

NDRC issues new Practice Manual for the New Mid-to Long-Term Foreign Debt Approval Registration Regime

Introduction

Following the promulgation of *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) on 10 January 2023 (see [link](#) to our earlier legal update, **January 2023 Client Briefing**), the National Development and Reform Commission of the PRC (NDRC) released the much anticipated practice manual for approval registrations of mid- to long-term foreign debt of enterprises 企业借用中长期外债审核登记办事指南 (the **Practice Manual**) on its website (see [link](#)) on 9 February 2023, one day before the new foreign debt approval registration regime under NDRC Order No. 56 takes effect.

Whilst the Practice Manual brings added clarity in NDRC's approach towards the new foreign debt approval registration regime, there are still a number of aspects (notably absence of NDRC's interpretation of its approach towards how equity, assets, revenue or other similar rights and interests in or to its underlying PRC enterprises under would be taken into account for the purpose of limb (2) of indirect offshore borrowing by PRC enterprises) where further clarifications from NDRC would be much welcomed as we enter into this new phase of the NDRC's foreign debt approval registration regime.

Key Clarifications

1. Indirect Offshore Borrowing by PRC Enterprises

As noted in our January 2023 Client Briefing (in particular, paragraphs 1(a) and 1(b) of that briefing), Article 33 of NDRC Order No. 56 introduces the concept of indirect offshore borrowing by PRC enterprises, which covers offshore bond issue or borrowing of offshore commercial loans by an offshore enterprise where:

- (1) the principal business activities of the relevant enterprise(s) are carried out in the

PRC; and

- (2) 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).

Q&A section of the Practice Manual confirms our understanding that the new foreign debt approval registration regime under NDRC Order No. 56 applies to red chip enterprises¹, offshore enterprises operating under VIE structures² and

¹ Q22 of Q&A section of the Practice Manual.

² Q24 of Q&A section of the Practice Manual.

specific types of onshore security for offshore facility³.

Q63 of Q&A section of the Practice Manual sets out a non-exhaustive criteria which NDRC will take into account when assessing whether the principal business activities of the relevant enterprises are carried out in the PRC under limb (1) of indirect offshore borrowing by PRC enterprises.

Q63 of Q&A section of the Practice Manual provides that, in assessing limb (1) of indirect offshore borrowing by PRC enterprises, NDRC will take substance over form and will take into account the financial indicators, operational conditions and such other relevant factors in determining whether business activities are located in the PRC. Q63 of Q&A section of the Practice Manual stipulates that NDRC would expect indirect offshore borrowing by PRC enterprises with the following characteristics to be subject to foreign debt approval registration regime under NDRC Order No. 56:

- (a) any of the operating income, net profits, total assets and net assets of the underlying PRC enterprise(s) represents more than 50% of the corresponding financial indicator of the issuer/borrower on a consolidated basis as determined based on the audited consolidated financial report of the same financial period; and
- (b) the key phases of the business activities are carried out in the PRC or the principal place of business is situated in the PRC (or the majority of the senior management in charge of business operations are PRC citizens or otherwise habitually reside in the PRC).

Unlike limb (1) of indirect borrowing by PRC enterprises, the Practice Manual is silent on NDRC's approach towards limb (2) of indirect offshore borrowing by PRC enterprises. Additional guidance from NDRC on how equity, assets, revenue or other similar rights and interests in or to its underlying PRC enterprises

under would be taken into account in determining whether an offshore financing would fall within the ambit of NDRC Order No. 56 would be much welcomed. Please refer to paragraph 1(b) of our January 2023 Client Briefing for the issues relating to limb (2) of indirect offshore borrowing by PRC enterprises.

2. Transition arrangements

NDRC Order No. 56 is silent on the transition arrangement from the foreign debt filing registration regime under NDRC Circular No. 2044 to the new foreign debt approval registration regime established under NDRC Order No. 56.

The Practice Manual clarifies that the borrower may utilise any unutilised foreign debt quota as specified in the foreign debt registration certificate approved under NDRC Circular No. 2044⁴ for so long as the unutilised foreign debt quota is utilised within the one-year validity period of the original foreign debt registration certificate. That said, the borrowers and relevant other parties that have utilised foreign debt quota under NDRC Circular No. 2044 are required to comply with the foreign debt risk management and ongoing foreign debt monitoring requirements under NDRC Order No.56.

