



Foreign Direct Investment Law

Brief Commentary on New Measures for FIE Record-Filings

Han Kun Corporate Team

On September 3, 2016, the *Decision of the Standing Committee of the National People's Congress on Amending Four Laws Including the Law of the People's Republic of China on Wholly Foreign-owned Enterprises* (the "**Decision**") was adopted at the twenty-second meeting of the 12th National People's Congress. The Decision amends the relevant approval clauses in the four laws,¹ whereby the establishment and alteration of foreign invested enterprises ("**FIEs**") not subject to special administrative measures for foreign investment will only be required to go through a record-filing process rather than case-by-case approvals. The Decision will come into effect on October 1, 2016, by which time the "pre-access national treatment plus negative list" administrative regime for foreign investment, which has been piloted in the free trade zones,² will be expanded nationwide.

On the same day, the Ministry of Commerce ("**MOFCOM**") released the *Interim Measures for Record-filing for the Establishment and Alteration of Foreign-invested Enterprises (Draft for Comment)* (the "**Draft**"), for the purpose of soliciting public opinions with a feedback deadline of September 22, 2016. The Draft, as an essential supporting document of the Decision, is also intended to take effect on October 1, 2016.

Abstract of the Draft

The Draft is composed of 5 chapters and 35 articles, generally follows the administrative

¹ Law of the People's Republic of China on Wholly Foreign-owned Enterprises, Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures, Law of the People's Republic of China on Sino-Foreign Cooperative Joint Ventures, and Law of the People's Republic of China on the Protection of the Investments of Taiwan Compatriots.

² China (Guangdong) Pilot Free Trade Zone, China (Tianjin) Pilot Free Trade Zone, China (Fujian) Pilot Free Trade Zone and China (Shanghai) Pilot Free Trade Zone.

framework for FIE record-filing that has been trial implemented in the free trade zones,³ and echoes the state policies of "streamlining administration", "contained deregulation" and "collaborative supervision". The main contents of Draft include:

- a. **Record-filing Administration for FIEs outside the Negative List**: FIEs not subject to the special administrative measures for foreign investment (i.e., the negative list), will only be required to go through a record-filing process, rather than to undergo case-by-case approvals. Record-filing with the competent department of commerce (the "**Record-filing Authority**") is not a prerequisite for FIE registration with the Administration for Industry and Commerce ("**AIC**").
- b. **Scope of Application**:
 - i. Wholly Foreign-Owned Enterprises, Sino-Foreign Equity Joint Venture Enterprises and Sino-Foreign Cooperative Joint Venture Enterprises;
 - ii. Enterprises established by investors in Hong Kong, Macau and Taiwan;
 - iii. Foreign-Invested Joint Stock Companies;
 - iv. foreign-invested holding companies, venture capital enterprises and equity investment enterprises.
- c. **Matters Subject to Record-filing**: The matters subject to record-filing are FIE establishments and alterations. FIE alterations include: general FIE and FIE investor information changes; changes to equity (shares) and cooperative interests (including pledges of equity); mergers, divisions and terminations; outward mortgages and transfers of property rights and interests in foreign invested companies; early withdrawal of foreign partner investments in Sino-Foreign Cooperative Joint Venture Enterprises; and entrusting the operation and management of the Sino-Foreign Cooperative Joint Venture Enterprises to third parties.
- d. **Flexible Timeline for Record-filing**: Record-filing mainly becomes a post-event procedural requirement:
 - i. record-filing for the establishment of FIEs may be conducted before the establishment (i.e., after obtaining pre-approval for the enterprise name and before issuance of the business license);
 - ii. record-filing for FIE alterations may be conducted within 30 days after the highest authority within the FIE has adopted the relevant resolution or decision;
 - iii. FIEs that have been approved and established before the implementation of the new

³ Measures for Record-filing Administration of Foreign Investment in Pilot Free Trade Zones (for Trial Implementation) promulgated by MOFCOM on April 8, 2015.

measures will only be required to go through the record-filing process for actual FIE alterations that occur, at which time the FIE's approval certificate will become invalid.

e. **Record-filing Procedures:**

- i. the Record-filing Authority will process the filing via the comprehensive foreign investment management information system (hereinafter referred to as the "**Record-filing System**"), which allows for online record-filing to be performed;
- ii. if the reported information is complete and accurate, the Record-filing Authority shall complete the record-filing procedure within three working days, and shall release the record-filing results through the Record-filing System and inform the FIEs or their investors online.

