

## CUATRECASAS, GONÇALVES PEREIRA



### LEGAL FLASH | SHANGHAI OFFICE

February 2014

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**Decision of the State Council on Repealing and Revising Certain Administrative Regulations** ("Decision") (国务院关于废止和修改部分行政法规的决定), issued by the State Council

The Decision revokes and revises a series of laws mainly affecting on foreign invested companies and registration requirements to keep them in line with the new amendment to PRC Company Law ("Company Law Amendment"), in force since March 1, 2014.

The main contents of the decision are highlighted below:

Amendments affecting on Joint Ventures ("JV")

1. The Decision revokes two relevant regulations concerning equity joint ventures ("EJV"): *Certain Provisions on Capital Contribution of the Parties to a Sino-Foreign Equity Joint Venture Enterprise* (《中外合资经营企业合营各方出资的若干规定》), promulgated on January 1, 1988, and its supplementary provisions (《中外合资经营企业合营各方出资的若干规定》的补充规定), promulgated on September 29, 1997, as the requirements and restriction set out in both regulations on the capital contribution in EJV enterprises are overruled by the Company Law Amendment.
2. The detailed rules for the implementation of the laws on EJV and cooperative joint ventures ("CJV") (《中华人民共和国中外合资经营企业法实施条例》及《中华人民共和国中外合作经营企业法实施细则》) are slightly amended as follows:
  - The Decision newly requires the EJV to specify the composition and timeframe of capital contribution in the articles of association.
  - The Decision newly requires the CJV to specify the capital amount subscribed by the parties in the articles of association.

Amendments affecting on Wholly Foreign Owned Enterprises ("WFOE")

The detailed rules for the implementation of the law on WFOEs (《中华人民共和国外资企业法实施细则》) are amended as follows:

- The Decision removes the requirement for the WFOE to have a registered capital in accordance with its business scale. In combination with the Company Law Amendment, any requirements related to a minimum registered capital have

been abolished for WFOEs, unless otherwise provided in other laws for specific industries.

- The Decision newly requires the WFOE to specify the capital amount subscribed by the shareholder(s) and the composition of the capital contribution in the articles of association.
- The Decision lifts the limitation under which capital contributions in the form of industrial property rights or know-how could not exceed 20% of the total registered capital.
- The Decision removes WFOEs' special rule on the capital contribution timeframe, which requested to disburse at least 15% of the registered capital within 90 days after incorporation and the remaining amount within the 2 years after incorporation.

#### Amendments affecting on registration procedures

The Decision revises two important regulations: the *Regulations of the People's Republic of China on Registration Administration of Companies* (《中华人民共和国公司登记管理条例》) and the *Regulations on the Administration of Enterprise Legal Person Registration of the People's Republic of China* (《中华人民共和国企业法人登记管理条例》). The main changes are set out as follows:

- The clauses referring to a minimum registered capital requirement are removed.
- The registration requirement on the paid-in capital is removed.
- Except for the companies limited by shares that are established by way of share offer, the requirement of submitting a capital verification report at the incorporation stage is removed.
- The composition of the contributed capital is no longer subject to statutory restrictions. However, certain prohibitions remain, such as capital contributions by way of valuating and pricing labor, credit, names of natural persons, business reputation, franchise right, or secured property.
- The annual check system is replaced with a public online system of company annual report. Companies shall submit to the administration for industry and

commerce ("AIC") the annual report of the previous year within the period from January 1 to June 30.

- The electronic business license, with legal effect equivalent to the printed version, will be adopted by the government.

#### Other amendments

The Decision approves the following amendments to provisions on the registration of partnership enterprises, sole proprietorship enterprises and farmers' specialized cooperatives (《中华人民共和国合伙企业登记管理办法》、《个体工商户条例》及《农民专业合作社登记管理条例》):

- The electronic business license, with legal effect equivalent to the printed version, will also be adopted for partnership enterprises, sole proprietorship enterprises and farmers' specialized cooperatives.
- The public online system of company annual report will also be adopted for the administration of partnership enterprises and sole proprietorship enterprises.

Date of issue: February 19, 2014. Date of effectiveness: March 1, 2014.

**Administrative Provisions on the Registration of Enterprise Registered Capital** ("Provisions") (《公司注册资本登记管理规定》), issued by the State Administration for Industry and Commerce ("SAIC")

The Provisions adapt the current AIC regime on company registered capital to be consistent with the Company Law Amendment.

The Provisions remove the threshold of registered capital for limited liabilities companies (including those with sole shareholder) and companies limited by shares to be in line with the Company Law Amendment.

As the Company Law Amendment allows companies to freely decide the composition and timeframe for capital contribution (which shall be stated in the articles of association), the Provisions likewise remove clauses regarding the registration of capital contribution's disbursements, composition and calendar, except for companies specifically required by law to pay the registered capital in one lump sum on incorporation. To this end, excluding those subject to special laws, companies no longer need to submit a capital verification report to the AIC.

