漢坤律師事務所
HAN KUN LAW OFFICES

Newsletter

11th Edition of 2013

Insights & Ideas

Legal Updates

Shanghai FTZ Removes Limitation on Foreign Investment in Healthcare Industry (Authors: Gloria XU, Feng YAN, Delong ZOU)

On October 24, 2013, the General Office of Shanghai Municipal People's Government forwarded the *Interim Regulations on Wholly Foreign-Owned Healthcare Institutions in the China (Shanghai) Pilot Free Trade Zone* ("Interim Regulations") jointly formulated by Shanghai Municipal Health and Family Planning Commission, Shanghai Municipal Commission of Commerce and Shanghai Municipal Administration of Industry and Commerce. The Interim Regulations set forth more detailed provisions on establishing and managing wholly foreign-owned healthcare institutions in the China (Shanghai) Pilot Free Trade Zone ("Shanghai FTZ") as allowed by *the China (Shanghai) Pilot Free Trade Zone General Plan*. In Shanghai FTZ, the limitation on foreign investment (including investors from Hong Kong Special Administrative Region, Macao Special Administrative Region, Taiwan area and other countries or regions) in China's healthcare industry is further removed.

Establishing Wholly Foreign-Owned Medical Institutions in Shanghai FTZ

a. Requirements on Foreign Investors

As prescribed in the Interim Regulations, the foreign investor applying for establishment of wholly foreign owned medical institutions shall be a legal person capable of bearing civil liabilities alone, having experience directly related to medical and healthcare investment and management, and satisfy one of the following conditions: (1) being able to provide advanced healthcare institutions management expertise, as well as management and service models; (2) being able to provide internationally advanced medical technology and equipment; or (3) being able to compensate for or improve the inadequacy of local medical service capacity, medical technology, funds and medical facilities.

b. Requirements on Wholly Foreign-Owned Medical Institutions

According to the Interim Regulations, a wholly foreign-owned medical institution to be established in Shanghai FTZ shall satisfy the following requirements:

(a) being an independent legal person；

(b) with a minimum investment amount of RMB 20 million；

(c) The operating period shall be 20 years.

The Interim Regulations do not have further provisions regarding the categories and levels of medical institutions.

c. The Inspection and Approval Procedures in Shanghai FTZ

According to the Interim Regulations, to establish a wholly foreign-owned medical institution in Shanghai FTZ, the applicant shall submit all application documents to the Shanghai FTZ Administration of Industry and Commerce (FTZ AIC). Within 40 working days after issuance of an acceptance certificate by FTZ AIC, the Shanghai municipal health and family planning department, the Shanghai FTZ Management Committee and FTZ AIC shall issue a written reply of approval or disapproval. In case of approval, the FTZ AIC shall deliver relevant documents including the Approval Certificate of Establishment of Medical Institution, the Approval Certificate of Establishment of Foreign-Invested Enterprise, and Business License to the applicant. The wholly foreign-owned medical institutions in Shanghai FTZ shall prepare for operation and apply for a Practice License of Medical Institutions according to related laws and regulations on medical institutions.

Establishing Medical Institutions outside of Shanghai FTZ

Outside Shanghai FTZ, China had forbidden the establishment of wholly foreign owned medical institutions for a long period. *The Interim Regulations on Sino-Foreign Equity and Cooperative Joint Venture Medical Institutions* clearly prescribes that the application for establishment of wholly foreign owned medical institutions shall be disapproved. However, with limitations on foreign investment in medical industry gradually removed, via a series of economic cooperation frame agreements, China allows investors from Taiwan, Hong Kong and Macao to establish wholly foreign-owned medical institutions in China.

a. Taiwan Service Provider

According to the *Cross Strait Economic Cooperation Frame Agreement* ("**ECFA**") executed on June 29, 2010, and the *Mainland and Taiwan Service Trade Agreement* executed on June 21, 2013, A Taiwan service provider is allowed to : i) establish wholly-owned hospitals and nursing homes in Fujian Province, Guangdong Province, Hainan Province and all provincial capitals as well as municipalities directly under the central government, and ii) establish wholly-owned medical institutions of other types all over China. On December 22, 2010, China's Ministry of Health and Ministry of Commerce jointly promulgated *Interim Regulations on Wholly Owned Hospitals Established by Taiwan Service Providers* which set forth provisions on establishing profitable or non-profitable wholly owned hospitals by Taiwan.

b. Hong Kong and Macao Service Provider

According to the *Closer Economic Partnership Arrangements and the Supplemental Agreements ("CEPA")* executed by China and Hong Kong, Macao, Hong Kong and Macao Service Providers are allowed to establish wholly owned medical institutions[1]. Meanwhile, the *Interim Measures on Wholly Owned Hospitals Established by Hong Kong and Macao Service Providers in China* promulgated on December 22, 2010 and relevant subsequent supplementary regulations prescribe detailed requirements on establishing wholly owned hospitals by Hong Kong and Macao Service Providers.

