

Corporate Commercial Client Alert

China Trade and Investment

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Highlights of the operational requirements under the new measures for the administration of overseas investment of enterprises

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On 26 December 2017, China's National Development and Reform Commission ("NDRC") issued the Measures for the Administration of Overseas Investment of Enterprises ("**New Measures**"), which came into effect on 1 March 2018, and on the same day replaced the Measures for the Administration of Approval and Record-filing of Overseas Investment Projects issued by the NDRC in 2014 ("**2014 Measures**").

In comparison with the 2014 Measures, the New Measures apply to more organizations and investment activities, strengthen the interim and ex post supervision by introducing reporting formalities, streamline compliance procedures by removing the pre-confirmation requirement and simplifying approval and record-filing procedures, and extend the deadline for completing formalities.

Importantly, the New Measures eliminate the need to acquire a confirmation letter, commonly known as a “road pass”, which was previously required for Chinese parties prior to making a binding offer with respect to certain types of overseas investment. The road pass requirement was often a source of concern for foreign vendors who were unsure whether the Chinese parties they were in discussion with would be qualified to make a binding bid or whether one Chinese party holding a road pass would preclude other Chinese bidders from obtaining one. This uncertainty has now been eliminated. The New Measures also provide that the satisfaction of approval or fulfilment of record-filing requirements should take place prior to project implementation rather than prior to an agreement becoming binding as was the case under the 2014 Measures. With this change, while completion risks may remain, the parties can be confident that a binding agreement that includes deal protection provisions, such as breakup fees, can be entered into prior to completing the NDRC procedures. Under the 2014 Measures, the agreement itself and all of the provisions therein would not be binding until the NDRC procedures had been complied with. This often put Chinese bidders at a disadvantage in competitive bidding situations.

For clarification purposes, the compliance regime under the New Measures does not affect the other parallel regime which also involves the approval, record-filing and reporting formalities in respect of Chinese overseas investments regulated and administered by the Ministry of Commerce and its local counterparts.

The following are some highlighted requirements in relation to a business’s compliance under the New Measures.

1. Who will be covered by the New Measures?

Categories	Details
All domestic organizations	Domestic enterprises, including companies, partnerships and sole proprietorships, etc.
	Domestic non-enterprise organizations, including public institutions and social groups, etc.
Certain overseas organizations	Overseas, Hong Kong, Macao, and Taiwanese enterprises controlled by domestic enterprises
	Overseas, Hong Kong, Macao, and Taiwanese enterprises controlled by domestic individuals

Note:

- a. “Enterprise” here means a non-financial or financial enterprise of any type.
- b. “Control” here means the direct or indirect holding of more than half of the voting rights of an enterprise, or having the capability of dominating the operation, finance, personnel, technology, and other major matters of the enterprise although not holding more than half of the voting rights.

2. What investments the New Measures apply to?

General scope	Non-exhaustive illustrations
Acquisitions of any overseas ownership, right of control, right of business management, or any other relevant rights and interests, by contributing assets or rights and interests, by providing financing or collateral security, or by any other means	Acquiring rights and interests in overseas land, such as ownership and land use rights
	Acquiring rights and interests in overseas natural resources, such as exploration and exploitation concessions
	Acquiring rights and interests in overseas infrastructure, such as ownership and business management rights
	Acquiring rights and interests in overseas enterprises or assets, such as ownership and business management rights
	Constructing, reconstructing, or expanding overseas fixed assets
	Setting up new overseas enterprises or injecting investment into existing overseas enterprises

	Establishing new overseas equity investment funds or investing in existing overseas equity investment funds
	Controlling overseas enterprises or assets by agreements, trust arrangements, or any other means

3. How to engage the NDRC?

Required Procedures	Conditions
Apply to the NDRC for approval	If the projects, directly conducted by domestic organizations or conducted through their controlled overseas organizations, involve sensitive countries, regions, or industries ("Sensitive Projects")
Make a record-filing with the NDRC or its local branch	If the projects, directly conducted by domestic organizations, are overseas investment projects other than Sensitive Projects
Report to the NDRC or its local branch	For those Non-Sensitive Projects conducted by domestic organizations through their controlled overseas enterprises, if the total investment exceeds USD300 million
	For all overseas projects, where any major casualty involving personnel sent overseas, major loss of overseas assets, damage to diplomatic relations between China and relevant country, or other major adverse condition occurs in the process of the overseas investment
	For overseas projects subject to approval or record-filing management, when the projects complete
	For all overseas projects, if the NDRC or its local branch issues a major event inquiry letter regarding a major event in the process of overseas investment

Note: In order to standardize and streamline formalities, the New Measures provide that the NDRC shall issue standard forms in relation to the approval application, record-filing and reporting requirements. Such standard forms are available on the NDRC's website from 9 February 2018.

4. What are sensitive projects?

Categories	Details
Projects involving sensitive countries or regions	Countries or regions without diplomatic relations with China
	Countries or regions in war or in civil disturbance
	Countries or regions in which enterprises are restricted from investment under an international treaty or agreement concluded or acceded to by China
	Other sensitive countries or regions
Projects involving sensitive industries – the NDRC has the power and obligation to issue and amend a catalogue of sensitive industries	Research, production, and maintenance of weapons and military equipment
	Exploitation or utilization of cross-border water resources
	News media
	Other industries in which enterprises are restricted from investment according to China's laws, regulations and macro-economic control policies

Note: The NDRC has issued a catalogue of sensitive industries for the year 2018 as follows:

- Research, production, and maintenance of weapons and military equipment
- Exploitation or utilization of cross-border water resources
- News media
- Restricted industries, including real estate, hotel, cinema, entertainment, sports club, and establishment of overseas equity investment funds or platforms with no specific industrial projects

The inclusion of the establishment of offshore investment funds in the catalogue of sensitive industries is of some concern, and, depending on how applications for such projects are treated, may have an impact on available investment structuring options. Other sensitive industry sector items reflect the NDRC's concern that too much overseas investment has been targeted at non-productive assets.

5. What are the deadline dates and channels for compliance activities?

Items	Compliance requirements
Deadline dates	For approval and record-filing, compliance documents shall be submitted and all formalities shall be completed before the implementation of relevant projects
	For projects of which approval or record-filing formalities have been completed, in case there are major changes to the projects, application documents regarding such changes shall be submitted before the occurrence of the changes (note: it is our understanding that such formalities shall also be completed before the occurrence of the relevant changes)
	For reporting regarding Non-Sensitive Projects conducted by domestic organizations through controlled overseas enterprises where the total investment exceeds USD300 million, compliance documents shall be submitted before the implementation of such projects
	For other reporting formalities, after the occurrence of the relevant events, compliance documents shall be submitted within the respective required time frames provided under the New Measures
Channels	Compliance documents in relation to approval, record-filing and reporting can be submitted through the NDRC's website
	If national secrets or other unsuitable conditions are involved, hard-copy compliance documents can be submitted

The New Measures continue the trend of providing for online filing rather than over-the-counter filing at a local agency.

The above highlights are for general reference only. Please seek specific legal advice prior to acting in relation to the compliance requirements mentioned herein.

Want to know more?

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