

Legal Commentary



CHINA PRACTICE · GLOBAL VISION

April 20, 2012

Ministry of Health Issued Measures for Administration of Sino-foreign Equity Joint and Cooperative Joint Medical Institutions (Revision Draft for Comments)

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On April 13, 2012, the Ministry of Health published draft Measures for Administration of Sino-foreign Equity Joint and Cooperative Joint Medical Institutions ("**Draft Measure**") for public discussion. The Draft Measure is published due to recent adoption of new Foreign Investment Industry Catalogue (2011), effective as of January 30, 2012, pursuant to which foreign investment to healthcare industry is no longer restricted. However, it appears that not only existing restrictions under the Interim Measures for the Administration of Sino-Foreign Equity and Cooperative Joint Venture Medical Institutions ("**Interim Measure**") issued by the Ministry of Health and the Ministry of Foreign Trade and Economic Cooperation in 2000 are not reduced, but new restrictions will be added. A summary of the Draft Measure is as follows:

Specifying the nature of business of foreign-invested medical institutions

The Draft Measure clarifies that the nature of business of a foreign-invested medical institution can be profitable or non-profitable. In addition to prior approvals from provincial health administration and provincial commercial authority, while profitable medical institution shall be registered with local administration of industry and commerce, non-profitable medical institution shall be registered with local civil affair bureau. In the event a Chinese partner is a non-profitable healthcare institution, the foreign-invested medical institution to be established must be a non-profitable medical institution.

2. Raising threshold for investment amount of foreign-invested medical institution

Compared to existing threshold of investment amount of RMB20M for a foreign-invested medical institution under the Interim Measure, the proposed minimum investment amount of a foreign-invested medical institution under the Draft Measure has been sharply increased to RMB100M. With regard to a foreign-invested medical institution to be established in the

central and western areas or in the old revolutionary-base, minority-inhabited, border/remote, or poor areas (老、少、边、穷地区) in China, the minimum investment amount may be adjusted to RMB 50M.

3. Delegation of approval authority

The approval authorities in terms of establishment of a foreign-invested medical institution will be delegated from the Ministry of Health and Ministry of Commerce to provincial health administration and commercial authority, which is consistent with a series of circulars issued by central government in 2011, and approval timeline will be adjusted from forty-five (45) working days to twenty (20) working days for each of health approval procedure and commercial approval procedure.

4. Restriction on foreign ownership remains unchanged.

Although foreign investment to healthcare industry is no longer restricted under the new Foreign Investment Industry Catalogue (2011), the Draft Measure obviously does not fully reflect such change. Foreign ownership in a foreign-invested medical institution will still be capped at 70%, and such limitation may be reduced from time to time under discretion of approval authorities, and establishment of wholly foreign-owned hospital may be gradually opened as well. It is interesting to note that the Ministry of Health indicates that only wholly foreign-owned hospital, instead of wholly foreign-owned medical institution, will be opened for incorporation gradually.

5. Whether Hong Kong and Macau service providers can continue to enjoy preferential treatment under CEPA?

The Interim Measure has been amended and supplemented twice to incorporate terms under the Closer Economic Partnership Arrangement between Mainland China and Hong Kong/Macau ("CEPA") and its amendments, pursuant to which Hong Kong and Macau service providers enjoy preferential treatment in terms of establishment of foreign-invested medical institution in China. As the Draft Measure will replace the Interim Measure, including its amendments, and the Draft Measure currently does not stipulate any preferential treatment applicable to Hong Kong and Macau service providers, it remains unclear whether Hong Kong and Macau service providers can continue to enjoy such preferential treatment under CEPA.

