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Optimization of Government Regulation Paths in Cross-Border M&A of Chinese-Funded Listed Companies

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Abstract: Cross-border M&A has become the main content of overseas investment of Chinese enterprises. As an important subject of cross-border M&A, the government's regulatory measures on Chinese-Funded Listed Companies have particularity and the necessity of further optimization. At present, the Chinese government has issued a series of legal documents to improve the investment environment. Notably, there are still deficiencies in the process of the supervision of overseas assets, administrative approval, information sharing between departments and supervision of intermediaries, which have potential negative impacts on the implementation of M&A or subsequent operations. This paper argues that the reasons lie in the insufficiency of legislative authority, information sharing mechanism and supervision mechanism of some government departments. In view of this, this paper seeks effective measures to optimize the government's regulatory path for this kind of M&A. The measures from the aspects of institutional improvement, coordination of government departments, overseas investment supervision system and official cooperation between countries in special fields will be expounded. The investigation in this paper may has a potential reference value for the relevant government departments to optimize the regulatory path of cross-border M&A of Chinese-Funded Listed Companies.

Keywords: Chinese-funded listed company, cross-border M&A, government regulatory path

1. Introduction

In the context of "One Belt, One Road" initiative and deepening cooperation with countries along the route, cross-border M&A has become an important way of direct investment in China [1]. At the same time, the impact of the new crown epidemic on the global economy brings uncertainty to the promotion of cross-border M&A transactions by Chinese-Funded Listed Companies (herein referred to as “CFLCs”), and puts forward new requirements for the optimization of the government's regulatory path regarding cross-border M&A [2]. In recent years, along with the accelerated pace of Chinese enterprises going abroad, the scale of overseas business of listed companies has been rising, and the mode of operation has changed from traditional product sales to cross-border M&A. Meanwhile, due to the restrictions of geographical and jurisdictional conditions, as well as the rules of information disclosure of enterprises' overseas transactions and the information sharing mechanism of government departments, it has become more difficult for regulators to supervise the overseas business of listed companies [3]. For example, there are gaps in government regulation of listed companies' overseas assets, and complicated administrative approval procedures affect the efficiency

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of M&A financing and foreign exchange payments. State-owned Assets Supervision and Administration Commission of the State Council (herein referred to as “SASAC”), Ministry of Commerce of the People's Republic (herein referred to as “MOFCOM”), National Development and Reform Commission (herein referred to as “NDRC”), etc. Departments listed above and several departments related have not formed an effective regulatory coordination and information sharing mechanism for cross-border M&A, equity investment and financing of domestic enterprises, including listed companies. The relevant government departments do not supervise the practice of intermediaries properly, and the supervision of their business conduct is indirect and incomplete.

Based on this, scholar Li Wei based on financing, taxation and other specific aspects of regulation and incentives to the government to make suggestions [4]. Scholars Fang Chong and Cui Jia put forward the current situation that each department works separately from the other. Further, they proposed the suggestion of playing the external supervision function of intermediaries by strengthening the borrowing supervision for the lack of supervision of government intermediaries' practice and the regulation gap of new disclosure of overseas assets [3]. Scholar Fang Jingzhi summarized her thoughts about cross-border supervision of listed companies in the experience of Chinese companies going to the Germany market. She proposed the factors affecting administrative efficiency under the current parallel approval system, and further refined the requirements of information disclosure in the cross-border M&A market of listed companies [5]. Based on the background of the above scholars' research, this paper will first summarize and discuss the regulatory measures for cross-border M&A by CFLC in the current legal system in China through the method of legal regulation analysis. Then, it will analyze the shortcomings that still exist in it according to the needs of the objective situation. There is a basic consensus among relevant scholars regarding the imperfection of the relevant system and the existence of procedural flaws in the governmental regulatory path. Among them, Gan Peizhong and Kong Lingjun argue that the review procedures of the CSRC are numerous and complex, which have led to the limitation of the role of intermediaries, as well as the low transparency of the procedures [6]. Ke Xiang believes that the legislative authority of the CSRC is low, as well as the level of public participation [7]. Lu Feng and Chen Yuehua specified the conceptual reasons for the difficulty of information sharing among government departments [8]. This paper summarizes and expands on the above-mentioned scholars' studies, and explains that the prerequisite for bringing into play the external supervision function of intermediaries and realizing the decentralization of government is to establish a sound mechanism for information sharing, supervision of offshore assets and intermediaries. Then, this paper proposes to realize the information sharing of relevant departments by establishing a local joint meeting system and a daily coordination mechanism. Furthermore, drawing on the suggestions of Zheng Zonghan, Tian Guanjun and Zheng Lingxi, it is proposed in the paper that establishing a social responsibility supervision system for overseas investment is an effective measure to control overseas assets [9-10]. Additionally, there is an introduction of the Equatorial Principles as well as mandatory disclosure of audit briefs which could achieve the regulation and control of intermediaries.

