

# Opening the gates for outbound investment

**The new NDRC Measures have made Chinese outbound investments easier by raising requirement thresholds and simplifying the approval process. This could reduce the premium often demanded by foreign sellers and boost the domestic economy**

**O**n April 10 2014, the National Development and Reform Commission (NDRC) officially promulgated the *Measures for the Administration of Approval and Filing of Outbound Investment Projects* (境外投资项目核准和备案管理办法) (New Measures), which came into effect on May 8 2014. The New Measures replaced the *Tentative Measures for Administration of the Check and Approval of Overseas Investment Projects* (境外投资项目核准暂行管理办法) issued in 2004 (Old Measures).

Consistent with the principles laid out by the PRC State Council in late 2013 in the *List of Investment Projects Subject to Government Check and Approval (2013)* (政府核准的投资项目目录 (2013年本)), the New Measures streamline and simplify the regulatory and approval process for Chinese outbound investments, and delegate significant power to the NDRC at the provincial level. This reflects the government's aim to encourage and facilitate investments made by Chinese entities in foreign jurisdictions. The implications of the New Measures, however, go beyond de-regulation in China's continuing efforts to go global.

## Defining outbound

Like the Old Measures, the New Measures apply to outbound investment projects (including establishment, merger or acquisition, equity participation, capital increase and reinvestment) carried out by all types of legal persons within the territory of the PRC (investors).

Outbound investments made by natural persons or other non-legal person entities – such as partnerships – in the PRC will be governed by separate measures that reference the New Measures.

Approval or filing requirements for an outbound investment through an offshore entity controlled by a PRC legal person have been eliminated, unless the investment involves the PRC parent providing financing or guarantee to the offshore entity. This change may be welcomed by Chinese investors intending to make outbound investments through offshore structures, as long as the Chinese parent entities do not provide financing or guarantees to the offshore structure. However, most outbound investments adopting offshore structures in practice still involve financing or guarantees provided by the Chinese parent entities, and, therefore, still require approval by or filing with the central or provincial level NDRC.

## Relaxed requirements

Under the Old Measures, approval of the NDRC at various levels was mandatory for all outbound investments. The New Measures



replace these approval requirements with a filing process, except where the investment amount exceeds US\$1 billion (Rmb6.25 billion) or the project is in a sensitive country, region or sector. The NDRC's approval remains mandatory in both cases. Where the investment amount exceeds US\$2 billion (Rmb12.5 billion) and the project is in a sensitive country, region or sector, the NDRC must submit its opinion to the State Council for final approval. In cases where the NDRC's approval is not required, the application can now be filed with the NDRC at the central or provincial level, depending on the nature of the Chinese investor (a central state-owned enterprise (central SOE) or any other type of entity) and the total investment amount of the project. A central SOE is an enterprise directly controlled and supervised by the State-owned Assets Supervision and Administration Commission of the State Council. The Old Measures had separate approval requirements for natural resources-based outbound investments, for which central NDRC approval was required if the investment amounted to US\$300 million (Rmb1.88 billion) or more, and non-natural resources-based investments, for which central NDRC approval was required if the investment amounted to US\$100 million (Rmb625 million) or more. This distinction no longer exists under the New Measures.

**Table 1. Approval and filing requirements of the NDRC**

Type of enterprise	Amount/sensitivity	Approval/filing requirement
Central SOEs	Less than US\$1 billion and not involving sensitive countries, regions or sectors	Filing with the NDRC
	US\$1 billion or more or involving sensitive countries, regions or sectors (regardless of investment amount)	Approval by the NDRC
	US\$2 billion or more and involving sensitive countries, regions or sectors	Approval by the State Council
Entities other than central SOEs	Less than US\$300 million and not involving sensitive countries, regions or sectors	Filing with the provincial NDRC
	US\$300 million or more but less than US\$1 billion, and not involving sensitive countries, regions or sectors	Filing with the NDRC
	US\$1 billion or more or involving sensitive countries, regions or sectors (regardless of investment amount)	Approval by the NDRC
	US\$2 billion or more and involving sensitive countries, regions or sectors	Approval by the State Council

The investment amount equals the total amount of the Chinese investment made in an outbound investment project. Investment can be in the form of cash, negotiable instrument, tangible asset, intellectual property, technology, equity interest, debt or guarantee. The New Measures make it clear that the amount of outbound lending or guarantee will be counted towards the total investment amount in an outbound investment project.

