

Foreign Investment

Latest Amendment to Company Law and Its Impact on FDI Practice in China

Only two months after Premier Li Keqiang instructed on the facilitation of reform of the company registered capital registration system at a State Council meeting on October 25, 2013, the amendment to the PRC Company Law reflecting such reform was adopted at the 6th meeting of the Standing Committee of the 12th National People's Congress of China (the “NPC”) and was published by the 8th Presidential Decree on December 28, 2013 (the “**2013 Amendment**”). The 2013 Amendment is to come into effect on March 1, 2014.

I. Highlights of the 2013 Amendment

The 2013 Amendment strictly follows the principles set by the State Council meeting in October for the reform of the registered capital registration system, with the following highlights.

1. “Paid In Capital” to “Subscribed Capital”

- The paid in capital of a company is no longer required to be registered on the company's registry, but is still required to be recorded on the shareholders' books of the company;
- No more minimum first installment of capital injection is required (which used to be 20% of the total registered capital);

- No more requirement on the time limit of completion of full capital contribution (which used to be within 2 years for a general company and 5 years for a holding company after the company's establishment);
- No more requirement of capital verification; and
- Registration of establishment of a company is no longer subject to payment of the first installment of its capital injection or the capital verification thereof.

However, for circumstances where any law, administrative regulation or the State Council mandates a “paid-in” regime for the registered capital of a company, the registered capital shall be actually paid in accordance with such law, regulation or decision of the State Council.

Further, for a joint stock limited company established by public share offer, its registered capital should still be the actually paid in share capital, which remains untouched by the 2013 Amendment.

2. Removal of General Minimum Registered Capital Requirements

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- The following general minimum registered capital requirements are removed by the 2013 Amendment:
 - RMB30,000 for a non-sole proprietorship limited liability company;
 - RMB100,000 for a sole proprietorship limited liability company; and
 - RMB5 million for a joint stock limited company.
 - It is no longer required that no less than 30% of the registered capital of a limited liability company must be cash.

However, for circumstances where any law, administrative regulation or the State Council stipulates minimum registered capital, the registered capital shall comply with such minimum-amount requirement under law, regulation or decision of the State Council.

3. Impact of the 2013 Amendment on FDI Practice in China

The 2013 Amendment, although with limited changes to the provisions of the Company Law, is material by nature in connection with the registered capital, and would have certain impact on the relevant legal system currently in place, in the sense that, to conform to and effectuate the 2013 Amendment in practice, a series of currently effective administrative laws and regulations (e.g. the *Administrative Rules on Company Registration* and the *Administrative Provisions on Registration of Registered Capital of Companies*) would have to be amended as well.

In addition, after the effectiveness of the 2013 Amendment, the NPC laws, administrative regulations and decisions of the State Council will be the only authorities to impose requirements of minimum registered capital

and to introduce paid-in capital system to exceptional sectors or situations. In other words, the relevant requirements currently stipulated in department rules and local legislations will be contradictory to the 2013 Amendment and thus become automatically void since March 1, 2014, unless such requirements fall into the scope of decisions of the State Council to be stipulating such requirements. For instance, the *Interim Provisions on the Establishment of Foreign-invested Printing Enterprises*, which are department rules issued in 2002, set forth the minimum registered capital of an FIE engaging in the printing of package and decoration of publications as RMB10 million and the minimum registered capital of an FIE engaging in the printing of other publication materials as RMB5 million. It is yet to be made clear whether many requirements like the ones named above would continue to be in effect after the 2013 Amendment comes into force.

Further, it could be rather complicated and even confusing when the Company Law and the FIE laws (including the *Chinese-Foreign Equity Joint Venture Law*, the *Chinese-Foreign Cooperative Joint Venture Law* and the *Wholly Foreign Owned Enterprise Law*) are not consistent or even conflict with each other in practice. The 2005 amendment to the Company Law used to cause great confusions in practice after it became effective on January 1, 2006, which was later solved by the *Implementing Opinions on Certain Issues regarding Application of Laws on Administration of Examination, Approval and Registration of Foreign Invested Companies* jointly issued by the State Administration for Industry and Commerce, the Ministry of Commerce, the General Administration of Customs and the State Administration for Foreign Exchange in April 2006 (the “**Opinions**”) and further

circulars issued by the State Administration for Industry and Commerce regarding the implementation of the Opinions.

The 2013 Amendment, as said above, designates the power of determining capital injection schedule and the percentage of each installment of capital injection of a company to the company's articles of association, without stipulating any mandatory requirement to that regard. Such general release of restrictions would definitely have direct impact on the applicability of the relevant requirements set forth in the Opinions and thus, would probably need clarification by the competent government authorities like what they did in 2006.

On the other hand, given the current FIE regulating regime comprising of the commerce authority's power to review the substance of an FIE's articles of association and the foreign exchange authority's power to scrutinize the cross-border flow of funds regulated under the capital accounts, it remains uncertain as to whether the local commerce authorities would, by taking the opportunity of article review, examine the "feasibility" of an agreement reached between the shareholders with respect to the amount of subscribed capital and the capital contribution schedule, even if recently the State Council has, with limited exceptions, just removed the power from the

Development and Reform Commissions to approve the generally encouraged and permitted foreign-invested projects. Even if having been agreed by the Chinese partner, there may also be practical obstacles for a foreign investor to inject capital at a time or by a percentage different from that of the Chinese investor. Further, it may be difficult to change what has been followed in practice for so many years, e.g. profit distribution in proportion to the actually paid in capital. All these questions, issues and even problems may in the FDI practice need answers and solutions after the 2013 Amendment.

