



HAN KUN LAW OFFICES

# Legal Commentary



CHINA PRACTICE • GLOBAL VISION

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## FDI

### **Introduction to the Implementation Measures of Shanghai Municipality for Carrying Out the Pilot Program of Foreign-Invested Equity Investment Enterprises (promulgated on December 24, 2010)**

On December 24, 2010, Shanghai Municipal Finance Services Office, Shanghai Municipal Commission of Commerce and Shanghai Municipal Administration of Industry and Commerce jointly promulgated the *Implementation Measures of Shanghai Municipality for Carrying Out the Pilot Program of Foreign-invested Equity Investment Enterprises* (the “**Measures**”), which provide that foreign investors can establish equity investment enterprises and equity investment management enterprises in Shanghai in the form of a partnership. The Measures will come into effect 30 days after the date of promulgation.

The main contents of the Measures include:

#### **Foreign Investors May Establish Equity Investment Enterprises in Form of Partnership**

The Measures emphasize that foreign investors may establish equity investment enterprises in the form of a partnership in Shanghai.

According to the Measures, an application for establishing a foreign-invested equity investment enterprise in the form of a partnership shall be submitted directly to the Shanghai Municipal Administration of Industry and Commerce, where the pre-approval from Shanghai commerce authority is not needed. Shanghai Municipal Administration of Industry and Commerce will consult with the Municipal Finance Services Office in writing within 5 days after receiving all application documents. This procedure of consultation is an internal procedure between the relevant authorities, which does not require the applicant's participation. A foreign-invested equity investment enterprise in the form of a partnership shall, with the industry and commerce registration documents, promptly conduct relevant foreign exchange administration formalities,

such as foreign exchange registration and account opening approval, with the Shanghai Branch of the State Administration of Foreign Exchange, but it still cannot make foreign exchange settlement of foreign capital unless it is an approved pilot enterprise as described below.

### **Special Requirements for the Names of Foreign-Invested Equity Investment Management Enterprises and Foreign-Invested Equity Investment Enterprises**

According to the Measures, foreign-invested enterprises that engage in equity investment management as their principal business and whose names include “equity investment fund management” shall meet the following requirements: (1) there shall be at least one investor, whose, or one of whose affiliate’s, business scope is related to equity investment or equity investment management; (2) when applying for the establishment, there shall be at least 2 senior managerial personnel (vice general manager and above, or senior managerial personnel with equivalent positions), who should meet the following requirements: a. at least 5 years of experience engaging in equity investment or equity investment management; b. at least 2 years of work experience as senior managerial personnel; c. having China-related equity investment experience or working experience at Chinese financial organizations; d. having no recorded regulation violation in the recent 5 years or pending economic disputes or litigations, and with good personal credit records; (3) the registered capital (or subscribed capital contribution) shall be no less than US\$2,000,000 and shall be contributed in cash. More than 20% of the registered capital (or subscribed capital contribution) shall be paid within 3 months after the issuance of the business license, and the balance shall be paid within 2 years.

According to the Measures, foreign-invested enterprises that engage in equity investment as their principal business and whose names include “equity investment fund” shall meet the following requirements: (1) the subscribed contribution shall be no less than US\$15,000,000 and the form of contribution is limited to cash only; (2) the partners shall make contributions in their own names, and the contribution of each limited partner (not including the general partner) shall be no less than US\$1,000,000; (3) the cash contribution by foreign investors shall be made in freely convertible foreign currency or RMB profits sourced within China or lawful RMB revenues from activities such as share conversion and liquidation, and Chinese investors shall make capital contribution in RMB.

