



# Client Alert

## 昊理文法律动态

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### [FDI/外商直接投资]

#### New Conveniences and Preferences for FIEs

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On April 6th, 2010, the State Council of PRC published the Several Opinions of the State Council on Further Effectively Utilizing Foreign Investment (the “State Council Opinions”). Thereafter, on May 4th, 2010, the National Development and Reform Commission promulgated the Notice On Effectively Delegating The Authority Of Approving Foreign Investment Projects (the “NDRC’s Notice”), and on May 7th, 2010, the State Administration of Industry and Commerce issued the Opinions on Giving Full Play to the Administrative Function of Administration of Industry and Commerce to Further Serve the Development of Foreign-invested Enterprises (the “SAIC’s Opinions”).

These Opinions and Notices are trying to facilitate foreign investment in China and upgrade the using of foreign investment at a high level. We highlight the new policy and incentives adopted by these Opinions and Notices as below.

#### **Approval Authority Delegated to Provincial Authority**

Pursuant to the State Council Opinions and the NDRC’s Notice, encouraged industry and/or permitted industry<sup>1</sup> with the total investment (including the increase of investment) less than

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<sup>1</sup> Encouraged industry are those classified as encouraged categories by the Catalogue for the Guidance of Foreign Investment Industries, while permitted industry are those foreign projects not listed in the Catalogue.

USD 300,000,000 may be approved by the approval authorities at the provincial level except for those that are subject to the approval of the relevant departments of the State Council as prescribed in the Catalogue of Investment Projects Authorized by the Government. That means the approval authority of provincial government will be raised greatly from USD 100,000,000<sup>2</sup> to USD 300,000,000.

As delegation of approval authority to local government by central government, it will greatly facilitate the foreign investor to go through the approval formalities for establishment of FIE or foreign M & A.

### **Debt-Equity Swaps**

The SAIC's Opinions states that foreign investors may apply for transferring their credit rights against their invested company to additional paid-in registered capital (equity rights). Although the Company Law has made it possible for all cashable properties to be contributed as capital<sup>3</sup>, credit rights are not yet acceptable to all local AIC, especially for credit rights of foreign investors. It is the first time the State AIC confirms that credit rights can be used as way of contribution for foreign investors. However, the SAIC's Opinions only stands for shareholders transferring their credit rights to additional paid-in capital, which means investors investing into a new company by credit rights are not surely acceptable right now. Moreover, the SAIC's Opinions provides that such debt-equity swap shall, before AIC registration, be approved by

<sup>2</sup> Decision of the State Council on Reforming the Investment System (Guo Fa [2004] No.20)

<sup>3</sup> Article 27 of the Company Law of the People's Republic of China (No.42 Decree of the Chairman of the year of 2005)

State Foreign Exchange Administration (SAFE) and approval authority.

As for the registration of contributions by credit rights, we find that the local practice in respect of several aspects, for instance, about what is the convertible credit rights, and what kind of debt-equity swap are acceptable, are quite different since the uniform rules has not been adopted.

We understand that the SAIC's Opinions may allow local AIC to further try and regulate foreign investors' capital contributions by credit rights, before the State AIC publishing uniform regulations on the approval and registration of debt-equity swap.

### **Prolonging Contribution Period**

According to the State Council Opinions and the SAIC's Opinions, foreign investors may be allowed to prolong their contribution period if they have paid the first installment of the registered capital and in no violation of any rules during their business operation. However, how long could be extended for the contribution period has not been specified in the Opinions.

### **Lower Capital Requirement for Name Approval**

The SAIC's Opinions lowers the requirement of registered capital from 50 million RMB to 30 million RMB<sup>4</sup> for a company to pursue a name with wording like "China" in it on condition that such company is a WFOE or a JV controlled by foreign investors and is a company in modern service industry or high-tech industry.

<sup>4</sup> Article 13 of the Implementation Measures for Administration of Enterprise Name Registration (No.10 Order of the State AIC)

## Conclusions

To our understanding of the Opinions and Notices, Chinese government is trying to continuously attract foreign investments into encouraged industries by making the foreign

investment convenient and preferential in some aspects. Given that some new policies may be adopted for FIEs, good professional advice and communications with the government would be beneficial for foreign investors and FIEs.

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*Should you have any questions about this Client Alert, please contact the partner of HaoLiWen FDI Group:*

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