2. The Current Situation of Government Regulation

This section will set out and elaborate on the governmental regulation of cross-border M&A of CFLC in the existing legal system. First of all, it is important to clarify that there is no unified law regulating Chinese companies' overseas investments, but rather a fragmented system of laws, administrative regulations and departmental rules. Firstly, Article 2 of the Securities Law of the People's Republic of China (hereinafter referred to as the "Securities Law") provides that this law applies only to the issuance and trading of stocks, corporate bonds, depositary receipts and other securities in China as determined by the State Council in accordance with the law. Plus, those not provided for in this law shall be governed by the Company Law of the People's Republic of China (hereinafter referred to as

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the “Company Law”) and other laws, administrative regulations. However, Article 168 of the Securities Law regulates the circulation of securities of listed companies, the government department that regulates the transfer of assets, and its supervision is carried out by the China Securities Regulatory Commission. Among the provisions of the Company Law for listed companies, it is worth mentioning that Article 120 stipulates the amount of asset changes that listed companies should convene and resolve at shareholders' meetings. In addition, Article 123 stipulates the setting of institutions responsible for information disclosure, which provides the key targets and paths for the government to supervise its cross-border M&A activities. Article 57 of the Law of the People's Republic of China on State-owned Assets of Enterprises provides for special supervision of the assets of Chinese-listed companies that are state-owned assets. It is implying that the SASAC is qualified to supervise the assets of Chinese-listed companies that are state-owned assets.

Among other State Council documents, the "Outline of the 14th Five-Year Plan of the National Economic and Social Development of the People's Republic of China and the Vision 2035" sets out the goal of "improving the classification and grading regulatory system for overseas investment". Additionally, it provides an ambitious vision for optimizing the regulatory approach for cross-border M&A by Chinese companies. The most important government regulations for cross-border M&A by CFLC are in the sectoral regulations. Foremost, the Measures for the Administration of Overseas Investment by Enterprises was implemented by the National Development and Reform Commission in 2018. The sectoral regulation implements an "overseas investment project filing and approval system" for direct or indirect overseas investment by Chinese companies, and further facilitate the approval of cross-border M&A projects. Secondly, the MOFCOM promulgated and implemented the "Measures for the Administration of Overseas Investment" in 2014. This regulation implements the commercial examination and approval in the form of "negative list". The measure mainly focuses on record management, and cancelling the preliminary reporting system for Cross-border M&A. Moreover, the approval of competent government departments is no longer the precondition for the effective of overseas investment related contracts or agreements. It further ensures the successful bidding of CFLC in cross-border merger activities and reduces the corresponding time cost.

The governmental regulatory measures listed above are for all Chinese companies' overseas investments. While the special regulation for Chinese-funded listed companies is also reflected in the Measures for the Administration of Information Disclosure of Listed Companies promulgated by the CSRC in 2021 (Hereinafter referred to as the "Measures"). In the Measures, Article 12, Article 22 stipulate that listed companies should make regular reports, interim reports, and in Article 11 stipulate that the stock exchange shall supervise the listed companies' The CSRC has the power to order or suspend the acquisition and reorganization activities of listed companies if the disclosure obligations are violated. Not only that, the CSRC has the power to order or suspend the acquisition and reorganization activities of Chinese-funded listed companies involving major asset reorganization and non-public offering. The legal basis for this is according to *the Measures for the Administration of Major Asset Reorganization of Listed Companies, the Measures for the Administration of Acquisition of Listed Companies, the Measures for the Administration of Securities Issuance of Listed Companies, and the Rules for the Implementation of Non-public Issuance of Shares by Listed Companies*.