Comparison between Establishing Wholly Foreign-Owned Medical Institutions Inside and Outside Shanghai FTZ

The following diagram sets forth the main regulation differences between establishing wholly foreign-owned medical institutions inside and outside of Shanghai FTZ.

[1]According to the Interpretations of Supplementary Agreements Nine of CEPA, the category of medical institutions shall be interpreted according to the provisions of the *Implementation Rules of Regulations on Medical Institutions*, including (1)Comprehensive Hospital, Hospital of Traditional Chinese Medicine, Hospital of Traditional Chinese and Western Medicine, Ethnic Medicine Hospital, Specialized Hospital, Rehabilitation Hospital; (2)Maternity and Child Care Hospital; (3)Community Health Service Center and Community Health Service Station; (4)Health Center, Village Health Center, Street Health Center; (5)Nursing Home; (6)Comprehensive Policlinic, Specialized Policlinic, Traditional Chinese Medicine Policlinic, Policlinic of Traditional Chinese and Western Medicine, Policlinic of Ethnic Medicine; (7) Clinic, Traditional Chinese Medicine Clinic, Clinic of Ethnic Medicine, health center, infirmary, health institution, health station; (8) Village Clinic; (9)Emergency Center, Emergency Station; (10)Clinical Laboratory Center; (11) Specialized Hospital of Prevention and Curing of Diseases, Specialized Center of Prevention and Curing of Diseases, Specialized Station of Prevention and Curing of Diseases ; (12) Nursing Institution, Nursing Station; (13) Other Medical Institutions.

.	Foreign Investors [2]	Taiwan Service Providers		Hong Kong and Macao Service Providers		
Permitted Types of Medical Institutions	Wholly Owned	Wholly Owned Hospitals[3]	Wholly owned medical institutions other than wholly owned hospitals and wholly owned nursing homes	Wholly owned medical institutions other than wholly owned hospitals and wholly owned nursing homes	Wholly owned hospitals	Wholly owned nursing homes
Nature of Business	For-profit	For-profit or non-profit	For-profit or non-profit	For-profit or non-profit	For-profit or non-profit	For-profit or non-profit
Permitted Operation Area	Shanghai FTZ	Fujian, Guangdong, Hainan and all municipalities and provincial capitals	All provinces	All provinces	All provinces	All provinces
Conditions of Foreign Investors	• Shall be a legal person; • Shall have experience directly related to medical and healthcare investment and management; • Shall be able to provide advanced hospital management expertise, as well as management and service models; • Shall be able to provide advanced international medical technologies and equipment; • Shall be able to	• Shall be a legal person; • Shall have experience directly or indirectly related to medical and healthcare investment and management; • Shall be able to provide advanced hospital management expertise, as well as management and service models; • Shall be able to provide advanced	Shall follow the standards and requirements of medical institutions set up by Mainland Chinese institutions or individuals	Shall follow the standards and requirements of medical institutions set up by Mainland Chinese institutions or individuals	• Shall be a legal person; • Shall have experience directly or indirectly related to medical and healthcare investment and management; • Shall be able to provide advanced hospital management expertise, as well as management and	• Shall be a legal person; • Shall have experience directly or indirectly related to medical and healthcare investment and management; • Shall be able to provide advanced hospital

2 Including Taiwan , Hong Kong and Macao Service Provider.

3 According to *Cross Strait Service Trade Agreement* executed on June 21, 2013, Taiwan Service Providers could establish wholly owned nursing homes in provincial capitals and municipalities directly under the central government, but the Agreement does not have further regulations on establishment of wholly owned nursing homes by Taiwan Service Providers.

