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Significant Changes in PRC Outbound Investment Regulations

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On December 26, 2017, the National Development and Reform Commission of the People's Republic of China ("NDRC") issued its new *Administrative Measures for Overseas Investments by Enterprises* (企业境外投资管理办法)[1] (the "New Measures"), which will come into effect on March 1, 2018. The New Measures, which will replace NDRC's existing filing and approval regulations on overseas investments by PRC enterprises[2], have simplified certain filing/approval procedures applicable to such PRC "outbound" investments, but at the same time have also expanded the scope of regulatory coverage over certain aspects of such investments.

Although how the New Measures will be implemented in practice by PRC regulators remains to be seen, we are of the view that the New Measures should help encourage outbound investments by PRC businesses, particularly investments that complement the PRC government's overall economic and political objectives (such as the "belt-and-road" initiative and investments in advanced technology and manufacturing). The simplified filing/approval procedures should also provide foreign sellers with additional, though incremental, clarity in evaluating regulatory requirements underlying acquisition proposals from prospective PRC buyers. But as the New Measures have expanded the scope and discretion of PRC regulators in reviewing PRC outbound investments in certain important aspects, foreign sellers should remain focused on potential regulatory requirements associated with transaction completion in evaluating such acquisition proposals.

Highlights of Key Changes

Simplified Filing/Approval Procedures for PRC Outbound Investments

- **Elimination of pre-signing "project information report" filing with NDRC.** Under current regulations, PRC enterprises making an outbound investment for US$300 million or more in value are required to file a "project information report" with NDRC before commencing substantive work on the transaction (and before entering into binding agreements). The original rationale for this system, when first introduced, was to supervise competition among potential PRC buyers for overseas assets and limit the likelihood of PRC buyers bidding against each other (and thereby raising the transaction cost for the ultimate buyer). However, in practice such "pre-signing" filing requirement have placed PRC buyers at a timing disadvantage compared with buyers from other jurisdictions, particularly in auctions. With PRC investors becoming much more active in overseas acquisitions, NDRC has eliminated this pre-signing requirement, which should put PRC bidders on a more leveled playing field with bidders from other jurisdictions.
- **Streamlined filing/approval procedures.** Currently, for outbound investments that are subject to filing confirmation or approval from the central NDRC[3], the relevant PRC investors (other than those that are central-level state-owned enterprises) would need to make NDRC filings with the local NDRC branch, which would first pre-screen the filings before forwarding them to the central NDRC for filing confirmation or approval. The New Measures have simplified the filing/approval procedure with respect to such investments by having the relevant PRC investors file directly with the central NDRC, which should ultimately shorten the overall review period for the more straight-forward transactions. In addition, the New Measures require NDRC to set up an online platform as an efficient way for investors to submit filing/approval applications and for NDRC to inform investors whether such applications have been accepted for review or not.

- **Flexibility on timing and post-filing/approval changes.** The New Measures have extended the validity period of NDRC's filing confirmation/approval notice for non-construction related transactions from one year to two years, which should allow PRC investors more time to close transactions without having to re-submit their applications. In addition, the New Measures have relaxed the situation in which PRC investors would need to re-submit their applications to only when there have been material changes to key aspects of the relevant transaction (rather than any changes).

Expanded Regulatory Coverage

- **Outbound investments by overseas entities controlled by PRC enterprises are covered.** In general, under current practice investments made by overseas entities controlled by PRC enterprises are sometimes deemed not subject to the same regulatory regime as direct outbound investments by PRC enterprises, unless the relevant PRC parent provides financing, guarantee or credit support for the transaction. The New Measures have made clear that investments by overseas entities controlled[4] by PRC enterprises are under their coverage. However, such investments are subject to a simplified regulatory regime—for investments by overseas entities controlled by PRC enterprises that are US$300 million or more in value and are not in sensitive countries/regions or industries, the relevant PRC parent would need to file a "large non-sensitive investment report" with the central NDRC, but no NDRC filing would be required for such non-sensitive investment with a value below US$300 million.[5]
- **Expansion of scope of sensitive investments subject to NDRC approval regime.** The New Measures, like the current rules, require that all investments in sensitive countries/regions or industries, regardless of size, be subject to formal central NDRC approval (instead of filing confirmation). But compared to the current rules, the New Measures have expanded the scope of sensitive industries by adding, in particular, a catch-all category of industries in which outbound investments may need to be restricted pursuant to the laws, regulations and economic adjustment/control policies of the PRC. This may be intended as a way to give PRC regulators more discretion in controlling, and modifying periodically, the overall macro-level trends and focus of PRC outbound investments. For example, the PRC State Council issued a policy guidance in August 2017 that listed, among others, real estate, hotels, cinemas, entertainment and sports club as sectors in which outbound investments should be restricted. The New Measures state that NDRC would separately release a list of sensitive industries, and we expect NDRC to retain discretion to scrutinize transactions in industries that it considers inconsistent with the PRC government's overall economic and political objectives.

Enhanced Post-Transaction Supervision

- **Enhanced post-transaction reporting.** In addition to transaction-based filings and approvals, the New Measures require PRC outbound investors to submit closing reports after the completion of their transactions. The New Measures have also implemented a post-transaction reporting system under which PRC investors are required to report, among other things, significant adverse events with respect to their investments (such as significant injury or death of employees, significant asset losses, or harm to PRC's diplomatic relations with other countries).

The New Measures represent a significant modification to the PRC outbound investment regulatory regime, and are intended to lessen the regulatory burden facing PRC outbound investors and provide additional clarity to the regulatory process. At the same time, PRC regulators maintain significant discretion in controlling the regulatory process and overall outbound investment trends under the New Measures. PRC enterprises looking at overseas acquisitions, as well as foreign sellers evaluating acquisition proposals from PRC enterprises, should consider the New Measures together with other relevant regulations and policy guidance from the PRC government in analyzing PRC regulatory issues for a particular transaction.

1. The New Measures do not cover direct outbound investments made by PRC individuals (as opposed to entities), but do cover outbound investments made by PRC individuals through their controlled offshore entities.
2. *Administrative Measures for Approvals and Filings of Overseas Investment Projects* (境外投资项目核准和备案管理办法), which came into effect in May 2014.
3. These outbound investments include (1) investments (regardless of size) in sensitive countries/regions or industries (see below), which require approval from the central NDRC and (2) investments that are US$300 million or more in value and in non-sensitive countries/regions or industries, which require filing confirmation from the central NDRC. Outbound investments that are not in sensitive countries/regions or industries and under US$300 million in value (other than those made by central-level state-owned enterprises) would be filed with the local NDRC branch only for filing confirmation.
4. "Control" in this context is defined as directly or indirectly owning a majority of the voting rights in the relevant entity, or, in the absence of a majority of such voting rights, the ability to manage the operations, finances, human resources, technology or other important aspects of such relevant entity.
5. Investments by controlled overseas entities in sensitive countries/regions or industries require approval from the central NDRC.

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