In recent years, the Chinese government has made great improvements to the regulatory behavior of cross-border M&A activities of listed companies, and has made a lot of efforts to further simplify administrative procedures and expand corporate power. However, there is still a lack of systematic regulatory system, insufficient supervision of listed companies' overseas assets, administrative approval procedures are still complicated and the process is time-consuming. Plus, there is a lack of coordination mechanism for information sharing between departments. The details will be elaborated in the next section.

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3. Shortcomings of the Government Regulatory Paths

3.1. Gaps in Government Regulation of Foreign Assets of CFLCs

There is a regulatory gap in the government's obligation to disclose information about the overseas assets of CFLCs. Currently, the CSRC and the Shanghai and Shenzhen Stock Exchanges have not formulated any special disclosure rules for listed companies' overseas assets and overseas transactions. The departmental regulation issued by the CSRC in 2022, "No. 26 of the Guidelines on Information Disclosure Content and Format for Companies Issuing Public Securities - Major Asset Reorganization of Listed Companies", does not provide for the disclosure of information on overseas assets of CFLCs. It only requires listed companies to "explain the reasons" if they "really cannot" disclose the information, which is ambiguous in terms of semantics and boundaries. In addition, in practice, listed companies basically adopt the relevant regulations for domestic assets and transactions in disclosing relevant information, so that little information on policies, laws, accounting, taxation and business environment in the location of overseas assets is disclosed. Even, the corresponding disclosure matters are not disclosed at all.

The government does not have enough control over the overseas assets of Chinese-listed companies. As the legal system of overseas countries (or regions) in the differences with China in terms of property rights and national conditions. There will be complicated property rights relationship, many irregular operations, wide unreasonable settings, unsound management system and inadequate supervision measures when the listed companies to invest abroad. These situations are prone to form an important reason for causing risks to listed companies. In recent years, there have been many kinds of risks for listed companies to invest abroad. For example, making high-risk speculative operation abroad without approval causing huge loss of assets, registering the assets of listed companies in their personal names or entrusting them to individuals for investment without compliance audit or relevant legal procedures. Plus, appointing foreign personnel improperly leading to loss of assets.

There is a lack of methods and basis for government-to-government supervision of the overseas assets of Chinese-listed companies. Sometimes the government finds problems with internal control and information disclosure of listed companies' overseas assets and transactions. Even sometimes the government finds clues or situations that seriously harm the interests of listed companies and minority shareholders. Due to limited conditions, it is difficult for supervision to obtain evidence, identify and enforce the law [3].

3.2. Continuously Complex Approval System and Numerous Procedures in Lengthy Processes

The time-consuming administrative approval procedures have forced most Chinese acquirer companies to adopt a single means of payment, namely cash payment. The reason for this situation is that when CFLCs pay the consideration for the acquisition of the target company, due to the numerous administrative approval procedures for the payment of the consideration by issuing shares. As a result, listed companies generally choose to pay in cash. However, since cash payment is a kind of outright purchase and because of the principle of "maximizing shareholders' interests", compared with the payment by issuing shares, the offer price of overseas target companies is often higher.

The efficiency of M&A financing and foreign exchange payments is still affected. The Ministry of Industry and Information Technology, the CSRC, the NDRC and the MOFCOM jointly issued the Work Plan for the Concurrent Approval of Administrative Permits for M&A and Reorganization of Listed Companies (hereinafter referred to as the "Work Plan") in 2014. The Work Plan specifies that the approval and filing of overseas investment projects implemented by the National Development

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and Reform Commission, the approval of foreign investors' strategic investment in listed companies and the centralized review of managers implemented by the MOFCOM will no longer be the preconditions for the approval of administrative licenses for M&A of listed companies of the CSRC. However, as relevant documents from the competent commercial departments are the preconditions for the Administration of Foreign Exchange to handle the foreign exchange registration and payment business, the foreign exchange business has not been included in the parallel approval system, and the approval still takes a lot of time [4]. Outbound investment projects with the amount of USD 50 million and above under OFDI, which are subject to enhanced control by the Foreign Exchange Bureau across the board, are also subject to extreme uncertainty [6]. Meanwhile, the SEC's lack of transparency in the approval process is also known as a widely questioned point [7].

