

CHINA LEGAL BRIEFING* 194

JANUARY 2009



* CHINA LEGAL BRIEFING is a weekly collection of Chinese law related news gathered from various media and news services, edited by WENFEI ATTORNEYS-AT-LAW LTD. distributed to its clients and CHINA LEGAL BRIEFING subscribers. WENFEI ATTORNEYS-AT-LAW LTD. does not accept responsibility for accuracy of quotes or truthfulness of content. CHINA LEGAL BRIEFING is not intended to provide advice.

- 1 Administrative Measures for the Registration of Capital Contributions with Equities of Companies (Draft for Opinion)**
- 2 Patent Law of Peoples' Republic of China**
- 3 Catalogue of Advantageous Industries for Foreign Investment in Central and Western Areas (2008 Version)**

Administrative Measures for the Registration of Capital Contributions with Equities of Companies (Draft for Opinion)

《公司出资登记管理条例（征求意见稿）》

Issued By **State Administration for Industry & Commerce**
Subject **Registration of Capital Contributions with Equities**
Promulgated on **December 17th 2008**
Source <http://www.saic.gov.cn>

Despite the fact that the Company Law provided for a legal ground for Equity Contributions by regulating that any assets which can be lawfully transferred and appraised in currency can be used as capital contribution, investors are still often faced with disappointments, when they filed for the approval of such Equity Contributions at the administrations for industry & commerce in China (AICs). This was caused by a lack of clarifications on how to comply with the Company Law. In this regard, the State Administration for Industry and Commerce (SAIC) seeks to provide a specific guideline regarding Equity Contributions by issuing the Draft of Administrative Measures for the Registration of Capital Contributions with Equities of Companies ("Draft") on December 17th, 2008.

The Draft is applicable to investors investing in other domestic limited liability companies or joint stock limited companies ("Invested Company") by making a capital contribution with their equities in such limited liability companies or joint stock limited companies established in China ("Equity Company"). It appears that the Draft may not be applicable to cross-border share transactions; however, there are good reasons to believe that the Draft will facilitate investments under the current economic crisis and provide more opportunities for investors to participate in the domestic M&A market.

Under the Draft, only transferable equities with clear and complete title are allowed to be contributed as registered capital. Certain kinds of equities are expressly prohibited as capital contribution, subject to the conditions below:

The registered capital of the Equity Company has not been fully subscribed;

1. Equities under pledge
2. Equities, which have been frozen by the competent authority
3. The transfer of equities is not allowed by the articles of association of the Equity Company
4. Lack of relevant approvals in case that such approvals shall be obtained, subject to the law, regulations and other provisions as set forth in the Decisions of the State Council.

It is also noteworthy that the total amount of a capital contribution with both equities and other non-monetary properties by all shareholders may not exceed 70% of the registered capital of an invested company, which is consistent with the requirement stated in Article 27 of the Company Law: The cash contribution thereof shall not be less than 30% of the total capital of a limited liability company (no such restriction exists for joint stock companies except for promoters of joint stock companies).

A specific difference with Company Law is that the draft mentions that the equity contribution ought to be actually subscribed and certain alternation filing requirements with AIC bureau shall be satisfied within one year after the establishment of an Invested Company, although the investors have one more year time to complete their capital contribution after the first installment (not less than 20% of the total registered capital), pursuant to Article 26 of Company Law.

For enterprises which are increasing the registered capitals, investors making the capital contribution with equities should make the actual contribution before the application for the registration of increasing registered capitals.

Of 14 articles in the Draft, the specific procedures for a registration of a capital contribution at the competent AIC bureau are explained in detail. For instance, requirements for the capital verification report, registration of an Invested Company, necessary document of an Equity Company/Invested Company needed to be submitted.

Patent Law of Peoples' Republic of China

专利法

Issued By	National People's Congress
Subject	Patent
Promulgated on	December 27th 2008
Effective from	October 1st 2009
Source	http://www.sipo.gov.cn

On 27 December 2008, the National Peoples' Congress approved the revision of the PRC Patent Law with the purpose to provide China with a protection of patents that will be both in line with national interests and supportive of domestic innovation.

