

NDRC Releases Final Outbound Investment Regulations

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China Outbound Investment

On December 26, 2017, China's National Development and Reform Commission ("NDRC") released the final *Administrative Measures for Enterprise Outbound Investment* (the "Final ODI Rules"), which will go into effect as of March 1, 2018 and govern NDRC's regime for reviewing Chinese outbound investment projects. The Final ODI Rules contain limited changes relative to the draft *Administrative Measures for Enterprise Outbound Investment* published on November 3, 2017 (the "Draft ODI Rules") and described in our previous alert (see [here](#)).

Changes Introduced by the Final ODI Rules

- **Scope of "sensitive industries" to be tied to China's laws and regulations, rather than "macro-control" policy.** Investments in "sensitive countries or regions" or "sensitive industries" are subject to review under the "verification and approval" process, rather than "record filing." The Draft ODI Rules defined sensitive industries as certain specific industries (military equipment development, manufacturing, or maintenance; cross-border water projects; and news media) and other industries to be defined by NDRC in accordance with China's "macro-control policy." Instead of referring to China's macro-control policy, the Final ODI Rules provide that the list of specific industries is to be supplemented by other industries in accordance with China's "laws, regulations, and related control policies."
- **For previously approved or filed projects, changes in investment percentages or of Chinese investor's controlling parent alone no longer to require "variation" filing.** The Draft ODI Rules provided that, for projects that have already gone through record-filing or verification and approval, a "variation" (变更) filing or approval would be required upon: (i) an increase or decrease in the investors involved, a significant change in the respective investment percentages, or a change in an investor's actual controlling person; (ii) a significant change in the investment location; (iii) a significant change in the project's main content or scale; (iv) an increase in the approved investment amount of more than 20 percent or \$100 million U.S. dollars; or (v) any other situation that significantly changes the content pertaining to the existing approval letter or record filing notice. The Final ODI Rules obviate the need to obtain a variation filing or approval for mere changes in the investment percentages or the identity of the investor's actual controlling person. The Final ODI Rules also clarify that a variation filing or approval is required when the investment amount increases by 20 percent or more than 20 percent.
- **References to "financial institutions" changed to "financial enterprises."** We noted in our previous alert that the Draft ODI Rules created liability for "financial institutions" and their responsible persons for providing guarantees or financing to projects prior such projects completing record-filing or verification and approval when

such procedures were required. The relevant provisions in the Final ODI Rules refer to “financial enterprises,” rather than to “financial institutions.”

Commentary

We note the following features of these additional changes.

Narrowing of NDRC’s discretion to deem industries sensitive unlikely to substantially increase predictability. The Final ODI Rules call for NDRC to publish the list of sensitive industries. We noted in our previous alert that the predictive value of the list would be determined by how clearly the categories are defined, whether the list contains minimum size requirements, and whether the list explains how to handle targets that hold both non-sensitive and sensitive assets. We also noted that NDRC likely would be able to revise the list at any time, so there would also remain a risk that transactions deemed non-sensitive when entered into could be deemed sensitive when NDRC conducted its review. The list of sensitive industries has not yet been published, and the Final ODI Rules do not otherwise shed new light on these questions. The fact that the Final ODI Rules require additions to the list to correspond to China’s “laws, regulations, and related control policies” rather than its “macro-control policy” will marginally limit NDRC’s discretion to deem industries as sensitive. But, without further guidance from NDRC, investors and targets will continue to have significant questions as to how the list will be applied.

Change to variation rules to give investors greater flexibility to modify or exit from previously filed or previously approved projects. The Draft ODI Rules aimed to provide great specificity to the requirement, set forth in NDRC’s existing outbound rules, that investors seek a “variation” filing or approval whenever a project that has already completed the approval or filings procedures undergoes a further change in its “equity structure” (股权结构). The Final ODI Rules improve on the draft rules by better tailoring the criteria for variations to transactions that will involve actual and material new outbound investments. By eliminating the need for a variation filing or approval when investor percentages change (but where the Chinese investors remain the same and the aggregate increase in investment amount is less than 20 percent), the Final ODI Rules allow Chinese investors more easily to make adjustments among themselves and to make follow-on investments in foreign targets. And by eliminating the need for a variation filing or approval when the Chinese investor’s ultimate parent changes, the Final ODI Rules prevent the variation requirement from being tripped by an ordinary course changes of control of the PRC investor. The later change may also incentivize Chinese investors to hold their foreign investments through investment-specific PRC holdings companies. The holding company would serve as the applicable investor entity (投资主体) for purposes of the initial filing or application and later could be transferred—without a variation filing or approval—to a new PRC investor when the initial parent desires to exit the investment.

New references to “financial enterprises” unclear, but may reach a broader range of entities providing guarantees or financing to outbound investment projects. “Financial institutions” was not defined in the Draft ODI Rules, and “financial enterprises” is not defined in the Final ODI Rules. Both terms are used and defined under various Chinese laws and regulations, with “financial enterprise” generally having the broader meaning of the two. Under the Final ODI Rules, “financial enterprises,” if read broadly, could include Chinese financial *investors*, such as private equity funds; the Final ODI Rules would then prohibit such funds from providing guarantees or financing to outbound projects prior to such projects completing the record-filing or verification and approval when such procedures are required.

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