3.3. Gaps of Information Sharing Mechanisms Between Relevant Regulatory Authorities.

Although the Work Plan implements the parallel approval of administrative permits for M&A and restructuring of listed companies, which improves the efficiency of administrative approval, the approval work of each administrative department is done independently. SASAC, MOFCOM, NDRC, Customs Bureau, Foreign Affairs and other departments have not formed an effective regulatory coordination and information sharing mechanism for M&A, equity investment and financing of domestic enterprises including listed companies abroad. This leads to a fragmentation of considerations and administrative inefficiency.

3.4. Incomplete and Non-Direct Supervision of Intermediaries

Due to many restrictions of cross-border supervision, the supervisory authorities rely more on the practice of intermediaries to judge the authenticity, accuracy and completeness of listed companies' overseas assets and overseas transactions. The supervisory authorities are unable to directly obtain relevant financial and business information for analysis and judgment, whether for daily supervision or on-site inspection. At the same time, individual companies fully entrust intermediaries to carry out due diligence, but they do not understand and are not familiar with foreign assets and are not strict with the work of intermediaries. Moreover, some intermediaries are not highly professional, or they directly use foreign intermediaries' reports and fail to exercise due diligence, resulting in due diligence Failure to identify the potential risks of offshore assets can also lead to the failure of government supervision.

4. Factors of Insufficient Government Regulation Paths

4.1. The Contradiction Between Low Legislative Power and the Urgent Need

The CSRC is an institution directly under the State Council, which supervises and manages the national securities and futures market in accordance with laws, regulations and the authorization of the State Council, and maintains the order of the securities and futures market to ensure its lawful operation. At the same time, each stock exchange in China, as an institution directly managed by the CSRC, is the rule maker of domestic trading in China, the maintainer of trading order, and also has the power to regulate the information disclosure of listed companies. It is safe to say that the CSRC is the most direct regulator of the operation of CFLCs. However, according to the Chinese Constitution, only the NPC, the Standing Committee of the NPC, the State Council and its ministries and commissions enjoy "inherent legislative power", and the CSRC does not enjoy inherent legislative power. The CSRC is limited to exercising the legislative powers granted by the State Council under the Company Law, the Securities Law, and the Fund Law within the terms of reference granted by the State Council [8]. However, the M&A approval process for CFLCs involves multiple

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government departments and multiple regulatory areas, while both the CSRC and the Exchange do not have statutory authority to regulate other government departments and conduct legislative activities in related areas.

4.2. The Urgent Need of the Improvement of Governing Philosophy

As different departments under the State Council, the MOFCOM, the NDRC and the CSRC have a compartmentalized management system, which makes departmentalism prevail and is reflected in the "departmentalization of power" and "departmentalization of interests". In this case, the department sees data or information as an important strategic resource to retain the power, interests and status of the department [9]. Such a perception makes government departments tend to hold on to their own information resources, thus rejecting information collaboration. From the current situation of each department's regulation, different departments such as customs, foreign administration, and taxation have different regulatory priorities and objectives, and different laws and regulations are referred to. Each department values its sovereignty and has a strong sense of self-protection, so its willingness to proactively collaborate in regulation is low. For example, some government departments are reluctant to exchange and apply information for the sake of maintaining departmental authority and departmental interests, which leads to the "private sector" in the attribution of information resources and creates artificial barriers to information interconnection. Such as, the import and export subsidy policies formulated by the commerce department to encourage enterprises, the empty shell enterprises grasped by the customs, the abnormal clues of false trade enterprises. Similarly, the taxation department's tax fraud enterprises are not shared with the Foreign Exchange Bureau in a timely manner, so it is difficult to see the effectiveness of cooperative supervision [12].

4.3. Lack of Regulatory System for Intermediaries

The Chinese regulatory authorities do not have clear regulations on the offshore practice of auditors and appraisers and the use of offshore intermediaries, so there are cases of outsourced audits and domestic intermediaries treating offshore audits as "free outbound trips".

It is also worth mentioning that the effectiveness of the CSRC's supervision of intermediaries is inadequate. In China's capital market management system, many regulators, including the CSRC, have authority over intermediaries and there is duplication of supervision. Moreover, the local agencies of the CSRC are often subject to the intervention of the local government, which is more likely to lead to the weakening of the CSRC's supervision of intermediaries and affect the uniformity of the supervision of intermediaries.

