

VIVIEN CHAN & Co.

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COMMERCIAL UPDATE



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New Foreign Investment Law Reform in China: Good News for Foreign Investors

The latest revised draft of the Guidance Catalogue for Foreign Investment Industries (the "Draft Catalogue") was released jointly by the National Development and Reform Commission and the Ministry of Commerce (MOFCOM). In this article, we will discuss the major changes made thereto.

Background

Prior to the revision of the Draft Catalogue, the Standing Committee adopted the Decision on Amending Four Laws Including the People's Republic of China Wholly Foreign-Owned Enterprise Law (the "Decision") and significant amendments have been made to the following Four Laws:

- Wholly Foreign-owned Enterprise Law
- Sino-foreign Equity Joint Venture Enterprise Law
- Sino-foreign Cooperative Joint Venture Enterprise Law
- Taiwanese Compatriot Investment Protection Law

Key Points of Amendments

The establishment or changes to certain particulars of a foreign-invested enterprise ("FIE") were previously subject to the approval of the MOFCOM. Following the implementation of the Decision, the MOFCOM approval requirements are now replaced by filing requirements for all FIEs not on the "negative list".

What is the "Negative List"?

Under the Draft Catalogue, industries either fall under the encouraged or negative list. The negative list is further divided into:

(i) Industries under the encouraged category but subject to restrictions on foreign equity holding, such as pharmaceutical and manufacturing industries;

(ii) Industries under the restricted category, such as construction and operation of nuclear power stations with the controlling shareholder being a Chinese entity; and

(iii) Industries under the prohibited category, such as news agencies.

For foreign investment that falls within this negative list, the new amendments do not apply and MOFCOM approval is still necessary.

Procedures of Record Filing

Establishment of FIE

Upon approval of its proposed name, a newly-established FIE has to be filed with the MOFCOM or its authorised local entity prior to the issuance of the business license by a representative of all investors or within 30 days of the issuance of the business license by a representative of the FIE. Should the new FIE be assessed to fall outside the negative list, MOFCOM will issue a notification of completion of filing within 3 working days.

Changes in FIE

Changes to key details of a FIE must be filed within 30 days of the changes, including the following:

- (1) Basic information of a FIE;
- (2) Equity interests (or shares) and cooperative interests;
- (3) Mergers, divisions or terminations;
- (4) Mortgage or assignment of rights and interests of FIE;
- (5) Advanced recovery of investment by a party to a Sino-foreign cooperative joint venture;
- (6) A Sino-foreign cooperative joint venture contracting out the management of its business.

Significance

We expect the Draft Catalogue to be promulgated shortly and together with the revisions to the foreign investment laws, the adoption of the record-filing system greatly simplifies the administration of FIEs in China, bringing China in line with foreign direct investment policies in other countries. Nevertheless, given that the reform is still in its early stages of implementation, foreign investors should note that various regulations are yet to be amended to adopt the new policy. We shall keep you posted of further updates.

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Competition Ordinance: First Enforcement Action Since Implementation

More than a year has passed since the implementation of the Competition Ordinance (the "Ordinance") (for more details, please refer to our publications [here](#) and [here](#)), and the Hong Kong Competition Commission has, for the first time, commenced proceedings in the Competition Tribunal (the "Tribunal") against five information technology ("IT") companies over alleged contravention of the First Conduct Rule by engaging in bid-rigging conduct.

As a recap, the First Conduct Rule prohibits agreements and concerted practices with an object or effect to prevent, restrict, or distort competition in Hong Kong, including activities such as price fixing, direct or indirect resale price maintenance, joint purchasing agreements.

The case concerns a tender issued by the Hong Kong Young Women's Christian Association ("YWCA") in July 2016 for the supply and installation of a new IT server system. In the first round of tenders, only one bid was received. As it was a requirement to at least receive five bids, a second round of tenders was instigated and a total

of four bids were received from the other four respondents of this case. Upon review, it was found that the formats and contents of the subsequent four bids were highly similar, which arose suspicion of bid-rigging. The Commission claimed that there were collusions to submit "dummy" bids in order for the first bidder to secure the contract. Remedies sought include pecuniary penalties and a declaration that each company had contravened the First Conduct Rule. The proceedings are expected to progress promptly and will be a significant milestone for the enforcement of the Ordinance.

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