

Shanghai FTZ and Equity Investment Enterprises

By David Yu and Kevin Huang

The *General Plan for the China (Shanghai) Pilot Free Trade Zone* (the “Plan”), adopted in principle at the executive meeting of the State Council on 3 July 2013, calls for the establishment of the China (Shanghai) Pilot Free Trade Zone (the “Zone”) comprising the four special customs supervision zones of the Shanghai Waigaoqiao Free Trade Zone, the Shanghai Waigaoqiao Bonded Logistics Zone, the Yangshan Free Trade Port Area and the Pudong Airport Comprehensive Free Trade Zone, covering a total area of 28.78 square kilometers. The Zone was formally established on 29 September 2013.

The Plan for the Zone serves to promote the facilitation of investment and trade, and market oriented innovation in finance. As one of the measures in this respect, equity investment enterprises are the beneficiaries of policy encouragement and support in the Zone.

New Policies on Investment Abroad

Since the establishment of the Zone, a series of new policies and regulations conducive to the establishment and development of equity investment enterprises has been issued. For example, the Plan contains a number of policy measures that are favorable to equity investment enterprises, including:

- exploration of the establishment of an administrative model using a negative list, and implementation on a trial basis of pre-establishment national treatment for foreign investors;
- implementation of the recordal system for general offshore investment projects;
- support for the engagement in various forms of offshore investment by various types of investment entities in the Zone;

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- encouragement for the establishment in the Zone of project companies that specialize in offshore equity investment;
- support for the establishment of offshore equity investment funds by qualified investors; and
- active consideration and improvement of tax policies appropriate for offshore equity investment and offshore business development.

Furthermore, the *Opinions of the People's Bank of China on Financial Support for the Establishment of the China (Shanghai) Pilot Free Trade Zone* issued by the People's Bank of China on 2 December 2013 also introduce a series of policy innovations for equity investment enterprises, with the resident free trade accounts and non-resident free trade accounts created thereby establishing fund flow channels in the Zone and outside the Zone, inside China and outside China. There are also prospects for the simplification of the foreign exchange registration procedures for the offshore investments of equity investment enterprises in the Zone, although the specific implementation thereof still remains to be seen.

New Regulations for Establishment and Administration

Additionally, the numerous new regulations issued in the Zone also bring changes to the establishment and administration of equity investment enterprises, offering numerous conveniences for the establishment of, and investment by, equity investment enterprises. For example:

- system of registration of subscribed for registered capital: pursuant to the *Several Opinions of the State Administration for Industry and Commerce on Supporting the Establishment of the China (Shanghai) Pilot Free Trade Zone* (the "SAIC Opinions"), enterprises in the Zone are subject to the system of registration of subscribed for registered capital, and are not required to register their paid-in capital or produce a capital verification document;
- centralized acceptance mechanism: pursuant to the SAIC Opinions, enterprises in the Zone make their applications using a single form, all of which are accepted at the same service window; and
- announcement of enterprise annual reports: the SAIC Opinions additionally specify that the annual inspection system is replaced by enterprise annual reports.

From the foregoing it can be seen that equity investment enterprises established in the Zone will benefit from more establishment and administration related conveniences, and it can be anticipated that the governmental formalities related to their investment activities will be simplified.

Questions Remain

Notwithstanding the issuance of a series policies and regulations favorable to equity investment enterprises, some uncertainties still remain in practice. Among these is the question of which authority will be the regulator of equity investment enterprises in the Zone, a question that we feel still remains unanswered.

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The *Notice of the Municipal Finance Office, et al Concerning Such Matters as the Business Registration of Equity Investment Enterprises in Shanghai, Etc. (Amended)* (ref. *Hu Jin Rong Ban Tong* [2011] No. 10) of Shanghai Municipality specifies that “the administrations for industry and commerce at each level in Shanghai shall register in accordance with the law the enterprises in Shanghai that engage in equity investment and equity investment management”. Whereas, in practice, applications for the establishment of equity investment enterprises are handled by the Shanghai Municipal Administration for Industry and Commerce and placed on the record with the NDRC.

However, the *Administrative Measures for the China (Shanghai) Pilot Free Trade Zone* (Order No. 7 of the Municipal Government) specify that the Administrative Committee of the Zone performs the following duties in accordance with the Measures: “leading the administrative work of the industry and commerce, quality inspection, tax and public security authorities in the Zone; coordinating the administrative work of the customs, inspection and quarantine, maritime and financial authorities in the Zone”. Accordingly, whether the foregoing signifies that the Administrative Committee of the Zone will be responsible for handling the applications and the recordal oversight of equity investment enterprises established in the Zone is unclear for the moment.

A similar issue also exists in the course of the investments by equity investment enterprises. Taking anti-monopoly reviews as an example, the *Administrative Measures for the China (Shanghai) Pilot Free Trade Zone* promulgated by the Shanghai Municipal People’s Government specify that, “the Administrative Committee of the Zone shall undertake the work relating to security reviews and anti-monopoly reviews”. However, the Plan issued by the State Council specifies that the Zone is required to cooperate with other authorities in conducting anti-monopoly reviews, and does not expressly empower the Administrative Committee of the Zone to exercise business operator concentration review power at its own discretion. Accordingly, when an equity investment enterprise in the Zone wishes to make an investment in a third party, the authority with which it is required to make a business operator concentration filing remains to be clarified.

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