5. Suggestions

5.1. The Improvement of the System and the Strengthening of Departmental Cooperation

Relevant departments should promote legislative activities and improve the special provisions on financing in the Securities Law and the Company Law. In addition, the departments are supposed to integrate legal resources. On the basis of administrative regulations such as "regulations", "provisions" and "Interim Measures" related to cross-border M&A, the paper suggests formulating special laws on cross-border M&A to enhance the binding force and authority of relevant norms of cross-border M&A [4]. Secondly, this paper suggests that the government should standardize the regulatory system, clarify the specific responsibilities of relevant departments, and set up conflict resolution methods and risk control mechanisms. Local administrative organs should carry out supporting departmental rules according to the general policy, combined with their own responsibilities, and implement the work of risk supervision to all departments.

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5.2. Strengthen Research on the Construction of a Social Responsibility Supervision System for Overseas Investment

In order to fully supervise the overseas assets of CFLCs, the Chinese government should promote the establishment of a social responsibility supervision system for enterprises' overseas investment [10]. The system includes two parts: risk supervision and social responsibility supervision of enterprises' overseas investment, and the social responsibility of enterprises' overseas investment can be divided into two levels.

The first is the basic responsibility that enterprises must fulfill for overseas investment, namely, the domestic parent company's internal control procedures for overseas subsidiaries and the strengthening of the construction of internal audit institutions. Secondly, if enterprises want to achieve sustainable development overseas, they should take the initiative to shoulder social responsibilities, that is, to disclose information to the Chinese government and the host country of investment, and cooperate with the activities of regulatory authorities.

In addition, the system also constructs a two-way risk control process and social responsibility supervision system for overseas investment composed of the government, domestic parent company, overseas subsidiary, host country, intermediary agency, non-governmental organization and media. At the same time, it has established three levels of macro, meso, micro regulatory prevention mechanism. Such a structure makes the relationship between supervision and promotion between the supervision mechanism and the social responsibility undertaken by the enterprise, and the diversification of supervision subjects promotes the diversification of supervision methods. The cross-cooperation between multiple parties has produced a new model of corporate social responsibility supervision under economic globalization, which is conducive to the continuous supervision of corporate social responsibility. Conversely, while undertaking social responsibility, enterprises can also continuously improve and optimize the supervision system.

In this system, China, as one of the regulatory bodies, plays a leading role in the entire risk prevention system of Chinese enterprises' overseas investment. Through the establishment of relevant laws and regulations, the state can dynamically monitor, prevent and deal with the risks of CFLCs' overseas investment from the macro level. Once an emergency is found, relevant departments and enterprises should be notified in time, and at the same time, the situation of the host country should be closely monitored, so as to grasp the initiative of risk control. As the first responsible person for overseas investment, the domestic parent company of the listed company should carry out continuous regulatory early warning and tracking control of the risks of Cross-border M&A from the micro aspect. Moreover, the parent company should design targeted business control activities according to the characteristics of overseas business and integrate risk management into daily business processes.

5.3. Improve Tax Supervision Measures for Cross-border M&As

The Chinese government should strengthen the corelation of regulation. In terms of Cross-border M&A, the Chinese government and the host country government can formulate laws and regulations for Cross-border M&A based on the existing policy of overseas income tax credit for enterprises. In terms of enterprise reorganization and M&A, the government can have relevant provisions on value-added tax, business tax, enterprise income tax and deed tax and other specific taxes based on domestic M&A activities. The government can also improve the tax system of Cross-border M&A by considering the characteristics and ways of Cross-border M&A of CFLCs.

The Chinese government should strengthen the policy orientation to encourage Cross-border M&A activities. At present, the Chinese government's tax policy has a single preferential way, and the preferential intensity is still very limited, which fails to fully reflect the policy orientation of the industries, regions and investment methods of overseas investment. Governments can learn from

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indirect incentives commonly used in Western countries. Such as lower capital gains tax rate, merger financing cost deduction, accelerated depreciation, merger income tax deferment, the establishment of loss reserves, etc., to further enrich tax incentives.

