

Updates on the New Rules for Establishment and Changes of Foreign-invested Enterprises

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On 8 October 2016, the Ministry of Commerce of the People's Republic of China (hereinafter "MOFCOM") promulgated the "Interim Administrative Measures for the Record-filing of the Establishment and Change of Foreign-invested Enterprises (the "FIEs")" (hereinafter the "New Rules")¹. The New Rules specify that with effect from the date of issuance, for the FIEs not subject to the special administration measures on market entry (alternatively, the "Negative List"²) all over the country, corporate establishment and changes can be conducted simply by completing the record-filing procedure (hereinafter the "Record-filing Regime"). Prior regulatory approval from the MOFCOM is no longer required.

Besides, scope of the Negative List which is not applicable to record-filing, as well as the procedures for corporate registration under the Record-filing Regime are also clarified by different authorities on the same date.

BACKGROUND

The Record-filing Regime has been currently running solely in the 4 Free Trade Zones (hereinafter the "FTZs"). With the aim to smoothly expand it to the whole country, the MOFCOM issued a draft of the New Rules (hereinafter the "Draft")³ in early September for public comments. Eligible entities, record-filing procedures, administration and supervision, as well as the legal responsibility have been specified in the Draft.

HIGHLIGHTS

The core of the New Rules remains unchanged. For FIEs not subject to the Negative List all over the country, corporate establishment and changes can be processed by record-filing instead of obtaining prior approval from the MOFCOM.

Meanwhile, several amendments and clarifications have been made based on public comments to the Draft, and the key points will be elaborated in the following section.

¹ MOFCOM (8 Oct 2016). Retrieved from: http://www1.www.gov.cn/xinwen/2016-10/09/content_5116164.htm

² The "Negative List" lists out the restricted or prohibited industries for foreign investment by the Chinese government. FIEs are allowed to invest and operate in any sectors not on the Negative List without approval.

³ Details could be referred to New Focus No.11 2016 published by BTMU, Hong Kong Branch. http://rmb.bk.mufg.jp/files/topics/371_ext_02_en_0.pdf

Negative List

While FIEs located in the four FTZs will continue to apply to the FTZs version of Negative List⁴, FIEs located outside the FTZs will apply to the nationwide version. According to the announcement jointly made by National Development and Reform Commission (hereinafter "NDRC") and MOFCOM⁵, **the nationwide version of Negative List include the i) restricted sectors, ii) prohibited sectors, as well as iii) those with specific requirements on shareholding and top management in the encouraged sectors listed on the "Catalogue for the Guidance of Foreign Investment Industries (Amended in 2015)"⁶**. FIEs subject to the Negative List still need to seek for MOFCOM's prior approval.

Corporate establishment and/or changes in relation to merger and acquisitions (hereinafter "M&A") should be carried out in accordance with the existing relevant regulations. For instance, an FIE merging with and/or acquiring a domestic non-FIE should comply with the "Provisions on M&A of Domestic Enterprises by Foreign Investors"⁷. Nevertheless, the corporate changes after the M&A is completed, record-filing can be conducted if the FIEs are not subject to the Negative List.

Corporate Changes for Record-filing

Record-filing is required in case of corporate changes as follows:

- 1) Basic corporate information, including name, address, corporate type, duration of operation, investment industry, business type, business scope, **whether or not the FIEs qualify for tax reduction or exemption on imported equipment**⁸, registered capital, total investment, organisation structure, legal representative, details of ultimate effective controller of the FIE, contacts and contact person;
- 2) Investors' basic information, including name, nationality, address, certificate, amount of capital contribution, term and form of investment, territorial source of funds and investor type;
- 3) Equity (shares), interests in cooperation;
- 4) Merger, division and termination;
- 5) Pledge of assets of a wholly foreign-owned enterprise;
- 6) Early recoupment of investment by a foreign investor of a Sino-foreign cooperative enterprise;
- 7) Entrustment management of a Sino-foreign cooperative enterprise.

