

NDRC's New Mid-to-Long Term Foreign Debt Approval Registration Regime

Introduction

Following a one-month consultation on the draft Administrative Measures for Approval Registration of Mid-to-Long Term Foreign Debts of Enterprises in September 2022 (see [link](#) to our earlier legal update, **September 2022 Client Briefing**), on 10 January 2023 the National Development and Reform Commission of the PRC (**NDRC**) has promulgated *the Administrative Measures for the Approval Registration of Mid-to-Long Term Foreign Debt of Enterprises* 《企业中长期外债审核登记管理办法》 (国家发展和改革委员会令第 56 号) (**NDRC Order No. 56**).

NDRC Order No. 56 establishes the foreign debt approval registration system, which, with effect from 10 February 2023, will replace the foreign debt filing registration system under NDRC Circular No. 2044¹, with NDRC Circular No. 2044 being repealed on the same day.

In this legal briefing, we will focus on the key changes to the foreign debt filing registration regime under NDRC Circular No. 2044 (as supplemented by NDRC Circular No. 2044 Practice Manual²) and highlight the relevant aspects of NDRC Order No. 56 where further guidance from NDRC (in form of new practice manual for NDRC Order No. 56 or other forms of Q&A) would be welcomed to facilitate the administration of the new foreign debt approval registration regime.

Key Changes

1. Scope of Borrower

Whilst the scope of borrower under NDRC Order No. 56 is substantially similar to the scope of borrower under NDRC Circular No. 2044 (which continues to cover (i) PRC enterprises, (ii) offshore enterprises controlled by PRC enterprises (**PRC Enterprise-Controlled Offshore Enterprises**) and (iii) the branches of PRC enterprises), there are two significant changes to NDRC Circular No. 2044:

(a) "Control" defined

"Control" is not defined in NDRC Circular

No. 2044.

Prior to the promulgation of NDRC Order 56, NDRC, through over-the-counter guidance and Q&As set out in NDRC Circular No. 2044 Practice Manual, adopts an expansive interpretation of PRC Enterprise-Controlled Offshore Enterprises to ensure that:

- (i) red chip enterprises which are ultimately controlled by individuals or their offshore family trusts (commonly referred to as "small red chip enterprises");

¹ The Circular on Promoting the Administrative Reform of the Recordation and Registration System for Enterprises' Issuance of Foreign Debts 《关于推进企业发行外债备案登记制管理改革的通知》(发改外资[2015] 2044 号).

² Practice manual for corporate foreign debt issue (企业发行外债备案登记办事指南) as set out on NDRC's website.

- (ii) red chip enterprises which are ultimately controlled by PRC government (commonly referred to as "big red chip enterprises");
- (iii) offshore enterprises operating under VIE structures; and
- (iv) specific types of onshore security for offshore facility (**Specific NBWD Structures**)³,

fall within the scope of NDRC Circular No. 2044.

Given the broad definition of indirect offshore borrowing by PRC enterprises (see paragraph 1(b) below), which could now capture red chip enterprises, offshore enterprises operating under VIE structures and Specific NBWD Structures, NDRC Order No. 56 now defines a PRC enterprise's "control" over an offshore enterprise with reference to (i) holding of over 50% of voting rights, or (ii) in the case where the PRC enterprise does not hold more than 50% of voting rights, the ability to direct the operation, finances, human resources, technology and other important matters of an enterprise⁴, which is more in line with the market's interpretation of such term.

(b) Indirect Offshore Borrowing by PRC Enterprises

The more significant change is the introduction of the concept of indirect offshore borrowing by PRC enterprises under Article 33 of NDRC Order No. 56, which covers offshore bond issue or borrowing of offshore commercial loans by an offshore enterprise where:

- (i) its principal business activities are carried out in the PRC; and
- (ii) the offshore bond issue/ borrowing by the offshore issuer/ borrower is based

on equity, assets, revenue or other similar rights and interests in or to its underlying PRC enterprise(s).

Whilst this broad definition will capture red chip enterprises, offshore enterprises operating under VIE structures and Specific NBWD Structures, the absence of reference to ultimate beneficial ownership and/or control by PRC individuals or PRC enterprises in the context of indirect offshore borrowing by PRC enterprises raises concern over its potential application to other types of offshore financings.

For example, in the context of venture capital, private equity and real estate funds, it is not uncommon for international fund managers backed by international investors to establish investment funds whose principal mandate is to invest in Greater China businesses, assets and real properties. Funds would often obtain asset level (including onshore/ offshore real estate financings) and holdco level financings to enhance the return on investment. Given such financings are customarily non-recourse in nature and often involves acquisition of offshore holding companies of PRC enterprises, there are concerns such offshore financings could potentially fall within the ambit of indirect offshore borrowing by PRC enterprises under NDRC Order No. 56.