In addition, the Chinese government should further improve the scope of the special restructuring regulations for M&A. The existing legal system is too harsh for the identification conditions of special reorganization, so that CFLCs can enjoy the preferential tax exemption in Cross-border M&A like domestic M&A. Further clarify the concept of the provisions on special reorganization identification, such as improving the interpretation of "reasonable commercial purpose".

Relevant departments can formulate effective adjustment methods for Cross-border M&A for special purposes. In Cross-border M&A, there are M&A that do not aim at substantive operation but aim at tax avoidance, such as the situation that some enterprises transfer assets or equity at obviously unreasonable prices. At this time, the government can fairly measure and evaluate the equity price by introducing the common cost method, market method and income method of asset evaluation into the tax law [13].

5.4. Strengthen the Supervision of Intermediaries

For financial institutions, relevant legislation should be strengthened and the concept of the Equator Principles (herein referred as to “EPs”) should be introduced into the provisions. The EPs aim to provide a common set of benchmarks and frameworks for financial institutions to identify, assess and manage environmental and social risks of projects [14]. For projects that do not conform to the EPs, the Equator Principles financial institutions will refuse to provide project financing, loans and refinements. The EPs explicitly specify the ambiguous environmental and social standards in project financing carried out by financial intermediaries, so that they are in line with the basic social standards. This principle is conducive to improving the moral level of the entire financial industry and establishing a sustainable financial concept.

On the one hand, relevant regulations should require financial intermediaries to verify financing projects that reach a certain scale. This is to strengthen its responsibility for comprehensive rating of overseas investment enterprises from the aspects of environment, society and economy. On the other hand, relevant regulations should require financial intermediaries to hire experts in social and environmental aspects to conduct separate reviews and regularly disclose social responsibility information to facilitate the supervision of the public and investors. At the same time, the staffing requirements of intermediary agencies are required. Relevant regulations should require them to have specialists in law, accounting and finance when conducting due diligence on cross-border M&A for CFLCs. At the same time, the agency should estimate the risk of cross-border M&A and provide follow-up guarantees to make up for the shortcomings in the supervision of the government and enterprises.

For audit institutions, the government can require domestic intermediaries to provide audit papers through relevant legislation and sign regulatory cooperation agreements with other countries. Moreover, the government can optimize the way to provide audit papers for overseas intermediaries through the audit information classification system [15].

In general, the government should improve the practice literacy and level of intermediaries through relevant policies, and strengthen the information disclosure of intermediaries. The intermediary should trutily report the problems found in the regulatory process to the state, and the state has the right to investigate the relevant responsibilities of the intermediary that does not report.

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6. Conclusion

The main research problem of this paper is that in the process of Cross-border M&A of CFLCs, there is a gap in the supervision of relevant government departments on their overseas assets. At the same time, the approval process of cross-border M&A is complex, there is no information sharing and cooperation mechanism between regulatory authorities, and there is a lack of supervision of intermediaries. Based on the above problems, this paper proposes the following solutions. Firstly, relevant departments can build an inter-departmental information sharing mechanism based on the parallel examination and approval system. Secondly, the government can establish a social responsibility supervision system for overseas investment. Finally, the government should strive to promote the special legislative activities on cross-border mergers and acquisitions, and optimize the supervision measures of Cross-border M&A taxation, financing and intermediary practice.

The significance of this article is to make a structural summary of Chinese scholars' discussions on relevant issues, and put forward innovative suggestions from multiple perspectives on the basis of rich research results. The author sincerely hopes that the research results of this article can provide constructive opinions or inspirations for relevant Chinese departments to carry out legislative activities related to cross-border M&A of listed companies. However, for reasons of space, the details of some suggestions and the specific steps of optimization measures are not further discussed in this article. For example, in the construction of overseas investment social responsibility supervision system, this paper does not discuss the method of establishing trust foundation and information exchange system of the host country government. In addition, the electronic technology that can be used to construct the cross-departmental information sharing mechanism still needs further elucidation. The above problems are expected to be deeply discussed and studied by experts and scholars in electronic information and international politics. With the development of medical technology, the global economy is gradually recovering from the impact of the COVID-19 epidemic, and China's legal construction is further comprehensive. It is believed that in the near future, cross-border M&A activities of CFLCs will achieve mutual success with the regulatory path of the Chinese government, and inject new vitality into the recovery of the world economy.

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