



Capital Markets

New MOFCOM Rules Enacted to Open Equity Contribution Channel to FIEs

A long-anticipated regulation, "Interim Measures for the Administration of Capital Contribution in the Form of Equity Involving Foreign-Invested Enterprises" (《关于涉及外商投资企业股权出资的暂行规定》) has been released by the Ministry of Commerce ("MOFCOM") on September 21, 2012 ("Measures") and came into effect on October 22, 2012. The Measures, although titled with "Interim Measures", are expected to mark another milestone in the promotion of foreign investment in the PRC.

Under the Measures, both PRC domestic investors and foreign investors may make capital contribution by using their equity interests in existing PRC entities to establish or invest in foreign invested enterprises ("FIE") in China. The Measures will supplement the *Measures of Administration of Registration of Capital Contribution in the Form of Equity* (《股权出资登记管理办法》) issued by the State Administration for Industry and Commerce on January 14, 2009, which generally excludes the capital contribution in the form of equity to the FIEs.

The following are highlights of the Measures.

● Transactions Allowing Contribution in Equity

The equity interests eligible for the capital contribution under the Measures should be equity interests ("PRC Equity") of a PRC domestic enterprise or an FIE ("Equity Entity"), which are allowed to be contributed into the registered capital in the following transactions:

- (i) Incorporating an FIE by establishing a new company;
- (ii) Converting a domestic enterprise into an FIE by increasing capital of the domestic enterprise; and
- (iii) Changing the equity structure of an FIE by increasing its capital.

The Measures have implied to exclude other transactions, for instance, purchase of existing shares in a domestic enterprise or an FIE by using the equity interest, out of the allowed transactions with capital contribution in equity.

● Qualified PRC Equity

The PRC Equity is required to have a clear and complete title and shall be free of any encumbrances. Specifically, it will be disqualified if,

- (i) the registered capital of the Equity Entity has not been paid

up in full;

- (ii) the PRC Equity is subject to a pledge;
- (iii) the PRC Equity is seized;
- (iv) the PRC Equity is prohibited from transfer under its articles of association;
- (v) the Equity Entity, in case it is an FIE, failed to pass the FIE annual inspection in the previous year;
- (vi) the Equity Entity is a foreign-invested holding company, foreign invested venture capital (equity) investment enterprise or a real estate development enterprise;
- (vii) the required approval for the transfer of the PRC Equity has not been obtained; or
- (viii) transfer of the PRC Equity is prohibited by laws, administrative regulations or State Council.

● Key Points to be Noted

- (i) Valuation and Pricing

The PRC Equity to be contributed to an FIE must be assessed by a licensed PRC valuation firm. The Measures allow the subscription price of the PRC Equity could be different from the valuation result, provided that the amount counted as the registered capital of the PRC Equity shall be no higher than the valuation result. The difference between the subscription price of the PRC Equity and amount counted as the registered capital may be booked as "capital reserve" of the FIE.

- (ii) Foreign Investment Industrial Policies

The Measures make it clear that no capital contribution in equity shall result in any violation of the foreign investment industrial policies including the Industry Guidance Catalogue for Foreign Investment. Any elements of the transaction causing the non-compliance must be split off before the equity contribution.

- (iii) No More Than 70%

Under the PRC Company Law, non-monetary contributions in the registered capital of a company may not exceed 70% of its total registered capital.

- (iv) Legal Opinion of PRC Law Firm

The legality of the PRC Equity as well as the compliance of PRC

foreign investment industrial policies and other regulations need to be addressed by a PRC qualified law firm in a formal legal opinion, which shall be part of the application documents.

(v) Other Regulatory Requirements

If the transaction involves FIE re-investment, change of shareholders of an existing FIE, acquisition of a domestic company by a foreign investor, components subject to the national security review, or any listed company or state-owned enterprise, the applicable regulatory requirements shall also be followed.

