

SETTING UP WHOLLY OWNED FOREIGN ENTERPRISE IN SHANGHAI

Characteristics of a WOFE

WOFE (Wholly Owned Foreign Enterprise) is a limited liability company, the establishment of which is governed both by the Company Law of PRC and Law of the PRC on Enterprises Operating Exclusively with Foreign Capital.

A WOFE can engage itself in approved business activities and issue tax invoices on its own. It is a corporation and a tax resident. All shareholders of WOFE should not be Chinese nationals.

Name of a WOFE

The name of the WOFE is governed by “Regulations on the Management of name of Enterprises”. Since WOFE is a limited liability company, its name should be in the form of “Name of City + Name of the Enterprise +Industry+ Company Limited “.

There are certain restrictions on the use of company names

- (1) It should be in Chinese
- (2) Arabic numerals, foreign characters or alphabets are not allowed.
- (3) It should not have content that contradicts national policies, damages social ethics, religions and culture.
- (4) It should not have content which damages fair competition and misleads the public
- (5) Unless special approval is obtained, it should not contain the following restricted words: China, Chinese, National, State. “International” is a restricted word unless it is used to designate the industry in which the company is operating, e.g. ABC International Trading Company Limited.

Name of a WOFE has to be approved by the government before registration.

Approval Authorities

Shanghai Foreign Investment Commission (SFIC), which has delegated its approval authority to the following bodies: Administration Commission of Pudong New Area, Administrative Committee of Waigaoqiao Free Trade Zone, people's government at district or county level, and the relevant industrial bureaus (hereinafter referred to as a whole as the examination and approval authorities) is the authorised body to approve investment projects in Shanghai except those subject to examination by the competent departments of the State Council according to law and regulations:-

1. A manufacturing project with a total investment of **over USD30 million** and any other projects which need to be approved by the competent department of the State Council shall be preliminarily examined by FICS and all related departments of the Shanghai Municipality and then submitted by FICS to the relevant departments of the State Council for approval.

2. If a project with a total investment **under USD 30 million** and
 - a. is to be located in **Pudong New Area**, it shall be examined and approved by Pudong New Area Administration Commission;
 - b. is to be located in **Waigaoqiao Free Trade Zone**, it shall be examined and approved by the Administrative Committee of Shanghai Waigaoqiao Free Trade Zone;
 - c. is classified as a **Type B project in the restricted foreign investment industries**, it shall be pre-examined by FICS and the relevant municipal departments before it is submitted to the responsible departments of the State Council for the examination and approval of its project proposal.
 - d. is to be **located in a municipal-designated industrial zone**, it shall be examined and approved by the district and county government where it is to be located.
3. An encouraged or permitted project with a total investment **under USD10 million** shall be examined and approved by the district or county or bureau authorities where the said project is to be located.
4. If a project does not fall under Category 1, 2 or 3 as mentioned above, or if a project is encouraged by the State or if it is of a non-manufacturing type it shall be examined and approved by FICS.

The Chinese government has produced a list of “approved investment projects”, in which investment projects are divided into four categories, Encouraged, Permitted, Restricted and Prohibited. The current list can be obtained from the government’s web site.

WOFE Application Procedure

Application is a four-step procedure.

Step one: Application for approval of intended investment activities (project proposal)

The examination and approval authority shall reply within 20 days on receipt of the proposal.

Step two: Application for intended name to be used by the WOFE with the Shanghai Administrative Bureau for industry and Commerce

Step three: Application for the approval of feasibility study, constitution (memorandum and articles of association)

A feasibility study will be prepared covering financing, site selection, technological process, equipments, raw material supply, market survey, economic results, foreign exchange, infrastructure facilities, etc.

Articles of Association should be prepared and submitted to the examination and approval authority. The examination and approval authority shall reply within 30 days on receipt of the feasibility study report and articles of association.

After the feasibility study report and articles of association have been approved, the applicant shall apply to the examination and approval authority, which shall issue the Approval Certificate within 3 days after receiving the application.

WOFE Application Procedure – Cont'd

Step four: Registration with the Administration for Industry and Commerce.

The company may then register with Shanghai Administrative Bureau for Industry and Commerce within 30 days after receiving the Approval Certificate and apply for the business licence. Shanghai Administrative Bureau for Industry and Commerce shall issue the business licence within 10 working days to those projects approved by the examination and approval authority of Shanghai. The enterprise is deemed as established on the date when the business licence is issued.