The following table reflects the difference between the Interim Measure and the Draft Measure in certain main aspects:

	Interim Measure	Draft Measure
Nature of	• N/A	Either profitable or non-profitable
Business		Only non-profitable medical institution can be established where the Chinese partner to such
		foreign-invested medical institution is a non-profitable medical institution
Registration	Administration of Industry and Commerce	Administration of Industry and Commerce for profitable foreign-invested medical institution
Authority		Civil affair bureau for non-profitable foreign-invested medical institution
Qualification	Legal person	Legal person
Requirements	Having direct or indirect healthcare investment or management experience	Having direct or indirect healthcare investment or management experience
for Parties to a	Being able to provide international advanced management experience,	
foreign-invested	modes, and service modes of medical institutions	
medical	Being able to provide international advanced medical technology and	
institution	equipment	
	Being able to make up or improve the inadequacy of local medical service	
	capacity, medical technology, funds, and medical facility	
Incorporation	Minimum investment amount of RMB20M	Minimum investment amount of RMB100M; for foreign-invested medical institution to be
Conditions		established in the central and western areas or in the old revolutionary-base, minority-inhabited,
		border/remote, or poor areas (老、少、边、穷地区) in China, minimum investment amount can be
		adjusted to RMB50M
	maximum term of foreign-invested medical institution of 20 years	Maximum term of foreign-invested medical institution of 30 years
	foreign ownership capped at 70%	Foreign ownership capped at 70%, but may be adjusted under discretion of approving authorities;
		establishment of wholly foreign-owned hospital will be opened gradually
Approval	Ministry of Health and Ministry of Commerce	Provincial agencies of Ministry of Health and Ministry of Commerce
Authority		
Timeline	Forty-five (45) working days for each of health approval procedure and	Twenty (20) working days for each of health approval procedure and commercial approval
	commercial approval procedure	procedure
Notarization	No notarization and legalization requirement on application documents	All application documents provided by foreign investor shall be notarized by local notary public and
and	provided by foreign investor	legalized by local PRC embassy or consulate
Legalization		

A comparison between the Interim Measure and the Draft Measure is attached to this legal commentary for your easy reference.

Conclusion

Right now the Draft Measure is soliciting public comments, and comments can be provided through http://www.chinalaw.gov.cn/article/cazjgg/201204/20120400363197.shtml. The deadline to respond is May 16, 2012, and the Draft Measure is expected to become effective within this year.

We understand the main purpose of revising the Interim Measure is to reflect the changes and spirit under the new Foreign Investment Industry Catalogue (2011), as well as several notices issued last year to simplify procedures on foreign investment to PRC healthcare industry, further reducing market entry obstacles. However, the Draft Measure indeed substantially raises thresholds in connection with entry of PRC medical industry by foreign investors, thereby potentially discouraging or restricting foreign investment to PRC healthcare industry, in particular investment to set up clinic, rather than full-service hospital, in China.

中外合资、合作医疗机构管理暂行办法

(2000年5月15日卫生部 对外贸易经济合作部令第11号发布)

(修订征求意见稿)

第一章 总则

第一条 为进一步适应改革开放的需要,加强对中外合资、合作医疗机构的管理,促进 我国医疗卫生事业的健康发展,根据《中华人民共和国中外合资经营企业法》、《中华人民共和国中
外合作经营企业法》、《医疗机构管理条例》等国家有关法律、法规,制定本办法。
第二条 本办法所称中外合资、合作医疗机构是指外国医疗机构、公司、企业和其他经济组织+(以下简称合资、合作外方+), 按照平等互利的原则,经中国政府主管部门批准,在中国境内+(了香港、澳门及台湾地区除外,下同+)与中国的医疗机构、公司、企业和其他经济组织+(以下简称合资、合作中方+)以合资或者合作形式设立的医疗机构。
第三条 申请在中国境内设立中外合资、合作医疗机构,适用本办法。
第四条 中外合资、合作医疗机构的经营性质可以为营利性或非营利性。
第五条 中外合资、合作医疗机构必须遵守国家有关法律、法规和规章。中外合资、合作医疗机构的正当经营活动及合资、合作双方的合法权益受中国法律保护。
第六条 第五条 卫生部和 对外贸易经济合作部(以下称外经贸部)<u>商务部</u>在各 自的职责 范围内负责全国中外合资、合作医疗机构管理工作。—
_ 第二章- 设-置-条-件
第七条 第六条 中外合资、合作医疗机构的设置与发展必须符合当地区域卫生规划和医疗机构设置规划,并执行卫生部制定的《医疗机构基本标准》。—
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申请设立中外合资、合作医疗机构的中外双方应是能够独立承担民事责任的法人 。合资、合作的中外双方应当<u>,并</u>具有直接或间接从事医疗卫生投资与管理的经验,并符合 下列要求之一:
(一)能够提供国际先进的医疗机构管理经验、管理模式和服务模式;
(二)能够提供且有国际领生水平的医学技术和设久。 (二)可以补充武改盖当地在医疗服久能