Under the Provisions, a company must file a record with the AIC if it changes its shareholding structure, composition of capital contribution or capital contribution schedule, which would imply the subsequent amendments of the company's articles of association.

In addition to major changes to the capital registration system in line with the Company Law Amendment, the Provisions revoke the Measures for Registration Administration of Capital Contribution with Equity Interests, and the Administrative Measures for Corporate Debt-for-Equity Swap Registration, issued by the SAIC on January 14, 2009, and November 23, 2011, respectively (this latter regulation was commented in our newsletter of December 2011). However, their main clauses are incorporated in the Provisions to preserve the legal grounds for these two forms of capital contributions.

The Provisions also apply to foreign-invested companies, except as otherwise provided by law.

Date of issue: February 20, 2014. Date of effectiveness: March 1, 2014.

**The Decision of the State Administration for Industry and Commerce on Revising the Regulations on the Administration of Enterprise Legal Person Registration of the People's Republic of China, the Administrative Regulations for the Registration of Foreign-invested Partnership Enterprises, the Administrative Measures for the Registration of Sole Proprietorship Enterprises; and the Administrative Measures for the Registration of Individual Businesses** ("Decision") (国家工商行政管理总局关于修改《企业法人登记管理条例实施细则》、《外商投资合伙企业登记管理规定》、《个人独资企业登记管理办法》、《个体工商户登记管理办法》等规章的决定), issued by the SAIC

The Decision was published with the Provisions referred to above, both of them related to the Company Law Amendment.

The Decision revises four AIC regulations, establishing the following changes:

- The minimum registered capital requirement for manufacturing companies (RMB 300,000), commercial retail companies (RMB 500,000) and commercial wholesale companies (RMB 300,000) and consulting companies (RMB 100,000) have been removed.
- According to the Company Law Amendment, the company annual check system has been replaced with a public system of company annual report. As a result, the Decision provides that companies are only required to report the company files on a public online platform.

- The Decision removes the documentation requirements for lease agreements and property ownership certificates. Furthermore, it is no longer compulsory that the lease term of the domicile exceeds one year;
- The Decision encourages companies to obtain electronic business licenses by granting them the same legal effect as paper business licenses.
- The AIC's assessment of the company's operating capacity has been lifted, ensuring greater autonomy to companies.

Date of issue: February 20, 2014. Date of effectiveness: March 1, 2014.

**Administrative Measures for Online Trading** ("Measures") (《网络交易管理办法》), issued by the SAIC

The Measures are enacted to regulate extensively China's booming electronic commerce market, mainly based on the Law on the Protection of Consumer Rights updated on October 25, 2013, Product Quality Law, Anti-Unfair Competition Law, Contract Law, Trademark Law and Advertising Law.

The Measures focus on "online commodity trading" activities, defined as business activities that involve selling commodities and providing services through the internet (including mobile internet), and "related services". These refer to profit-making services for online commodity trading, such as third-party trading platforms, promotion, credit evaluation, settlement, logistics, express delivery, network access, server hosting, virtual space rental, and website and webpage design and creation.

Operators of online commodity trading and related services ("Operators") must be registered with the AIC and obtain a business license, which must be prominently displayed on the website on which Operators conduct their business activities.

#### Protection of online consumers' rights

The Measures reiterate online consumers' rights to return the commodity within seven days of receipt without giving a reason, as provided under the new Law on the Protection of Consumer Rights, in force since March 15, 2014. This right does not apply to (i) customized commodities; (ii) fresh and perishable commodities; (iii) audiovisual products downloaded online or unpackaged by consumers, computer software and other digital commodities; (iv) newspapers and journals that have been delivered; or (v) commodities that customers consider unsuitable for return due to their nature when purchased.

The Measures emphasize Operators' responsibility for personal data protection, and Operators are obliged to (i) seek consumers' prior consent for collecting and using their personal data, (ii) keep the collected data confidential and secured, and (iii) take effective measures to remedy any leakage or loss of personal data.

#### Provisions on unfair competition

By implementing the provisions of PRC Anti-Unfair Competition Law, the Measures prohibit Operators from engaging in certain unfair practices, including the following:

- Using without authorization the domain name, name or logo of a well-known website, or creating a domain name, name or logo that is confusingly similar to that of a well-known website, which could mislead consumers;
- Using or forging without authorization the electronic logos of governmental departments or social organizations to spread misleading and false propaganda;
- Improving one's own business reputation or another's business reputation by creating fictitious transactions, deleting negative feedback or in any other way.
- Jeopardizing competitors' business reputations by making malicious assessments that contradict facts after completing a transaction.
- Carrying out illegal technical attacks against competitors' websites or webpages, making it impossible for the competitors to operate normally.

#### Special provisions for operators of third-party trading platforms

Operators of third-party trading platforms ("Platform Operators"), such as Taobao, Tmall and Amazon, are online network systems that provide web space, virtual business premises, transaction rules, deal-making and information disclosure, to both parties of online commodity transactions.

