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AMENDED ADMINISTRATIVE MEASURES ON OUTBOUND AND INBOUND INVESTMENTS ISSUED FOR PUBLIC COMMENT

Introduction

On 16 August 2012, the Department of Foreign Capital Utilization and Overseas Investment of the National Development and Reform Commission (**NDRC**) released for public comment draft versions of two amended regulations:

- *Amended Measures for the Administration of Examining and Approving Outbound Investment Projects* (**Draft Outbound Investment Measures**)

- *Amended Measures for the Administration of Examining and Approving Foreign Investment Projects* (**Draft FDI Measures**)

The existing Outbound Investment Measures and FDI Measures were promulgated nearly eight years ago on 9 October 2004. Since then, the NDRC has issued a number of ministerial circulars revising the approval procedures for outbound investment and FDI projects. Amending the two measures reflects an effort by the NDRC to consolidate those circulars into formal legislation, and to make the approval procedures simpler and more transparent.

Key Amendments to the Outbound Investment Measures

Definition of "Investor"

Under the current Outbound Investment Measures, investors undertaking outbound investment projects are required to undergo examination by, and obtain approval from, the NDRC or State Council. Outbound investment projects are defined as investments acquiring ownership rights or control over the management and operations of offshore entities, including by setting up an entity, or via mergers and acquisitions, share purchases, capital contributions or re-investment.

The current definition of an "investor" includes both a domestic entity and its offshore subsidiary(ies). In the Draft Outbound Investment Measures, offshore subsidiaries are no longer included in this definition. Nor are offshore subsidiaries undertaking outbound investment activities required to obtain approval from the NDRC. However, a domestic parent company would need to obtain approval if it wished to provide financing or guarantees to its offshore subsidiary for the purpose of an outbound investment.

Special Projects/Industries

Under the current Outbound Investment Measures, undertaking "special projects" requires approval from the NDRC, irrespective of the project size. Special projects are defined as outbound investment projects in the territory of Taiwan, and in countries without diplomatic relations with China.

The Draft Outbound Investment Measures expands the territorial scope of special projects to include countries that are:

- without diplomatic relations with China;
- subject to sanctions; and
- engaged in ongoing wars or turmoil.

Investment activities in certain industries are also deemed special projects in the Draft, including:

- telecommunications services;
- cross-border water resource development and utilization;
- large-scale land development;
- backbone electric grids and networks;
- news and media; and
- any other sensitive industries as determined by the NDRC.

Consolidation of Various Circulars

The current approval regime for outbound investments is set forth in the following circulars:

- *Measures for the Administration of the Examining and Approving of Outbound Investment Projects Interim Measures for Administering and Approving of Outbound Investment Projects* issued by the NDRC on 9 October 2004

- *Notice on Issues Concerning the Improvement of the Administration of Outbound Investment Projects* issued by the NDRC on 8 June 2009

- *Notice on Delegating the Power to Approve Outbound Investment Projects* issued by the NDRC on 14 February 2011

The Draft Outbound Investment Measures collate the provisions of all three documents, making the overall approval procedure more transparent and efficient.

Outbound Investment Approvals

In the *Notice on Delegating the Power to Approve Outbound Investment Projects* issued by the NDRC on 14 February 2011, the NDRC delegated part of its approval authority to its provincial bureaus. The Draft Outbound Investment Measures confirm this delegation, and provide details of the various levels of authority:

	Approval Thresholds Under Current Outbound Investment Measures	**Approval Thresholds Under Draft Outbound Investment Measures**
State Council	Resource projects: USD 200m or more	Not mentioned
NDRC	• Resource projects: USD 30m to 200m • Other projects: USD 10m or more	• Resource projects and transport infrastructure projects: USD 300m or more • Other projects: USD 100m or more
Provincial DRC and Central State Owned Enterprises	• Resource projects: less than USD 30m • Others: less than USD10m	• Resource projects and transport infrastructure projects: less than USD 300m • Other projects: less than USD 100m

Information Report

Before any substantial work may be conducted on an overseas project in which a Chinese entity intends to invest over USD 100 million, the investor must report the details of the project to the NDRC in writing. This requirement is set forth in the *Notice on Issues Concerning the Improvement of the Administration of Outbound Investment Projects* issued by the NDRC on 8 June 2009, and has been adopted into the Draft Outbound Investment Measures.

"Substantial work" is defined in the Draft Outbound Investment Measures as signing a binding agreement or making a binding offer. Filing an application letter to a foreign governmental authority no longer rises to the level of substantial work.

Key Amendments to FDI Measures

Expanded Definition of "Foreign Investor"

Over the past few years, foreign-invested partnerships have emerged as a new form of foreign investor in China. Various regulations have been introduced to address their activities, in particular the *Provisions on the Registration of Foreign-Invested Partnership Enterprises*. The Draft FDI Measures add such partnerships to the legal definition of a foreign inbound investor, reflecting the aim of the NDRC to keep pace with developments in the marketplace.

Inbound Foreign Investment Approvals

The investment approval regime for inbound investments is governed by several regulations:

- *Interim Measures for Administering and Approving Foreign Investment Projects* issued by the NDRC on 9 October 2004

- *Notice on Further Strengthening the Administration of Foreign Investment Project*s issued by the NDRC on 7 August 2008

- *Notice on Effectively Delegating the Power to Approve Foreign Investment Projects* issued by the NDRC on 4 May 2009

The NDRC's approval power is also delegated to its provincial DRCs under the Draft FDI Investment Measures, as illustrated in the table below:

	Approval thresholds Under the Current FDI Measures	**Approval thresholds Under the Draft FDI Measures**
NDRC	• Projects in industries that are "encouraged" and "permitted" for foreign investment: USD 100m or more • Investment in industries that are "restricted" for foreign investment: USD 50m or more	• Encouraged and permitted industries: USD 300m or more • Restricted industries: USD 50m or more
Provincial DRCs:	• Encouraged and permitted industries: under USD 100m • Restricted industries: under USD 50m	• Encouraged and permitted industries: under USD 300m • Restricted industries: under USD 50m

The classification of industries as encouraged, permitted or restricted in nature is contained in the *Catalogue for the Guidance of Foreign Investment Industries*, last revised in December 2011.

National Security Review and Public Comments Process

According to the Draft FDI Measures, when a foreign investment involves matters concerning national security, a special review process is required. This stipulation is currently stated in the *Notice on the Establishment of a Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (**Security Review Notice**), issued by the General Office of the State Council on 3 February 2011.

The Security Review Notice mandates a special review where foreign investors merge with or acquire:

- domestic military industrial enterprises and military related industrial enterprises;
- enterprises which surround major and sensitive military facilities; or
- other enterprises relevant to national defense security.

A national security review must also be conducted where a foreign investor acquires control of an enterprise in industries that are closely connected to national security, including:

- key agricultural products;
- key energies and resources;
- key infrastructure facilities;
- key transport services;
- key technologies; and
- major equipment manufacturing.

The Draft FDI Measures stipulate that the NDRC may solicit public comments on proposed foreign investment projects that materially impact the public interest. However, no examples of such projects are given.

Conclusion

Inbound and outbound investments involving China continue to grow and become increasingly complex. The Draft Outbound Investments Measures and Draft FDI Measures are important steps by the Chinese government to introduce more efficient and transparent approval procedures for such projects. These measures clearly enumerate key terms and parameters of the investment process and reduce uncertainty for stakeholders navigating the necessary steps with the NDRC. They also reflect the government's intention to increase flexibility for Chinese investors to go abroad, and for foreign investors to enter China.

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