

JUNHE SPECIAL REPORT



May 3, 2018

All You Need to Know about the Application for Overseas Investment Projects

—Key Points of NDRC Guidelines for Preparing Application for Overseas Investment Projects

On December 26, 2017, the National Development and Reform Commission (the “NDRC”) promulgated *the Measures for the Administration of Overseas Investment of Enterprises* (“Decree 11”), which came into force on March 1, 2018. One month before Decree 11 became effect, the NDRC published *the Ancillary Template Documents of Measures for the Administration of Overseas Investment of Enterprises* (2018 Version), which, consisting of 15 documents¹ in total, provided template documents/forms and detailed guidelines for NDRC formalities for overseas investment projects (collectively, the “Guidelines”). This article aims to help enterprises prepare documents relevant to the formalities for overseas investment projects in a correct and efficient manner by analyzing and summarizing key points in the Guidelines and major differences among the documents subject to different formalities.

1. Key Information

According to the Guidelines, the key information of the overseas investment formalities is about “Entity-Project-Financing” (see chart below). The NDRC and its local agencies review the overseas investment projects from the following seven aspects: information on the investor, investment destination, background of the project, main content and size of the project, investing and financing plan of the project, major risks and relevant precautions, and the impacts of the project on the national interests and national security of China.

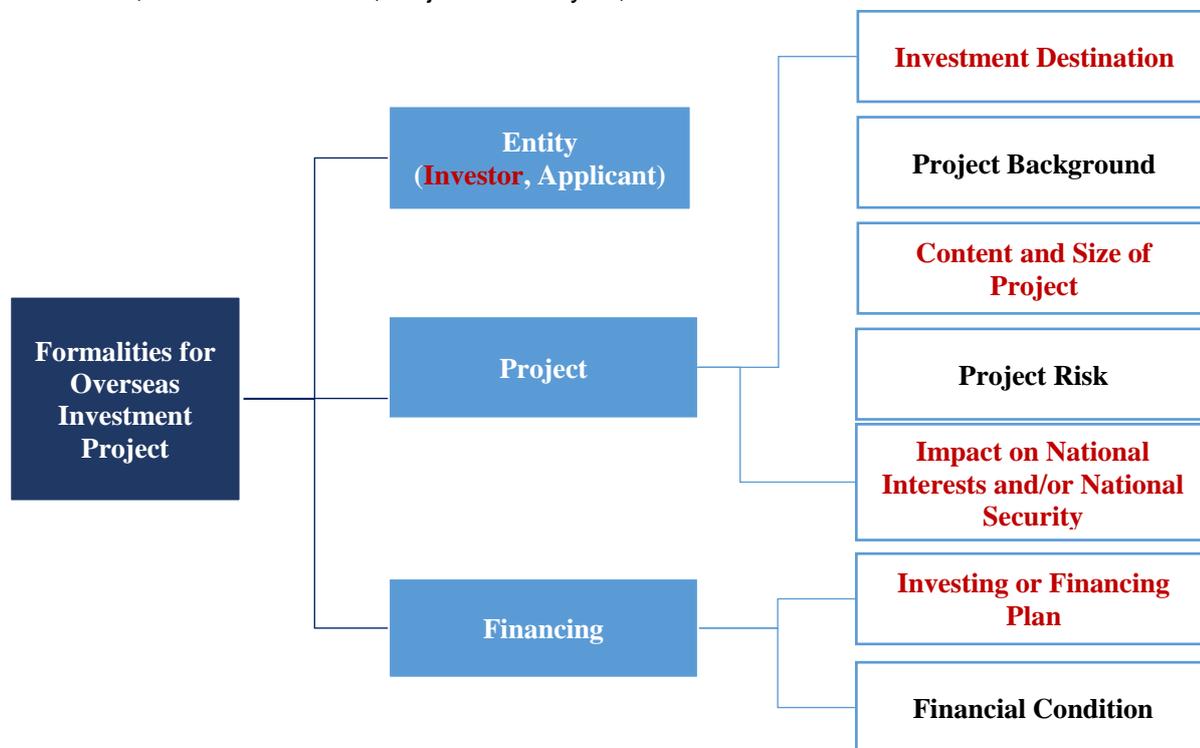
Among the above aspects, for projects subject to approval, **information on the investor, investment destination, main content and size of the project, investing and financing plan of the project and the impacts of the project on the national interests and national security of China** are the main concerns of the NDRC when

