

China set to introduce key national foreign investment law reforms in October 2016.

Overview

- The National People's Congress ("NPC") Standing Committee adopted significant amendments to China's wholly foreign-owned enterprise and Sino-foreign joint venture (collectively, foreign-invested enterprise or "FIE") laws on 3 September 2016.
- The amendments replace existing Ministry of Commerce ("MOFCOM") approval requirements with filing requirements, for all FIEs (provided they are not subject to national market access restrictions). On the same day, MOFCOM published draft rules (with consultation period ending on 22 September 2016) outlining the essential features of this new filing regime. The draft rules, if implemented in their present form, will shorten the processing time and enhance certainty of transactions involving these FIEs.
- The new regime builds on, and replaces, the negative list system (currently in place in the four free trade zones ("FTZs") of Shanghai, Tianjin, Guangdong and Fujian) from 1 October 2016. In the FTZs, for FIEs not within the negative list, the foreign investment approval regime has already been replaced by a filing regime administered by the FTZ authorities.
- MOFCOM is expected to issue a new nationwide negative list (which will set out the national market access restrictions) in parallel with the implementation of the new system on 1 October 2016, replacing the negative list in the FTZs. The publication of this list is fundamental to how the new regime will operate, as it will determine which sectors and which matters are covered by the new filing requirements, and which items continue to require approval.

The key features of the new regime, from the draft rules, are:

- All newly-established FIEs must be filed with the provincial or city MOFCOM (or the relevant bureau in the FTZs) ("Local MOFCOM"). The filing must be made after the pre-registration approval of the FIE's name and is made either before the issue of the FIE's business licence

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by a representative of all the investors, or within 30 days after the issue of the FIE's business licence by a representative of the FIE.

- If a FIE (including a FIE established before 1 October 2016) undergoes a change in certain key details including the following, it must file the change with Local MOFCOM within 30 days of the change occurring: (i) basic FIE information including name, address, form, term, industry, nature and scope of business, nature of project, registered capital, total investment, organisational structure, legal representative, details of ultimate effective controller and contact details; (ii) basic information on the FIE's investors including name, nationality, address, certificate, amount, term and form of investment, territorial source of funds and investor type; (iii) shareholding and pledges of shareholding; (iv) merger, division and termination. The filing requirement is triggered when the change is adopted by resolution of the competent organ of the FIE (unless regulations provide otherwise). If the change triggers a requirement subject to national market access restrictions (for example, the business scope is extended to include a sector in the negative list), then it is subject to approval, and the filing regime does not apply.
- If a filing is confirmed by Local MOFCOM to be outside the negative list and with no further information required to be submitted, Local MOFCOM must issue a notification of completion of filing within 3 working days of submission, thus significantly shortening the processing time (for example, for a new establishment under the Sino-Foreign Equity Joint Venture Law Implementing Rules, a decision is required within three months of receipt of complete documentation).
- The new regime imposes more extensive information requirements than the current foreign investment approval regime in several respects, such as the requirements for information on the FIE's and investors' ultimate effective controllers to be filed on the new establishment of a FIE, and territorial source of funds (in both cases, "control" is widely defined and includes shareholding control, effective control of decision-making bodies and control of business decisions, human resources, finance and technology).
- Importantly, as a change in certain particulars (see above) triggers the new filing requirements, an offshore transaction resulting in a change of a FIE's ultimate effective controller needs to be filed with Local MOFCOM. Also, MOFCOM had previously sought (in the Draft Foreign Investment Law published in January 2015) to require approval of any offshore change of control of FIEs in sectors with market access restrictions (including certain variable interest entities). Accordingly, further regulation of offshore transfers of effective interests in FIEs cannot be ruled out.
- A key change introduced by the new regime is that the completion of the filing is not, unlike the previous approval requirements, a condition of effectiveness of the establishment or change of particulars of the

relevant FIE. Instead, if the FIE or its investors do not make the filing, they could be ordered by Local MOFCOM to rectify and fined up to RMB 30,000. However, if the FIE is subject to national market access restrictions, regulatory approval is still required for the establishment or changes to be effective.

- We expect these changes to promote, for FIEs not subject to national market access restrictions, the use of certain cross border financing structures which previously required MOFCOM approval but will now require filings only. For example, structures involving:
 - the granting of security over equity in such FIEs; or
 - the enforcement of an equity interest purchase undertaking to effect transfers of equity in such FIEs from an offshore parent to an onshore parent.
- No provision is made for the information filed with Local MOFCOM (which will be stored in a nationwide online system) to be made publicly available. However: (i) the FIE and its investors are to have access to the information filed; and (ii) Local MOFCOM may publicly release, through MOFCOM's nationwide FIE reporting network, details of non-compliance with the filing regime by the FIE and its investors.
- Local MOFCOM is required to monitor compliance with the national security regime and notify MOFCOM of any non-compliance.

Reference:

[Decision to Amend Four Laws including the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises \(全国人民代表大会常务委员会关于修改《中华人民共和国外资企业法》等四部法律的决定\)](#), NPC Standing Committee, 3 September 2016

[Provisional Administrative Rules on Foreign Invested Enterprises' Establishment and Changes \(Draft for Comments\)](#) (商务部关于《外商投资企业设立及变更备案管理暂行办法》(征求意见稿)公开征求意见的通知), MOFCOM, 3 September 2016

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