The Measures establish that Platform Operators' role is to oversee online trading activities, requiring them to carry out standard administration and supervision tasks on the Operators, such as authenticating Operators' identification; notifying Operators of their rights, obligations and non-compliance liabilities; taking necessary measures to prevent Operators from violating the rules: establishing a dispute settlement system for online commodity trading; coordinating with the AIC to investigate illegal online business activities.

### Non-compliance penalties

The Measures set fines between RMB 10,000 and RMB 30,000 for violating specific requirements or obligations provided under the Measures. Specifically, Operators that do not clearly display their business license on their website and do not submit their operating statistics to their local AIC will be fined up to RMB 10,000.

Date of issue: January 26, 2014. Date of effectiveness: March 15, 2014.

**Bulletin of the State Administration of Taxation on Issues concerning the Determination of Enterprises' Tax Resident based on the Actual Place of Management** ("Bulletin [2014] No. 9") 国家税务总局关于依据实际管理机构标准实施居民企业认定有关问题的公告), issued by the State Administration of Taxation ("SAT")

The concept of tax residence for enterprises was introduced by China's Enterprise Income Tax Law ("EITL"), effective since 2008. Later in 2009, the SAT published Circular [2009] No. 82 providing guidelines to foreign companies controlled by Chinese investors regarding their possible qualification as tax residents in China based on the criterion of place of effective management. Article 7 of this Circular [2009] No. 7 provides the possibility for a foreign companies controlled by Chinese investors to apply for being recognized as Chinese tax resident.

In February, Bulletin [2014] No. 9 was published to modify or clarify provisions under Circular [2009] No. 82 in relation to the application process. Below we highlight its main contents:

- **The main Chinese investor's in-charge tax bureaus will handle the applications** that foreign companies controlled by Chinese investors submit to qualify as tax residents in China. Under Circular [2009] No. 82, the tax bureau in charge of the application was the one of the place of effective management, which could cause conflicts when the company had more than one place of effective management.
- **The competence for assessment of the tax residency is delegated to provincial-level tax bureaus**, which must report to the SAT within 30 days. The SAT must publish the decision on the Chinese tax residence of a foreign company on its official website, and it is entitled to verify the decisions made. Meanwhile, under Circular [2009] No. 82 the application process involved step-by-step assessment by several levels of tax bureaus up to the SAT's final approval.
- **Dividends from a Chinese subsidiary** that the foreign company with tax residence in China receives benefits from the exemption of article 26 of the EITL



(further developed in articles 17 and 83 of the Implementation Rules of the EITL). Circular [2009] No. 82 contained a similar provision, which is confirmed and further clarified in Circular [2014] No. 9.

Bulletin [2014] No. 9 applies to applications after its date of effectiveness in relation to tax year 2013 onwards.

Date of issue: January 29, 2014. Date of effectiveness: January 29, 2014.

**Bulletin of the State Administration of Taxation on the Release of Administrative Examination and Approval Items** ("Bulletin [2014] No. 10") 国家税务总局关于公开行政审批事项等相关工作的公告), issued by the SAT

The SAT issued Bulletin [2014] No. 10, which lists 87 items requesting examination and approval from the tax authorities. These items include those referred to daily tax management (e.g. VAT general taxpayer identification), foreign-related tax management (e.g. tax treaty benefits on passive income), tax reductions, exemptions and refunds (e.g. the super deduction on qualifying R&D expenses). These items are identified in the annex to Bulletin [2014] No. 10.

Date of issue: February 13, 2014. Date of effectiveness: February 13, 2014.

**Bulletin of the State Administration of Taxation on the Issuance of the Administrative Measures for Applying the Tax Refund (Exemption) to Taxable Services Eligible for Zero-Rated Value Added Tax** ("Bulletin [2014] No. 11") (国家税务总局关于发布《适用增值税零税率应税服务退(免)税管理办法》的公告), issued by the SAT

Bulletin [2014] No. 11 substitutes Bulletin [2013] 47, issued by SAT on Promulgating the Administrative Measures for Tax Refund (Exemption) for Taxable Services Subject to Zero Value Added Tax Rate (commented in our newsletter of September 2013).

Bulletin [2014] No. 11 clarifies the following:

- Headquarters paying VAT on a consolidated basis could be mainly engaged in services subject to the zero-rated VAT system.
- Regarding international transportation, it specifies (i) the international transportation activities that qualify for the zero-tax rate system, (ii) the tax base to be considered when computing the "exemption, credit and refund" method, and (iii) the materials to be enclosed to the declaration of "exemption, offset and refund".

- Trading companies rendering R&D and design services qualifying for the zero-rated VAT exemption can switch from the refund (exemption) method to the exemption, offset and refund tax methods.

Date of issue: February 8, 2014. Date of effectiveness: January 1, 2014

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