Rethinking Government Approvals: The New Administrative Licensing Law

The entry into effect of the *Administrative Licensing Law* on July 1 2004 promises to be a milestone in China's advance toward creation of a more transparent legal system and a more limited, efficient and less arbitrary government.

More than seven years in the making, the *Administrative Licensing Law* (the Law) is intended to narrow the scope of activities for which a licence or approval is required, and even in cases where a licence or approval is required, the bias has been shifted in favour of self-regulation. This should reduce barriers to market entry and thereby enhance competition in goods and services. To curb the monetary incentive to impose licence or approval requirements, as well as the tendency toward corruption, the imposition of fees for licences or application documents is prohibited unless regulations expressly provide otherwise.

If well implemented, the Law should reduce the potential for the unreasonable procedural delays and non-meritorious rejection of applications with which many foreign investors are all too familiar. In the power industry, for example, an inside-the-fence generating project was held up for years, and foreign investors eventually driven out, by the unwillingness of the power bureau to provide an essential interconnection approval. In another instance, an otherwise completed generating project was unable to obtain an operating licence for failure to obtain certification by the local labour bureau. Long-term power purchase agreements have suffered from discontinuity and bias with respect to dispatch instructions and tariff approvals.

Comparable problems have affected foreign investors in other industries as well, although those most affected have been Chinese citizens lacking sufficient *guanxi*.

SCOPE OF THE LAW

The Law's scope is quite broad. Article 3 provides that the Law applies to the creation as well as the implementation of administrative licensing. Article 2 defines administrative licensing as the grant of permission for the undertaking of specified activities in accordance with an application to do so as approved by an administrative authority. Such permission, as stipulated in Article 39, may be in the form of permits, licences or other certificates; professional qualifications; approval documents or other certificates; administrative licences in other forms; and labels or seals affixed to equipment, facilities, products and goods that have passed inspection. The Law applies to applications by citizens, legal persons and other entities (whom we shall collectively refer to as "persons" for convenience of exposition) without regard to ownership, and thus protects foreign-invested as well as domestic enterprises.

To constrain the tendency of bureaucracies to subject society and the economy to unnecessary and excessive administrative licensing requirements, Article 11 provides that the creation of administrative licences shall be consistent with the laws of economic and social development, foster the activism and initiative of legal persons and other entities, protect the public interest and social order, or promote the coordinated development of the economy and society with the ecological environment. Administrative licence requirements that do not meet any of the above criteria are deemed improper.

Article 12 enumerates six areas where administrative licences may be required:

(1) state security, public safety, macroeconomic regulation, ecological environmental protection, and matters that directly impact human health or the safety of people or property;
(2) the development and exploitation of natural resources, the allocation of public resources, and market entry in industries that directly impact the public interest;
(3) determination of the qualifications for professions and industries that provide services to the public and directly impact the public interest;
(4) important equipment, facilities, products and goods that directly impact public safety, human health, or the safety of people and property, which must be examined in accordance with technical standards and norms;
(5) the establishment of enterprises or other organizations for which the qualifications of the principals must be determined; and
(6) other matters for which administrative licences may be required by law or administrative regulation.

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The central government imposes administrative licensing requirements by law, administrative regulation or, when necessary, by decision of the State Council, although the latter must later be upgraded to the status of law or administrative regulation (Article 14). Article 15 provides that provincial-level governments may create administrative licensing requirements for matters not subject to national laws or administrative regulations. They may not do so, however, with respect to matters that should be subject to unified nationwide qualifications, or registration or preconditions with respect to the establishment of enterprises or other entities. Provincial-level administrative licensing requirements may not restrict competition by individuals, enterprises or commodities from other regions. No provision authorizes sub-provincial-level governments to impose administrative licensing requirements.

Conversely, administrative licences need not be imposed under Article 13 under the following circumstances:

(1) where persons are capable of making their own decisions;
(2) where market competition is capable of providing effective regulation;
(3) where industry or intermediary organizations are capable of self-regulation; or
(4) where the administrative authorities can resolve any problems by supervision after the fact or by other means.

The Law applies to the creation as well as the implementation of administrative licences, and Article 19 requires that the drafting authority convene hearings or solicit comments by other means before creating licence requirements. However, persons have no right under the Law to challenge improperly created administrative licensing laws and regulations. The responsibility for taking such action is instead reserved to the administrative authorities and their higher-level organs (Article 71). Persons do, however, have the right to speak and defend themselves with respect to the implementation of administrative licensing, and to administrative review or administrative litigation in accordance with law (Article 7). They also have the right under Article 7 to compensation for the infringement of their legal rights and interests in the implementation of administrative licensing.

The Law recognizes that administrative licences constitute a limited form of property rights. An administrative authority may not unilaterally alter a valid administrative licence (Article 8). The licensee is entitled to compensation if the licence must be altered or revoked in the public interest because of a change of law or a material change in the conditions on which the licence was based. However, administrative licences are not transferable except when otherwise provided by laws or regulations (Article 9). The principal exception to this stipulation would appear to involve land use rights.