In the absence of NDRC's guidance on how offshore enterprise's equity, assets, revenue or other similar rights and interest in or to PRC enterprises would be taken into account in assessing whether an offshore financing would be considered as indirect offshore borrowing by a PRC enterprise, it is unclear whether offshore financing where the principal source of repayment is upstreaming of dividend from the offshore borrower's PRC subsidiary would be construed as indirect offshore borrowing by PRC enterprises, even if the PRC subsidiary is not providing any form of credit support/

³ Based on NDRC Circular No. 2044 Practice Manual, offshore note issue by offshore parent company secured by PRC security from PRC subsidiary of the offshore parent (see Q43 of NDRC Circular No. 2044 Practice Manual) and offshore borrowing by offshore subsidiary of PRC enterprise backed by letter of credit issued by a PRC bank, which in turn is secured

by assets of the PRC enterprise (Q44 of NDRC Circular No. 2044 Practice Manual).

⁴ Article 2 of NDRC Order No. 56.

enhancement (whether in the form of security, keepwell deed, letter of comfort or otherwise).

2. Usage of foreign debt

Compared with NDRC Circular No. 2044 and NDRC Circular No. 2044 Practice Manual, NDRC Order No. 56 retains the positive list of encouraging incurrence of foreign debts to promote (i) development of core business of the borrower, (ii) implementation of key national strategies and (iii) development of the real economy.

There are three key changes to the negative list for usage of foreign debt:

(a) Expansion of negative list

NDRC Order No. 56 expands the negative list first introduced under NDRC Circular No. 2044 Practice Manual, which, in addition to the existing restrictions, now prohibits usage of foreign debts proceeds which threatens information and data security of the PRC, increase local government's implicit debts, or otherwise for speculative purpose.

(b) Removal of restriction towards replenishment of deficit and non-production related expenses

One notable amendment to the negative list in respect of the negative list under the NDRC Circular No. 2044 Practice Manual and the consultation draft is the removal of prohibition against application of foreign debt towards replenishing deficits (弥补亏损) and expenses which are not applied towards production (非生产性支出). This removal, coupled with the removal of the requirements of (i) proof of the borrower's relative strength in its repayment ability and (ii) absence of default or deferral/ rescheduling of payment of principal and/or interest under any existing bond or other indebtedness from the conditions for incurrence of foreign debt (see paragraph 3 below for details), can facilitate offshore creditors and PRC borrowers in implementing debt restructuring arrangements.

(c) Restriction on onlending

As highlighted in our September 2022 Client Briefing, the onlending restriction in the consultation draft presents challenges to the offshore loan market where it is customary for either the investment holding company or the financing vehicle to be the borrowing entity for group financings. NDRC Order No. 56 seeks to address this by permitting onlending to the extent such on-lending arrangement is specified in the application materials and has been specifically permitted.

3. Conditions for borrowing foreign debts

Compared with NDRC Circular No. 2044, in which conditions for borrowing foreign debts are determined based on the credit profile, repayment ability and governance of the borrower, NDRC Order No. 56 extends the scope of NDRC's scrutiny for the purpose of foreign debt approval registration to take into account of criminal records of the enterprises and their controlling shareholders and controlling persons (including any criminal conviction as a result of bribery, corruption, embezzlement or misappropriation of properties, or destruction of socialist market economic order, or any suspected criminal activities or material breach of laws or regulations which is subject to lawful investigation) in the past three years.

As mentioned above, we expect that the removal of the requirements of (i) proof of the borrower's relative strength in its repayment ability and (ii) absence of default or deferral/ rescheduling of payment of principal and/or interest under any existing bond or other indebtedness from the conditions for incurrence of foreign debt would be conducive to consensual debt restructuring between offshore creditors and PRC borrowers.

4. Additional Reporting Requirements

As observed in our September 2022 Client Briefing, there is a notable increase in ongoing reporting requirements imposed on the borrower to facilitate NDRC's effective mitigation of foreign debt risk.

We summarise below the reporting requirements under NDRC Order No. 56:

Timing	Action Required
A. Approval Registration Application	
T	Submission of application materials for foreign debt approval registration.
T + 5 PRC working days	Approval and registration authority (i.e. NDRC) to inform the applicant if the application materials are incomplete, incompliant with the prescribed format or outside the scope of authority of the approval and registration authority through online portal. The application is deemed to have been accepted for processing on the submission date if the approval and registration authority does not notify the applicant within five PRC working days of receipt of application.
T + (if applicable) 5 PRC working days (see the above column) + 3 months after the date of acceptance of application for processing ⁵	Approval and registration authority to issue either (i) the Foreign Debt Approval Registration Certificate or (ii) refusal of approval and registration, giving reasons. The borrower may make a drawdown under the offshore loan or issue the offshore bond upon obtaining the Foreign Debt Approval Registration Certificate.
B. Ongoing Reporting Requirements	
10 PRC working days after each borrowing (an existing requirement under NDRC Circular No. 2044)	Post-utilisation reporting to approval and registration authority.
10 PRC working day after expiry of the one-year term of the Foreign Debt Approval Registration Certificate (a new requirement introduced under NRDC Order No.56)	Report the status of foreign debt to approval and registration authority.
5 PRC working days prior to end of January and July of each year (a new requirement introduced under NRDC Order No.56)	Report on status of use of foreign debt proceeds, repayment of principal and payment of interest and related plans, and key business performance indicators to approval and registration authority.
Promptly (a new requirement introduced under NRDC Order No.56)	Report on material circumstances which might affect the borrower's due performance of debt obligations (including payment default risk (whether onshore or offshore) and any major restructuring).