力、医疗技术、资金和医疗设施方面的个足 。
第九条 第八条 设立的中外合资、合作医疗机构应当符合以下条件: -
在我国中西部地区或老、少、边、穷地区设置中外合资、合作医疗机构的,可适当降低投资总额,但不得低于5000万元人民币;
(<u>五)省级以上卫生行政部门(五)法律、法规或规章</u> 规定的其他 <u>条件材料</u> 。
第九十条 合资、合作中方以国有资产参与投资 (包括作价出资或作为合作条件)) , 应当经相应主管部门批准,并按照国有资产评估管理有关规定,由国有资产管理部门确认的评估机构 对拟投入国有资产进行评估。经省级以上国有资产管理部门确认的评估结果,可以作为拟投入的国有 资产的作价依据。
合资、合作中方为非营利性医疗机构的,不得举办营利性中外合资、合作医疗机构。
第三章-设置审批与登记
第十条 <u>第十一条</u> 设置中外合资、合作医疗机构,应 先向所在地设区的市 当向省级工生行政部门提出申请,并提交以下材料:
(_() 设置医疗机构申请书;
(_(二))合资、合作双方法人代表签署的项目建议书及中外合资、合作医疗机构设置可行性研究报告;
(三)(三)医疗机构选址报告、建筑设计平面图以及土地使用、规划建设等方面的证明材料;

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和银行资信证明;

(四)合资、合作双方各自的注册登记证明+(复印件+)、法定代表人身份证明+(复印件+)

(五) 国有资产管理部门对拟投入国有资产的评估报告确认文件。

一 设区的市级卫生行政部门对申请人提交的材料进行初审,并根据区域卫生规划和医疗机构设置规划提出初审意见,并与申请材料、当地区域卫生规划和医疗机构设置规划一起报所在地省级卫生行政部门审核。

上述材料中,合资、合作外方提供的材料应当为本国语言或英语及中文两种文本,并经所在国公证认证以及中国驻申请人国籍所在国使(领)馆的认证。

第十一条 省级卫生行政部门对申请材料及设区的市级卫生行政部门初审意见进行审核 后报卫生部审批。

报请审批,需由省级卫生行政部门向卫生部提交以下材料:

- ·····(一)申请人设置申请材料;
- (二)设置地设区的市级人民政府批准发布实施的《医疗机构设置规划》及设置地设区的市级和省级卫生行政部门关于拟设置中外合资、合作医疗机构是否符合当地区域卫生规划和医疗机构设置规划的审核意见。
- (三)省级卫生行政管理部门关于设置该中外合资、合作医疗机构的审核意见,其中包括对拟 设置中外合资、合作医疗机构的名称、选址、规模(床位、牙椅)、诊疗科目和经营期限等的意见; (四)法律、法规和卫生部规定的其他材料。

<u>省级</u>卫生<u>行政部门</u>应当自受理之日起 <u>4520</u> 个工作日内,<u>对申请人提交的材料进行审核,并</u>根据区域卫生规划和医疗机构设置规划提出审核意见,作出批准或者不予批准的书面决定。