IMPLEMENTATION

Under Articles 22 to 25, governments and administrative authorities are responsible for implementing administrative licences within the scope of their respective authority, either directly or by entrusting another administrative authority to do so under their supervision. They are prohibited from making improper demands, like the purchase of designated commodities or services as a condition for the processing of an administrative licence application (Article 27). Technical procedures generally are to be implemented by qualified specialized technical entities (Article 28).

In the interest of transparency and fair treatment, application forms may not require applicants to provide irrelevant information (Articles 29 and 31). This should reduce the potential for bias in the granting of licences. Application requirements must be displayed, and the administrative authority is required to provide explanations and reliable information at the applicant's request (Article 30). When possible, applicants are allowed to correct errors in their applications, and are also allowed five days to provide missing or incomplete information (Article 32). Electronic filings are to be facilitated (Article 33).

The examination of applications is subject to detailed procedures. Any verification must be conducted by two or more officers (Article 34), persons whose interests are materially affected by an application are to be informed by the administrative authority, and they along with the applicant have the right to comment on the application (Article 36). Decisions on applications are to be made in writing on a timely basis and with an explanation in the event of rejection (Articles 36 to 38), decisions to grant administrative licences are to be published (Article 39), and administrative licences generally are to be of nationwide scope unless a regional scope is specified (Article 41).

The timeframes for processing applications are quite tight unless law or regulation provides otherwise. A decision is to be made within 20 days subject to a 10 day extension in general, or 45 days subject to a 15 day extension when the application is processed in a unified or a joint and collective manner (Article 42). An additional 20 days is allowed for preliminary examination by a subordinate administrative authority when required, unless law or regulation provides otherwise (Article 43). Additional provisions govern amendments and renewals (Articles 49 and 50).

Public hearings are convened when required by law or when the administrative authority itself decides that a hearing is required in the public interest.

Hearings are held at public expense (Articles 46 and 47). Applicants and affected parties are entitled to seven days notice of any hearing; hearings are to be open and when necessary the hearing is to be publicly announced; the presiding officer is to be disinterested; the examining officers are to present their evidence at the hearing; the applicant and affected parties may also provide evidence and may argue and cross-examine; minutes shall be taken and signed by all participants; and the minutes shall constitute a basis for the eventual decision on the application (Article 48). Such procedures should provide for a more open and better-informed administrative process.

Administrative licences with respect to development and exploitation of limited natural resources, the allocation of public resources, and market entry in industries that directly impact the public interest are generally to be decided through tender, auction or another method characterized by fair competition (Article 53). Examination of professional qualifications and technical inspections are to be conducted in a fair and professional manner (Articles 54 and 55).

In an important measure to limit the extraction of fees, administrative authorities are prohibited from assessing application and examination fees unless laws or regulations provide otherwise, and from charging for standard application forms. Implementation expenses are instead to be funded through budgetary appropriations (Article 58). Any fees that are collected are to be turned in to the state treasury (Article 59). The effectiveness of these provisions is unclear, however, given that past efforts to limit the imposition of fees have been handicapped by budgetary shortfalls.

Implementation is under the supervision of higher-level administrative authorities (Articles 60 and 61). Administrative authorities have the power to inspect licensees and their products to protect the public and monitor compliance (Article 62). Licensees who do not exploit natural or public resources in accordance with law shall be ordered to rectify the situation; failure to do so shall be handled in accordance with law and administrative regulations (Article 66). Similarly, licensees licensed to enter specified industries that impact the public interest are subject to supervision of their services and fees (Article 67). This provision would apply to public utilities, but may also have a broader reach.

Administrative licences may be revoked at the request of affected parties or by the administrative authority on its own initiative if the licence was improperly granted or is the product of corruption. The licensee may be eligible for compensation if the licence is revoked because it was improperly granted, but not if the licensee engaged in corruption (Article 69). Specific rules and regulations govern a person's rights of administrative appeal. The *Administrative Litigation Law* governs a person's rights of litigation in the event of improper treatment, including the refusal of an administrative authority to issue a licence or permit after the person has satisfied the legal requirements.

CONCLUSION

The *Administrative Licensing Law* constitutes a substantial and long-awaited effort to curb the bureaucratic tendency to impose costly and unnecessary licensing requirements and to curb parochial protectionism by local governments. It should make the licensing process less burdensome, more open and less subject to delay. Regulatory barriers to market entry will continue to exist, but will need to have a stronger connection to the several concepts of the public interest specified in the Law. This will not prevent the imposition of barriers to market entry intended to protect existing enterprises, but should reduce their scope and create a more rational basis for compliance. While foreign investors will benefit from the Law, the greatest beneficiaries will be Chinese people themselves as the government's focus shifts further toward regulation with respect to the protection of public health and safety and away from restrictions on competition.

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