¹ The ancillary template documents for the Measures for the Administration of Overseas Investment of Enterprises include the following 15 documents: (1) Standard Text of Overseas Investment Project Application for Approval or Filing, (2) Model Text of Overseas Investment Project Application Report, (3) Standard Text of Overseas Investment Project Approval, (4) Standard Text of Overseas Investment Project Filing Form, (5) Standard Text of Overseas Investment Project Filing Notice, (6) Standard Text of Overseas Investment Project Modification Filing, (7) Standard Text of Overseas Investment Project Modification Approval or Notice, (8) Standard Text of Overseas

Investment Project Extension Filing, (9) Standard Text of Overseas Investment Project Extension Approval or Notice, (10) Standard Text of Overseas Investment Project Relevant Information Filing, (11) Standard Text of High-value Non-sensitive Overseas Investment Project Report Form, (12) Standard Text of Major Adverse Event Reporting Form of Overseas Investment Project, (13) Standard Text of Completion Report Form of Overseas Investment Project, (14) Sample Shareholding Structure Tracing Back to the Final Actual Controller of an Investor and (15) Standard Text of Statement on Authenticity of Overseas Investment Project.

it decides whether a project fulfils the approval requirements. The other factors — project background, the implementation of supporting conditions, financial condition, major risk analysis,

etc. — are only for NDRC’s reference, and are not considered as major concerns from the NDRC’s perspective².



2. Investor

In the event where only one investor is involved, such investor shall be the applicant. Where a project is jointly conducted by two or more investors, according to the Decree 11, the investor with the larger or largest investment shall submit an application for approval or filing after obtaining the written consent of the other investor or investors. If each investor makes the same amount of investment, one of the investors shall submit the application after they reach an agreement through consultation. Such condition shall be clarified in the application document, such as “Investor A, B, and C have reached an

agreement through consultation that A shall be the applicant”. If a parent company (company A) submits an application for its subsidiary (company B), the application document shall contain a statement to the effect of “the applicant is **A**, the parent company of investor **B**”.

3. Application Requirements

1) Application Categories

According to Decree 11, depending on the nature of the projects, the project formalities may be subject to three different administration categories: **approval, filing or reporting**.

² See “Model Text of Overseas Investment Project Application Report” Page 10.

Category	Applicable Project	Application Document	Authority in Charge
Approval	Sensitive projects ³ conducted by investors directly or through controlled overseas enterprises controlled by investors (regardless of the amount of Chinese investment)	Application Report	NDRC
Filing	Non-sensitive projects directly conducted by investors	Filing Form	NDRC (if the investor is a central SOE or a local enterprise with its investment \geq USD 300 million) NDRC's local counterpart at the provincial level (if the investor is a local enterprise with its investment $<$ USD 300 million)
Reporting	High-value non-sensitive projects conducted through overseas enterprises controlled by onshore investors (with an amount of Chinese investment \geq USD 300 million)	Reporting Form	NDRC

Among the above three administration regimes, approval is the most demanding way of administration. The application for the projects subject to approval need to be conducted through the submission of an application report to NDRC, while the application for the projects subject to filing and reporting only require the submission of a filing form. Hence, this article mainly focuses on the requirements for the approval formalities, and also briefly compares the difference of the

requirements for application documents under the three formalities.

2) Key Points of the Application for Projects Subject to Approval

This section summarizes the key points of the application for projects subject to the approval formalities from the following five aspects: (a) investor, (b) investment destination, (c) main content and size of project, (d) investing and

³ "Sensitive project" under Decree 11 means a project involving a sensitive country or region; or a sensitive industry. "**Sensitive country or region**" means:

- (1) a country or region without diplomatic relations with China;
- (2) a country or region in war or civil disturbance;
- (3) a country or region in which enterprises are restricted from investment under any international treaty or agreement, among others, concluded or acceded to by China; or
- (4) any other sensitive country or region.

According to the NDRC's "Catalogue of Sensitive Industries of Overseas Investment" (Fa Gai Wai Zi [2018] No. 251) which came into effect on March 1, 2018), "**Sensitive industry**" means:

- (1) research, production or maintenance of weapons;
- (2) exploitation or utilization of cross-border water resources;
- (3) news media; or
- (4) other industries in which enterprises are restricted from investment according to Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the National Development and Reform Commission, the Ministry of Commerce, the People's Bank of China and the Ministry of Foreign Affairs on Further Directing and Regulating the Direction of Overseas Investments (Guo Ban Fa [2017] No. 74): real estate, hotels, cinemas, entertainment, sports clubs, and equity investment funds or investment platforms set up overseas without any specific industrial project.

financing plan and (e) impacts of the project on the national interests and national security of China.