In case of merger, division, capital decrease or other corporate changes where announcement should be made as required by relevant laws and regulations, situation of the announcement made shall be declared during the record-filing procedure.

For FIEs which are listed companies or those listed on the National Equities Exchange and Quotations (NEEQ)⁹, record-filing is not required if the changes in shareholding ratio of the foreign investor is less than 5%, or if there are no changes in absolute or relative ownership levels.

⁴ The State Council of the People's Republic of China (8 Apr 2015). Special Administration Measures on Market Entry for Foreign Investment (Negative List) in the FTZs. Retrieved from: http://www.gov.cn/zhengce/content/2015-04/20/content_9627.htm

⁵ NRDC & MOFCOM (8 Oct 2016). No.22 Order of NRDC & MOFCOM, 2016. Retrieved from: <http://www.mofcom.gov.cn/article/h/zongzhi/201610/20161001405285.shtml>

⁶ NDRC & MOFCOM (10 Mar 2015). No.22 Order of NRDC & MOFCOM, 2015. Retrieved from: http://www.fdi.gov.cn/1800000121_39_4830_0_7.html

⁷ MOFCOM (22 Jun 2009). No.6 Decree of MOFCOM, 2009. Retrieved from: <http://tradeinservices.mofcom.gov.cn/en/b/2009-06-22/76729.shtml>

⁸ Newly added comparing to the Draft.

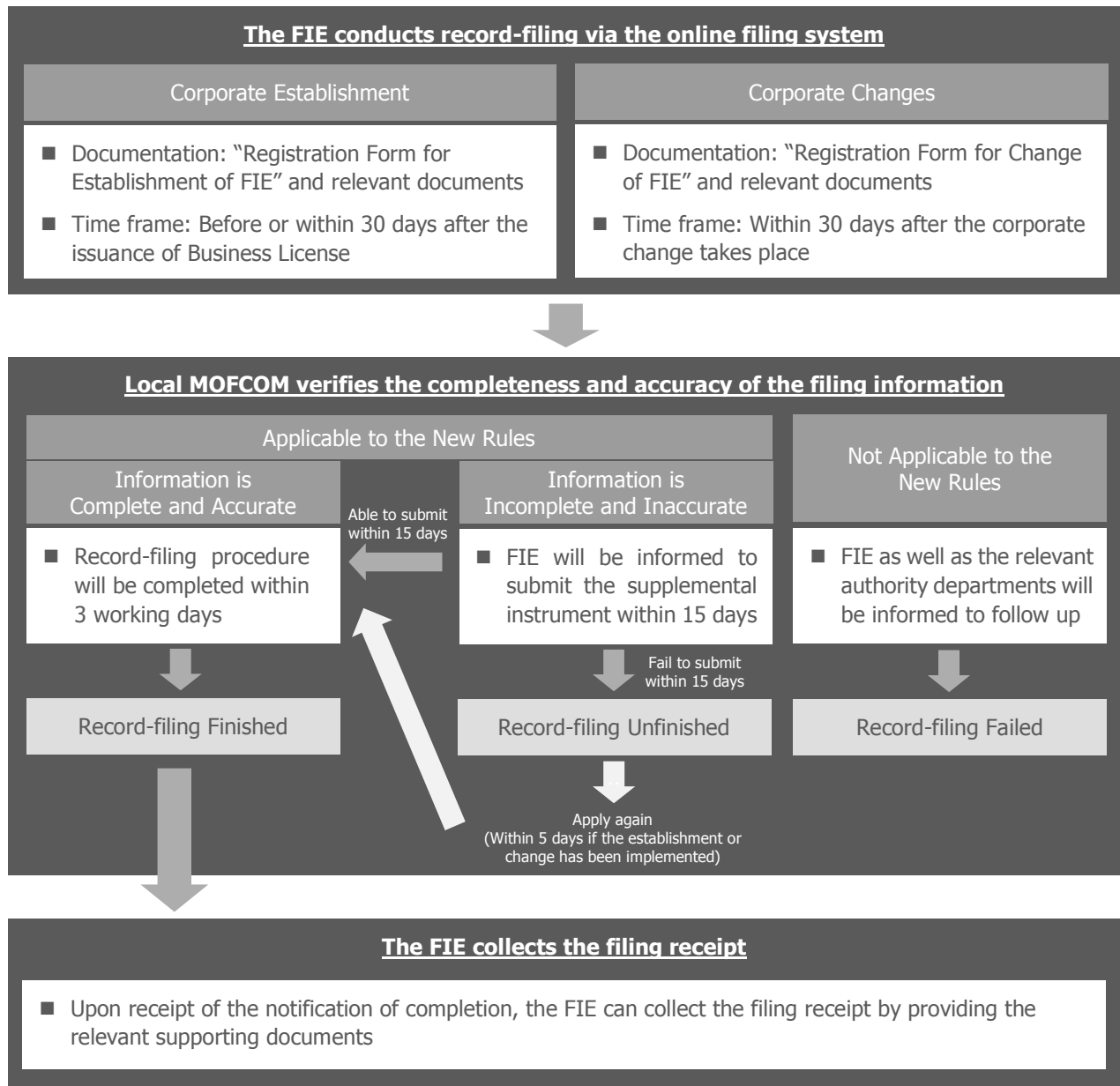
⁹ Also known as the "New Third Board", China's newest stock market which provides public transfer or financing services for the non-listed small-to-medium enterprises over-the-counter.

