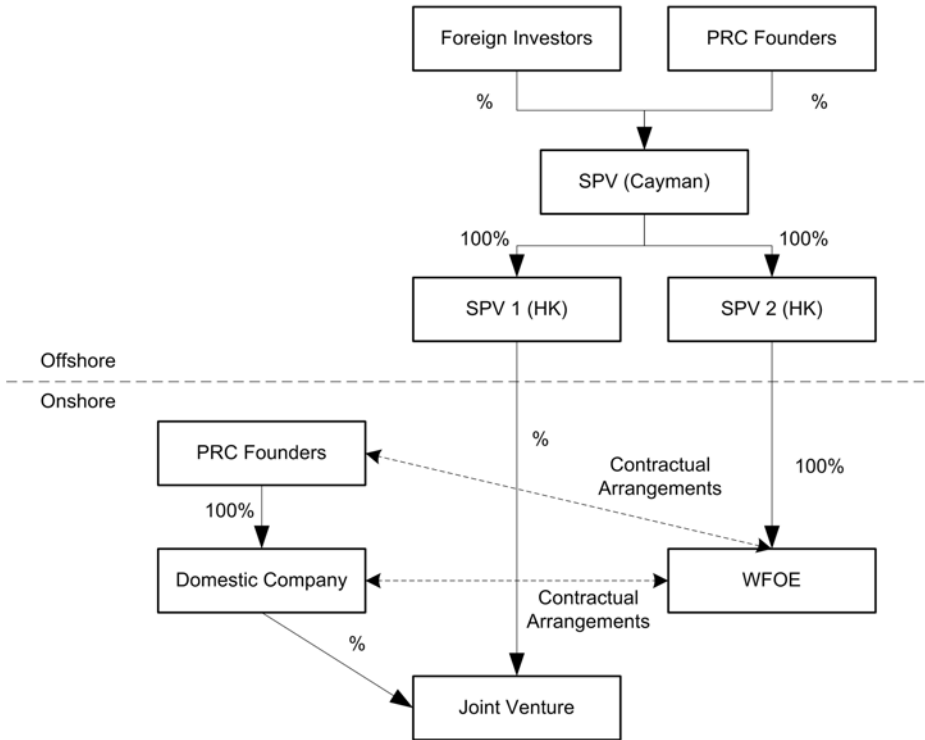


Diagram 2-1. A Typical Hybrid Captive-Joint Venture Structure (Pre-financing Structure)

Post-financing Structure



Digram 2-2. A Typical Hybrid Captive-Joint Venture Structure (Post-financing Structure)

joint venture could potentially increase the risk that the PRC government will view the structure as an intentional circumvention of the central MOFCOM approval requirements under the M&A Rules. Apart from the direct ownership advantage, the hybrid captive-joint venture structure shares similar advantages and disadvantages of a typical captive structure.

Creeping Acquisition

Under the creeping acquisition structure, the PRC founders would form an offshore SPV which would in turn form a WFOE in China. However, instead of entering into the typical captive structure contractual arrangements, the WFOE would instead operate its own business directly and gradually "migrate" the business of the existing domestic company to itself over a period of time. Since the transfer of all or substantially all of the assets and business from the domestic company to the WFOE would arguably trigger the M&A Rules, the WFOE in this

case will typically avoid directly acquiring a large portion of the domestic company's assets and business. This structure is more suitable for asset-light businesses where existing customer, supplier and other contracts of the domestic company can be allowed to expire over time and be subsequently renewed with the WFOE.

We are not aware of any PRC company adopting the creeping acquisition structure after the M&A Rules came into effect that has successfully listed offshore, but we are aware of several private equity and venture capital transactions that have adopted the creeping acquisition structure after the M&A Rules came into effect and have been advised by leading PRC law firms that the structure will work from the M&A Rules and PRC securities law perspectives.

Compared to the captive structure and the hybrid captive-joint venture structure, the creeping acquisition

structure has a relatively simple corporate structure. However, as there is no official interpretation yet on how such structures will be treated under the M&A Rules, and due to the lack of successful public company precedents in the market, the regulatory risks and uncertainties for the creeping acquisition structure seem relatively higher than those for the captive structure and the hybrid-joint venture structure.

