

February 2023

Follow @Paul\_Hastings



## *Mainland China to Implement New Foreign Debt Financing Regulations on 10 February 2023*

By [Vivian Lam](#), [Jeff Lee](#), [Hulka Lo](#) & [Alex Chan](#)

Mainland China will see the implementation of a new set of foreign debt financing regulations—the Administrative Measures for the Approval and 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》) (the “New Measures”)—on 10 February 2023.

The National Development and Reform Commission (the “NDRC”), being a ministerial-level department of the State Council of the People’s Republic of China in charge of formulating and implementing strategies on national economic and social development, has promulgated the New Measures on 10 January 2023. The New Measures are the fruit of a month-long public consultation of a premature draft, the Administrative Measures for the Approval and Registration of Mid-to-Long Term Foreign Debt of Enterprises (Consultation Draft) (《企业中长期外债审核登记管理办法 (征求意见稿)》), published by the NDRC on 26 August 2022.

Set to take effect a month after its promulgation, on 10 February 2023, the New Measures will repeal and replace the Circular on Promoting the Reform of the Administrative System on the Filings and Registrations of Foreign Debt of Enterprises (《国家发展改革委关于推进企业发行外债备案登记制管理改革的通知》(发改外资[2015]2044号)) (the “Circular 2044”), which will be superseded after serving as one of the governing instruments of Mainland China’s foreign debt activities since September 14, 2015.

The New Measures do not change the existing requirement that, in Mainland China, borrowers/issuers of foreign debts have to register their debts with the NDRC prior to drawdown/issuance and, within 10 PRC business days of drawdown/issuance, report the details of the debts to the NDRC.<sup>1</sup> Also, like the Circular 2044, the New Measures are expected to continue to treat debts incurred or bonds issued in the China (Shanghai) Pilot Free Trade Zone (中国(上海)自由贸易试验区) as foreign debts for the purpose of determining whether registration with the NDRC is needed.<sup>2</sup> By and large, the New Measures are fairly consistent with the existing regulatory practices in Mainland China.

Nevertheless, the New Measures fill various regulatory gaps left over by the prior regulatory regime and consolidate the NDRC’s earlier responses to some of its related questions available on its webpage (the “NDRC Q&As”), in order to codify those responses and hence reduce uncertainties.<sup>3</sup> The table below discusses the key provisions of the New Measures and compares the New Measures to the Circular 2044 where appropriate.

	Circular 2044	New Measures
<b>1. Applicability</b>	Where a PRC entity or a non-PRC entity or branch controlled by a PRC entity issues a variety of debt instruments outside of Mainland China with a maturity of more than one year, whether the bonds are denominated in Renminbi or another currency. <sup>4</sup>	<p><u>Same</u>, but the New Measures also expressly apply to indirect borrowing of an entity (not necessarily controlled by a PRC entity) having its main operating activities in Mainland China, as it indirectly issues offshore bonds or takes out offshore commercial loans through an offshore enterprise, and the issuance or borrowing is "based on" (基于) the equity interests, assets, revenues and other similar rights or interests of underlying PRC entities.<sup>5</sup></p> <p>Following the extension of the New Measures to indirect borrowing, registration with the NDRC of offshore debt instruments of (a) red-chip companies and (b) offshore enterprises controlled through non-PRC variable interest entities by PRC entities, becomes statutorily required.<sup>6</sup></p>
<b>2. Eligibility to incur foreign debts</b>	<ul style="list-style-type: none"> <li>▪ good credit scores and standing;</li> <li>▪ bonds already issued and the other debts not in default;</li> <li>▪ mature risk management policies relating to corporate governance and foreign debts in place; and</li> <li>▪ relatively competent in meeting debt obligations<sup>7</sup></li> </ul>	<ul style="list-style-type: none"> <li>▪ legally incorporated and validly existing, business operations in compliance, and has a robust corporate structure that operates well;</li> <li>▪ has a reasonable demand for incurring foreign debts, compliant use of proceeds, has the competence in meeting debt obligations, and has robust foreign debt risk management policies; and</li> <li>▪ for the most recent three years, both the borrowers/issuers and their controlling shareholders and beneficial owners have not been convicted of corruption, bribery, asset misappropriation or embezzlement, or disorder in the socialist market economy, <u>and</u> have not been lawfully investigated for engaging in criminal behavior or material breach of laws and regulations<sup>8</sup></li> </ul>

