
China Reforms Its Registration System for Foreign Investment

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On October 8, the Ministry of Commerce (“MOFCOM”) issued the Provisional Measures for Filing Administration of Establishment and Changes of Foreign-Invested Enterprises (“FIEs”) (“Filing Administration Measures”).¹ The Filing Administration Measures are based on the Decision of the Standing Committee of the National People’s Congress on the Revision of Four Laws Including the Law on Wholly Foreign-Owned Enterprises issued on September 3 (“Revision Decision”).² Together, the two documents simplify the procedures for establishment, amendment and termination for FIEs in industries other than those listed in the special entry administration measures (the “National Market Access Negative List”). We summarize below the key features of the Filing Administration Measures.

1. Scope of Filing Administration

Article 2 of the Filing Administration Measures provides that the filing administration applies to the establishment and changes of FIEs other than those that are subject to the special entry administration measures stipulated by the State, i.e., outside the National Market Access Negative List.

On October 8, the National Development and Reform Commission and MOFCOM jointly issued an announcement stipulating that the scope of the National Market Access Negative List consists of the Restricted and Prohibited categories specified in the Catalogue of Industries for Guiding Foreign Investment (2015 Revision) (the “Catalogue”),³ and industries specified in the Encouraged category in which equity or senior management-related requirements are imposed.⁴ Relevant existing regulations remain applicable to the establishment and change of enterprises incorporated by foreign parties through mergers and acquisitions across all industries.

Therefore, foreign investment in the Restricted and Prohibited categories in the Catalogue, as well as the Encouraged category with equity or senior management requirements, will continue to be subject to the approval and registration regime, regardless of investment amount or investment type (greenfield investment or M&A). The acquisition of domestic non-FIEs by foreign investors will continue to be subject to the Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors. Where listed companies are involved, the Measures for the Administration of Strategic Investment in Listed Companies by Foreign Investors apply. All other forms of foreign

investment shall be subject to the simpler filing administration procedure.

2. Filing Administration Procedure

Article 5 of the Filing Administration Measures provides that for the establishment of an FIE which falls within the filing scope, after having obtained pre-approval of the name of the enterprise, application materials need to be submitted online either prior to the issuance of business license or within 30 days thereafter. Article 6 provides that the filing for changes after the FIE has been established needs to be carried out within 30 days after the occurrence of the change. Article 11 provides that filing authorities shall verify the registration application only for completeness and accuracy, and determine whether the application matters fall within the filing scope. If so, the filing authority is obligated to complete the filing procedure within three working days.

Fundamentally different from the previous approval and registration regime, filing administration does not require that the filing authority substantively review and examine the application materials, and the filing is no longer a pre-condition for undergoing other formalities, such as business license, bank account and tax registration.

3. Disclosure Requirement

Certain disclosure requirements under the Filing Administration Measures are more extensive than under the previous approval regime, which still applies to the Restricted and Prohibited categories of industries as well as some industries in the Encouraged category. For example, Articles 5 and 6, as well as the ancillary application forms, require the entry of information regarding the ultimate effective controllers of the FIE and its investors, and the territorial source of funds. “Control” is widely defined and includes direct or indirect de facto control through shareholding, contract, trust or other means.

In short, the Filing Administration Measures constitute a significant simplification of regulations governing foreign investment in those industries not subject to more extensive review. While the investment catalogue structure governing foreign investment is retained, the Filing Administration Measures extend the nationwide negative list administrative model already adopted in the four pilot free trade zones of Shanghai, Tianjin, Guangdong and Fujian.

The Filing Administration Measures do not, however, signify a narrowing of the negative list so foreign investors in many industries, including some of those that are most attractive to foreign investors, will continue to be subject to approval requirements. As such, China will continue to be pressed by major trading partners to offer a narrower negative list as a condition to conclusion of investment treaties

¹ See <http://tfs.mofcom.gov.cn/article/bc/201610/20161001404965.shtml>.

² See http://www.npc.gov.cn/npc/xinwen/2016-09/03/content_1996747.htm. The other three laws are Law on Sino-Foreign Equity Joint Ventures, Law on Sino-Foreign Co-Operative Enterprises, and Law on the Protection of Investment by Taiwanese Compatriots.

³ See <http://www.mofcom.gov.cn/article/b/c/201503/20150300911747.shtml>.

⁴ See <http://www.mofcom.gov.cn/article/h/zongzhi/201610/20161001405285.shtml>.

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