For the time being, amendment or reenactment of the FIE laws is already in the legislative agenda of the 12th NPC, for which the Ministry of Commerce has initiated the brainstorming of think tanks and from various other aspects of the society for drafting of the relevant bills. We are honored to be a part of the process. It is undoubtedly challenging for the government authorities to align the Opinions and the newly amended Company Law as much as possible taking into consideration of the prospective change of laws so as to avoid or minimize the instability and unpredictability of laws and regulations in regulating foreign investments. For foreign and Chinese investors, apparently skillful and professional guidance and advising by experts are crucial to better shape and perform their investment plans in view of all the foregoing complexity.

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外商投资法律热点问题

公司法修改及其对外商投资的影响

媒体报道，2013 年 10 月 25 日国务院总理李克强主持召开国务院常务会议，部署推进公司注册资本登记制度改革。仅仅两个月之后，第十二届全国人民代表大会常务委员会第六次会议即于 2013 年 12 月 28 日通过了修改公司法的决定，并于同日以第 8 号主席令发布，确定于 2014 年 3 月 1 日起开始施行。

一、公司法修改要点

从公布的内容看，公司法的此次修改完全依照 10 月份国务院常务会议确定的注册资本登记制度改革的基本原则进行，要点可归纳如下：

1、改实收资本制为认缴资本制

- 实收资本不再作为公司登记事项，但仍需作为有限责任公司股东名册的记载事项；
- 不再规定首期出资比例（修订前为 20%）和全部出资完成期限（修订前为普通公司成立起 2 年，投资公司成立起 5 年）；
- 不再进行验资；
- 对首期注册资本的出资及验资不再作为公司登记设立的前提。

但是，如法律、行政法规以及国务院决定另行规定注册资本应予实缴的情形，应从其规定。

此外，采取募集方式设立股份有限公司的，其注册资本仍为募集的实收股本总额。这一点此次修订并无变化。

2、取消作为一般性要求的注册资本最低限额

- 取消了非一人有限责任公司人民币三万元、一人有限责任公司人民币十万元、股份有限公司人民币 500 万元的一般性注册资本最低限额。
- 取消了货币出资金额不得低于有限责任公司注册资本 30% 的限制。

但是，如法律、行政法规以及国务院决定另行规定注册资本最低限额，应从其规定。

二、对外商投资的影响

本次公司法的修改，形式上是在 2005 年修订基础上针对注册资本相关事项做出的微调。虽对条款修改有限，但是修改内容本身却是实质性的，对现有法律体系也必然带来冲击。可以想象，《公司登记管理条例》、《公司注册资本登记管理规定》等一系列行政法规及规章也必然需要同时做出调整。

此外，本轮修订后的公司法只承认法律、行政法规以及国务院决定另行规定的注册资本最低限额及资本实缴要求。那么，现有部门规章、地方法规及规章中如有相关限制，除非由国务院统一梳理之后发布决定使之合法化，否则均应在 2014 年 3 月 1 日之前加以清理。比如，2002 年发布的部委规章《设立外商投资印刷企业暂行规定》分别为从事出版物、包装装潢印刷和从事其他印刷品印刷经营活动的外商投资企业设定了人民币 1000 万元及 500 万元的最低注册资本。此类规定或去或留，无疑需要尽快明

确。

关于公司法作为相关领域内的一般法与三资企业法作为外商投资领域特别法之间的关系及其具体适用原则,2005 年公司法修订并于 2006 年 1 月 1 日实施之后在实践中一度引起了相当的混乱,最终以 2006 年 4 月国家工商行政管理总局、商务部、海关总署、国家外汇管理局印发《关于外商投资的公司审批登记管理法律适用若干问题的执行意见》(以下简称“《执行意见》”)进行了整体性的澄清。甚至在上述四部委《执行意见》出台之后,国家工商行政管理总局又随后发布了实施《执行意见》的通知,所涉实践问题的复杂程度可见一斑。

本次公司法的修改,将确定出资期限及每期出资比例的权利完全委诸公司章程,直接冲击上述《执行意见》中关于新设外商投资企业及其增资时的出资比例、出资时限及验资要求,相关部委似有必要仿效 2006 年的做法对相关问题予以澄清。

同时,在商务部门可对公司章程进行实质审查并且外汇管理部门对资本项下资金跨境流动实施管控的背景之下,如何认定股东之间业已达成一致的认缴

资本金额及出资时限的合理性?在发改委逐渐淡化外商投资项目核准的同时,投资可行性审批是否会因为判断注册资本认缴及出资时限合理性的必要而借尸还魂?中外股东非同时或非同比例出资是否完全没有障碍?如何克服按中外投资者之间实缴资本比例进行利润分配的思维逻辑和实践惯性?这些恐怕都是在公司法修改之后的外商投资领域需要进一步观察和回答的问题。

目前,三资企业法的修订或重新立法已经被纳入第十二届全国人大常委会立法规划,商务部即将为此启动法律草案的起草工作,已经开始公开征集意见,我们也正在积极参与其中。如何令《执行意见》与新修订的公司法相互协调的同时,又在一定程度上照顾规章制定的前瞻性从而避免或减少外商投资实践操作中的朝令夕改,值此诸法求变之际,无疑将极大的考验相关政府机关的智慧,也是置身其间的中、外投资者所必需面对的挑战。

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