

ONE MORE STEP TO THE NEGATIVE LIST SCHEME

On September 3rd, 2016, the National People's Congress Standing Committees of the People's Republic of China (the "PRC") adopted the Decision on Revising Four Laws Including the Law of the People's Republic of China on Wholly Foreign-owned Enterprises (the "Decision"), which will take effect on October 1st, 2016.

Currently, except for enterprises registered in the free trade zones¹, the foreign-invested enterprises and those enterprises invested by Taiwanese ("FIEs") shall obtain prior approval from the Ministry of Commerce ("MOC") and its local counterparts for their incorporation and major changes. However, upon the effectiveness of the Decision, after the special administrative measures is announced by the State (the "National Negative List"), the FIEs not in the National Negative List shall adopt record-filing procedure for its incorporation and changes, while for the FIEs in the National Negative List, current administrative approval procedure will still apply.

Specifically, for each type of FIEs not in the National Negative List, the Decision shows following items will be switched to record-filing procedure:

Types of Enterprise	Items require record-filing
Wholly Foreign-owned Enterprises ("WFOE")	<ul style="list-style-type: none"> – The establishment; – The separation, merge and other major modification; and – The extension of the operation period.
Sino-Foreign Equity Joint Ventures ("EJV")	<ul style="list-style-type: none"> – EJV agreement, contract and articles of association; – The extension of operation period; and – The termination of an EJV contract.
Sino-Foreign Cooperative Joint Ventures ("CJV")	<ul style="list-style-type: none"> – CJV agreement, contract, and articles of association; – Significant modification to the CJV contract; – The assignment of the entire or partial rights and responsibilities under the CJV contract;

¹ The China (Shanghai) Pilot Free Trade Zone, the China (Guangdong) Pilot Free Trade Zone, the China (Tianjin) Pilot Free Trade Zone, the China (Fujian) Pilot Free Trade Zone and the Expanded Area of China (Shanghai) Pilot Free Trade Zone.

Types of Enterprise	Items require record-filing
	<ul style="list-style-type: none"> – The entrustment to a third party for the operation of a CJV; and – The extension of the operation period.
Enterprises invested by Taiwan compatriots	<ul style="list-style-type: none"> – The establishment.

On the same day of the publication of the Decision, MOC released the Interim Measures for the Record-filing Administration for the Incorporation and Change of Foreign-invested Enterprises (Draft for Comment) (the "Draft for Comment") soliciting for public comments before September 22nd, 2016. This Draft for Comments addresses the specific administrative requirements, procedures and other issues in relation to the implementation of the Decision.

1. Applicable scope of the Draft for Comments

According to the Draft for Comment, the record-filing procedure will apply to the FIEs that are not covered under the National Negative List (the "Applicable Enterprises").

The incorporation and changes of the Applicable Enterprises are required to be administrated by record-filing.

2. Record-filing procedures

The Draft for Comment stipulates a relatively flexible time frame for the required record-filing.

– At Incorporation Stage:

It can be performed either after obtaining the name reservation notice before the issuance of the business license, or 30 days after the issuance of the business license.

– For record-filing of modification:

It shall be performed within 30 days after the decision or resolution of such change has been made.

The Draft for Comment classifies the record-filing items into seven categories, among which, some items which are not requested by MOC are now to be recorded, such as modification of business types, project nature, information of the ultimate controller, resource of funds, etc.. Detailed requirements may be further clarified by the MOC.

All the application for record-filing shall be submitted via the online record-filing system. The record-filing authority will perform a formal examination towards the integrity and accuracy of the submitted information. For applications that fall into the scope of record-filing, the competent authority shall complete the record-filing with 3 working days. After receiving the notice for the completion of record-filing, the Applicable Enterprises or their investors can obtain a receipt for such record-filing.

Foreign investments which may involve anti-monopoly and national security review shall be subject to anti-monopoly and security review in accordance with relevant laws and regulations.

It seems that the central government intends to implement the record-filing procedure nationwide from 1st October, 2016. However, the National Negative List, which is needed for the implementation of the Decision, has not been issued yet.

Besides, currently the articles of associations of FIEs, EJV contracts and CJV contract will become effective only after approved by competent authorities, same as the modification. As the administrative measures of examination and approval will be partially replaced by record-filing from 1st October, 2016, the above mentioned agreements, contracts and articles of association shall be reviewed and modified to meet the formalities under the new administrative regime.

Garrigues will keep close eyes on the practice and the final version of the Draft for Comments and keep you posted.

Follow us:



www.garrigues.com

This publication contains general information and does not constitute professional opinion or legal advice.

© J&A Garrigues, S.L.P., all rights reserved. Exploitation, reproduction, distribution, public communication and transformation, total and partial, of this work, without written permission from Garrigues.

3205 West Gate Mall 1038 Nanjing Xi Lu – Shanghai 200041
T +86 21 5228 1122 - F +86 21 6272 6125

China World Trade Center 1, Jian Guo Men Wai Avenue (Tower 1 – Office 1815) - Beijing 100004
T +86 10 85720000 - F +86 10 85720020