Reverse Merger (Backdoor Listing)

Under the reverse merger structure, a public company listed on an offshore stock exchange (which may or may not be owned or controlled by the PRC founders) would acquire the domestic company owned or controlled by the PRC founder, and in connection with such acquisition, the offshore public company would allot and issue a certain number of its shares to the PRC founder as payment of the acquisition consideration.

As one of its major developments, the M&A Rules introduced the share swap (a common method used for reverse mergers) as a method for the acquisition of a PRC company and provided relatively detailed qualification requirements and approval procedures for share swap transactions. However, as discussed above, almost no such transactions have been approved in practice, which has had a chilling effect on structuring transactions in a manner designed to fit within the share swap provisions of the M&A Rules.

The MOFCOM Guidance clarifies that MOFCOM will accept applications for approval of such acquisitions if the offshore acquiror is an offshore public company. This appears to be a positive development and suggests that MOFCOM may now be open to considering reverse mergers (or backdoor listings) by

offshore public companies. However, as discussed below, this may be less than ideal for private equity or venture capital investments.

Although the MOFCOM Guidance does not specify qualifications for the offshore public company, it is possible that MOFCOM will apply Article 29 of the M&A Rules for the qualification of the offshore public company, that is, the offshore public company shall be duly listed on a lawful offshore stock exchange (excluding the over-the-counter market) and the share price of the offshore public company shall have remained stable for a year prior to the share swap acquisition. We believe that few private equity or venture capital investors, let alone PRC founders, own or control offshore public companies that can satisfy the foregoing qualification requirements.

However, if one of the foreign investors is a special purpose acquisition company, or SPAC, or a "shell" offshore public company that (i) satisfies the qualification requirements discussed above, and (ii) is willing to transfer a substantial portion of its shares to the PRC founders, the reverse merger structure may be a viable structure for private equity or venture capital investments.

If the reverse merger transaction is duly approved and cleared by central MOFCOM and CSRC in accordance with the M&A Rules, the MOFCOM Guidance and other applicable laws, the offshore restructuring completed through such transaction would be in full compliance with PRC laws, which would be a tremendous advantage over the other alternative transaction structures. However, the reverse merger with listed shell companies, or SPACs, as defined under the U.S. securities laws, can also involve a number of other disadvantages and

burdens that investors and PRC founders should understand before utilizing such vehicles.

Two-Step Onshore Acquisition

Under the two-step onshore acquisition structure, an offshore SPV controlled by foreign investors would acquire a substantial portion of the domestic company's equity interest from the PRC founders transforming it into a Sino-foreign joint venture, or alternatively, the offshore SPV controlled by foreign investors would form a new Sino-foreign joint venture with the domestic company into which the domestic company would contribute all or substantially all of its assets and business. After a certain period of time, the offshore SPV would acquire the remaining equity interest of the new Sino-foreign joint venture transforming it into a WFOE and simultaneously issue shares in the offshore SPV to the PRC founders for cash or other consideration.

Prior to the MOFCOM Guidance, the two-step onshore acquisition structure had been widely considered not viable under the M&A Rules due to Article 55 and the general anti-circumvention provision in the M&A Rules. Article 55 of the M&A Rules provides that where a foreign investor purchases equity in an FIE, the current laws and regulations on FIEs and the relevant provisions on the investors' equity change in FIEs, or the FIE Regulations, would apply, and matters not covered therein are to be handled "by reference" to the M&A Rules. Since the M&A Rules contain certain additional and stricter requirements compared to the FIE Regulations, there had long been doubt about whether and to what extent the M&A Rules should apply in the context of an acquisition of an existing FIE.

The MOFCOM Guidance specifically clarifies that, the M&A

Rules apply only if the PRC target company is a pure domestic company, i.e. a company owned by PRC entities or natural persons. Transfers of equity interests in an existing FIE, such as a Sino-foreign joint venture, are not subject to the M&A Rules, nor is there any need to apply "by reference" to the M&A Rules as required by Article 55 of the M&A Rules, regardless of whether the acquisition is an affiliated acquisition or whether the acquiror is an existing shareholder or a new investor. This makes the two-step onshore acquisition structure a possible alternative for offshore restructurings in China.