(vi) Foreign Debt and Import Duty Exemption Quotas

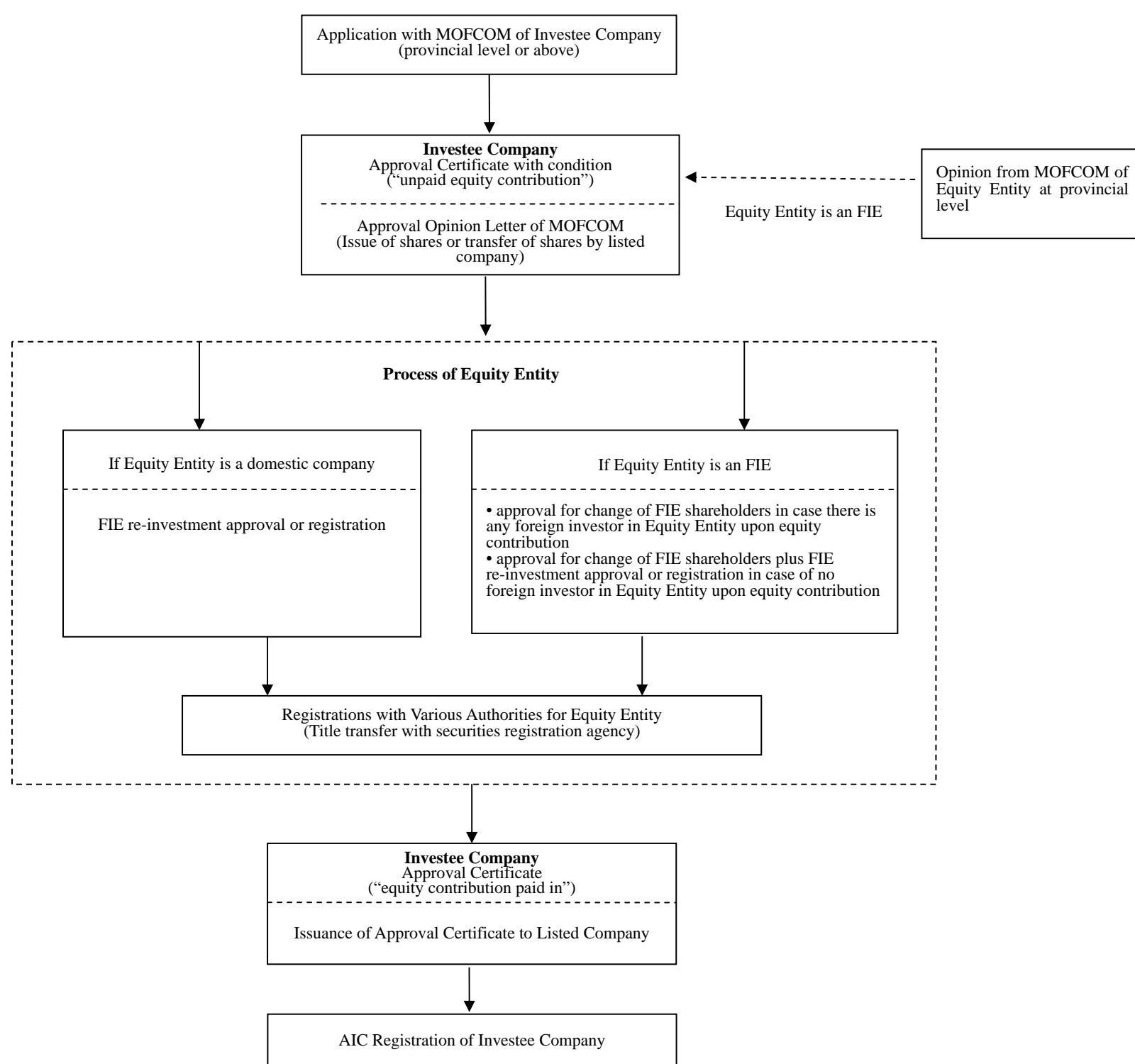
The registered capital contributed in equity shall be excluded in calculating foreign debt and import duty exemption quota of the investee company. Such restrictions are understandable to the

extent that the Equity Entity has enjoyed the quota prior to the transaction. However, it is also possible that an investee company may be unable to borrow foreign debts as much as those in case of all contribution in cash.