The NDRC requires different application documents for different types of investors, details of which can be found in the table below. (Note: documents needed are marked as “√” and documents not needed are marked as “X”):

(a) Investor

No.	Item	Enterprise	Public Institution and Social Group	Individual	Overseas SPV ⁴	Note
1	Basic Information	Name, Registered Place, Registered Capital, Legal Representative, Type of Enterprise, Date of Establishment, Scope of Business, Main Business	Name, Domicile, Scope of Business, Legal Representative, Source of Fund, Founding Capital, Sponsor Entity, etc.	Name, Domicile, ID Number	Same as Enterprise	
1.1	Supporting Evidence	Business License	Registration Certificate of Public Institution or Social Group	Identity Card	Certification of Incorporation or similar documents	
2	Shareholding Structure	Layered shareholding structure tracing back to the final actual controller; the structure shall disclose layer by layer for top five major shareholders and other shareholders holding no less than 10% of the shares; or all GP, and LP with top five largest investment in a partnership	X	X	Basic information on the top five major shareholders or all GP, and LP with top five largest investment in a partnership	If applicable, clarify controller and way of control (such as management agreement, trust or otherwise)

⁴ For projects conducted through an overseas enterprise controlled by the investor, the application documents shall clarify the information of such overseas enterprise. Where more than one controlled overseas enterprise

is involved, the documents shall clarify the information of the enterprises one by one through the controlling chain.

No.	Item	Enterprise	Public Institution and Social Group	Individual	Overseas SPV ⁴	Note
3	Operation	Operation information of the past two years, assets, liabilities, income, profit and other major financial indicators	Major financial indicators	Basic information and financial conditions of top three major domestic enterprises controlled	Same as Enterprise	Audited annual or semi-annual financial report ⁵
4	Credit of the Past Two Years	See 4.1-4.5 below			Any local administrative or criminal penalty in the past two years	Enterprise investor shall disclose the credit of the past two years of its controlling shareholder (or GP) layer by layer <u>until</u> its final actual controller
4.1	Whether Listed in the Overseas Investment Violation Record	✓	✓	✓	X	See NDRC's Violation Publicity System http://jwzt.ndrc.gov.cn/jwzt-ex/home.do
4.2	Whether Recorded in the Enterprise Irregular Operation Catalogue	✓	X	X	X	See National Enterprise Credit Information Publicity System http://gsxt.saic.gov.cn/
4.3	Whether Listed as Discreditab le Enterprises with Major Violation of Law	✓	X	X	X	

⁵ In case the investor is a newly formed enterprise, the investor shall provide the latest audited financial statement of the controlling

shareholder, general partners or actual controller.

No.	Item	Enterprise	Public Institution and Social Group	Individual	Overseas SPV ⁴	Note
4.4	Whether Listed as Discreditable Person Subject to Enforcement by National Court System	✓	✓	✓	X	See China Enforcement Information Publicity System http://shixin.court.gov.cn/
4.5	Whether Listed as Party of Major Tax Violation	✓	✓	✓	X	See Major Tax Violation Publicity System http://hd.chinatax.gov.cn/xxk/
5	Investment Decision-Making Document ⁶	✓	✓	✓	✓	
6	Binding Investment Agreement or other Similar Document	✓	✓	✓	X	If establishing overseas subsidiary and cannot provide such document, this requirement may be exempted in case of reasonable explanation
7	Supporting Documents Proving the Authenticity and Lawfulness	✓	✓	X	X	- Self-owned capital: deposits, etc. - Intangible assets: audit report or

⁶ As required in the Model Text of Overseas Investment Project Application Report, the “Investment Decision-Making Document” means:

- (1) For domestic enterprises, relevant decision-making document based on the actual situation of the enterprise (Article of Association, management policy, etc.), such as board resolution, investment committee resolutions. If part of the decision-making authority is at the hand of the controlling shareholder or actual controller of the

investor, then provide applicable document based on which the controlling shareholder or actual controller make such decision.

- (2) For domestic public institutions or social groups, relevant decision-making document based on the actual situation of the entities.
- (3) For domestic individuals, relevant decision-making document or written statement.
- (4) For projects conducted through overseas enterprise controlled by investors, also provide board resolution or other similar document of the overseas enterprise.

