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China Released Measures for the Administration of Overseas Investments by Enterprises (Draft for Comments)

I. Background

The National Development and Reform Commission (NDRC) of People's Republic of China released Measures for the Administration of Overseas Investments by Enterprises (Draft for Comments) in early November, 2017. Comments are to be submitted before December 3rd, 2017.

This document ("**Draft**") is drafted to optimize the overseas investment administration, encourage innovative investment structure, and promote international trade, investment & financing, manufacture, and services. The Draft will replace the Administrative Measures for Approval and Record-filing on Overseas Investment Projects ("**Order No. 9**") issued in August 2014 by the NDRC.

II. Highlights of the Draft

Following are some highlights in this draft which would change the procedural and material requirements of the currently overseas investment regulation practice.

1. **"Confirmation Letter" from NDRC is no longer required for certain investments**

Currently for overseas acquisition or bidding project with an investment amount of over $300 million, a "Confirmation Letter" issued by NDRC should be obtained before any substantive work could be initiated. This requirement of governmental approval is deleted in the Draft, which would bring more certainty and efficiency to the timeline of relevant investments.

2. Additional individuals and entities are covered in the Draft

(1) Order No. 9 only applies to investments made by domestic corporate entities, in addition to which the Draft also applies to investments made by partnerships.

(2) The Draft covers investments by domestic enterprises through overseas enterprises controlled by such domestic enterprises, and investments by domestic individuals through overseas enterprises or Hong Kong, Macau, Taiwan enterprises controlled by such individuals, which are two types of investments not explicitly covered by the previous regulation.

(3) The Draft confirms that it applies to both financial and non-financial enterprises.

3. Investments that requires approval from NDRC are further defined

Sensitive investments are subject to approval of NDRC. According to the Draft, sensitive investments include investments involving sensitive countries and districts or involving sensitive industries.

- Sensitive countries and districts include (1) countries and districts that China has no diplomatic relation with, (2) countries and districts having war or civil unrest, and (3) countries and districts investments to which should be restricted pursuant to international treaties to which China is a party (added);
- Sensitive industries include (1) R&D, manufacture and maintenance of weapons (added), (2) cross-border water resources development and utilization, (3) media and news, etc. Telecommunication service, large-scale land development, major power line and grid are no longer included in the list of sensitive industries in the Draft compared to Order No. 9. A list of sensitive industries would be published by NDRC.

4. Approval or filing with NDRC is no longer an entry-into-force condition for definitive investment agreements

The Draft provides that required filing with or approval of NDRC is a condition for implementation of the relevant project (in which the implementation means the actual investment of property, equity, or actual provision of financing or guarantee), instead of an entry-into-force condition for definitive investment agreements required by Order No. 9.

In addition to the above, several changes to the procedural matters are made in the Draft compared to the previous regulation, for instance, local enterprises would be able to file with NDRC instead of through local DRCs, occasions requiring filing of amendment to original application are detailed, the validity period for approval documents obtained from NDRC is extended, etc.

III. Implications

Since November 2016, the Chinese authorities have been imposing a tighter control over the examination and approval with respect to overseas investments. In August 2017, the State Council published a Guideline (see our previous legal update here) which puts outbound investments into three categories: encouraged, restricted, and prohibited. The measures in the Draft, if finally go into effect, would further encourage and facilitate overseas investments by reducing compliance cost and improve efficiency and transparency of regulation. We will follow up on the publication of the relevant legislation and policies.

We would be happy to answer any questions that you might have.

Sincerely,
China Desk

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