f. **Concurrent and Post-Event Supervision:** Although pre-approval for FIE establishment and alterations has been abolished, the Record-filing Authority may conduct supervision concurrent with or subsequent to the filing event, such as regular random inspections, whistleblower-based inspections, inspections according to the suggestions and feedback by relevant departments or judicial organs, and inspections initiated based on administrative authority. In the meantime, Record-filing Authorities will closely cooperate and enhance information sharing with public security departments, state-owned asset departments, customs departments, taxation departments, industry and commerce departments, and securities, foreign exchange and other relevant administrative departments. If the Record-filing Authority discovers illegal acts by the FIEs or their investors that are not within its jurisdiction, it shall promptly report to the competent authority.

g. **Legal Liability and Consequences:** According to the Draft, FIEs and their investors shall bear legal liability if they violate record-filing obligations, conduct investment and operating activities relating to the industries falling within the negative list, or do not cooperate with the supervision and inspection process. In addition, the credit status of the FIEs and their investors will be recorded in the foreign investment credit file system operated by MOFCOM, and made public via MOFCOM's foreign investment information publicity system.

Brief Commentary

Upon the promulgation of the Decision and the release of the Draft for Comment, the administrative regime of "pre-access national treatment plus negative list" for foreign investment, which has been piloted and tested in the free trade zones, will be formally implemented on a national scale in less than one month. At that time, FIE establishments and alterations that are not subject to the special administrative measures for foreign investment will only be required to go through a standardized and simplified record-filing process, rather than case-by-case approval. Naturally, this is excellent news for FIEs currently falling within the "Encouraged"

and "Permitted" categories, which account for the great majority of FIEs in China. In addition, the administrative uncertainty arising from the case-by-case approval regime will also be substantially mitigated. There is no doubt this innovative measure will facilitate the FIE establishment procedures as well as structure the foreign investment regulatory system that is geared to international standards, so as to cultivate a more liberal and transparent investment environment for foreign investors. In addition, the pending release of the negative list for foreign investment is also expected to synergize with the ongoing reform of the market entry negative list that is intended to apply to all types of enterprises nationally. A new mechanism is taking shape by which FIEs will initially be subject to a pre-access negative list that will provide for national treatment, which will result in FIEs then being treated the same as domestic entities during the application of a market entry negative list.

Notably, the Decision and the Draft still insert the negative list mechanism into the current FIE laws, which is reminiscent of the "*Foreign Investment Law of the People's Republic of China (Draft for Comment)*", promulgated by MOFCOM in January, 2015 ("**Draft Foreign Investment Law**"). The Draft Foreign Investment Law is considered to have the historic task of breaking down the current legislative model whereby the trio of FIEs laws and the Company Law are mutually exclusive from each other, as well as to introduce a series of innovative regulatory mechanisms. The Decision and the Draft promote the negative list regime nationwide without breaking the current legislative model. To some extent, this can be seen as a progressive implementation of some of the innovative measures of the Draft of Foreign Investment Law, while on the other hand signals that certain key reforms proposed in the Draft Foreign Investment Law (e.g., the validity of the VIE structure) are still under advisement or need to be further modified, and there is no timetable for the formal pronouncements on these issues in the near term. Nevertheless, the current promotion of the negative list regime nationwide still has landmark significance for transforming the regulatory framework for foreign investment.

The *Interim Measures for Record-filing for the Establishment and Alteration of Foreign-invested Enterprises* is set to be formally implemented as of October 1, 2016, by which time the special administrative measures for foreign investment (i.e., the negative list) will also be made public and implemented, which will replace the current *Catalogue of Industries for Guiding Foreign Investment*. However, based on the practice in the Shanghai Free Trade Zone, the negative list may have few differences compared to the current *Catalogue of Industries for Guiding Foreign Investment*, and thus the prospect for the significant expansion of access for foreign investment is not promising. Furthermore, before the debut of the Foreign Investment Law, the negative list regime will still need to be harmonized with a large number of current FIE-related laws and regulations (such as the regulations for FIE equity changes, mergers or divisions, equity interest capital contributions, and mergers and acquisitions by foreign investors), which will be gradually refined in the course of practice and which may also reveal new issues. We will continue to monitor these legislative and regulatory changes.

● **Important Announcement**

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If you have any questions regarding this publication, please contact **Mr. David Tang (+86-21-6080 0905; david.tang@hankunlaw.com)**, **Ms. Jun Li (+86-21-6080 0981; jun.li@hankunlaw.com)** or **Mr. Min Zhu (+86-21-6080 0955; min.zhu@hankunlaw.com)**.