No.	Item	Enterprise	Public Institution and Social Group	Individual	Overseas SPV ⁴	Note
	of the Source of Investment Fund					evaluation report - Bank financing: Letter of Intent for Financing issued by the bank - Public fund raising (stock, debts): applicable supporting documents
8	Statement on the Authenticity of Overseas Investment Project	✓	✓	✓	X	Signed by the investment decision-making personnel (such as commitment letter signed by directors of the board that makes the investment decision through its board resolution)

(b) Investment Destination

Please note that there are three kinds of destinations in the application report:

- (i) Direct destination
- (ii) Final destination
- (iii) Other relevant country and region

Below is an example⁷

A domestic enterprise A forms an enterprise B in Country X, and enterprise B forms an enterprise C in Country Y, and enterprise C enters into an agreement to purchase shares of an enterprise in Country Z. In this case, the investor shall clarify the entire path of investment, and the direct destination of this project is Country X, the final

destination is Country Z while Country Y is a relevant country and region.

If multiple countries and regions are involved in an investment, investors are required to clarify the investment condition of each country and region along the path of investment in the following aspects:

- (i) Whether the political and security conditions of the destination are suitable for the investment. (NB: This is the NDRC's main concern which needs to be elaborated in great detail)
- (ii) Any prohibition or restriction in the laws, regulations and access and regulatory policies of the destination. (NB: This is NDRC's main concern which needs to be elaborated in great detail.)

⁷ See "Model Text of Overseas Investment Project Application Report"

- (iii) Natural resources, infrastructure, economic and financial situation, social and cultural environment. According to the Guidelines, the main content and size of a project is divided into two types: new construction and merger and acquisition.

(c) Main Content and Size of a Project

Type	Main Content		Note
New Construction	Construction Content and Size	<ul style="list-style-type: none"> - Location, content, size, technical scheme, construction timetable and progress schedule of the project, scale and targeting market of major products. - Natural resources exploitation projects need to clarify the exploitable volume and quality of the resources, rights on the natural resources that may be acquired by Chinese parties and exploitation plan, etc. 	For projects to construct overseas enterprises, but not yet covering the construction of new product lines, mergers of assets or other investments. Investors are required to clarify the name, registered place, registered capital, legal representative (if applicable), type of enterprise and scope of business of the proposed enterprise. Statement of supporting conditions can be simplified or omitted.
	Implementation of Supporting Conditions	Labor, land, materials of the project; road, railway, harbor, energy supply and other supporting infrastructure facilities; whether the project can fulfil the local technical, environmental, energy-saving and security requirements.	
Merger and Acquisition	Acquisition Target	Equity deal project shall include name, registered place, registered capital, legal representative (if applicable), type of enterprise, scope of business and other basic information of the enterprise to be acquired; name, nationality or registered place, shareholding ratio and other basic information of major shareholders; distribution of major assets (industry and location), operating and financial conditions; whether a listed company and the latest	

Type	Main Content		Note
		<p>stock price (if applicable); position in the industry held by the enterprise to be acquired and its product, technology, brand, etc.</p> <p>Asset deal project shall include structure and distribution of the assets to be acquired (industry and location), basic information of the asset owner (name, nationality or registered place, holding ratio, etc.), appraisal price or value made by professional agency (if applicable), etc.</p>	
	Acquisition Plan	Acquisition target, acquisition price (with the explanation of the evaluation principle and major parameters), party conducting the acquisition, type of transaction, project time schedule, and shareholding structure tracing back to the final actual controller of the target before and after the acquisition.	

(d) Investing and Financing Plan of the Project

The amount of intermediate financing and security in complex investing and financing plans shall be calculated based on the principle of “substance over form” and the characteristics of the project, to avoid repetitive computation.

Below is an example⁸

A Chinese investor A plans to acquire certain assets with a value of USD 2 billion (which is also the final acquisition price). Investor A is a domestic enterprise, B is A's controlled overseas enterprise.

Apparently A has invested (deemed as A's direct investment): ① USD 500 million self-owned capital, ② USD 500 million provided to B as shareholder loan, ③ USD 500 million provided to B as security; B has invested (deemed as A invests through B):④ USD 500 million self-owned capital; ⑤ USD 500 million borrowed capital (shareholder loan provided by A); ⑥ USD 500 million borrowed capital (bank loan, secured by A). Substantially, ② and ⑤ refer to the same sum of fund, and ③ and ⑥ refer to the same sum of fund. Therefore, when applying the “substance

⁸ See “Model Text of Overseas Investment Project Application Report”

over form” principle, the amount of Chinese investment is ①+②+③+④=USD 2 billion, not a simple accumulation of the above amount (①+②+③+④+⑤+⑥=USD 3 billion). The direct

investment of the investor is ①+②+③= USD 1.5 billion.

