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CHINA INTRODUCES NEW RULES ON OUTBOUND INVESTMENT

China's National Development and Reform Commission (NDRC) is introducing new rules aimed at streamlining outbound investments and increasing oversight of investments that may have sensitivity to China.

The Administrative Measures for Outbound Investment of Enterprises (Order No. 11) comes into force on 1 March 2018 and replaces previous legislation (Order No. 9), following a public consultation.

The NDRC – China's economic planning body – says that the new rules will encourage innovative outbound investments, promote cooperation in global production capacity and reduce administrative burdens for Chinese outbound investors.

The main changes are as follows:

Key issues

- The Scope Of Outbound Investments
- Simplifying approvals, filing and reporting
- Penalties

THE SCOPE OF OUTBOUND INVESTMENTS

- **Regulating outbound investments via controlled offshore entities**

  Order No. 11 expands the scope of the NDRC outbound regime to cover outbound investment activities carried out by Chinese investors indirectly via their controlled overseas entities. Chinese investors must submit a project report to the NDRC before closing any outbound investment of US$ 300 million or more through their controlled overseas subsidiaries.

  In this connection, Order No. 11 broadly defines the "control" as the direct or indirect ownership of 50% or more of voting rights of another company, or the power to direct the operations, financial, human resources and technical affairs of another company.

- **Diversity of PRC investors**

  The new regime applies to Chinese financial institutions which are therefore not only subject to the approval by their own industry regulatory authorities (CBRC, CSRC or CIRC), but also the approval or filing of the NDRC, in terms of their outbound investments.

SIMPLIFYING APPROVALS, FILING AND REPORTING

- **Sensitive and regulated investments subject to approval**

  Outbound investments involving sensitive countries/regions (countries with no diplomatic ties to China or which are at war) or sensitive industries including research, development, production and maintenance of weapons, cross-border water resources and news media require NDRC approval. Order No. 11 also includes a catch-all provision which gives the NDRC the flexibility to adjust the scope of sensitive investments if national policies change.

It should be noted that some other outbound investments are classified by a separate regulation previously issued by the State Council of China as "restricted." These include, for example, real estate, hotels, cinema, entertainment, and sport clubs. Restrictions on these sectors will continue to apply to China's outbound investments, together with those imposed by the NDRC (as described above).

- **Threshold for outbound investments subject to filing**

  Non-sensitive outbound investments are required to be filed with NDRC at either central level or local level as follows: Non-sensitive investment initiated by a central state-owned enterprise or a financial institution under the administration of central government must be filed with central NDRC; a non-sensitive investment initiated by a local enterprise (including local state-owned enterprise or privately owned company) with investment of more than US$ 300 million must be filed with central NDRC; and non-sensitive investments less than US$ 300 million need to be filed with the relevant local NDRC.

- **Outbound investment via offshore entities subject to reporting**

  If a Chinese investor intends to make, via its controlled offshore entity, a non-sensitive investment of more than US$ 300 million, a Large Amount Non-sensitive Investment Report must be submitted to the NDRC. Non-sensitive investments of less than US$ 300 million are not subject to any approval, filing or reporting procedures with the NDRC.

- **Abolition of confirmation letters**

  Under Order No. 9, outbound investments and auction sale bids valued at US$ 300 million or above were subject to a requirement to supply information to the NDRC and the obtaining of a confirmation letter prior to the entry into of a binding agreement, provision of a binding offer or application to an offshore authority for governmental approval. Order No. 11 has removed the requirement to obtain this confirmation letter, which should help to alleviate the procedural burden on Chinese investors for outbound investments, reducing transaction costs and, importantly, enable them to accelerate transactional work at the initial stage of an outbound deal (in particular in the case of a bidding process). The abolishment of this hurdle of the requirement to obtain an NDRC confirmation letter is indicative of the NDRC's approach of simplifying and relaxing regulation of outbound investment activities at the pre-investment stage.

PENALTIES

- **How does the regulation work?**

  The NDRC will supervise and inspect outbound investment through online monitoring, interviews or through random checks.

- **In-progress monitoring**

During the course of an outbound transaction, the NDRC may require the investor to submit a written report concerning "material events." Order No. 11 does not define what constitutes a "material event."

- **Post-investment reporting system:**

  Order No. 11 introduces the requirement for "transaction completion reporting" (within 20 business days of the completion of a construction project or closing of equity or asset transaction) and "material adverse event reporting" (such as injuries to employees or major loss of offshore assets).

- **Recording non-compliance.**

  The NDRC will publish details of activities that are in breach of the rules and relevant disciplinary measures.

- **Disciplinary measures**

  Investors that break the rules by (amongst other things) concealing transaction information, making false statements, improperly obtaining NDRC approval or filing notices, implementing unauthorised transactions or harming national interests and national security will be punished through the suspension or termination of the investment and prosecution.

WHAT'S NEXT?

In addition to NDRC, the Ministry of Commerce, the State Administration of Foreign Exchange and some other PRC government authorities are also involved in the regulation and administration of Chinese investors' outbound transactions. It remains to be seen whether these authorities will amend their own regulatory regimes.

Below is a link to access our briefing on the full picture of PRC regulatory approvals for outbound investment.

https://www.cliffordchance.com/briefings/2017/08/prc_regulatory_approvalsfilingsrequiredfo.html

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