China's Patent Law has been revised two times since its first promulgation in 1984, first in 1992, then again in 2000. However, many large international corporations feel reluctant to

put their money in Chinese market considering the poor intellectual property protection and the unpredictable enforcement of the Patent Law.

Due to the promulgation of the third revision, just before New Year 2009, it is believed that the Chinese government will show more determination in enforcing patent rights and grant more patents to encourage innovations in the country.

The third revision sets out higher fines for patent infringements. These fines are raised from three times to four times the amount of the illegal gains, and the penalty in case where there are no illegal gains is raised from RMB 50,000 to RMB 200,000. Patentees will enjoy better protection by claiming a maximum statutory compensation amounting to RMB 1million, which includes the reasonable expenses of the right owners incurred while enforcing their lawful rights.

An additional amendment to Article 20 provides a foreign filing license regime similar to the U.S. system. A prior security examination by the State Intellectual Property Office will be required for whoever intends to file an application in a foreign country for his invention completed in China. Failure to meet such requirements will have impact on the patentees to lose his patent rights in China.

A compulsory license may be granted to an entity qualified to exploit the patent, if a patentee has not exploited the patent or has not sufficiently exploited the patent without any justified reason three years after the patent grant and four years as of the filing date of patent application, or a patentee is judicially or administratively determined to be abusing his patent rights in an anti-trust way (Article 48).

For the sake of the public health interests, the government may grant a compulsory license to manufacture and export a patented drug to the country or region who is a member of relevant international treaties while China is a member thereof, and who has no or insufficient capability to manufacture the foresaid drug.

In addition, the manufacture, use, sale or import of a Chinese-patented drug or medical instrument has been exempt from infringement to a patent, if such activity is for the purpose of providing necessary information to obtain an administrative approval.

Catalogue of Advantageous Industries for Foreign Investment in Central and Western Areas (2008 Version)

中西部投资优势产业目录(2008 修订)

Issued By **State Development and Reform Commission**
Subject **Foreign Investment**
Promulgated on **December 23rd 2008**
Effective from **January 1st 2009**
Source <http://www.fdi.com.cn>

Compared to the 2004 Catalogue, the 2008 Catalogue of Advantageous Industries for Foreign Investment in Central and Western Areas (“2004 Catalogue”) brings more opportunities to now 441 industries for foreign investment throughout the 21 provinces and autonomous regions, which are located in the central and western areas of the People’s Republic of China. The goal of this Catalogue is to develop the economy in this Central and Western Areas by attracting foreign investments in certain industries.

Foreign investments in industries included into the 2008 Catalogue will enjoy treatments granted to “the encouraged industries” as provided for in the Provisions on Guiding the Direction of Foreign Investments (Order No. 346 of the State Council). Projects under construction, which meet the conditions of the 2008 Catalogue, may enjoy the relevant treatments under the 2008 Catalogue.

The following are examples of industries for foreign investment which may be of interest:

1. Reconversion of farmland to forests and pastures, protecting natural forests and subsequent development of national key ecological projects;
2. Water saving and irrigation techniques and dry land water saving;
3. Protective cultivation technology;
4. Development of applied technologies for processing and production of coal (however, in such projects a Chinese Party must be the majority investor);
5. Deep processing of high-class cotton, wool, fibrilia, silk and synthetic fiber products;
6. Value-added telecommunication services (within the framework of China’s commitment to the WTO);
7. Road transportation of passengers (however, in such projects a Chinese Party must be the majority investor)
8. Development of tourist areas (spots) and construction, protection and business operations of their supporting facilities.

© Wenfei, Beijing, 15 January 2009

Check the China Legal Briefing archives on: <http://www.wenfei.com/publications.html>

Obtain your personal subscription from: china@wenfei.com