(e) Impacts on National Interests and Security

No	Item	Analysis
1	Impact on industry	Impact on the following aspects: (i) the technical and structural improvement of the industry; (ii) the increase of the international competitiveness of the industry; (iii) its upstream, downstream and related industries; (iv) the export of Chinese products, equipment, technology, brand, standard, etc.
2	Impact on macro economy	Any possible major negative effect on the economy, price stability, employment or balance of international payment of China, any possible impact on external energy supplying and interconnectivity of infrastructure, etc.
3	Impact on national relations	Impact on China’s national relationships regarding mutual benefit, “Belt and Road”, economic and cultural communication between countries, etc.
4	Whether related to China’s prohibited overseas investment projects	Whether the project involves any resource, product, technology and service that is prohibited or restricted to export (see <i>Guo Ban Fa [2017] No. 74 Guiding Opinions on Further Directing and Regulating the Direction of Overseas Investments</i>), if applicable, a statement on relevant approval is required, and whether it may have major negative effect on China’s performance of international obligations (such as any obligation to implement any sanction made by UN Security Council)

4. Major Differences Among Applications for Projects Subject to Approval, Filing and Reporting

	Approval	Filing	Reporting
Document to be obtained	Approval Letter	Notice of Filing	N/A
Investor	See Section 3.2(a) above.	Basic information part is almost the same as required for the approval formalities, but the operation situation can be simplified to the latest audited financial statement revealing year-end total assets, net assets, major business income, and net profit (the approval formalities need financial information of the past two years).	Similar to filing formalities, but need to state the time and brief process by which the investor establishes or acquires the overseas enterprise.
Destination of	See Section 3.2(b)	Location of the investment only, no investment condition of the destination	Same as the filing formalities.

	Approval	Filing	Reporting
Investment	above.	needed.	
Main Content and Size of Project	See Section 3.2(c) above.	When multiple industries are involved, only report the one with the largest investment. When multiple investing methods involved, only report the major one. The general requirement is similar to that of the approval formalities, but unrelated parts can be omitted.	Similar to the filing formalities, but no need to state the implementation of supporting conditions of new construction projects; no shareholding structure of the acquisition target required.
Major Risk and Precaution	Investor shall analyze political, security, economic, social, environmental and other major risks of the project, and corresponding precaution and solutions.	Similar to the requirements of the approval formalities but can be simplified.	Same as the filing formalities.
Impact on National Interests and Security	See Section 3.2(e) above.	Same as the approval formalities.	Same as the filing formalities, but does not require evaluation on whether the project is prohibited by national policy for overseas investment.
Decision-making Document of the Investor	See Section 3.2(a) above	Same as the approval formalities.	
Binding Investment Agreement or other Similar Document	Required	Same as the approval formalities	Not required
Supporting Document Proving the Authenticity and	See Section 3.2(a) above.	Same as the approval formalities, but supporting documents regarding investment through controlled overseas enterprise (not relating to financing or security provided by the	

	Approval	Filing	Reporting
Lawfulness of the Source of Investment Fund		investor) can be simplified.	
Statement on the Authenticity of Overseas Investment Project	See Section 3.2(a) above.	Same as the approval formalities.	

5. JunHe Comments

In general, the Guidelines issued by the NDRC provide quite clear and detailed instructions on the required information and procedures for the application for overseas investment projects. Meanwhile, the NDRC also specifies in the Guidelines the key points that are subject to its review, which are the five aspects mentioned in this article, and make it easier for investors to prepare the application accordingly. It can be seen from the Guidelines that the NDRC's requirements on the application for projects subject to approval, filing and reporting are different. As such, based on the understanding of different application requirements under different administration regimes, an enterprise may focus on preparing the necessary information and materials, so as to improve the efficiency of its application for overseas investment projects.

ZHENG Yu	Partner	Tel: 86 10 8553 7652	Email: zhengy@junhe.com
YU Daxing	Associate	Tel: 86 10 8553 7609	Email: yudx@junhe.com
WANG Xiao	Associate	Tel: 86 10 8540 8632	Email: wangx_Tasha@junhe.com

This document is provided for and only for the purposes of information sharing. Nothing contained in this document constitutes any legal advice or opinion of Jun He Law Offices. For more information, please visit our official website at www.junhe.com or our WeChat public account “君合法律评论”/WeChat account “JUNHE_LegalUpdates”.

