

## MOFCOM Removes Capital Contribution Restrictions on Foreign Investments in China

On 17 June 2014 the Ministry of Commerce of China (MOFCOM) issued the *Notice on the Improvement of Foreign Investment Approval and Administration Matters* (《关于改进外资审核管理工作的通知》) (“Notice”), confirming that the company registration system reform introduced in China earlier this year applies equally to foreign-invested enterprises (FIEs).

Amendments to the PRC Company Law, which came into effect on 1 March 2014, introduced significant changes to the registered capital system of companies incorporated in China. These changes include: (i) change from a paid-in capital to a subscribed capital system, (ii) removal of minimum registered capital thresholds, (iii) removal of the statutory timeline for capital contribution, (iv) removal of the 30 percent minimum cash contribution requirement, (v) removal of the capital verification requirement, and (vi) removal of the annual inspection requirement.

### Main Points of the Notice

Since the amendments to the PRC Company Law were issued, the State Administration for Industry and Commerce of China (SAIC) has promulgated various regulations for implementing the amendments. The Notice is the first document issued by MOFCOM that officially confirms the equal applicability of the PRC Company Law amendments to FIEs, which fall under the regulatory regime of MOFCOM. The main points of the Notice are as follows:

#### (I) NO SPECIFIC REQUIREMENT ON THE FORM OR TIMING OF CAPITAL CONTRIBUTION

The Notice provides that investors of FIEs may freely choose the form and timing of their capital contribution.

The form and schedule of capital contribution may be agreed by investors in the joint venture contracts and/or articles of associations, which are then subject to the approval of the competent authorities.

#### (II) THE MINIMUM REGISTERED CAPITAL REQUIREMENTS REMOVED

Except those industries which are expressly required to have a minimum registered capital under applicable laws and regulations or requirements by the State Council of China, the previous statutory minimum capital requirements of RMB 30,000 to incorporate a limited liability company (RMB 100,000 for a sole shareholder limited liability company) and RMB 5 million for a joint stock company, shall be removed.

#### (III) FROM “PAID-IN CAPITAL” TO “SUBSCRIBED CAPITAL”

The authorities will no longer verify the paid-in capital of an FIE, which is also not required to be registered with SAIC.

#### (IV) FILING OF THE INVESTMENT CERTIFICATE WITH THE LOCAL APPROVAL AUTHORITY

After completion of capital contribution by its investors, an FIE shall, within 30 days after issuance of the corresponding investment certificates to its investors, file such investment certificates (duly affixed with the company chop of the FIE) with the local approval authority, together with relevant supporting documents. The supporting documents may be bank receipts in case of cash contribution, title certificates, transfer agreements and valuation reports in case of contribution by intangible assets, or evidence of inspection and acceptance of assets, valuation and title evidence in case of other in-kind contribution.

## Other Clarifications

### (I) TOTAL INVESTMENT AND REGISTERED CAPITAL OF FIEs REMAIN UNCHANGED

Chinese law provides FIEs shall have a “total investment”, which is the combination of registered capital and foreign debt financing. The ratio between registered capital and total investment is stipulated by law. The difference between the total investment and registered capital of an FIE represents the foreign debt quota to which it is entitled. When the amendments to the PRC Company Law were promulgated earlier this year, it was not entirely clear whether the total investment concept for FIEs would also be changed in view of the reform of the registered capital system. The Notice clarifies this issue by explicitly providing that the ratio between an FIE’s total investment and registered capital shall comply with the currently applicable regulations such as the *Interim Measures of the Ratios between the Registered Capital and Total Investment of a Sino-foreign Equity Joint Venture* (《关于中外合资经营企业注册资本与投资总额比例的暂行规定》). In other words, the concepts of total investment and foreign debt quota will remain unchanged.

### (II) TRANSITIONAL ARRANGEMENT

According to the Notice, investors of FIEs that were approved prior to 1 March 2014 shall continue to perform their capital contribution obligations in accordance with the approved joint venture contracts and articles of associations. The Notice provides that investors may apply to the competent authorities for approval if any changes to the approved capital contribution obligations are required.

## Implications for FIEs

While acknowledging that the amendments to the PRC Company Law shall equally apply to FIEs, the Notice also serves to confirm that FIEs are subject to a different regulatory regime from domestic companies. As a result, the benefits that FIEs may enjoy as a result of the PRC Company Law amendments may not be as significant as they would hope for. In particular:

- Any changes to the approved capital contribution requirements should be submitted to the original approval authority for approval. It remains to be seen whether the local approval authorities will indeed allow enterprises to make amendments that are compliant with the amended PRC Company Law, for instance, by reducing the registered capital and by removing the capital contribution deadline.
- The total investment concept remains unchanged. Therefore, even if FIEs are technically allowed to have a nominal registered capital, a low registered capital amount will mean that the FIEs can only have a limited foreign debt quota.
- Although the requirement of capital verification by a qualified accountant has been removed, the Notice stipulates that once capital has been contributed, an FIE should submit to the local approval authority a copy of the investment certificate issued by the FIE to its investors as well as evidence of the capital contribution. This means that the verification procedure is not completely removed.

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