⁵ The approval and registration authority may request for supplemental disclosure, explanations and raise follow up queries to intermediaries by issuance of request for supplemental documents or information. The period commencing from the date of such notice and the authority's receipt of all documents required shall be excluded for the purpose of computation of the 3 month approval registration review period.

Timing	Action Required
C. Amendments to the Foreign Debt Approval Registration Certificate⁶	
T	Acceptance by the approval and registration authority of amendment application.
T + 20 PRC working days ⁷	Approval and registration authority to issue either (i) written decision of amendment approval or (ii) refusal of modification approval, giving reasons.

Given the extended approval registration review period, it is important for PRC borrowers and financiers to factor in the approval registration review period and commence discussions on refinancings well in advance.

As NDRC Order No. 56 expressly prohibits the relevant governmental authorities and financial institutions from processing any foreign debt related applications (including foreign debt registration) and businesses (including foreign exchange application, account opening fund settlement and remittance and fund utilisation) prior to the issue of Foreign Debt Approval Registration Certificate, it remains to be seen how the potential conflicts between the extended approval registration review period and the registration time limits under other existing foreign debt registration regimes operated by other governmental authorities in the PRC (e.g. 15 PRC working day time limit for submission of registration for PRC security/ guarantee for offshore financings (内保外贷)) would be resolved.

5. Codification of liabilities on enterprises, key management and intermediaries

Under NDRC Circular No. 2044 and the NDRC Circular No. 2044 Practice Manual, the borrower and the key management of the borrower are responsible for the authenticity, accuracy and completeness of the application materials submitted to NDRC.

NDRC Order No. 56 extends this obligation to underwriters, law firms and accountancy firms. An intermediary will be in breach of the NDRC Order No. 56 if (a) that intermediary knows or

ought to have known that the borrower violates the NDRC Order No.56 and continues to provide services to the borrower; or (b) a report or an opinion issued by that intermediary or information disclosed in a document submitted to NDRC contains any concealment, misrepresentation, misleading information or material omission. A breach by an intermediary will be posted on Credit China and/or recorded in the National Enterprise Credit Information Publicity System.

We expect that intermediaries will conduct a more comprehensive due diligence in debt financings as well as application materials prepared by the applicant to ensure full discharge of their legal obligations under the NDRC Order No. 56.

6. Transition arrangements

NDRC Circular No. 2044 will be simultaneously repealed as NDRC Order No. 56 takes effect. However, the transition arrangement is not set out in NDRC Order No. 56.

Specifically, it is unclear:

- (a) in the case an applicant which has already submitted its foreign debt registration application with NDRC in accordance with the requirements of NDRC Circular No. 2044 but has not completed the registration, whether it would be required to withdraw its application and make a fresh application pursuant to NDRC Order No. 56;
- (b) in the case of an enterprise which has already incurred foreign debts (within the meaning of NDRC Order No. 56) where

⁶ Article 18 of NDRC Order No. 56.

⁷ The approval and registration authority may request for supplemental disclosure, explanations and raise follow up queries to intermediaries by issuance of request for supplemental documents or information. The period commencing from the date of such notice and the authority's receipt of all documents required shall be excluded for the purpose of computation of the 20-PRC-working-day approval registration review period.

foreign debt registration was not required under NDRC Circular No. 2044, whether it would be necessary for such enterprise to make a foreign debt application under NDRC Order No. 56 if the promulgation of NDRC Order No. 56 necessitate such approval registration;

- (c) in the case of an enterprise which has already incurred foreign debts in compliance with NDRC Circular No. 2044 and such foreign debts have not been fully repaid as of 10 February 2023, whether it would be necessary for such enterprise to comply with the reporting obligations under NDRC Order No. 56; and
- (d) in the case of borrowers which have unused foreign debt quota under existing Foreign Debt Registration Certificate (which will expire after 10 February 2023), whether such unused foreign debt quota obtained in accordance with the NDRC Circular No. 2044 can continue to be utilised after NDRC Order No. 56 takes effect on 10 February 2023.

Further clarification on the above will be welcomed.

Conclusion

NDRC Order No. 56 represents the first comprehensive overhaul of NDRC's foreign debt filing registration regime since the promulgation of NDRC Circular No. 2044 in 2015. It is expected that NDRC will issue new practical manual to provide more clarity on the implementation of NDRC Order No. 56.

Please feel free to contact your usual Norton Rose Fulbright contacts if you have any queries on this legal briefing.

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