- 第十二条_ 申请设置中外合资、合作中医医疗机构+_(含中外合资、合作中西医结合医疗机构和中外合资、合作民族医医疗机构+)_的,按照本办法第十条和第十一条要求,经所在地设区的市级卫生行政部门初审和所在地的省级卫生行政部门审核,报国家中医药管理局审核后转报报省级中医药管理部门审核。省级中医药管理部门应当自受理之日起 20 个工作日内审核完毕,转报省级卫生行政部门审批。
- **第十三条**_ 申请人在获得<u>省级卫生行政</u>部<u>门</u>设置许可后,按照有关法律、法规向<mark>外经贸</mark> <u>省级商务</u>部<u>门</u>提出申请,并提交以下材料:
 - ((一 →) 设置申请申报材料及批准文件;
- (_(二<u>)</u>) 由中外合资、合作各方的法定代表人或其授权的代表签署的中外合资、合作医疗机构的合同、章程:
 - ←(三→) 拟设立中外合资、合作医疗机构董事会成员名单及合资、合作各方董事委派书;

(四)工商行政管理部门出具的机构名称预先核准通知书; (五)(四)法律、法规和外经贸部或规章规定的其他材料。

外经贸省级商务部门应当自受理申请之日起 4520 个工作日内,作出批准或者不<u>予</u>批准的书面决定;予以批准的,<u>发给颁发</u>《外商投资企业批准证书》。——获得批准设立的中外合资、合作医疗机构,应自收到外经贸部颁发的申请人应当自收到《外商投资企业批准证书》之日起 120 个月工作日内,凭此证书,按照规定到国家工商行政管理部门或民政部门办理注册登记手续。

设立非营利性医疗机构的,申请人应当自收到《外商投资企业批准证书》之日起 20 个工作 日内,通过商务部外资投资审批管理系统网络填写《外商投资非营利性医疗机构备案表》。

第十四条 申请在我国中西部地区或老、少、边、穷地区设置中外合资、合作医疗机构或申请设置的中外合资、合作医疗机构所提供的医疗服务范围和内容属于国家鼓励的服务领域,可适当放宽第七条、第八条规定的条件。 第十五条 获准设立的中外合资、合作医疗机构,应当按照《医疗机构管理条例》和《医疗机构管理条例实施细则》关于医疗机构执业登记所规定的程序和要求,向所在地省级卫生行政部门规定的卫生行政部门

<u>省级卫生行政部门根据</u>第十五条 符合国家外商投资项目管理规定的中外合资、合作医疗机构的类别和规模,确定省级卫生行政部门或设区的市级卫生行政部门受理中外合资、合作医疗机构业登记申请建设项目,应当按照规定办理核准手续。

第十六条 中外合资、合作医疗机构命名应当遵循卫生部发布的《医疗机构管理条例实施细则》规定。中外合资、合作医疗机构的名称由所在地地名、识别名和通用名依次组成<u>,并符合国</u>家相关规定。

第十七条—— 中外合资、合作医疗机构的校验,按照国家有关规定执行。

第十八条 申请人通过并购设置中外合资、合作医疗机构的,应当按照新设置中外合资、 合作医疗机构进行申请。

第十九条 中外合资、合作医疗机构不得设置分支机构。

第四章 变更、延期和终止

中外合资、合作医疗机构涉及合同、章程有关条款的变更,由所在地<mark>外经贸</mark>省级商务部门<mark>转报外经贸部</mark>批准。

第二十九二条 中外合资、合作医疗机构合资、合作期 20 年届满,因特殊情况确需延长合资、合作期限的,合资、合作双方可以申请延长合资、合作期限,并应当在合资、合作期限届满的

90 天前申请延期。延期申请经向省级卫生行政部门和外经贸商务部门提出延期申请。省级卫生行政部门审核同意后,报请卫生部和外经贸部审批。审批机关和商务部门自接到申请之日起 4520 个工作日内,作出批准或者不予批准的书面决定。

第二十三条_ 经批准设置的中外合资、合作医疗机构,应当在审批机关规定的期限内办理完有关登记注册手续; 逾期未能完成的,经审批机关核准后,撤销该合资、合作项目不能完成的,应当于有效期满前 30 天向省级卫生行政部门和商务部门提出延期登记注册申请。省级卫生行政部门和商务部门自接到申请之日起 20 个工作日内,作出批准或者不予批准的书面决定。未申请延期且逾期未能完成登记注册的,该批准自动失效。

