

# China reforms her foreign direct investment regulatory regime

On 3 September 2016, China's Standing Committee of the National People's Congress (NPCSC) adopted a resolution (Resolution) to abolish the current examination and approval regime applicable to the establishment of most foreign-invested enterprises (FIEs) in China. On the same day, the Ministry of Commerce (MOFCOM) published a set of draft measures to implement the change. Both developments represent a major milestone moving towards a simplified regime for regulating foreign direct investment in China.

## **NPCSC's Resolution**

According to the Resolution, certain provisions of the *Law on Sino-foreign Equity Joint Venture* (EJV Law), the *Law on Sino-foreign Cooperative Joint Venture* (CJV Law), the *Law on Wholly Foreign-owned Enterprise* (WFOE Law) and the *Law on Protection of Taiwanese Investment in Mainland China* (Taiwanese Investment Law) will be amended with effect from 1 October 2016.

These amendments generally provide that an FIE may be established by way of mere filing with the relevant foreign investment authority, so long as the industry in which it engages is not subject to any special access restriction imposed by the State. The State Council will issue a "negative list" (负面清单), which may be adjusted from time to time, to set out the industries in which FIE establishment must still be examined and approved under existing laws and regulations.

In the past couple of years, FIEs established in the free trade zones in

Shanghai, Tianjin, Guangdong and Fujian with business activities outside the "negative list" were only subject to filing under a pilot scheme. In contrast, current EJV Law, CJV Law, WFOE Law and Taiwanese Investment Law require the establishment of all other FIEs to be subject to the examination and approval of the relevant foreign investment authority. The same stringent requirement applies if the FIE undergoes "major changes", such as the increase or decrease of total investment/registered capital, change of business scope, transfer of equity interest or the creation of any encumbrance on the equity interest, and its merger, splitting or dissolution etc.

The amendment under the Resolution has the significant effect of extending the pilot scheme from the free trade zones to nationwide. The more relaxed "filing" requirement will replace the "examination and approval" procedures in the formation and change of key particulars of FIEs.

## **MOFCOM's Consultation Draft**

On 3 September 2016, MOFCOM issued a draft of the *Interim Measures on Administration of Filing for the Establishment of and Changes in FIEs (Consultation Draft)* for the implementation of the NPCSC amendment. The Consultation Draft is now available for public consultation until 22 September 2016.

The Consultation Draft addresses the following key points:

- the filing procedure can be completed within 30 days after the incorporation of the FIE or upon the occurrence of the change of company particulars;
- the PRC authorities will tighten post-investment supervision. If an FIE or its investor fails to duly complete the filing procedure, or if it conducts business in a sector under the "negative list" without pre-approval or in which foreign investment is prohibited, or if it fails to cooperate with the relevant authorities' supervision, penalties and other punishment

such as public disclosure of the non-compliance may be imposed; and

- the information of the ultimate controller of the FIE and any subsequent change must be filed with MOFCOM.

### What next

In order to conform with the changes under the Resolution, it is anticipated that MOFCOM may further amend (or, in some cases, repeal) a number of ministry-level regulations which it has published in the past. These regulations may relate to the establishment and change of foreign-invested companies limited by shares, foreign-invested holding companies, change of equity interests in foreign-invested enterprises, and merger and acquisition involving the establishment or change of foreign-invested enterprises etc. Similarly, it

is possible that other government authorities that regulate foreign investment, including the State Administration for Industry and Commerce and the State Administration of Foreign Exchange, may streamline their administrative roles in regulating foreign direct investment. The Resolution may therefore, very likely, trigger a major systematic reform in China's regulatory regime of foreign direct investment.

This is a significant legal development in the FDI arena. We will stay close to latest legislative developments and keep you updated on major changes.

## Contacts



### [Kelly Gregory](#)

Partner

T: 86 21 2320 7234

Email:

[kelly.gregory@cliffordchance.com](mailto:kelly.gregory@cliffordchance.com)



### [Glen Ma](#)

Partner

T: 86 212320 7217

Email:

[glen.ma@cliffordchance.com](mailto:glen.ma@cliffordchance.com)



### [Yang Tiecheng](#)

Partner

T:86 10 65352265

Email:

[tiecheng.yang@cliffordchance.com](mailto:tiecheng.yang@cliffordchance.com)



### [Ge Yin](#)

Counsel

T: 86 21 23207202

Email: [yin.ge@cliffordchance.com](mailto:yin.ge@cliffordchance.com)



### [Yang Yi](#)

Counsel

T: 86 21 23207201

Email: [yi.yang@cliffordchance.com](mailto:yi.yang@cliffordchance.com)

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

The above is based on our experience as international counsel representing clients in their business activities in China. As is the case for all international law firms licensed in China, we are authorised to provide information concerning the effect of the Chinese legal environment, however we are not permitted to engage in Chinese legal affairs in the capacity of a domestic law firm.

Should the services of such a firm be required, we would be glad to recommend one.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, 33/F, China World Office 1, No. 1 Jianguomenwai Dajie, Chaoyang District, Beijing 100004, People's Republic Of China  
Clifford Chance, 40th Floor, Bund Centre, 222 Yan An East Road, Shanghai 200002, People's Republic of China

© Clifford Chance 2016

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta\* ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

\*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.