

Client Alert

April 24, 2014

New NDRC Rules Set to Facilitate China Outbound Investments

By Xiaohu Ma, Paul McKenzie and Jun Deng

As we reported in [our February 18, 2014 alert](#), China's State Council adopted a new, more permissive approach to regulation of overseas direct investment ("ODI") with the promulgation on December 2, 2013 of the *Circular Concerning the Catalogue of Investment Projects Subject to Governmental Approvals (2013 Version)* (关于政府核准的投资项目目录(2013年本)的通知) (Guo-Fa [2013] No. 47) (the "**2013 Catalogue**"). The focal point of this new approach is to largely replace the decades-old approval system with a system that requires a mere "filing for the record" or "recordation filing" ("备案" or "bei an" in Chinese). Specifically, all ODI projects involving investment of less than US\$1 billion, other than projects involving designated "sensitive regions" or "sensitive industries", are subject to a filing procedure with the National Development and Reform Commission ("**NDRC**") at the central level. For ODI projects involving investment of less than US\$300 million, filing with the competent provincial government agency is generally sufficient.

More than four months after the release of the 2013 Catalogue, the NDRC finally announced the *Administrative Measures for Approval and Recordation Filing of Overseas Investment Projects* (境外投资项目核准和备案管理办法) on April 8, 2014 (the "**New NDRC Rules**"), which will take effect on May 8, 2014 and supersede the 2004 *Tentative Administrative Measures for Approval of Overseas Investment Projects*. The New NDRC Rules constitute a concrete step to put the State Council's new ODI policy into operation.

This alert provides highlights of the just-released New NDRC Rules.

SUMMARY OF ODI APPROVAL AND FILING REGIME

The approval and filing regime embodied in the New NDRC Rules for non-sensitive ODI projects is consistent with the requirements of the State Council's 2013 Catalogue and can be summarized as follows:

Client Alert

TYPE OF ODI PROJECT		APPROVAL		FILING	
		State Council	NDRC	NDRC	Provincial government
Projects in a sensitive location or industry	with investment of US\$2 billion or more	•			
	with investment of less than US\$2 billion		•		
Other projects with investment of US\$1 billion or more			•		
Other projects with investment of less than US\$1 billion but greater than or equal to US\$300 million				•	
Other projects with investment of less than US\$300 million	by enterprises under direct supervision of the central government			•	
	other				•

KEY OBSERVATIONS

- **Liberalizing effect:** As summarized above, the New NDRC Rules have removed the approval requirements for most ODI projects of less than US\$1 billion and delegated administrative authority over most ODI projects of less than US\$300 million to the provincial governments, thus substantially reducing the regulatory hurdles for China's ODI activities.

In addition, according to the NDRC's replies to media inquiries on April 10, 2014, the NDRC has resolved to take further steps to reduce bureaucracy in implementing the New NDRC Rules. According to the NDRC, an applicant may now submit an application for NDRC ODI approval or filing directly to the competent provincial government without the application first being processed by governmental agencies at the county or municipal level – a significant step in simplifying application procedures. NDRC also contemplates introducing an online electronic filing system in the second half of this year, which would require an applicant to fill out only a pre-formulated application form and attach certain related documents.

- **Overseas reinvestment:** The liberalizing effect of the New NDRC Rules on ODI projects is also expected to facilitate reinvestments overseas by an offshore entity previously established or acquired as part of an ODI transaction. The NDRC has indicated in its replies to media inquiries that such an offshore entity can reinvest funds overseas without either a further ODI approval or filing being required so long as the domestic parent is not providing any financing or guarantee associated with the reinvestment transaction.
- **Pre-transaction procedure:** We questioned in our previous client alert whether the newly introduced ODI filing system would be operated as a semi-approval procedure that would involve the government's substantive review of the filing materials. The New NDRC Rules provide that the relevant NDRC approval must be obtained or the relevant NDRC filing must be completed either before the parties enter into a definitive agreement or before the signed definitive agreement takes effect. This is an interesting requirement, since under typical regulatory practice, where a transaction is subject to a "bei an" filing, the filing would be undertaken after the transaction has been undertaken and the effectiveness of the

Client Alert

transaction documents would not be conditioned on the filing being made. Doubtless the new filing requirement for most ODI projects is much less stringent than the approval requirement under the old ODI regulations. Nonetheless, requiring the filing pre- rather than post-transaction gives the NDRC *de facto* power to vet ODI projects in the process of deciding whether to accept the related filing application. As a practical matter, if NDRC chose not to accept or confirm an ODI filing application, the related transaction would not be able to proceed because the definitive transaction document will not come into effect. We will monitor closely how NDRC and its provincial counterparts implement this pre-transaction filing requirement in practice.