The foreign enterprise may engage an agent authorized by Shanghai Municipal Foreign Economic Relations and Trade Committee to handle its application on its behalf.

Business Address

A separate business address, located in commercial buildings or locations is required as the official address. One address could be used by one company only.

Legal Representative

Legal representative is the only representative of the company in Shanghai, appointed by the board of directors. Local representative is not required. Normally, if the legal representative does not intend to stay and work in Shanghai for over 90 days (within a year), no employment visa is needed. In case that the legal representative is a foreigner and intends to stay in China for over 90 days in a year, employment visa is needed.

Capital and Shareholders

A minimum of one shareholder, either a corporation or a natural person, who must not be Chinese national, is required. Capital must be of private nature, public offering of capital is not allowed.

China adopts a registered capital system. All registered capital has to be paid up in cash, physical assets or intangible assets. If injection of capital is not in the form of cash, valuation by a local “valuation professional” is needed, according to the regulations relating to the particular industry.

Strict capital injection requirement should be fulfilled. “Capital” includes not only registered capital but also promissory loans from the investor, parent company or financial institutions.

Different regulations for different industries govern the minimum capital requirements and schedule of injection. Local auditors should be engaged to issue audit report on capital injection.

If capital is not injected according to the schedule as stipulated by the relevant regulations, business licence and certificate may be withdrawn.

Directors

A board of directors is not always required. For a small company, the general manager or legal representative is the CEO of the company and shall be treated as having the power of the directors of the company.

There is no residential requirement for the directors.

Status of the Parent Company

The Shanghai Government works on an “approval system” instead of a “registration system”, that means, the application may be rejected without giving any reason. It is therefore important that the necessary requirements should be fulfilled and documents required by the government must be fully and accurately submitted. Some of the requirements are:-

- (1) If the company documents are not in Chinese, certified translation by approved translator is required.
- (2) Notarization of statutory documents of the parent company may be required.

Documents required for application

The applicant should complete "Form for Establishing Wholly Owned Foreign Enterprise" and submit together with the following documents:

- (1) An application duly signed by the chairman of the board or general manager of the foreign enterprise with the following details: name of the WOFE, name of the legal Representative, scope of business, duration and address, etc;
- (2) Statutory documents of the parent company issued by the authorities of the country or region of origin; e.g. Constitution, Certificate of Incorporation, Business Certificate, Tax Certificate
- (3) A letter issued by a bank which has business relations with the applicant certifying its financial and credit standing (bankers' reference letter);
- (4) The list of Legal Representatives and their curriculum vitae.
- (5) A feasibility report

Upon issuance of the Registration Certificate, the applicant is required to complete post-establishment registration procedures, including:-

- (1) Opening of bank accounts
- (2) Registration with the National Tax Bureau and Local Tax Bureau
- (3) Application of “Enterprise Code”
- (4) Preparation of statutory stationery, including company chops
- (5) Registration with the State Statistics Bureau
- (6) Registration with the Customs Office
- (7) Application for Employment Visa (For foreign representative)

Time Required

It normally takes less than 30 days from receiving instructions and full particulars and necessary documents from the applicant to issue the Approval Certificate. Thereafter, the Post-establishment Registration procedures take less than 30 days.

Annual Examination

Annual examination is a system that is peculiar to corporations in China. The Shanghai Administrative Bureau for Industry and Commerce, together with other departments concerned (e.g. tax authority, customs, foreign trade) are authorised by law to conduct an annual examination of the enterprise. In brief, the objective of the examination is to investigate whether the enterprise abides to the laws, regulations and the conditions for granting its licences. In particular, the examination will concentrate on the following areas:-

Annual Examination – Cont'd

1. Registered capital – whether the capital has been paid up according to the constitution and conditions for application and proposal.
2. Operations – whether the company is still operating within the approved activities, at the approved location and within the approved scale and employees.
3. Registration details – whether there are any changes in registration details.
4. Financial details – whether the company is still a profitable enterprise, whether necessary tax and customs duties are paid and whether foreign exchange is used according to government policies and regulations.

The examination is in the form of a report to be completed by the enterprise concerned annually (together with the payment of an annual fee). The Shanghai Administrative Bureau for Industry and Commerce will examine the report and make necessary enquiries.

The annual examination will be conducted from January to May every year. Those enterprises unable to fulfill the requirements of the annual examination may have their business licences revoked.

Audit and Accounting

Accounting records are required to be kept in Chinese or Chinese with English. Annual audit by a local auditor is required

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