	compensate for or improve the inadequacy of local medical service capacity, medical technologies, funds, and medical facilities	international medical technologies and equipment; • Shall be able to compensate for or improve the inadequacy of local medical service capacity, medical technologies, funds, and medical facilities			service models; • Shall be able to provide advanced international medical technologies	management expertise, as well as management and service models; • Shall be able to provide advanced international medical technologies
Total Investment	No less than RMB 20 million	No less than RMB 20 million, which may be appropriately reduced in under-developed regions such as ethnic minority areas, border regions, or poverty-stricken areas	Shall follow the standards and requirements of medical institutions set up by Mainland Chinese institutions or individuals	Shall follow the standards and requirements of medical institutions set up by Mainland Chinese institutions or individuals	Only second-level or higher hospitals are permitted • Second-level hospitals: no less than RMB 20 million; • Third-level hospitals: no less than RMB 50 million	Not Stipulated[4]
Investment Term	20 years	Not Stipulated	Shall follow the standards and requirements of medical institutions set up by Mainland Chinese institutions or individuals	Shall follow the standards and requirements of medical institutions set up by Mainland Chinese institutions or individuals	Not Stipulated	Not Stipulated
Health Approval Authorities	all application documents shall be submitted to the local Administration of Industry and Commerce in shanghai FTZ	The Ministry of Health	Provincial-level health administrative departments	Provincial-level health administrative departments	Guangdong: Provincial-level health administrative departments	The Ministry of Health

[4] Ibid.

	and within 40 working days after issuance of Acception Certificate of the local Administration of Industry and Commerce in shanghai FTZ, Shanghai Municipal Health and Family Planning Department, Management Committee of Shanghai FTZ and local Administration of Industry and Commerce of Shanghai FTZ shall issue written documents notifying approval or disapproval.				Outside Guangdong：The Ministry of Health	
Commerce Approval Authorities	Ibid	For-profit: approved by the Ministry of Commerce; Non-profit: filed with the Ministry of Commerce	Not Stipulated	Not Stipulated [5]	For-profit: approved by the Ministry of Commerce; Non-profit: filed with the Ministry of Commerce	For-profit: approved by the Ministry of Commerce; Non-profit: filed with the Ministry of Commerce

[5] According to the *Supplementary Provisions (II) to the Interim Measures for the Administration of Sino-Foreign Equity or Cooperative Joint Venture Medical Institutions* (Order No. 61 of the Ministry of Health and the Ministry of Commerce), since January 1, 2009, the establishment of wholly-owned outpatient departments by Hong Kong and Macao service providers in Guangdong Province shall be examined and approved by the commerce department of Guangdong Province.

Legal Updates

1. **Shanghai FTZ's New Rules on Establishing Sino-Foreign Cooperative For-Profit Training Institutions (Authors: Huan WANG, Feng YAN, Huanhao HE)**

As authorized by the State Council, one of the 18 opening up measures to be taken in the China (Shanghai) Pilot Free Trade Zone ("**Shanghai FTZ**") is to allow the establishment of Sino-foreign cooperative joint venture education and training institutions and Sino-foreign cooperative joint venture vocational skills training institutions. On November 13, 2013, the General Office of Shanghai People's Government issued *the Interim Measures of the Shanghai FTZ for Administration of Establishment of Sino-Foreign Cooperative Joint Venture For-Profit Training Institutions* ("Interim Measures"), which represents the newest reformation for the administration of foreign investment in non-governmental training institutions.

No Laws or Regulations outside the Shanghai FTZ Governing the Same

For a long time, the law on domestic-funded and Sino-foreign cooperative joint venture for-profit training institutions ("**FPTI(s)"**) remains unclear. *The Education Law of the PRC* (effective as of September 1, 1995, revised in 2009) expressly prohibits any institution or person from establishing a school or other education institution for profit. *The Non-State Education Promotion Law of the PRC* (effective as of September 1, 2003; revised in 2013) ("**NSEPL**") provides that non-state education is a public undertaking, so does *the Regulations of the PRC on Sino-Foreign Cooperative Education* (effective as of September 1, 2003) ("**SFCER**") as to Sino-foreign cooperative education. Moreover, *the Implementing Measures for the SFCER* (effective as of July 1, 2004) and *the Administrative Measures for Sino-Foreign Cooperative Professional Skills Training Education* (effective as of October 1, 2006) expressly provides that no Sino-foreign cooperative educational or professional skills training institution may engage in for-profit activities. Although the law permits the contributors to obtain "reasonable gains" from the balance of the school, such reasonable gains do not equal to distributable profits, and such training institutions remain non-for-profit and cannot operate for profit as enterprises. Indeed, both the NESPL and SFCER authorize the State Council to formulate administrative measures concerning the for-profit non-state training institutions separately. However, no nationwide rule has been enacted by the State Council so far.