● **Approval Authorities and Examination Process**

Capital contribution in equity to FIEs shall be approved by MOFCOM, or its provincial level counterpart at the location of the investee company, in accordance with the examination process as demonstrated in the following chart:

Approval Process for Contribution in Equity to FIEs



Remarks

Despite the complex approval procedures and the relatively stringent requirements, it is expected that the Measures, by providing an additional way of making capital contribution, would be welcomed by both foreign investors and domestic investors who are seeking innovative structures to make investments or restructure their investment portfolio.

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资本市场的法律热点问题

商务部发布新规，放开外商投资企业股权出资

2012年9月21日，商务部发布了期盼已久的《关于涉及外商投资企业股权出资的暂行规定》（“《规定》”），该规定于2012年10月22日实施。虽被冠以“暂行规定”的名称，却被业界期待成为中国促进外商投资领域的又一里程碑。

《规定》实施后，境内和境外投资者以其持有的中国境内企业的股权在中国新设或入资外商投资企业已经合法可行。在《规定》发布之前，国家工商行政管理总局曾于2009年1月14日发布《股权出资登记管理办法》，而该《办法》排除了以股权方式出资外商投资企业的情形。《规定》的出台，正是对这一立法领域缺口的弥补。

《规定》要点

● 股权出资交易结构

可用于股权出资的股权应是中国境内企业或外商投资企业（“**股权企业**”）的股权（“**境内股权**”）。《规定》提供了三种股权出资的交易结构，包括：

- (1) 以新设公司形式设立外商投资企业；
- (2) 增资使非外商投资企业变更为外商投资企业；
- (3) 增资使外商投资企业股权发生变更。

由此可见，《规定》排除了其他用股权出资的交易结构，例如以股权作为对价购买境内企业或外商投资企业的已有股权（而非增资形式的新增股权）的交易形式。

● 境内股权要求

用作出资的境内股权应当权属清晰、权能完整，依法可以转让。属于以下情形的，股权不得用于出资：

- (1) 股权企业的注册资本未缴足；
- (2) 股权已被设立质权；
- (3) 股权已被依法冻结；
- (4) 股权企业章程（合同）约定不得转让的股权；
- (5) 未按规定参加或未通过上一年度外商投资企业联合年检的外商投资企业的股权；
- (6) 房地产企业、外商投资性公司、外商投资创业（股权）投资企业的

股权；

- (7) 法律、行政法规或者国务院决定规定股权转让应当报经批准而未经批准；
- (8) 法律、行政法规或者国务院决定规定不得转让的其他情形。

● 其他关注

(1) 强制评估和自由定价

用作出资的境内股权应当经依法设立的境内评估机构评估。交易各方可在评估的基础上协商确定用于出资股权的“交易作价”以及计入被投资企业注册资本的“股权出资金额”。但是，股权出资金额不得高于股权评估值，这意味着“交易作价”和计入被投资企业注册资本的“股权出资金额”之差可以计入被投资企业的资本公积金。

(2) 外商投资产业政策

《规定》强调，股权出资后，被投资企业和股权企业及其直接或间接持股企业应符合《指导外商投资方向规定》、《外商投资产业指导目录》以及其他外商投资相关规定；不符合有关规定的，应在申报股权出资之前剥离相关资产、业务或转让股权。境内外投资者不得以股权出资方式规避外商投资管理。