	Circular 2044	New Measures
		Unlike Circular 2044, the New Measures stop short of expressly requiring borrowers/issuers in Mainland China wishing to incur additional foreign debts to ensure that their existing bonds and debts are not in default. A PRC borrower/issuer who remains solvent but who is otherwise not allowed to raise foreign debt capital because it has defaulted on a limited number of repayment obligations, will become able to do so. The New Measures afford PRC borrowers/issuers greater flexibility in refinancing their existing debt obligations.
<b>3. Debt instruments covered</b>	Expressly refers to offshore bonds (境外发行债券) and mid- and long-term cross-border commercial loans (中长期国际商业贷款). <sup>9</sup>	Expressly refers to senior debts (高级债), perpetual securities (永续债), capital debts (资本债), mid-term notes (中期票据), convertible bonds (可转换债券), exchangeable bonds (可交换债券), financial leases (融资租赁) and commercial loans (商业贷款). <sup>10</sup>  Coupled with express references to a wide variety of debt instruments in the New Measures, whether the debts or bonds are incurred or issued in the China (Shanghai) Pilot Free Trade Zone, Hong Kong, Macau, or any non-PRC jurisdictions, it is expected that more debt instruments will come under the ambit of the New Measures.
<b>4A. Use of proceeds of foreign debts: NDRC registration certificate</b>	In practice, but not statutorily required, use of proceeds is expected to align with that stated in the Filing and Registration Certificate of Issuance of Corporate Foreign Debt (企业发行外债备案登记证明) (the "2044 Certificate") issued by the NDRC.	Use of proceeds is expressly required to align with that stated in the Review and Registration Certificate of Incurrence of Corporate Foreign Debt (企业借用外债审核登记证明) (the "New Certificate") issued by the NDRC prior to the incurrence of the foreign debt, and the proceeds should not be appropriated for any other purpose. <sup>11</sup>
<b>4B. Use of proceeds of foreign debts: positive list</b>	Use of proceeds to support the following is encouraged: <sup>12</sup>	Use of proceeds to support the following is encouraged: <sup>13</sup> <ul style="list-style-type: none"> <li>▪ major industries; and</li> </ul>

	Circular 2044	New Measures
	<ul style="list-style-type: none"> <li>the Belt and Road Initiative (一帶一路);</li> <li>joint development of the Jingjinji Metropolitan Region (enclosing Beijing, Tianjin and Hebei, PRC) (京津冀);</li> <li>the Yangtze River Economic Belt (长江经济带) development; and</li> <li>international cooperation of production capacity and equipment manufacturing and other major constructions and investments in key areas</li> </ul>	<ul style="list-style-type: none"> <li>implementation of national major strategies and development of the real economy</li> </ul>
<b>4C. Use of proceeds of foreign debts: negative list</b>	<p>Use of proceeds ought not to:<sup>14</sup></p> <ul style="list-style-type: none"> <li>violate PRC laws and regulations;</li> <li>threaten or adversely affect the national interests and economic security of the PRC;</li> <li>be contrary to the PRC macro-economic control targets;</li> <li>contravene development planning and industrial policies of the PRC; and</li> <li>be used to cover losses, incur non-productive expenditures and, except for borrowers/issuers which are financial institutions, on-lend to third parties</li> </ul>	<p><u>Same</u>, but use of proceeds also ought not to:<sup>15</sup></p> <ul style="list-style-type: none"> <li>threaten or adversely affect the information and data security of the PRC;</li> <li>increase hidden debts of local governments;</li> <li>be used to speculate</li> </ul> <p>Further, certain restrictions from the NDRC Q&amp;As have been relaxed:<sup>16</sup></p> <ul style="list-style-type: none"> <li>the restrictions against using proceeds of foreign debts to cover losses and incur non-productive expenditures have been removed; and</li> <li>borrowers/issuers which are <u>not</u> financial institutions may on-lend their proceeds of foreign debts to third parties, if the intention to do so is set forth in the application materials submitted to the NDRC <u>and</u> the NDRC gives its approval</li> </ul> <p>With the removal of these restrictions, the New Measures appear to allow for an expansive use</p>

	Circular 2044	New Measures
		of proceeds by eligible borrowers/issuers.
<b>5. Registration with the NDRC</b>	<b>A. When is the NDRC expected to make a determination?</b>	
	The NDRC will notify the borrowers/issuers in the next five PRC business days whether it accepts the registration. <sup>17</sup>	The NDRC will notify the borrowers/issuers in the next five PRC business days if the application documents are incomplete, the registration is non-compliant or the debt instruments concerned are outside the jurisdiction of the NDRC, otherwise the registration is deemed accepted by the NDRC. <sup>18</sup>
	<b>B. When are SAFE registration, bank account opening and other ancillary matters expected to occur?</b>	
	In practice, but not statutorily required, the borrowers/issuers may proceed to register their foreign debts with the State Administration of Foreign Exchange of the State Council of the People's Republic of China (the "SAFE"), open bank accounts, receive, exchange and use the proceeds of foreign debts, after obtaining the 2044 Certificate from the NDRC.	Expressly provides that, <sup>19</sup> only after obtaining from the NDRC a New Certificate, can the borrowers/issuers proceed to register their foreign debts with the SAFE, open bank accounts, receive, exchange and use the proceeds of foreign debts.
	<b>C. When will the NDRC issue the registration certificate?</b>	
	The NDRC is expected to issue the 2044 Certificate within seven PRC business days after deciding that it accepts the registration. <sup>20</sup>	The NDRC is expected to issue the New Certificate within three months after deciding that it accepts the registration, <sup>21</sup> and the New Certificate will be valid for a year. <sup>22</sup>  As the borrowers'/issuers' actual use of proceeds need to be consistent with that stated in the New Certificate, and the NDRC may take up to three months to issue the New Certificate and may raise queries to ensure the integrity of the debt capital raising process, potential borrowers/issuers should reach out to the NDRC sooner rather than later.
	<b>D. Is the NDRC expected to raise queries?</b>	

