

State Council further simplifies the approval requirements for cross-border investments into and out of China

The State Council has recently updated its List of Investment Projects subject to Government Approvals (2014 List), which became effective as from 18 November 2014. The 2014 List further delegates approval authority from central level agencies to their respective local counterparts that regulate foreign investment in China (FDI) and outbound investment of Chinese companies (ODI). Essentially, the threshold for FDI projects in both the encouraged and restricted categories of foreign investment that would trigger government approval has been raised. Likewise, even ODI with an aggregate investment of US\$1 billion will not be subject to government approval unless it involves a sensitive industry or region. This showcases the commitments made by China's new leadership in streamlining the government approval procedures for, among others, FDI and ODI projects.

Background

The new leadership of the Chinese government has reiterated to the public that it is committed to regulatory reforms. As part of the reforming initiatives, the National Development and Reform Commission of the PRC (NDRC) issued the *Administrative Measures for Approval and Record Filing of Outbound Investment Projects* (NDRC ODI Rules) in April 2014. In October 2014, the Ministry of Commerce (MOFCOM) promulgated the *Administrative Measures for Outbound Investment* (MOFCOM ODI Rules). Both regulations have significantly simplified the administrative procedures by removing the need for government approval for most ODI projects. Specifically, the NDRC ODI Rules only require those projects where the Chinese party invests more than US\$1 billion, or those projects in "sensitive" jurisdictions or sectors to be subject to the NDRC approval procedures, while the MOFCOM ODI Rules only require ODI dedicated to "sensitive" jurisdictions or sectors to be subject to MOFCOM's approval.

In parallel with the initiative of simplifying government approval procedures for ODI projects, NDRC also issued the *Administrative Measures for Approval and Record Filing of Foreign Investment*

Projects in May 2014 (NDRC FDI Rules). The NDRC FDI Rules have the effect of delegating a substantial amount of approval authority to local agencies, so that any FDI project with a total investment of less than US\$300 million (as opposed to US\$100 million in the preceding regulation) which is within the “encouraged” or “permitted” category of foreign investment no longer requires central NDRC approval.

Shortly thereafter, the State Council updated the 2014 List notwithstanding the fact that it was only amended in December 2013. Sections 11 and 12 of the 2014 List highlight the new streamlined approval requirements for both FDI and ODI projects, as detailed below.

Foreign Investments

Compared to the NDRC FDI Rules, Section 11 of the 2014 List further liberalizes administrative scrutiny over FDI projects in several aspects:

- For FDI projects with a total investment of US\$1 billion or more that are “encouraged” under the prevailing version of the Catalogue for the Guidance of Foreign Investment Industries (Catalogue)¹ and which are mandatorily required to be controlled by a Chinese shareholder, central NDRC approval would be triggered. Among such FDI projects, those projects with a total investment of US\$2 billion or more will be escalated to State Council for filing.
- In respect of those FDI projects (other than those in the real estate sector) that are classified as “restricted” under the Catalogue, the threshold that would trigger review by the NDRC is raised from US\$50 million to US\$100 million;
- In respect of the other FDI projects classified as “restricted” under the Catalogue that have a total investment of less than US\$100 million (or in the case of the real estate sector, irrespective of the amount of total investment), the approval of the provincial or a lower level government agency with the delegated authority will be triggered.

Please see below a table summarizing the gist of the 2014 List.

¹ Chinese government issues, and updates from time to time, a separate *Catalogue for the Guidance of Foreign Investment Industries* identifying which sectors are encouraged, restricted or prohibited for foreign investment. Any section which is not included in this catalogue is regarded as “permitted” for foreign investment. Prior to the promulgation of the 2014 List by the State Council, NDRC (as the lead agency which coordinates with MOFCOM and other agencies) issued the draft 2014 amendments to this catalogue for public review and comments. It is worth noting that the latest draft amendments seem to have substantially reduced the number of “restricted” sectors. Please refer to our separate client briefing to be issued shortly for more details of the changes introduced under the draft.

Project Approval Requirements

Approval by central NDRC	Approval by local government/local branch NDRC
<p>“Encouraged” category of foreign investment:</p> <ul style="list-style-type: none"> requiring Chinese shareholders’ control (including absolute and relative control); and with a total investment of US\$ 1 billion or more <p>among which an FDI project having a total investment of US\$2 billion or more shall be submitted to the State Council for filing.</p>	<p>“Encouraged” category of foreign investment:</p> <ul style="list-style-type: none"> requiring Chinese shareholders’ control (including absolute and relative control); and with a total investment of less than US\$ 1 billion
<p>“Restricted” category of foreign investment with a total investment of US\$100 million or more (except for those in the real estate sector)</p>	<p>FDI projects in the following sectors shall be subject to approval by the provincial government (usually delegated to the NDRC branch at the provincial level):</p> <ul style="list-style-type: none"> real estate sector (irrespective of the total investment amount); or any other sector “restricted” for foreign investment with a total investment of less than US\$100 million

The 2014 List further highlights that foreign investment in the infrastructure or strategic sectors (e.g., transportation, energy, water reservoir, mining and tobacco etc.) as referred to in Sections 1 to 10 of the 2014 List should still be subject to the approval requirements set out therein, which accords with the requirements applicable to domestic investment in the same sectors.

The 2014 List has yet to clarify whether other FDI projects which it did not cover would still be subject to any form of government approval or filing requirement (e.g., those FDI projects in the “permitted” or “encouraged” sector which may be controlled by foreign investors). As a general principle, if an FDI project is not mentioned in the 2014 List, it implies that government approval will not be required for such a project unless the target industry overlaps with any sector set forth in Sections 1 to 10 of the 2014 List. Having said that, it is expected that the NDRC will soon issue implementing rules to specify in detail how the relevant approval or filing procedures would operate.

Outbound Investments

According to Section 12 of the 2014 List, only those outbound projects involving sensitive jurisdictions or sectors require Chinese government approvals. In other words, the US\$1 billion threshold that triggers central NDRC approval under the NDRC ODI Rules has been lifted. As for those ODI projects initiated by central State-owned enterprises (irrespective of the total investment amount) or other Chinese companies (where the total investment exceeds US\$300 million), filing with central NDRC will suffice. This is consistent with the NDRC ODI Rules.

Observation

The 2014 List, together with the relevant regulations issued in 2013 and 2014 (including the latest draft 2014 amendments to the Catalogue), demonstrate the effort of the Chinese government to streamline administration and further delegate approval authority downwards. This coincides with the policy trend of decentralization with regard to the supervision of foreign-related investments. It is perceived that, ultimately, the Chinese government may only have to issue a “negative list” to differentiate matters that require government approval and those that do not.

Contacts

Beijing

Terence Foo

Partner

E: Terence.Foo@CliffordChance.com

Shanghai

Kelly Gregory

Partner

E: Kelly.Gregory@CliffordChance.com

Hong Kong

Emma Davies

Partner

E: Emma.Davies@CliffordChance.com

Glen Ma

Partner

E: Glen.Ma@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.

Clifford Chance, 33/F, China World Office 1, No. 1 Jianguomenwai Dajie, Chaoyang District, Beijing 100004, 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

www.cliffordchance.com

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 Widyati & Partners in association with Clifford Chance.