

MOFCOM issued formal rules for the reformed foreign direct investment regime

On 8 October 2016, MOFCOM promulgated the *Interim Measures on Administration of Filing for the Establishment of and Changes in Foreign-invested Enterprises* (FIE Measures) after taking into consideration the public comments it received on the consultation draft (Consultation Draft). The provision of the FIE Measures are largely identical to the Consultation Draft, and are promulgated to implement the resolution of the Standing Committee of the National People's Congress (Resolution) which abolishes the existing examination and approval regime on establishing most foreign-invested enterprises (FIEs) in China.

On the same day, MOFCOM also issued a circular jointly with the National Development and Reform Commission to confirm that the current "negative list" (*i.e.* industrial sectors that cannot benefit from the new filing-based regulatory regime) includes industrial sectors under the "prohibited category", "restricted category" and those within the "encouraged category" that are subject to shareholding and/or senior management requirements under the *Catalogue for the Guidance of Foreign Investment Industries (Amendment in 2015)*.

New under the FIE Measures

Based on the Consultation Draft, the FIE Measures further clarify the following issues:

- if any matter subject to filing also triggers a public announcement requirement, the filing should cover the information relating to such public announcement;
- for listed companies or non-listed public companies (*i.e.* NEEQ listed SMEs), the filing obligation will only be triggered where a foreign shareholder's shareholding changes by more than 5% in aggregate, and/or the controlling or comparative controlling status changes in such companies;
- all filing documents should be in the Chinese language or have a corresponding quality Chinese translation attached;
- if an FIE/foreign investor is included in MOFCOM's blacklist,

MOFCOM will only remove it from the blacklist in three years' time provided that the non-compliance has been remedied and that the FIE/foreign investor has not committed any new violation during this period.

Effective date and transitional arrangements

The FIE Measures took effect on 8 October 2016, its promulgation date. The FIE Measures also provide transitional arrangements for applications that have been lodged but awaiting completion of procedures with MOFCOM and/or its local counterparts. It provides that where such an application falls within the scope of filing according to the FIE Measures, the applicant should proceed with the filing procedures under the FIE Measures instead.

Pending issues

Although the Consultation Draft requires "equity pledge" to be subject to filing, the FIE Measures have apparently removed this requirement. Although "equity pledge" may be considered to be an "equity change", the removal of the term "equity pledge" raises doubt as to whether MOFCOM would issue separate rules for equity pledges.

The Consultation Draft provides that foreign-invested investment companies, foreign-invested venture capital companies and foreign-invested private equity companies are

treated as foreign investors under the new regulatory regime. The FIE Measures however reduce the coverage of the above definition, namely, "investment-type FIEs", to just foreign-invested investment companies and venture capital companies. The lack of reference to "foreign-invested private equity companies" has raised a lot of questions in the market, and we believe that the change may also be related to the rules on foreign exchange control (such as those on the use of capital funds, etc.) as well as the qualified foreign limited partner (QFLP) regime.

Since MOFCOM requires FIE filings to disclose the ultimate controller, it remains to be seen how this disclosure requirement would reconcile with the regulatory regime of "round-trip" investment in the case where an FIE is ultimately controlled by Chinese national(s).

We will continue to monitor latest developments in this area and provide updates on major changes.

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