Procedures and Required Documents

The record-filing procedure will be conducted via MOFCOM’s online filing system called “Integrated Management Information System for Foreign Investment” through the link: <http://wzzxbs.mofcom.gov.cn>.

Supporting documents such as the business license, etc., should be uploaded via the online system. In case the originals are in foreign languages, documents translated into Chinese should also be attached. FIEs or their investors need to ensure consistency of the two versions.

Procedures are basically the same as stated in the Draft. However, FIEs should also note that, as stipulated in the “Circular regarding the Registration Issues after Implementation of Record-filing Regime for FIEs (Gongshangqizhuzi [2016] No.189)”¹⁰ promulgated by the State Administration for Industry and Commerce (hereinafter “SAIC”), for FIEs not subject to the Negative List, **registration at the SAIC in relation to corporate establishment, changes or cancellation can be conducted without filing receipt from the MOFCOM**. In other words, record-filing at the MOFCOM and registration at the SAIC can be conducted at the same time for time saving.



¹⁰ SAIC (8 Oct 2016). Retrieve from: http://qyj.saic.gov.cn/wjfb/201610/t20161008_171546.html

Administration and Supervision

The New Rules added that, forging, altering, leasing, lending or transferring the filing receipt will constitute non-compliance activities which will further lead to penalties or other punishments, and will be recorded and published on MOFCOM's "Foreign Investment Integrity Filing System". However, such non-compliant information can be removed in case the violation has been corrected and in compliance for at least 3 years.

Meanwhile, FIEs which violate other laws and regulations will be punished by the relevant authorities.

Re-arrangements for the Uncompleted Procedures

For corporate establishment and/or changes accepted by the local MOFCOM but not yet approved before the New Rules took effect, record-filing shall be conducted if applicable, and the approval procedure will be terminated.

COMMENTS

It is estimated that application of the New Rules could significantly reduce the need for approval on FIEs' corporate establishment and changes by more than 95%. Simplification of procedures and enhancement of efficiency is expected to improve the convenience of foreign investment, and further reduce the uncertainties caused during the approval procedures.

In the future, more optimised special administration measures on market entry can be expected. It is very likely that the nationwide version of Negative List may be integrated with the FTZs version, or the restricted and prohibited items of the Negative List will be adjusted and reduced in order to further encourage foreign investment.

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