The New NDRC Rules also include a separate pre-signing reporting requirement for overseas acquisition and bidding projects involving investment of US\$300 million or more. This reporting requirement is inherited from NDRC's 2004 rules and was in the past a major obstacle that China ODI investors had to overcome in pursuing overseas acquisition opportunities. It appears that NDRC has retained this requirement in the New NDRC Rules to reduce or avoid, among other things, Chinese companies' internal competition in chasing the same offshore deal.

- **Clarification of timeframes:** The New NDRC Rules provide greater clarity on the time frames for the NDRC's responses to applications. The New NDRC Rules provide the NDRC with 20 business days to review an application for ODI approval. That 20 day period may be extended for another 10 business days and excludes the evaluation period discussed below. NDRC review time for ODI filing applications is limited to only seven business days.

A key point to note is that the time period in each case runs from the date the application is officially accepted. NDRC retains the discretionary authority that is typical in most regulatory application procedures in China to determine when an application is in proper order and can be officially accepted. Helpfully, the New NDRC Rules also seek to limit the time the NDRC can take at this stage, stating that the NDRC must decide within five business days after an application is submitted whether the submission is in good order. Still, the actual submissions process could turn out to be quite bureaucratic, permitting the ODI approval/filing process to be delayed substantially beyond the regulatory timeframe – as is the case with other applications processes for governmental approval, filing or registration in China, such as current antitrust approval procedures.

- **Evaluation:** The New NDRC Rules provide that the NDRC may engage, at its own cost, a qualified agency to conduct an evaluation associated with the NDRC's review of proposed, sensitive ODI projects and ODI involving US\$1 billion or more. Such evaluation procedure may take up to 40 business days to complete. If triggered, this evaluation procedure could potentially increase the uncertainty in NDRC's ODI approval process. Having sensed the concerns over this evaluation procedure, NDRC has publicly clarified that this procedure will apply only to a very limited number of ODI projects involving complicated or sensitive external issues.
- **Sensitive regions and sensitive industries defined:** The New NDRC Rules specifically define "sensitive countries or regions" as those with which China does not have diplomatic relations and those that are under international sanctions or are involved in wars or domestic chaos. Likewise, "sensitive industries" are defined to include telecommunications infrastructure, cross-border water resources development, large scale land development, power mains, power grids and news media. Tax havens like

Client Alert

the Cayman Islands and the British Virgin Islands have no diplomatic relations with China and may fall out of favor as targets for Chinese ODI. Other jurisdictions that do have diplomatic relations with China – and favorable tax treaties with China as well – ought to be in a more favorable position to receive Chinese ODI. In particular, Hong Kong may become a preferred investment target for many Chinese companies.

- **Term of validity:** The approvals and the confirmations of filing issued by the NDRC are not perpetual. Once issued, they remain valid for only one year – or two years for investments in construction projects. While the New NDRC Rules provide for the possibility of renewal, investors must remain alert to the possible expiry of the approval or filing and prepare in advance.
- **Regulations limited to corporate investors:** The New NDRC Rules govern only corporate investors. Thus, it remains unclear as to how individuals' outbound investments will be regulated.

While certain issues remain unsettled as we note above, the New NDRC Rules are set to open a new chapter for China's ODI regulatory control, which, we expect, will be followed by additional actions taken by the Ministry of Commerce and other relevant Chinese authorities, such as the State Administration of Foreign Exchange. We note that the Ministry of Commerce has previously published a set of draft ODI administrative rules to solicit comments. We will keep you updated on related regulatory developments.

Contact:

Xiaohu Ma

852 2585 0868

xma@mofo.com

Paul McKenzie

86 10 5909 3366

pmckenzie@mofo.com

Thomas Man

86 10 5909 3313

tman@mofo.com

Sherry Yin

86 10 5909 3566

syin@mofo.com

Jun Deng

852 2585 0878

jdeng@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 10 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.