	<b>Circular 2044</b>	<b>New Measures</b>
	The NDRC is generally not expected to raise queries save for exceptional circumstances. <sup>23</sup>	<u>After</u> accepting the registration, the NDRC may by written notice require the borrowers/issuers or the intermediaries to provide supplemental materials or respond to enquiries. The time taken for such enquiries and responses will not count towards the aforementioned three-month period required by the NDRC to issue the New Certificate. <sup>24</sup>

The New Measures expressly equip the authorities with an arsenal of measures and disciplinary actions applicable in case of violations, ranging from mandatory interviews with authorities, to public warning and revocation of the New Certificate.<sup>25</sup> These measures can be applied towards not only the borrowers/issuers, but also their senior management, as well as the intermediaries.<sup>26</sup> All violations will also come into the public records.<sup>27</sup>

The New Measures, set to take effect on 10 February 2023, do not set forth any savings measures or transitional provisions. As such, there are scenarios that may not be conclusively settled under the New Measures, including the following:

- Whether any foreign debts incurred or foreign bonds issued before, but which remain outstanding after, 10 February 2023, are subject to the provisions of Circular 2044 or the New Measures, taking into account that the New Measures impose more stringent obligations on borrowers/issuers compared to Circular 2044; and
- Whether any unutilized foreign debt quota which will otherwise only expire on a date later than 10 February 2023, will expire on that date because of the inauguration of the New Measures, unless a New Certificate is obtained to replace the 2044 Certificate.

It remains to be seen how the New Measures will be applied in practice, and borrowers/issuers are encouraged to seek early consultations with the NDRC should clarifications be required.

✧ ✧ ✧

*If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Hong Kong lawyers:*

Vivian Lam  
852.2867.9516  
[vivianlam@paulhastings.com](mailto:vivianlam@paulhastings.com)

Jeff Lee  
852.2867.1232  
[jefflee@paulhastings.com](mailto:jefflee@paulhastings.com)

- 
- <sup>1</sup> Sections 10 and 24, New Measures; Section 1(3), Circular 2044.
  - <sup>2</sup> Items 35 and 64, NDRC Q&As.
  - <sup>3</sup> See, NDRC's website, questions-and-answers section: <https://services.ndrc.gov.cn/ecdomain/portal/portlets/bjweb/mobile/answerconsult/interactiveinfo.jsp?idseq=&itemcode=010147>.
  - <sup>4</sup> Section 1(1), Circular 2044.
  - <sup>5</sup> Sections 2(1) and 33, New Measures.
  - <sup>6</sup> Codifying items 31 and 34 of the NDRC Q&As into the New Measures.
  - <sup>7</sup> Section 3(7), Circular 2044.
  - <sup>8</sup> Section 9, New Measures.
  - <sup>9</sup> Section 1(1), Circular 2044.
  - <sup>10</sup> Section 2(5), New Measures.
  - <sup>11</sup> Section 25, New Measures, codifying existing regulatory practices.
  - <sup>12</sup> Section 2(6), Circular 2044.
  - <sup>13</sup> Section 7, New Measures, codifying item 47 of the NDRC Q&As into the New Measures.
  - <sup>14</sup> Item 47, NDRC Q&As.
  - <sup>15</sup> Section 8, New Measures.
  - <sup>16</sup> Section 8(5), New Measures.
  - <sup>17</sup> Section 3(10), Circular 2044.
  - <sup>18</sup> Section 13, New Measures.
  - <sup>19</sup> Section 17, New Measures, codifying existing regulatory practices.
  - <sup>20</sup> Section 3(10), Circular 2044.
  - <sup>21</sup> Section 14, New Measures.
  - <sup>22</sup> Section 16, New Measures.
  - <sup>23</sup> Item 26, NDRC Q&As.
  - <sup>24</sup> Section 15, New Measures.
  - <sup>25</sup> Section 28, New Measures.
  - <sup>26</sup> Section 29, New Measures.
  - <sup>27</sup> Section 30, New Measures.

#### Paul Hastings LLP

Stay Current is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2023 Paul Hastings LLP.