第二十三条 中外合资、合作医疗机构合资、合作期满或者终止的,应当保护患者合法 权益,妥善安置职工,并按照有关规定进行资产处置。合资、合作终止的,还应当按照规定办理《医 疗机构执业许可证》注销手续。

第五章- 执业

第二十一四条 中外合资、合作医疗机构作为独立法人实体,自负盈亏,独立核算,独立承担民事责任。

第二十<u>二</u>五条 中外合资、合作医疗机构应当执行《医疗机构管理条例》和《医疗机构管理条例实施细则》中关于医疗机构执业的规定。

第二十三六条 中外合资、合作医疗机构必须执行医疗技术准入规范和临床诊疗技术规范,遵守新技术、新设备及大型医用设备临床应用的有关规定。

第二十四<u>七</u>条 中外合资、合作医疗机构发生医疗事故<u>损害争议的</u>,依照国家有关法律、法规处理。

鼓励中外合资、合作医疗机构通过参加商业保险等方式,保护医患双方合法权益。

第二十五<u>八</u>条_ 中外合资、合作医疗机构聘请外籍医师、护士<u>等</u>,按照《中华人民共和国执业医师法》和《中华人民共和国护士管理办法》等国家</u>有关规定办理。

第二十六九条 发生重大灾害、事故、疾病流行或者其他意外情况时,中外合资、合作 医疗机构及其卫生技术人员要服从卫生行政部门的调遣。

第二三十七条_ 中外合资、合作医疗机构发布本机构医疗广告,<mark>按照应当遵守</mark>《中华人民共和国广告法》、《医疗广告管理办法》办理等有关规定。

第二三十八一条 中外合资、合作医疗机构的医疗收费服务价格按照国家有关规定执行。

第六章—监 监督管理

第三十三条 县以上地方各级卫生行政部门负责本行政区域内中外合资、合作医疗机构的日常监督管理工作。

中外合资、合作医疗机构的《医疗机构执业许可证》每年校验一次,《医疗机构执业许可证》的校验由医疗机构执业登记机关办理。

第三十一四条 中外合资、合作医疗机构应当按照国家对外商投资企业的有关规定,接受国家有关部门的监督。

第三十二五条_ 中外合资、合作医疗机构违反国家有关法律、法规和规章,由有关主管部门依法查处。对于违反本办法的中外合资、合作医疗机构,县级以上卫生行政部门和外经贸商务部门可依据相关法律、法规和规章予以处罚。

第三十三六条 地方卫生行政部门和地方<mark>外经贸行政</mark>商务部门违反本办法规定,擅自批准中外合资、合作医疗机构的设置和变更的,依法追究有关负责人的责任。

中外各方未经<u>省级卫生行政</u>部<u>门</u>和<mark>外经贸省级商务</mark>部<u>门</u>批准,成立中外合资、合作医疗机构 并开展医疗活动或以合同方式经营诊疗项目的,视同非法行医,按<u>照</u>《医疗机构管理条例》和《医疗 机构管理条例实施细则》及有关规定进行处罚。

第七章 附则

第三十四条 第三十七条 香港特别行政区、澳门特别行政区、<u>的投资者在内地,</u>台湾地区的投资者在大陆投资举办合资、合作医疗机构的,参照本办法执行。

——**第三十五条** 申请在中国境内设立外商独资医疗机构的,不予以批准。

第三十六条 各省、自治区、直辖市卫生、外经贸行政部门可依据本办法,结合本地实际制订具体规定。 第三十七条 本办法由卫生部和外经贸部负责解释。及国家相关规定执行。

第三十八条—本规定自 2000 年 7 月 1 日起实施。 1989 年 2 月 10 日颁布的卫医字 [89] 第 3 号文和 1997 年 4 月 30 日颁布的 [1997] 外经贸发第 292 号文同时废止。 中外合资、合作医疗机构中的合资双方股权比例要求根据实际情况适时调整,并逐步放开外资独资医院的设置。

第三十九条 本办法自 2012 年××月××日起施行,《中外合资、合作医疗机构管理暂行办法》同时废止。

第四十条 本办法由卫生部和商务部负责解释。

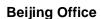


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