

New rules easing foreign investment in China

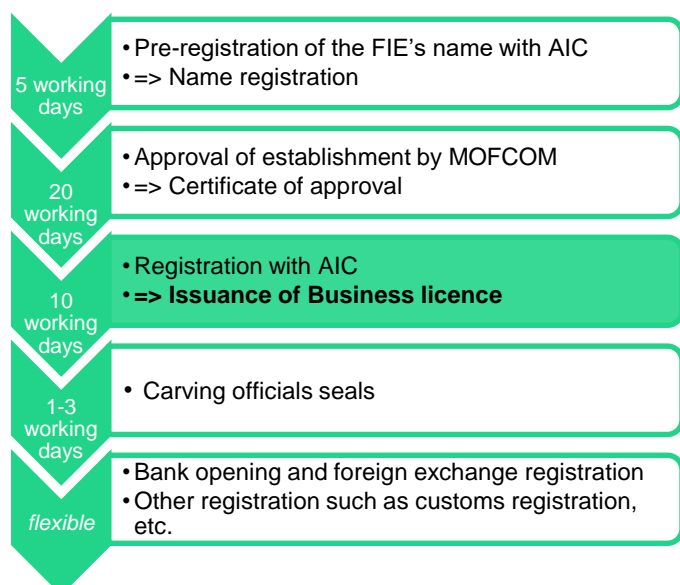
Traditionally, the establishment of a subsidiary in the People's Republic of China (called a foreign invested enterprise, or “FIE”) is a long and burdensome administrative process.

New rules, which became effective in October 2016, introduce a major change by replacing, for most industries, the old system of mandatory prior review and approval of the project by the Ministry of Commerce (“MOFCOM”) by a simple filing system.

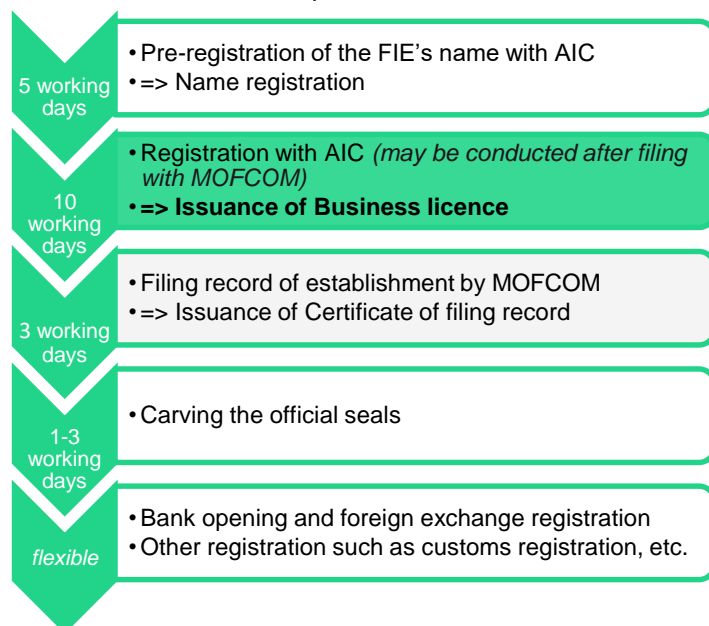
Below is a summary of the key points of this new FIE filing regime.

1. Removal of market entry approval for FIE's incorporation

According to the *Interim Administrative Measures for the Record-filing of the incorporation and changes of foreign-invested enterprises* effective since October 8th, 2016, foreign investors can now register a company (wholly foreign owned companies or joint-ventures) in Mainland China without going through the MOFCOM approval. Before this reform, the typical procedure for the registration of a FIE was as follows:



Since October 8th, the procedure is as follows:



At first sight, both procedures seem similar. However, Certificate of filing record should be issued by MOFCOM within 3 working days instead of 20 working days for the previous Certificate of approval. In addition, the completion of the filing with MOFCOM is not, unlike the previous approval requirement, a condition of effectiveness of the establishment of the FIE and can be conducted after the issuance of the business license. As a result, the reform will simplify and shorten the time required to set up a FIE.

2. Scope of the reform

The new regime applies to the first incorporation and certain defined corporate changes of FIEs engaging in industries which are not subject to special entry administration measures (i.e. the restricted and prohibited industries for foreign investment according to the Catalogue for the guidance of the foreign investment).

The reform does not apply to any investment in the restricted or prohibited category of the Catalogue for the guidance of the foreign investment nor in encouraged industries with special requirements for shareholding and/or senior management composition. The reform also does not apply to any acquisition of a Chinese domestic company by foreign investors.

3. Application of the recording regime to corporate changes of FIEs

The reform will not only impact the registration of new FIEs but also corporate changes of already established FIEs. The following changes are now subject only to record filing instead, of the previous mandatory MOFCOM prior approval:

1. change of the basic information of FIEs (including name, registered address, business scope, registered capital, organizational structure, legal representative, the information, contact persons and contact methods of the final actual control person of the foreign-funded enterprises),
2. change of the basic information of FIEs' shareholders,
3. changes in equity (shares) or equity cooperation, including equity pledge,
4. merger, division or dissolution,
5. foreign-invested enterprise mortgaging its property or rights and interests to others,
6. advance recovery of investments by foreign partners of Sino-foreign cooperative joint ventures,
7. entrusted operation administration of Sino-foreign cooperative joint ventures.

Record-filing of those changes shall be made within 30 days upon the occurrence of the change.

4. Effective date for corporate changes

Starting from October 2016, the effective date to take into account any corporate changes is the date the highest authority of FIEs signed the resolution. Before, it was the date of approval of such corporate changes by the MOFCOM. In the event there are precedent conditions or any required approval for the entry into force of the change of foreign-invested enterprises, the time of occurrence of the change will be deemed to be the time at which such requirements are met.

5. Less documents, more information required

The registration of a new FIE will be subject to a simplified administrative procedure. It is no longer necessary to provide a feasibility study report or a bank reference letter issued by the bank of the investor,

which were burdensome to prepare and could take time to be obtained. However, the new record filing system requires the disclosure of additional information such as the "ultimate controllers" of the FIE. Ultimate controllers of an entity include the following:

1. persons that have more than 50% shares or voting rights in such entity,
2. persons that have less than 50% shares or voting rights but have sufficient voting rights to significantly influence the resolutions of such entity, and
3. persons that otherwise have significant influence on the operational, personnel, financial and technological matters of such entity.

Any change of a FIE's ultimate effective controller needs to be filed with the MOFCOM as well.

Furthermore, officials could always request additional information and documents under the Draft Measures and thus defer the timeline.

6. Conclusion: Is the reform a real game changer?

This reform can hardly be viewed as a real game changer. Foreign investors looking to establish a WFOE in China do not need to obtain MOFCOM approval anymore. However, they still undergo record filing procedure with MOFCOM either before the issuance or after the issuance of the business license.

Because this reform is recent, uncertainties remain regarding the way local authorities, especially the AIC, will implement the new measures. It is therefore recommended to check local practices. In addition, the AIC may require additional verifications for the registration of companies whose shareholders are foreign investors.

The difficulties inherent in such reform should soon be lifted and we expect the delay for the registration of FIEs to be reduced. For FIEs already in operation in China, corporate changes and equity transfer of FIEs should be easier and faster to implement. This 2016 reform may not be the global foreign investment reform that experts expected but it is a step toward more flexibility and efficiency for FIEs corporate matters in China.

Our dedicated team remains at your entire disposal for any additional information you may need.



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