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National Development and Reform Commission Further Issues Guidance Regarding Documentary Requirements for Filing by Equity Investment Enterprises

By David Yu, Nicholas Lou and Teddy Li

Following the *Notice on Further Standardizing the Development and Filing Management Work of Equity Investment Enterprises in Pilot Areas* (Fa Gai Ban Cai Jin [2011] No. 253) ("**Filing Notice**") issued by the General Office of the National Development and Reform Commission ("**NDRC**") on 31 January 2011, the Department of Fiscal and Financial Affairs of NDRC recently published a series of guidelines regarding documentary requirements for filing by equity investment enterprises ("**Guidance**") via its website. The Guidance was released to better implement the detailed documentary requirements for filing under the Filling Notice.

The Filing Notice provides provisions and instructions for fund-raising and investment operations conducted by equity investment enterprises in pilot areas in order to promote steady, healthy and standardized development of the equity investment enterprise industry in those areas. In addition, it also provides a filing management process to improve the standardization and systemization of existing filing management. Requirements under the Guidance can be mainly broken down into two categories: one is regarding the format of application forms, and the other is regarding the basic necessary information to be included in application documents. Generally, the documents required for filing by equity investment enterprises under the Guidance are within the scope of documentary requirements under Article 5 of the Filing Notice. Nevertheless, we draw your attention to the following.

Relaxing the Requirements for Exemptions from Filing

Article 5 of the Filing Notice provides three circumstances under which an equity investment enterprise can be exempted from filing. The second circumstance provided therein is where the total capital (including both capital already paid-up by investors and capital that has been committed but not paid-up) is less than RMB 500 million (or equivalent amount in foreign currency). Hence, according to market participants, it is clear that the Filing Notice in fact requires equity

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investment enterprises, the total capital of which is more than RMB 500 million, to file and be subject to filing management (this understanding was also confirmed by a concerned officer of NDRC in her/his response to questions from the press in relation to the Filing Notice). However, a footnote of the *Standard Format of Application Letter for Filing of Equity Investment Enterprises*, part of the Guidance, provides that, if the total committed capital of an equity investment enterprise is more than RMB 500 million (or equivalent amount in foreign currency), but the capital amount actually paid-up is less than RMB 100 million, the equity investment enterprise can also be exempted from filing. Such footnotes appear to relax the requirements for exemption from filing. However, because the Guidance was not released by NDRC as a formal regulatory document, such exemptions from filing need further confirmation by actual implementation from the local development and reform commissions.

Advice Concerning Limited Partners' Involvement in the Management or Investment Decisions of Equity Investment Enterprises

The footnotes of the *Guidance to the Partnership Agreement of Equity Investment Enterprise*, another part of the Guidance, provides words of caution with respect to limited partners' direct or indirect involvement in the equity investment enterprise's management and investment decision-making. The footnotes suggest that, to avoid situations where limited partners might bear legal liabilities due to violations of relevant provisions under the *Partnership Enterprise Law*, and to better ensure the general partners' function as expert managers, an equity investment enterprise's partnership agreement not contain any stipulation which allows limited partners to, in fact or in effect, be directly or indirectly involved in the equity investment enterprise's management or investment decisions-making. It appears that NDRC has adopted a prudent attitude regarding the issue of limited partners directly or indirectly executing partnership affairs. Therefore, equity investment enterprises which expect to apply for filing should take notice of NDRC's position and avoid any such stipulations in the partnership agreement so as to minimize any negative impact during the filing process.

Disclosure of the Sources of the Equity Investment Enterprise's Capital

Among the required documents for filing under Article 5 of the Filing Notice is a statement from the promoter on whether fund-raising of the equity investment enterprise complies with laws and regulations. Furthermore, the Application Documents Schedule under the Guidance clarifies that a *Form of Sources of Equity Investment Enterprise' Capital of Equity Investment Enterprise* must also be completed and submitted for filing. The equity investment enterprise shall complete the form, indicating the source of its capital according to two categories: State-Owned Capital and Non-State-Owned Capital.

- State-Owned Capital ("State-Owned" refers to both wholly state-owned and state ownership of a controlling share (or relatively with controlling shares); all other cases are deemed "Non-State-Owned Capital") includes: fiscal capital investments, State-Owned industry enterprises, State-Owned insurance companies, State-Owned banks, State-Owned securities companies, other State-Owned financial institutions and other State-Owned capital;

- Non-State-Owned Capital includes: Non-State-Owned industry enterprises (including manufacturing, service trade and other various types of non-financial institutions), Non-State-Owned insurance companies, Non-State-Owned banks, Non-State-Owned securities companies, other Non-State-Owned financial institutions, individuals, foreign capital (including those from foreign institutions, foreign individuals and domestic foreign-invested institutions) and other Non-State-Owned capital.

The abovementioned also provide further requirements on disclosure by equity investment enterprises. Such heightened requirements may assist NDRC in monitoring whether equity investment enterprises have violated relevant laws and regulations. For example, according to the relevant provisions under the *Partnership Enterprise Law* and Filing Notice, wholly stated-owned companies, state-owned enterprises, listed companies and non-profit institutions are not allowed to act as general partners in equity investment enterprises. In addition, NDRC clarifies in the *Guidance to the Partnership Agreement of Equity Investment Enterprise*, part of the Guidance, that "state-owned enterprise" means an enterprise whose collective state-owned interest equals 50% or more.

Guidance on the Prospectuses of Equity Investment Enterprises

The Guidance also provides detailed guideline on the prospectus of an equity investment enterprise ("**Prospectus**"). Apart from the usual content within the Prospectus, such as general information regarding the enterprise, organization and management structure, investment policies, revenues, costs, disbursal and distribution of performance-based bonuses, etc., NDRC further stipulates the following regarding content included in the Prospectus:

- **Requirements for investors' qualification**: It is recommended that the Prospectus clarify that the minimum capital subscription of each individual investor is not less than RMB 10 million;

- **Requirements for lawful subscription**: The Prospectus shall clarify that each investor may not invest in the equity investment enterprise by means of entrusting another investor to hold the shares on her/his/its behalf.

- **Tax**: According to the relevant laws, administrative regulations and rules, the Prospectus shall only include the following legend with respect to tax: the equity investment enterprise will pay taxes according to the relevant tax regulations of the State.

- **Risk factors**: The Prospectus shall fully, accurately and faithfully disclose all risk factors throughout the equity investment enterprise's entire establishment and investment operations, including any legal and policy risks which may exist.

NDRC's issuance of a series of regulations on the management of equity investment funds while the *Securities Investment Fund Law* is in the process of revision indicates its attitude as to which administrative department should be empowered to regulate equity investment funds. Nevertheless, the agency granted regulatory power and the regulatory system implemented will be ultimately determined by the revised *Securities Investment Fund Law*.

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