Please refer to paragraph 4 of our January 2023 Client Briefing for details of such reporting obligations.

3. Status of NDRC Circular Nos. 666 and 778

Whilst NDRC Order No. 56 expressly abolishes NDRC Circular No. 2044, NDRC Order No. 56 is silent on the status of NDRC Circular Nos. 666⁵ and 778⁶, which supplement the now abolished NDRC Circular No. 2044.

The Practice Manual⁷ confirms that NDRC Circular Nos. 666 and 778 continue to apply to incurrence of mid- to long-term foreign debts by

³ Q32 and Q33 of Q&A section of the Practice Manual.

⁴ Q61 of Q&A section of the Practice Manual.

⁵ Circular on Filing Requirements with respect to Application for Foreign Debt Issuance by Local State-owned Enterprises 国家发展改革委办公厅关于对地方国有企业发行外债申请备案登记有关要求的通知 (发改办外资[2019]666号).

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⁶ Circular Regarding Requirements of Applying for the Registration of Issuing Foreign Debt by Real Estate Developers 国家发展改革委办公厅《关于对房地产企业发行外债申请备案登记有关要求的通知 (发改办外资[2019]778号)》.

⁷ Q54 to Q56 of Q&A section of the Practice Manual.

real estate enterprises and local government financing vehicles.

4. Application documents

In comparison with the application documents required for the foreign debt filing registration regime under NDRC Circular No. 2044, NDRC now requires additional documents as part of the foreign debt approval registration application pack:

(1) Financial statements

In addition to the annual financial statements of the borrowers and the security providers/guarantors for the past three years and the latest financial statements (which are required under the previous foreign debt filing registration regime), the corresponding financial statements of the approval registration applicant for the same period.

(2) Legal opinions and authenticity undertakings issued by professional entities

In light of the new intermediaries' obligations to ensure authenticity, accuracy and completeness of the application materials submitted to NDRC under Article 22 of NDRC Order No. 56 (see paragraph 5 of our January 2023 Client Briefing), the Practice Manual now specifies that legal opinions and authenticity undertakings form part of the application materials for foreign debt approval registration.

Whilst the Practice Manual does not specify the content of such legal opinions, we expect that, similar to the approach adopted in the bond market, such legal opinions in the context of international commercial loans would be in form of the legal opinion issued by borrower's legal counsel confirming the authenticity, accuracy and completeness of the application materials based on borrower counsel's legal due diligence in respect of the proposed offshore borrowing. We expect that this will form part of the standard legal due diligence process for external legal counsel in discharging their legal obligations under Article 22 of NDRC Order No. 56.

(3) (in the case of offshore bond issuance) Due diligence report and authenticity undertaking issued by the underwriters

(4) (where the relevant enterprise has incurred foreign debts under the previous or the current foreign debt regime) approval documents and information relating to usage of such previously approved foreign debt quota(s) and other related information of the previously approved foreign debt quota(s)

(5) Security documents⁸

Applicants are now required to submit all security documents under the offshore borrowing as part of the foreign debt application pack. It remains to be seen whether any Chinese translation for such document is required.

It is also noteworthy that, consistent with the practice under NDRC Circular No. 2044, the Practice Manual confirms that, in the case of offshore commercial loans, the signed facility agreement or document(s) with equivalent effect must be submitted to NDRC as part of the application pack.

5. Timeline of approval registrations

Whilst the Practice Manual confirms the three-month timeline for the approval registration process, the Practice Manual recommends the parties to submit the application materials no later than 45 PRC working days before the date of bond issuance or the first utilisation of commercial loans, which is in line with the recommendation provided under the practice manual for NDRC Circular No. 2044.

It remains to be seen whether NDRC could potentially complete the foreign debt approval registration review within 45 PRC working days.

Conclusion

The publication of the Practice Manual one day prior to the effective date of the new foreign debt approval registration regime under NDRC Order No. 56 provides a much needed guidance to market participants ahead of the implementation of NDRC

⁸ Q45 of Q&A section of the Practice Manual. February 2023

Order No. 56. That said, we expect NDRC to provide further implementation guidance through update to the Practice Manual and feedback to foreign debt applications made under NDRC Order No. 56. We will continue to monitor the development of the foreign debt approval registration regime under NDRC Order No. 56 and provide timely updates to our clients.

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

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