

# Client Alert

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## China's NDRC Tables Further Streamlined Outbound Investment Rules

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Overseas investment from China has experienced rapid growth each year in the last several years, with the Ministry of Commerce (“**MOFCOM**”) reporting USD735.1 billion in new investment having been deployed overseas by Chinese investors in 2015. At the same time, the growing volume of overseas investment masks challenges. Often a significant obstacle to successful completion of an overseas acquisition by a Chinese enterprise, particularly in the context of a competitive bid, is the set of Chinese regulatory filings to which the acquisition is subject. These filings often contribute uncertainty to the transaction and cause delays and are a source of frustration for both Chinese enterprises and their overseas investment targets.

Both MOFCOM and the National Development and Reform Commission (“**NDRC**”) have taken steps over the last three years to simplify and streamline the regulatory framework for overseas investment. Based on the release on April 13, 2016, of the *Draft NDRC Decision on Revising the Administrative Measures on Approval and Record-filing of Outbound Investment Projects* (国家发展改革委关于修订《境外投资项目核准和备案管理办法》的决定(公开征求意见稿)) (the “**Consultation Draft**”), it seems that the NDRC contemplates more far-reaching reforms. The period for public consultation in respect of the Consultation Draft ended on May 13, 2016, and it is expected that the NDRC will issue amended rules on outbound investment projects based on the Consultation Draft soon.

We discuss the key elements of the Consultation Draft below.

- **Changes to “Road Pass (路条)” Regime**

A particularly onerous requirement of Chinese overseas investment rules is the requirement that a Chinese enterprise obtain initial approval from the NDRC before commencing any “substantive work” (including signing a binding agreement or making a binding offer) on any major transaction. The necessity of this approval – sometimes referred to as a “road pass” (路条) – can sometimes cause unwanted uncertainty. The NDRC is required to confirm that the transaction complies with Chinese overseas investment policies. The approval process has historically given the NDRC discretion to determine which Chinese entity has the right to pursue a particular overseas transaction. Although there is no specific provision in the law contemplating this, the NDRC has typically issued only one road pass for a given transaction, thus eliminating competition amongst Chinese enterprises for the same deal.

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2014 measures of the NDRC – the *Administrative Measures on Approval and Record-filing of Outbound Investment Projects* (境外投资项目核准和备案管理办法) (the “**Measures**”), which came into effective on May 8, 2014, and were amended on December 27, 2014 – took a step to liberalize the road pass requirement, limiting projects that require a road pass to those with investment of USD300 million or more.

The Consultation Draft goes one step further and proposes to streamline the road pass process. No longer is the NDRC required to consider whether the proposed deal is in line with the State’s overseas investment policies. It also recharacterizes the road pass document issued by the NDRC from a “confirmation letter” (确认函) to an “acceptance receipt” (收悉函) and requires the NDRC to issue such acceptance receipt within seven working days after receiving the application. Finally, it adjusts associated penalties so that Chinese enterprises are not penalized for commencing substantive work on a relevant transaction before the road pass is issued, but only if they commence work before submitting the filing to the NDRC.

The more passive role being contemplated for the NDRC, together with the other changes, suggests that the road pass system will be reduced to a filing regime, with applicants obtaining only an acknowledgement of filing from the NDRC and with more than one applicant able to complete a filing in respect of a single transaction. This change should open up competition among Chinese enterprises in the overseas M&A market and reduce the uncertainties historically associated with the NDRC’s road pass regime.

- **Streamlining Approval of Certain Overseas Investment Transactions**

Generally speaking, overseas investment transactions are subject to a “filing-for-the-record” (备案) procedure with the NDRC before the transaction closes, which does not involve substantive regulatory review of the transaction. Pursuant to the Measures, only transactions involving investment into a sensitive country (region) or industry<sup>1</sup> are subject to regulatory approval (核准) – approval by the NDRC or, if the transaction involves investment of USD2 billion or more, then approval by the State Council on the basis of an opinion from the NDRC.

The Consultation Draft contemplates elimination of the role of the State Council, which would mean that NDRC approval is sufficient even for overseas investment transactions involving both investment of USD2 billion or more and investment into a sensitive country, region or industry.

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<sup>1</sup> The Measures specifically define “sensitive countries or regions” as those with which China has does not have diplomatic relations and those which are under international sanctions or are involved in wars or domestic chaos. “Sensitive industries” are defined to include telecommunications infrastructure, cross-border water resources development, large scale land development, power mains, power grids and news media.

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- **Removal of Requirement for Opinion from Provincial Counterpart of NDRC**

The Measures require that applications from “local enterprises”<sup>2</sup> for NDRC approval of overseas investment transactions into sensitive countries (regions) or industries be accompanied by the opinion of the relevant provincial counterpart of the NDRC on the transaction.

The Consultation Draft contemplates the elimination of this requirement. Applications for this approval from local enterprises must still be submitted to the NDRC via its relevant provincial counterpart, but the NDRC’s provincial counterpart can directly forward the application to the NDRC for its approval without having to formulate its own view on the transaction.

- **Letter of Intent from Financiers No Longer Required**

The Measures require that the pre-closing applications for approval from/filing-for-the-record with the NDRC or its provincial counterpart in respect of an overseas investment transaction be accompanied by a letter of intent from a bank containing key financing terms for the project, if the transaction is subject to bank financing. The Consultation Draft contemplates removal of this requirement.

- **Regulatory Regime for Investment in Taiwan**

The Measures provide that investment by Chinese enterprises into Taiwan is to be regulated under separate regulations. The Consultation Draft contemplates instead that investment into Taiwan will be subject to the same regime governing overseas investment, one additional requirement being that the NDRC consult with the Taiwan Affairs Office before granting any approval or completing any filing-for-the-record in respect to an investment transaction into Taiwan.

The Chinese government continues to relax the regulatory regime relevant to overseas investment. Look for issuance by the NDRC of new regulations to implement the changes contemplated by the Consultation Draft, and for other changes to overseas investment rules by the NDRC, MOFCOM and the State Administration of Foreign Exchange in order to reduce deal uncertainty and facilitate the ability of Chinese enterprises to bring overseas investment transactions to successful completion in a timely manner, particularly in the context of a competitive bid.

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<sup>2</sup> The Measures provide no definition of the term “local enterprise”, but it is generally understood to refer both to privately-owned enterprise as well as State-owned enterprise invested in and supervised by local rather than the central government.

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