

## **New Regulations on Equity Contribution Issued by China's MOFCOM**

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### **New provisions significantly improve the ability of foreign investors to create new enterprises, merge existing enterprises**

On September 21, 2012, the **Ministry of Commerce (MOFCOM)** issued the Interim Provisions of the on Equity Contribution of Foreign-invested Enterprises (“Interim Provisions”), which came into effect on October 22, 2012. The Interim Provisions provide an application procedure and a policy basis for **Chinese and foreign investors to contribute capital in the form of equity interest to an enterprise in China**. These provisions significantly improve the ability of foreign investors to create new enterprises or to merge existing enterprises, in turn facilitating business expansion without requiring large amounts of upfront cash.

### **Below are some highlights of the Interim Provisions:**

1. Contributing capital in the form of an equity interest to a PRC enterprise (“Equity Enterprise”), regardless if its shareholders are Chinese or foreign investors, to establish or modify the shareholdings of a FIE (“Invested Enterprise”) shall be subject to the relevant regulations of the Interim Provisions.
2. Equity interest in real-estate enterprises, foreign-invested companies and foreign-invested venture (equity) enterprises shall not be used as capital contribution. Furthermore, Article 24 of the Interim Provision implies that neither the Chinese shareholders nor the foreign investors of a foreign-investment-real-estate enterprise shall use their equity interest to make contributions to either a FIE or a domestic enterprise.
3. Equity interest used for capital contribution shall be appraised by a qualified Chinese valuation institution. The amount of equity interest contributed to the registered capital of the Invested Enterprise shall be no higher than the appraised valuation amount.
4. The Interim Provisions detail the forum and procedure for application to MOFCOM for an equity contribution to an Invested Enterprise. Specifically, the provincial-level MOFCOM branch in charge of

the Invested Enterprise must approve the formation or change to the capital structure of an FIE through capital contribution of equity interest, unless MOFCOM's approval is explicitly required. The Interim Provisions provide the following specific procedure to acquire that approval: (a) The foreign investor should file with the approval authority of the Invested Enterprise; (b) if the Equity Enterprise is a FIE and its formation was approved by a separate authority, however, then the Invested Enterprise's approval authorities should consult the Equity Enterprise's approval authorities about the capital increase; (c) if everything is in order, then the approval authority of the Invested Enterprise authorizing the capital increase should issue or amend the FIE's Approval Certificate and mark it "capital contribution with equity unpaid"; (d) the Equity Enterprise then applies to its own approval authorities for a change in shareholder with the aforementioned Approval Certificate; and (e) the Invested Enterprise should finally apply for the revised Approval Certificate of the FIE with the Invested Enterprise's approval authorities (marked with "capital contribution with equity paid").

5. The Interim Provisions create two different definitions for "total investment." Generally, "total investment" includes 100 percent of registered capital. The meaning changes, however, when calculating the total investment for the purposes of determining the amount of foreign debt and duty-free import the enterprise can take on. Namely, total investment will be determined by the registered capital less the equity interest contributed by a foreign party.

6. Foreign investors may use their equity interest in a domestic entity as consideration for other investors' equity interests in a different domestic enterprise and in the acquisition of a listed company's shares.

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