“Sensitive countries or regions” have been defined to include countries which have no diplomatic ties with the PRC or are subject to international sanctions, together with other countries or regions in war or turmoil or otherwise deemed sensitive by the NDRC. The definition of “sensitive sectors” covers the operation of the telecommunication infrastructure business, the development and use of cross-border water resources, large-scale land development, power transmission grids and networks and mass media, as well as other sectors deemed sensitive by the NDRC. As neither definitions are exhaustive, the NDRC retains discretion in its interpretation of “sensitivity”.

If an outbound investment project with an investment amount of US\$300 million or more is carried out through a bidding or acquisition process, the investor is required to submit an information notification to the NDRC and obtain a confirmation before proceeding to execute any binding agreement, making any binding offer or submitting any formal bidding documents. After receiving the information notification from the investor, the NDRC is required to issue a confirmation letter within seven working days if it considers the project to be consistent with the national policies for overseas investments.

### Smoothened process

In terms of application procedures, central SOEs submit applications to the NDRC. Other entities submit applications to the provincial NDRC, which will be passed to the NDRC if filing with or approval by the NDRC or the State Council is required.

The procedures have been greatly streamlined and simplified as compared to those under the Old Measures.

Both the filing and approval applications will be assessed substantively. Factors to be considered for granting an approval include whether the outbound investment project complies with national laws and regulations, sector policies, outbound investment policies, national regulations on capital investments, national security and public interest concerns and international treaty obligations, as well as whether the investor is capable of making the investment. Factors for granting a filing are substantially the same. Therefore, the NDRC may still, at its discretion, refuse to grant an approval or filing confirmation.

If an approval is required, the NDRC is generally required to make a decision within 20 to 30 working days (excluding the time period for seeking assessment opinions from external



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experts) from the day it accepts the application for approval. If only a filing is required, the time limit for the NDRC (or its provincial counterparts) to make the decision is seven working days after acceptance. Given that a considerable portion of outbound investment projects will only require a filing with the NDRC, the introduction of a shortened time frame for filing should be able to speed up the overall timetable for many outbound investment projects.

### Direct effects

Without the NDRC’s approval or filing confirmation (at the central or provincial level) for an outbound investment project,

the PRC foreign exchange, customs, immigration and tax authorities will not give clearance to the investor. Further, banks are not allowed to lend to the investor in connection with the project.

An investor is required to have obtained the NDRC's approval or filing confirmation before entering into any legally binding document in relation to an outbound investment project. Alternatively, under the New Measures, the investor can specify in a document that its effectiveness is conditional upon obtaining approval or filing confirmation. As mentioned above, for an outbound investment project carried out through a bidding or acquisition process with an amount of US\$300 million or more,



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the investor is also required to have obtained the NDRC confirmation letter for information notification before entering into any legally binding agreement, making any binding offer or submitting any formal bidding documents.

The approvals and filing confirmations will be valid for two years in the case of construction projects or one year in the case of all the other projects from the date of issuance.

#### **Fuelling a positive cycle**

Chinese outbound investments are expected to be made easier under the New Measures. The new law has streamlined and simplified the regulatory and approval process for Chinese outbound investments. It has also increased the threshold required for central NDRC approval (from US\$100 million, for

non-natural resources-based investments, and US\$300 million, for natural resources-based investments, to US\$1 billion) and, therefore, has delegated significant regulatory power to the provincial level NDRC – a welcome de-regulation in China's continuing efforts to go global. In light of these positive changes, it will be easier and faster for a Chinese investor to clear the local regulatory approval process required for an outbound investment. Sophisticated overseas sellers may now be less inclined to see the prerequisite Chinese regulatory approvals as “walk rights” for Chinese investors/buyers. The result is that Chinese investors/buyers may be able to reduce the so-called “China premium” which overseas sellers typically demand, especially in disposals conducted through auction sales, and to improve the economic returns on their outbound investments.

The New Measures may have a positive impact on China's overall economy which is in a challenging transition to sustainability, competitiveness, higher efficiency and productivity. Amid reduced economic returns in certain key sectors (such as real estate) and significant overcapacity in certain industries (such as steel manufacturing, construction and renewable energy), the New Measures encourage excess capital to be invested outside China. The resulting increase of capital outflow may help mitigate the lower return and overcapacity issues in China's domestic economy.

It will also help reduce China's excessive foreign-exchange reserves (the largest component of which are US dollar assets) and further diversify the asset classes of the State. Despite the recent volatility in its exchange rates, the *renminbi* is expected to stay strong. A strong currency will facilitate Chinese outbound investments, adding to the positive effects brought by the New Measures.

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