
New Measures Relating to Foreign Investment in China's Commercial Sector

CHARLTONS
易周律師行
Solicitors

Hong Kong

Shanghai

Beijing

Yangon

www.charltonslaw.com

NEW MEASURES RELATING TO FOREIGN INVESTMENT IN CHINA'S COMMERCIAL SECTOR

INTRODUCTION

New Measures for The Administration of Foreign Investment in the Commercial Sector (the 'New Measures') which shall come into force on 1 June 2004, introduce the following changes:

- (i) foreign companies, entities or foreign investors will be able to establish Wholly Owned Commercial Foreign Invested Enterprises ('**Commercial WFOES**') and to open the associated stores anywhere in Mainland China as from 11 December 2004 (Articles 21 and 22 of the New Measures); and
- (ii) the geographic restrictions on the establishment of Commercial Foreign Invested Enterprises ('**Commercial FIES**') and any associated stores will be removed as from 11 December 2004.

For the purpose of this note, the term 'Commercial FIES' includes Commercial WFOES.

The minimum capital requirement for establishing a Commercial FIE is RMB300,000 as is required by Article 23 of The PRC Company Law (as amended on December 25 1999) (Article 7 of the New Measures). There are no minimum annual turnover or asset requirements.

Subject to certain exceptions (see below), foreign investors will be required to apply for and obtain approval from MOFCOM to establish a Commercial FIE and open any related retail store.

To view bilingual versions of the New Measures and the Foreign Trade Law of the PRC please *click here*.

APPLICATION PROCEDURES UNDER THE NEW MEASURES

Foreign investors wishing to establish a Commercial FIE or open an additional store shall submit an application to the provincial level commercial authority of MOFCOM overseeing the relevant Commercial FIE's place of registration so that a preliminary review of the application can be carried out.

Once a preliminary review is completed, the provincial level commercial authority will submit the application together with the application documents to MOFCOM within one month of receiving all application documents. MOFCOM will then issue a final decision either to accept or to reject the application within three months (Article 10 of the New Measures).

On condition that the following criteria are satisfied, the approval of the provincial level commercial authority of MOFCOM *in lieu* of that of MOFCOM is sufficient for opening a new store in the same provincial or provincial equivalent jurisdiction to where a **retail** Commercial FIE is located: -

- The business area of a single store of the retail Commercial FIE is 3,000 square meters or less and the total number of stores does not exceed 3. In addition, the total number of stores of the same kind opened by the same foreign investor in China through establishing Commercial FIES does not exceed 30;

- The business area of any single store of the retail Commercial FIE is 300 square meters or less, and the total number of stores does not exceed 30. Furthermore, the total number of stores of the same kind opened by the same foreign investor in China through establishing Commercial FIES does not exceed 300.
- The Commercial FIE's business scope does not encompass the sale of goods on television, by phone, by mail, on the World Wide Web, or through automated vending machines;
- The Commercial FIE's business scope does not encompass the sale of books, newspapers, periodicals, crude oil, finished oil products, the operation of gas stations engaging in retail distribution of finished oil products, the sale of pharmaceuticals, motor vehicles, agricultural byproducts, agricultural production materials or data, pesticides, mulching films, fertilizers, salt, tobacco, grain, vegetable oil, sugar for human consumption, or cotton, etc (Articles 10, 17 and 18 of the New Measures).

With the exception of Hong Kong and Macau service providers (see below), foreign investors may submit their application to establish a Commercial WFOE no earlier than 11 December 2004. When an application is approved, the Commercial WFOE and its new stores will not be subject to any geographic restrictions (Article 22 of the New Measures). Likewise, applications by foreign investors (other than Hong Kong and Macau service providers) to establish a Commercial FIE or additional stores outside the current geographic restrictions may not be submitted before 11 December 2004.

HONG KONG AND MACAU SERVICE PROVIDERS

As of 1 January 2004, Hong Kong and Macau commercial service providers as defined under "service provider(s)" in the Mainland/Hong Kong Closer Economic Partnership Arrangement or the Mainland/Macau Closer Economic Partnership Arrangement (each known as 'CEPA') as the case may be, may establish Commercial WFOES in Mainland China.

Prior to 11 December 2004, in addition to being able to establish Commercial FIES and stores for **retail** activities in provincial capitals, capitals of autonomous regions, municipalities directly under the Central Government, municipalities separately listed on the State Plan and special economic zones, Hong Kong and Macau commercial service providers may also establish Commercial FIES for **retail** activities in regional and county level municipalities in the province of Guangdong and in regional level municipalities in other parts of Mainland China (Article 25 of the New Measures).

As of 11 December 2004, Hong Kong and Macau commercial service providers may establish **other** Commercial FIES anywhere in Mainland China (Article 22 of the New Measures).

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As legal advisers as to Hong Kong Law, this note represents our understanding of PRC law and regulations in respect of foreign investment in the Mainland and is provided for information purposes only. The contents of this note does not constitute legal advice and definitive advice should be sought from PRC qualified legal advisers.