

境外投资法律热点问题

境外投资的最新发展 - 以人民币出境并购

近期由于遏制外汇出逃等多种原因，境外投资项下的外汇出境审查较之前普遍速度放缓、时间加长且不确定性也有所增加。而与此同时，随着人民币纳入特别提款权(SDR)货币篮子，人民币国际化的步伐在不断加快。在此大背景下，我们注意到近期中国企业境外投资的一个最新发展，就是更多地以人民币进行境外并购。

一、 相关法律规定

我国关于人民币境外直接投资⁵的规定主要是2011年中国人民银行颁布的《境外直接投资人民币结算试点管理办法》(以下简称“《办法》”)和国家外汇管理局同年发布的《关于规范跨境人民币资本项目业务操作有关问题的通知》(以下简称“《通知》”)。

根据《办法》，凡跨境贸易人民币结算试点地区⁶内登记注册的非金融企业，如进行境外投资(包括通过设立、并购、参股等方式在境外设立或取得企业或项目全部或部分所有权、控制权或经营管理权等权益)，在依照相关法律法规获得境外直接投资主管部门的核准备案后，都可到银行办理境外直接投资人民币资金汇出，但必须在以下限额之内：

(1) 累计汇出的前期费用一般原则上不得超过其向境外直接投资主管部门申报的中方投资总额的

15%；

(2) 汇出的全部人民币资金和外汇资金之和不得超过境外直接投资主管部门核准的境外直接投资总额。

此外，就今后的利润汇回问题，《办法》和《通知》也做了明确规定。凡以人民币出境直接投资的，境内机构可以将其所得的境外直接投资利润，以人民币汇回境内。境内机构因境外投资企业增资、减资、转股、清算等发生的人民币收支，可以凭境外直接投资主管部门的核准文件到银行直接办理人民币资金汇出手续。

除上述以人民币直接跨境投资外，境内企业还可以考虑在境外进行人民币融资来支付并购款。根据《办法》第十五条，中国境内银行可以按照相关规定向境内企业在境外投资的企业或项目发放人民币贷款。这为境内企业通过境外设立的特殊目的公司进行人民币融资、支付并购款项，提供了可能性。

二、 评论

《办法》和《通知》自2011年出台至今已有一段时间。但之前因各种原因，人民币出境并非境内企业境外并购的首选货币。而近期由于外汇出境的

⁵ 不含以 RQDII 等渠道进行境外证券投资的情况。

⁶ 根据《关于扩大跨境贸易人民币结算试点有关问题的通知》(银发〔2010〕186号)，跨境贸易人民币结算试点地区包括北京、天津、内

蒙古、辽宁、上海、江苏、浙江、福建、山东、湖北、广东、广西、海南、重庆、四川、云南、吉林、黑龙江、西藏、新疆共20个省(自治区、直辖市)。

审查难度加大和不确定性增加，人民币出境无疑给企业顺利完成境外投资并购提供了一条途径。

而根据我们的了解和相关经验，对于真实目的的人民币境外投资并购，目前并无政策障碍，但实践中一般要求被投资地区属于可进行人民币清算³

的国家或地区。同时，如交易对方要求以约定的外币而非人民币作为交易货币，境内企业还需确保被投资地区的银行可以进行人民币兑换。此外，以人民币并购可能还会对办理相关政府部门的备案核准⁴、交易的架构以及交割具体安排和时间等造成潜在影响，需对相关细节提前予以考虑和安排。

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³ 目前包括新加坡、伦敦、卢森堡、韩国、香港、加拿大在内的超过 20 个国家和地区可进行人民币清算安排。

⁴ 《办法》规定，境内机构在办理有关境外直接投资核准备案时，应当明确拟用人民币投资的金额。为此，企业在办理相关手续时，需预留出使用人民币投资的灵活度。

Overseas Investment

Latest Development on Overseas Investment - Outbound Direct Investment in Renminbi

Due to the recent stringent control of foreign exchange outflow and for certain other reasons, remittance of foreign exchange out of China for outbound investments has taken longer than before and the uncertainty has also increased. Meanwhile, with the recent inclusion of Renminbi in Special Drawing Rights currency basket, Renminbi's internationalization has expedited. Against this background, we expect that more Chinese entities will invest overseas directly in Renminbi funds.

I. Applicable Rules

The applicable rules concerning Renminbi overseas direct investment¹ mainly include the *Measures for the Administration of Pilot Program on Settlement of Outbound Direct Investment in Renminbi* promulgated by the People's Bank of China in 2011 (the “**Measures**”) and the *Notice on Certain Issues in Relation to the Administration of Handling of Cross-Border Renminbi Capital Accounts* issued by the State Administration of

Foreign Exchange in the same year (the “**Notice**”).

Under the Measures, a non-financial enterprise registered in the pilot program region² may, after completing the required governmental filing/approval procedures, have banks remit Renminbi funds out of China for their outbound direct investments (greenfield projects or acquisition of equities or other interests in overseas entities), within the amounts as set forth below:

- (1) the total amount of preliminary expenses remitted out of China shall, in principle, not exceed 15% of the total investment amount as stated by the Chinese investor in its application documents submitted to the relevant authorities; and
- (2) the total amount of Renminbi funds and foreign exchange funds (if any) remitted outward shall not exceed the total investment amount as approved/filed with the relevant authorities.

¹ Our discussion here does not cover the “overseas securities investment” through RQDII scheme or other routes.

² Pursuant to the applicable rule, the region covers Beijing,

Tianjin, Shanghai and 17 other provinces, municipalities and autonomous regions.

The Measures and the Notice also provide that profits earned from the overseas direct investment in Renminbi and certain other earnings and expenditures generated therefrom may be remitted outward and inward in Renminbi.

In addition to the direct investment in Renminbi funds, there seems to be another possible route where, pursuant to Article 15 of the Measures, a Chinese investor may, via its overseas subsidiary, obtain Renminbi financing overseas for the payment of the acquisition price.

II. Our Observations

The Measures and the Notice have been in place for some time, but it seems that for various reasons, Renminbi was not the currency that many Chinese investors considered using for their overseas acquisition. However, due to the recent

difficulty in outward flow of foreign exchange, we have noted that more and more investors now turn to Renminbi to facilitate their outbound investments.

From our experience, replacing foreign funds with Renminbi seems to be a viable option for many outbound transactions, if the target is registered in a country or region where RMB clearing can be handled³. From a transactional (not a regulatory) point of view, if the counterparty does not accept Renminbi, Chinese investors need to ensure that the Renminbi funds can be converted into the agreed currencies in the destination country. Furthermore, the payment in Renminbi may have potential impacts on the transaction structure, closing arrangement and timeline, etc. Hence, it needs to be well planned ahead in order to invest in Renminbi funds⁴.

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³ Currently, over 20 countries and regions, including Singapore and Hong Kong, can handle Renminbi clearing.

⁴ For example, the Measures provide that a Chinese investor must specify the amount of Renminbi funds which it plans to

use for its overseas direct investment in its application documents to the relevant authorities. Hence, Chinese investors must leave the room for future investment in Renminbi at the stage of governmental procedures.