In general, the existing local rules or regulations formulated by various provinces or municipalities concerning non-state non-diploma education or professional skills training institutions focus on non-for-profit training institutions.

The current laws outside Shanghai FTZ concerning the FPTIs include *the Interim Administrative Measures of Shanghai Municipality for For-Profit Non-State Training Institution* (effective as of July 20, 2013), *the Interim Registration Measures of Shanghai Municipality for For-Profit Non-State*

Training Institution (effective as of July 19, 2013) and *the Administrative Measures of Shenzhen Municipality for For-Profit Professional Skills Training Institutions* (effective as of February 1, 2006). However, the foregoing local rules have not stipulated any provision for Sino-foreign cooperative for-profit training institutions. Therefore, there is no law or regulation outside the Shanghai FTZ governing the same.

New Rules in the Shanghai FTZ

According to the Interim Measures, a Sino-foreign cooperative for-profit training institution is a corporate entity established by qualified foreign enterprises or other economic institutions and Chinese enterprises or other economic institutions, which provides the public with for-profit educational or professional skill training services. The respective competent authorities shall be the educational administrative department and the administrative department for labor and social security.

The breakthrough made by the Interim Measures is to permit the establishment of Sino-foreign cooperative "for-profit" training institutions, which remains short of legal basis outside the Shanghai FTZ.

The following chart compares the establishment of a Sino-foreign cooperative training institution ("**SFCTI**") in the Shanghai FTZ with that outside the Shanghai FTZ from material aspects:

	In the Shanghai FTZ	Outside the Shanghai FTZ
For-profit or not	for-profit[6]	public taking, including “request a reasonable return” and “do not request a reasonable return”
Organizational form	corporate entity	generally, private non-enterprise entities
Competent authority	**Education:** the educational administrative department; **Professional Skills:** the administrative department for labor and social security.	**Education:** the educational administrative department; **Professional Skills:** the administrative department for labor and social security.
Scope of operation	**Permitted:** non-diploma education; professional skills training; **Prohibited:** diploma education; pre-school education; religious, police, political and Party school education	**Permitted:** diploma education other than compulsory education; professional skills training; **Prohibited:** compulsory education; religious, police, political and Party school education
Founder	enterprises or other economic institutions	educational institution with legal person status
Basic conditions for the establishment	1) meet the requirements provided for by *the Law of the PRC on Sino-Foreign Cooperative Joint Ventures* and *the Company Law of the PRC*; 2) a legal representative of the company who knows well the education affairs and management; 3) full-time and part-time teachers and administrative staffs corresponding to the class, rank and scale; 4) relevant investment no less than RMB 1 million and fund resources to ensure daily operation; 5) company address and teaching facilities corresponding to the training project; 6) management system for running the institution and teaching.	1) meet the basic conditions set forth in *the Education Law of the PRC*, *the Vocational Education Law of the PRC* and *the Higher Education Law of the PRC*, and shall have legal person status. 2) establish in accordance with state standards applicable to the establishment of other education institutions of the same level and type. 3) the cooperators shall have relevant educational qualifications and demonstrate that they can provide education of a sufficient quality. 4) the investment amounts shall correspond to the rank and scale of the prospective SFCTI, and asset verification shall be carried out by law.
Branches	may establish branch companies or subsidiary companies	shall not establish subordinate institutions or other Sino-foreign cooperative institutions
Development fund	draw profits as statutory reserve and discretionary reserve according to *the Company Law of the PRC*	draw profits as a development fund for construction and maintenance of the SFCTI and the purchasing or upgrading of teaching facilities

[6] In the Shanghai FTZ, you may also establish a Sino-foreign cooperative non-for-profit training system in accordance with the SFCER.