However, it is important to note that the MOFCOM Guidance did not change the general anti-circumvention provision in the M&A Rules. Therefore, if the parties to a two-step onshore acquisition transaction intentionally designed the transaction or a series of transactions to circumvent the central MOFCOM approval requirement under the M&A Rules, such transaction or series of related transactions might still be challenged by MOFCOM. In addition, as discussed above, although the MOFCOM Guidance represents the most recent views of MOFCOM and is expected to be followed in practice, it does not have the force of law. MOFCOM's views in the MOFCOM Guidance materially deviate from Article 55 of the M&A Rules, which was jointly issued by six PRC governmental authorities including MOFCOM while the MOFCOM Guidance was issued by the MOFCOM Department of Foreign Investment Administration after consultation with the Foreign Invested Enterprise Registration Bureau of the State Administration for Industry & Commerce. Therefore, it is questionable whether the MOFCOM Guidance can supersede

Article 55 of the M&A Rules and thus we cannot rule out the possibility that MOFCOM may change its position in the future and amend the MOFCOM Guidance accordingly.

If the two-step onshore acquisition transaction is duly approved by central or local MOFCOM in accordance with the M&A Rules, the MOFCOM Guidance and the other FIE Regulations, the offshore restructuring completed through such transaction would be in compliance with PRC laws, which would be a tremendous advantage over the other alternative transaction structures. Of course, the approval process for the two-step onshore acquisition can be very time-consuming and burdensome, and it is as yet unclear how this structure would work in practice and how the relevant PRC governmental authorities, in particular MOFCOM and CSRC, will react to it from the M&A Rules and PRC securities law perspectives.

Other Structures

We are also aware of other structures adopted in various transactions, some of which may raise serious M&A Rules circumvention concerns, or that are otherwise not viable for most private equity or venture capital investments in China. Some involve the acquisition of a domestic company by an offshore SPV held by a family member of the PRC founders that has a foreign passport, or the granting to the PRC founders of large portions of incentive options in the offshore SPV otherwise held entirely by foreign investors, or the use of trust arrangements, or the acquisition of a domestic company by an offshore SPV held by foreign investors that subsequently sell a portion of the offshore SPV's equity to the PRC founders.

Conclusion

In the area of offshore restructurings for Chinese businesses, numerous structures have been adopted, and every transaction seems to have its unique and highly individual circumstances that make adopting a "one-size-fits-all" structure nearly impossible. In addition, the viability or acceptability of certain offshore structures can change dramatically due to the promulgation of new laws and regulations and how their interpretation evolves over time. Accordingly, it is difficult to endorse or bless one structure over another, and the structure most suitable for a certain transaction will need to be determined based on the specific circumstances. Close consultation with counsel experienced in working with such structures and in how they will be scrutinized and tested in the IPO or M&A context is essential. In addition, it is important to remember that the general anti-circumvention provisions in the M&A Rules still remain, and structures that are deliberately designed to circumvent the requirements will be at risk. It is also important to note that, given the limited number of successful public company precedents in the market, it is still unclear how CSRC will react to any of the offshore structures discussed above if the related offshore SPV ever goes public on an offshore stock exchange.

Endnotes:

1. SAFE Circular 75 was promulgated to regulate round trip investments in which PRC residents establish or control an offshore special purpose company to acquire their existing assets or equity in a PRC company. SAFE Circular 106 has expanded the definition of round trip investment by requiring SAFE Circular 75 registration of green-field investments by offshore holding companies formed or controlled by PRC residents in connection with which no pre-existing domestic company or asset is involved. Before an offshore holding company established or controlled by a PRC resident can make a green-field investment into China (e.g., establishing a subsidiary in China), the PRC resident must complete SAFE Circular 75 registration and the offshore company must also have a two-year operating history (which may be shortened to one year for R&D companies).
2. Based on public information available to us, only Poly (Hong Kong) Investments Limited, a high-profile, state-owned enterprise that is listed on the Hong Kong Stock Exchange, was able to obtain central MOFCOM approval for the share swap acquisition of one of its affiliated PRC companies.
3. Article 238 of the PRC Securities Law provides that the direct or indirect overseas offering or listing of securities by PRC enterprises shall be approved by CSRC in accordance with the relevant regulations of the State Council. Various other PRC regulations, including *Circular of the State Council Concerning Further Strengthening the Administration of Overseas Share Issuance and Listing*, also expressly grant similar power to CSRC.

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