

Corporate amendments allowed for FIEs this year

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In brief

- » 2020 is the first year for the enforcement of the new Foreign Investment Law and its Implementation Regulations.
- » The management of foreign-invested enterprises (FIEs) is urged to check if any amendments to their corporate documents and registration are necessary.

Feedback

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In detail

China issued the Foreign Investment Law and its implementation rules in late 2019, both taking effect from 1 January 2020. The law and the implementation rules have brought major changes to the shareholding limitations and the corporate governance of FIEs, if compared to the three previous FI laws¹. These changes require FIEs' to make necessary amendments within a five-year grace period.

This infoletter serves as a reminder to existing FIEs to consider if corporate amendments should be performed.

» Regulatory changes

› Corporate shareholding and governance

- a) The minimum threshold of 25% of foreign investment in an equity joint-venture (EJV) is not mandatory anymore. Shareholders can agree by themselves on a shareholding percentage - which means divestment and share transfer below the 25% threshold is now a feasible option;
- b) The board of shareholders (BoSs) is now made the top governing body of a company (including all FIEs), instead of the board of directors (BoDs);
- c) The BoDs is not a must. An executive director can be its substitute;
- d) The transfer of shares in an EJV can now be greenlighted by 50% of the remaining shareholders (100% consent is required previously).

› Profit distribution

Per the previous laws, an EJV's profit to its shareholders should be proportional to their shareholding percentages, which is usually set out in its JV agreement and its article of association (AoA).

The FI Law has now aligned its profit distribution mechanism with that of the Company Law. Now the shareholders of an EJV can agree on the profit distribution in the way they prefer.

» Corporate amendments

If corporate amendments are necessary, the amendments should be reflected not only in the corporate documents of an FIE, but also be submitted to the relevant authorities for updating the official record. If you are in one of these situations, you should consider if an amendment is necessary or not:

Situations that requires AoA amendments	Y / N?
1. You have not updated your company's AoA since 2019?	
2. You have no establishment of a supervisor board or supervisor in your company's AoA?	
3. You have no establishment of a BoSs in your company's AoA?	
4. You have BoDs set as the highest authority in your company's AoA?	
5. You cannot, as an EJV partner, ask for profit distribution not in line with your shareholding percentage, per your EJV contract?	
6. You cannot sell your shares in an EJV as you cannot obtain a consent from all other shareholders?	
7. You cannot sell further your shares in an EJV due to the minimum 25% threshold constraint?	

¹ (a) Wholly Foreign-owned Enterprises Law; (b) Sino-foreign Equity Joint Ventures Law; (c) Sino-foreign Co-operative Enterprises Law.

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If the answer to the above situation is a “yes”, it implies the need for a corporate amendment - which may include the following:

- › Establishing a BoSs;
- › Setting out the authority, voting process of the BoSs;
- › Adjusting the authority, nomination method, headcount, voting process of the BoDs;
- › Maintaining or amending the JV agreement;
- › Amending any other issues that differ from the FI Law.

If an EJV agreement has to be amended, negotiations may be expected between the JV partners.

WTS Observation

Existing FIEs are advised to check and update their corporate documents and registration, and plan for the amendment application to the Chinese authorities within the five-year grace period. If failing to amend by then, late applications may not be accepted.

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