### **Special Treatment for Foreign-Invested Equity Investment Pilot Enterprises**

Foreign-invested equity investment pilot enterprises referred to in the Measures shall mean such foreign-invested equity investment enterprises and foreign-invested equity investment management enterprises as determined by the Joint Conference, which is convened by the relevant leaders under the Shanghai Municipal People’s Government and whose members

include Shanghai Municipal Finance Services Office, Shanghai Municipal Administration of Industrial and Commerce, Shanghai Municipal National Development and Reform Commission, Shanghai Municipal Commission of Economy and Informatization, Shanghai Municipal Science and Technology Commission, Shanghai Municipal Finance Bureau, Shanghai Local Taxation Bureau, Shanghai Municipal Housing Security and Building Management Bureau, Shanghai Municipal Government Legislative Affairs Office, Shanghai Branch of State Administration of Foreign Exchange, Shanghai Banking Regulatory Bureau, Shanghai Securities Regulatory Bureau and Shanghai Pudong New District People's Government, etc. The Joint Conference Office is located at Shanghai Finance Services Office. Shanghai Finance Services Office is in charge of the daily work of the Joint Conference, Shanghai Municipal Commission of Commerce is responsible for the approval of establishment of foreign-invested equity investment management enterprises and approval of investment activities in Shanghai of foreign-invested equity investment enterprises, Shanghai Municipal Administration of Industry and Commerce is responsible for the registration of foreign-invested equity investment enterprises and foreign-invested equity investment management enterprises, Shanghai Branch of State Administration of Foreign Exchange is responsible for the foreign exchange administration matters provided under the Measures, and other members of the Joint Conference shall be responsible for relevant work pursuant to their respective responsibilities to promote the pilot program of foreign-invested equity investment enterprises in Shanghai. The Joint Conference is responsible for coordinating the pilot program of foreign-invested equity investment enterprises in Shanghai.

Approved foreign-invested equity investment pilot enterprises may conduct foreign exchange settlement of foreign exchange capital with the foreign exchange authority. Offshore investors of the foreign-invested equity investment enterprise that applies for the pilot enterprise status shall meet the following conditions: (1) it shall be comprised of offshore sovereign funds, pension funds, endowment funds, charitable foundations, fund of funds, insurance companies, banks, security companies and other offshore institutional investors recognized by the Joint Conference; (2) during the preceding fiscal year, its own assets shall be not less than US\$500,000,000 or the assets under management by it shall be not less than US\$1,000,000,000; (3) it shall have sound governance and internal control system and shall not have received any punishment from judicial departments and relevant supervision organizations within the recent 2 years; (4) the offshore investors or its affiliates shall have more than 5 years of relevant investment experience; (5) other conditions that may be required by the Joint Conference.

Approved foreign-invested equity investment management pilot enterprises may use foreign currency capital to contribute to the equity investment enterprise sponsored and established by it, and the amount of such contribution shall not exceed 5% of the total amount of the funds raised.

Such capital contribution in foreign currency will not affect the nature of the equity investment enterprise invested by it, which means that if all other partners are domestic partners and make capital contribution in RMB, the nature of the fund shall be a purely domestic fund, but the fund may not invest in industries where foreign investments are prohibited. Furthermore, the Measures expressively prohibit foreign-invested equity investment enterprises from investing in secondary securities transactions, financial derivatives transactions, non-self-use real estate investment use or using non-self-owned funds to make investments or to provide loans or guarantees to third parties.

### **Contribution Custodian System for Foreign-Invested Equity Investment Pilot Enterprises**

According to the Measures, contributions made to foreign-invested equity investment pilot enterprises will be put in custody of certain custodian bank, and the custodian account and use of the funds in the account shall be managed by the custodian bank in accordance with relevant rules. The responsibilities taken by the custodian bank include, but are not limited to: (1) regularly reporting information regarding fund operation and investment projects of the foreign-invested equity investment pilot enterprise to the Joint Conference Office and the relevant members of the Joint Conference; (2) after the end of each fiscal year, submitting to the Joint Conference Office an annual report of the domestic equity investments in said year that shall have been verified as consistent by all parties to the foreign-invested equity investment pilot enterprise; (3) supervising over the operation of the investments of the foreign-invested equity investment pilot enterprise, and in case of any violation of laws and regulations or the fund custodian agreement, refusing to execute such investment activities and report promptly to the Joint Conference Office; (4) other matters subject to supervision as determined by the Joint Conference.

If you have any questions regarding the foregoing, please feel free to contact us. Thank you!

## Important Announcement

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