2. Analysis on the Newly Revised Measures of Reporting Balance of Payment Statistics (Authors: Irene CAI, Huanhao HE)

On November 9, 2013, the State Council promulgated *The Decision of the State Council on Revising the Measures for Reporting Balance of Payments Statistics* (the "**New Measures**"; the Measures prior to the revision referred to as the "**Old Measures**"), which is to become effective as of January 1, 2014. There are several major changes in the New Measures, including i) expanding the statistics scope to include the foreign financial assets and liabilities of Chinese residents into the reporting scope and ii) expanding the scope of reporters to include non-Chinese residents. Here, "**Chinese residents**" refer to: i) natural persons who stay within Mainland China for more than one year, excluding students and persons accepting medical treatment who are from foreign countries and the regions of Hong Kong, Macao and Taiwan, and foreign staff members of foreign embassies and consulates in China and their family members; ii) Chinese persons who stay abroad for a short-time (with an overseas stay of less than one year), study abroad, or accept medical treatment aboard, and staff members of Chinese embassies and consulates in foreign countries and their family members; iii) legal persons of enterprises and institutions (including foreign-invested enterprises, and foreign-invested financial institutions) and China-based agencies (excluding China-based agencies of international organizations and foreign embassies and consulates in China) of overseas legal persons, which are legally established within the territory of China; and iv) state organs (including Chinese embassies and consulates in foreign countries), social organizations and troops of China.

Chinese Residents Shall Report Foreign Financial Assets and Liabilities

The Old Measures limited the scope of reporting balance of payment statistics to economic transactions between Chinese residents and non-Chinese residents. The New Measures has included relevant information about foreign financial assets and liabilities of Chinese residents into the scope of reporting, and adds a new Article 13 which provides that: "Chinese residents, as individuals, with foreign financial assets and liabilities shall, according to the provisions of the State Administration of Foreign Exchange ("**SAFE**"), report relevant information about their foreign financial assets and liabilities."

Starting from January 1, 2014, Chinese individual residents who hold foreign stock, bond, deposit, fund units or financial products, or who have borrowed foreign loans shall report the relevant information according to the New Measures. So far, SAFE has not formulated detailed rules for the implementation of the New Measures, while it is expected that SAFE would probably set up a minimum amount of foreign financial assets and liabilities for the purpose of reporting.

Non-Chinese Residents Shall Also Report

According to the Old Measures, only Chinese residents are obligated to report, while the New

Measures also require non-Chinese residents carrying out economic transactions within the territory of China to report the relevant information. However, as to the economic transactions between Chinese residents and non-Chinese residents, the Chinese resident bears major obligation to report in accordance to the New Measures. SAFE is yet to formulate detailed rules for non-Chinese residents to report.

Add New Reporters and Subjects with Confidential Obligation

Other revisions include that: (1) not only parties directly participated in the transaction shall report, institutions that provide depositary and clearing services and dealers that operate or act as clients to carry out such transactions as foreign securities, futures and options shall also report; (2) not only the SAFE and its branches and sub-branches shall strictly keep confidential specific data reported by the reporters, banks, dealers, and institutions that provide such services as depositary trust and clearing shall also strictly keep confidential specific data reported by reporters, of which they are aware in the course of handling their operations.

Revise Punishment Rules

Pursuant to the New Measures, where Chinese residents and non-Chinese residents fail to report the balance of payments statistics as required, the SAFE or its branch or sub-branch shall punish them according to Article 48 of the A*dministrative Regulations of the People's Republic of China on Foreign Exchange*, which reads as "SAFE or its local counterpart shall order the organization or individual concerned to take appropriate remedial action and issue a warning, and may fine an organization up to RMB 300,000 or an individual up to RMB 50,000. Further, the personnel who carry out the balance of payments statistics are subject to the penalty legally if they violate the confidential provision. Where the SAFE or its branch or sub-branch, banks, dealers, and institutions that provide such services as depositary trust and clearing violate the confidential provision, they will be investigated in accordance with law."

Important Announcement

This Newsletter has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

If you have any questions regarding this publication, please contact:

Contact Us

Beijing Office
Tel.: +86-10-8525 5500
Suite 906, Office Tower C1, Oriental Plaza
No. 1 East Chang An Ave.
Beijing 100738, P. R. China

Estella CHEN Attorney-at-law
Tel.: +86-10-8525 5541
Email: estella.chen@hankunlaw.com

Shanghai Office
Tel.: +86-21-6080 0909
Suite 5709, Tower 1, Plaza 66, 1266 Nanjing West Road,
Shanghai 200040, P. R. China

Yinshi CAO Attorney-at-law
Tel.: +86-21-6080 0980
Email: yinshi.cao@hankunlaw.com

Shenzhen Office
Tel.: +86-755-3680 6500
Suite 4709, Excellence Times Plaza, 4068 Yitian Road, Futian District,
Shenzhen 518048, P. R. China

Jason WANG Attorney at-law
Tel.: +86-755-3680 6518
Email: jason.wang@hankunlaw.com