(3) 出资比例

作为一种实物出资方式，按照《公司法》规定，以股权作为出资和其他形式的非货币出资总共不得超过被投资公司注册资金总额的70%。

(4) 法律意见书

《规定》要求律师事务所就境内股权的合法性以及股权出资符合外商投资产业政策和管理规定出具法律意见。

(5) 现行法律制度的适用

若股权出资涉及上市公司、国有资产、外商投资企业境内再投资、外商投资企业股权变更、外国企业并购境内公司或国家安全审查制度，相应领域的法律法规应相应适用。

(6) 外债登记和进口免税额度

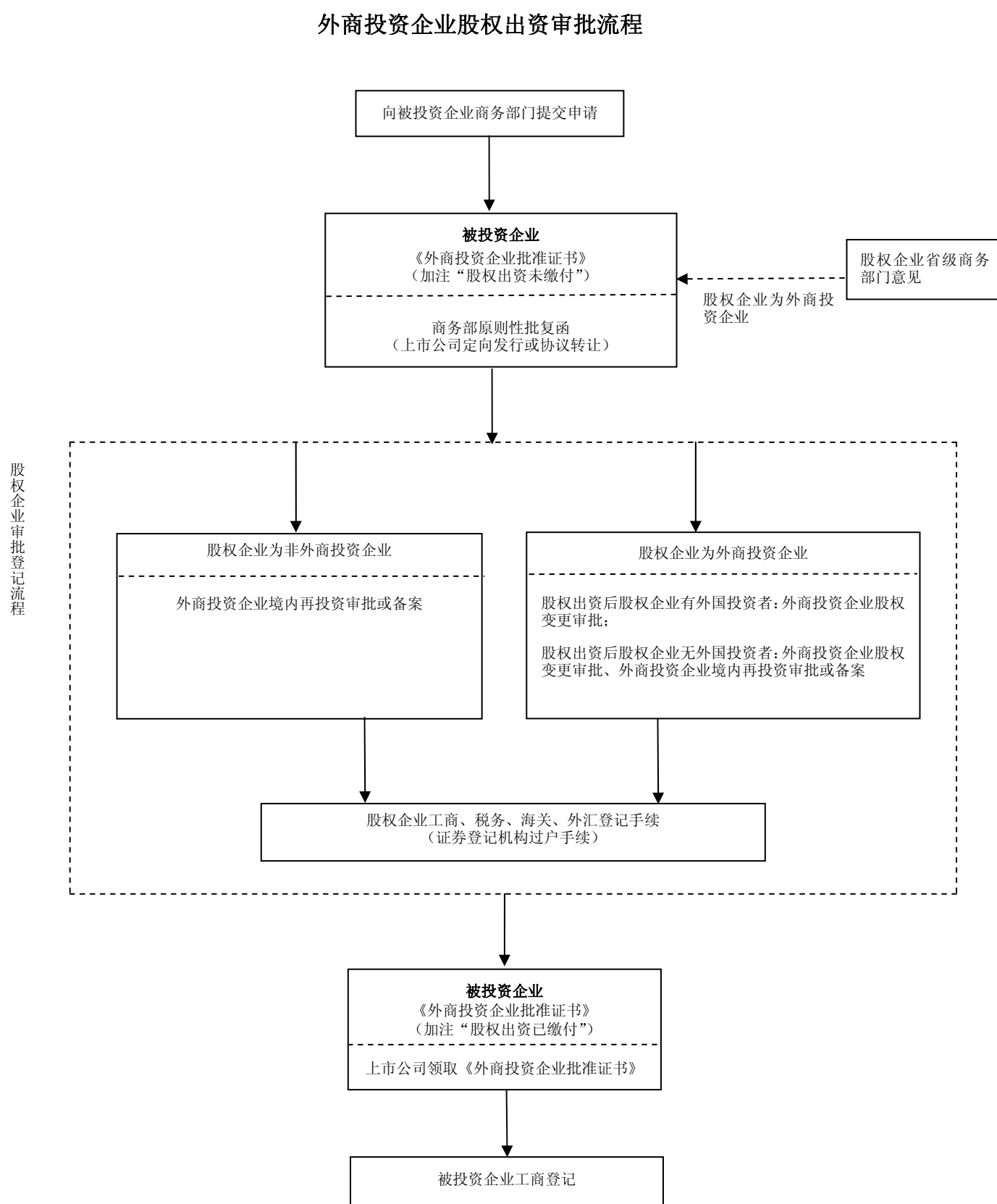
在办理被投资企业外债登记和进口免税额度时，应以被投资企业扣除股权出资部分的注册资本所确定的投资总额进行核定。若境内股权在出资之前

已经享受过同额度，该等限制性规定的制定可以被理解。但是，该等规定有可能限制以股权出资的外商投资企业自境外融资的能力。

● 审批机关和审批流程

涉及外商投资企业股权出资的审批机关为商务部或省级商务主管部门。商务部门的审批级别由现行外商投资领域相关规定确定。

外商投资企业股权出资的审批流程如下图所示：



评述

虽然受制于繁琐的审批流程及相对严格的要求，作为对股权出资这种灵活多样的出资形式的放开，《规定》无疑将被正在寻求以创新结构进行投资或重组的境内外投资者追捧。

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