PAUL HASTINGS

STAY CURRENT

January 2018

Follow **@Paul_Hastings**

China Modifies Regime on Administration of Outbound Investments

By Paul Guan, Meka (Qingkai) Meng, Ting Wang & Cece Yang

As part of the effort since late 2016 to curb irrational or disfavored types of Chinese investments overseas and to encourage non-speculative outbound investments, the Chinese government recently issued new regulations governing outbound investments by Chinese companies. The *Administrative Measures for Outbound Investment by Enterprises 《企业境外投资管理办法》* ("**NDRC Order 11**") issued by the National Development and Reform Commission (the "**NDRC**") of the People's Republic of China (the "**PRC**") on December 26, 2017 and effective March 1, 2018, replaces the preexisting NDRC approval and filing scheme for outbound investments by Chinese enterprises in effect since 2014 ("**NDRC Order 9**").

Set forth below is a high-level summary of the new NDRC approval/filing/reporting requirements under NDRC Order 11:

Type of Investment Project	Investment Amount by Chinese Investors	Investment by a Chinese Investor Located within China Directly		Investment Indirectly via an Offshore Entity Controlled by a Chinese Investor Located within China
		Central Enterprise	Non-Central Enterprise	
Sensitive project	Any amount	NDRC approval		NDRC approval
Non-sensitive project	≥ USD 300 million	NDRC filing		Report to NDRC
	< USD 300 million	NDRC filing	NDRC provincial branch filing	No pre-investment approval, filing or report required

Key Changes under NDRC Order 11:

- **Types of NDRC Review.**
  - An NDRC approval involves a comprehensive review of the merits of the transaction and may be difficult to obtain. While the NDRC is generally required to make a decision within 20 working days upon acceptance of the relevant application, it may,

in its discretion, engage a consulting agency to perform an assessment of the transaction, in which case the approval process may take up to 90 working days.

– An NDRC filing is generally considered less difficult to obtain, and the NDRC is expected to complete the filing and issue a filing notice within 7 working days after its acceptance of the relevant submission.

– Note that NDRC may reject an approval or a filing if it determines that the relevant transaction is not in compliance with PRC laws, regulations, governmental planning or policies, international treaties, or is a threat to or harms China's national interests and national security.

– A report to NDRC is generally considered to be procedural, the completion of which should be straight forward (after submission of the required information via NDRC's online system, if NDRC does not request any supplemental information within 5 working days, the report shall be deemed completed).

- **Conditions Precedent**. Each NDRC approval, filing, and report (as applicable) becomes a condition precedent to the closing of an outbound investment under NDRC Order 11, instead of a condition to the execution of a binding transaction agreement, or as a condition to such agreement taking legal force and effect, as was required under NDRC Order 9. This is an investor-friendly change. In addition, the "road pass" practice under NDRC Order 9 that was criticized by both Chinese investors and their foreign counterparts is now abolished by NDRC Order 11. We expect that these changes would significantly increase Chinese investors' ability to participate in transactions that involve a bidding process.

- **Sensitive Projects**. "Sensitive projects" include (i) projects involving sensitive countries and regions and (ii) projects involving sensitive sectors. While we expect that outbound investments involving sensitive countries and regions would be rare, outbound investments involving sensitive sectors may be investment hot spots from time to time. Particularly, in addition to those sectors expressly listed under NDRC Order 11 as sensitive (i.e., research, manufacture & repair of weapons, development & usage of cross-border water resources, and news & media), the definition of "sensitive sectors" under NDRC Order 11 also includes a catch-all provision that incorporates sectors considered to be "restricted" pursuant to other PRC laws, regulations and policies, which gives the Chinese government flexibility to effectively control outbound investments in any particular sector that is "overheated." We expect that the NDRC will promulgate a catalogue of sensitive sectors in the near future, and that such catalogue may be updated from time to time.

- **Broadened Definition of Chinese Investors**.

– Controlled offshore entities. NDRC Order 11 governs outbound investments made directly by a PRC domestic entity or through an offshore entity controlled by such PRC entity. "Control" is defined as holding, directly or indirectly, more than half of the voting rights of the entity, or being able to dominate the operations, finance, personnel, technology or other important matters of such entity. Whereas an overseas investment by an offshore subsidiary of a PRC entity using such subsidiary's own offshore funds was outside the scope of NDRC Order 9, such investment is now within the ambit of NDRC Order 11.

- Financial enterprises. NDRC Order 11 is expressly applicable to financial institutions. As a result, a financial institution making an overseas investment will need to comply with the requirements of the NDRC under NDRC Order 11, in addition to the requirements of other regulators such as the China Banking Regulatory Commission and the China Insurance Regulatory Commission.

- Individuals. Unlike NDRC Order 9, which excluded individual investors, NDRC Order 11 applies to a PRC natural person who makes an outbound investment via an offshore entity under his or her control.

- **Broadened Forms of Covered Investment**. NDRC Order 11 covers a non-exhaustive list of overseas investment scenarios, including:

  - Increasing the investment in an existing offshore investment. Prior to the issuance of NDRC Order 11, if an existing outbound investment by a Chinese investor had already received approval from both the NDRC and Ministry of Commerce ("**MOFCOM**"), a "follow-on" investment (i.e., increasing the investment amount) in the same investment would not need to undergo NDRC's review again; a mere reinvestment filing with MOFCOM would suffice. Now, such a "follow-on" investment is subject to NDRC's regulatory scheme under NDRC Order 11.

  - Indirect control of offshore entities or assets through agreements, trusts, etc. NDRC Order 11 applies to any offshore entity or asset that is controlled by PRC entities through contracts or trusts, and thus forecloses circumvention of the NDRC's procedures via, among others, VIE ("variable interest entity") arrangements.

- **NDRC's Enforcement Authority**. The NDRC is empowered with extensive authority to enforce NDRC Order 11, including suspension or cessation of investments, withdrawal of previously granted approvals or filings, and issuance of warnings to investors and persons in charge. NDRC Order 11 violations may be announced online and reported to nationwide credit databases and other authorities for joint disciplinary sanctions, which may have adverse effects on such Chinese investor and its affiliates' other investment projects.

Conclusion

NDRC Order 11 has simplified and streamlined certain NDRC's procedural aspects governing Chinese outbound investments in ways that are generally investor-friendly, but has subjected more types of entities and investment arrangements to regulatory oversight, and will also collect more information from investors. Since the NDRC retains considerable discretion, the impact of NDRC Order 11 on Chinese investors' outbound deal activity remains to be seen. Non-PRC sellers, managers, target companies, and co-investors should, when structuring and negotiating an outbound deal with their Chinese counterparties, be aware of NDRC Order 11 and its implementation to navigate the uncertainty and challenges of securing the necessary NDRC clearance with respect to such deal.

✧ ✧ ✧

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Beijing

Meka (Qingkai) Meng
86.10.8567.5303
mekameng@paulhastings.com

Shanghai

David S. Wang
86.21.6103.2909
davidwang@paulhastings.com

Jia Yan
86.21.6103.2969
jiayan@paulhastings.com

Hong Kong

David Blumenfeld
852.2867.9079
davidblumenfeld@paulhastings.com

Paul Guan
852.2867.9570
paulguan@paulhastings.com