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**NDRC's NEW REPORTING REQUIREMENTS FOR CHINESE COMPANIES'
OUTBOUND INVESTMENTS**

Introduction

In June 2009, the National Development and Reform Commission (**NDRC**) issued the *Notice on Questions Relating to the Better Management of Investments Abroad (Notice)*. In the Notice, the NDRC amended and clarified the reporting requirements for international bids and/or M&A transactions during outbound foreign direct investments (**OFDI**) by Chinese companies. The NDRC is the key regulator of this area.

Key Provisions of the Notice

1. **New Reporting Requirements**

Under the Notice, before engaging in any "substantive activities" relating to international bids and/or M&A transactions, Chinese investors must submit a report to the NDRC detailing the intended transaction.

Although the Notice does not require investors to secure actual approval at that time, it reflects the NDRC's intention to tighten the review and approval process for Chinese OFDI projects involving bids and M&A.

The term "substantive activities" refers to:

- signing legally binding agreements;
- submitting legally binding bid documents; and
- lodging any approval applications with the foreign government of the investment destination.

2. **Details Required**

The report by the Chinese investor to the NDRC must include, *inter alia*, a description of the background of the project, the results of due diligence and the execution plan the bid or acquisition.

In addition, the following documents must be attached to the report:

- a preliminary indication of interest signed by the Chinese investor and the foreign investee, such as a non-binding letter of intent, a term sheet or a framework agreement; and
- a document granting internal approval for the Chinese party to proceed with the transaction, such as a board resolution.

3. Confirmation Letter

If the report contains all the necessary information and documents, the NDRC will issue an official confirmation letter within 7 business days. If the NDRC believes that the project has material risks, it will not simply halt the investment but will instead highlight those risks in the confirmation letter. This effectively means that the project will be subject to a heightened level of scrutiny by the NDRC when it is submitted for formal approval.

When it seeks the NDRC's formal approval for an OFDI involving a bid or M&A, the PRC investor must submit the confirmation letter. The Notice states that such a letter is only valid for a "certain period of time", during which the investor may conduct substantive activities for the transaction. If the investor fails to complete the substantive activities or other necessary preparations within this period – for example, it does not sign an initial binding agreement or make a binding bid – but still wishes to proceed with the investment, then it must apply to extend the term of the letter's validity or must resubmit its initial report to the NDRC. However, if the investor chooses not to proceed with the investment, the letter will simply lapse.

4. Formal Approval

After a Chinese investor has completed substantive activities and made other necessary preparations, it must apply to the NDRC for official approval of its intended investment. The NDRC will issue its decision within 20 working days after accepting an application for review. Where necessary, the NDRC may extend this period by a further 10 days.

Current PRC law states that a Chinese investor may only enter into legally binding agreements (such as JV contracts or share purchase agreements) after it has obtained formal NDRC approval for the OFDI in question.

However, PRC investors commonly – particularly in the case of the 2 types of OFDI covered by the Notice – sign binding transaction documents upon obtaining the NDRC's confirmation letter. The Notice makes it clear beyond any doubt that the effectiveness of those documents is made conditional upon the Chinese party obtaining the NDRC's formal approval of the project, in addition to the subsequent approvals from the other relevant authorities (i.e., the Ministry of

Commerce, the State Administration of Foreign Exchange and/or the State-owned Assets Supervision and Administration Commission).

The Notice confirms the process for obtaining formal NDRC project approval, where the project in question involves an international bid or M&A. It lays down very detailed requirements that must be met before it will grant a confirmation letter, to prevent any surprises during the formal approval process.

Conclusion

In addition to tightening the reporting and approval requirements for international bids and M&A deals, the Notice ensures that the NDRC will be involved with the review process of such transactions at an early stage. Specifically, it enables the NDRC to examine details of the Chinese party's bid – or even competing bids from different PRC entities – for a given foreign investment opportunity before any binding document is signed.

Despite stating on a number of occasions that it will not interfere with commercial decisions, the NDRC tends to have a persuasive influence over the choice of the "preferred" PRC candidate for OFDI projects. For example, it is more likely to nominate a large state-owned entity than a smaller one or a privately held concern. Thus, competing Chinese investors do not have to fight amongst themselves as to who will be selected, as that could likely lead to "over-hyping" of – and thereby increase the price for – a deal.

Via the confirmation letter process, the NDRC also provides PRC entities with an enhanced opportunity to learn of its attitude towards their proposed transactions. The NDRC's confirmation letters provide the investors with an indication of whether government approvals would likely be secured for their proposed investment. In this regard, the Notice provides more certainty for Chinese companies on this important question, which information they could in turn share with their foreign counterparts. This is vitally important news, as it means that all the parties involved in such transactions have a better sense as to the status of ultimate Chinese government approvals which hitherto have generally been obscure, and therefore whether the transaction will likely proceed as contemplated.

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