

Adapting to the evolving corporate framework

Min Min of **Zhong Lun Law Firm** explains the latest updates in corporate governance in terms of shareholder and VIE structures, FIEs and SOEs as well as what to expect from the Foreign Investment Law

1. What have been the key legislative developments affecting corporate governance over the past 12 months?

According to the *PRC Foreign Investment Law (Draft for Comments)* published by the Ministry of Commerce, China will end the current model of divided legislation for foreign investment, and instead embark on the road of uniform regulation of foreign investment with the Foreign Investment Law and the *PRC Company Law*.

Once the Foreign Investment Law enters into effect, the current three foreign-invested enterprise (FIE) laws will be abolished, meaning that when foreign investors invest in and establish enterprises, they will be required to adopt the limited liability or company limited by shares form and establish the companies' governance structures in accordance with the Company Law. Furthermore, the draft Foreign Investment Law provides for a uniform system for the administration of foreign investment. e.g. at the investment access stage, a decision will be made as to whether the permission and security review systems apply based on the investment act, and after the establishment of an FIE, it will be subject to the uniform information reporting system.

2. Has the Company Law amended last year gone far enough to address China's corporate governance issues?

The main thrust of the most recent amendments to the Company Law is as follows:

- (1) abolition of the minimum registered capital requirement, except for certain special industries such as banking, and elimination of the restrictions on the initial capital contributions by the promoters when establishing a company and on the percentage of the capital contributions to be made in cash;
- (2) implementation of a system of registration of the subscribed-for registered capital and elimination of the registration of the company's paid-in capital and the requirement that a company submit a capital verification report at the time of establishment or capital increase;
- (3) establishment of a uniform enterprise integrity information announcement platform to disclose enterprise registration, record filing and administrative penalty information; and

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(4) abolition of the enterprise annual inspection system.

The amended Company Law reduces the mandatory provisions of the law, grants companies greater autonomy and provides them with greater flexibility in corporate governance, but ignores difficult corporate governance issues such as shareholder suppression and the stalemates that can arise as a result of it.

3. Establishing WFOEs in China has become relatively easier, but what is the next step in allowing foreign investors to operate more smoothly in China?

To further promote the development of WFOEs in China, it is necessary to promote the Negative List administration model of the Shanghai FTZ on a wider scale. For sectors other than those found on the Negative List, foreign-invested projects should be made subject to the record filing system rather than check and approval, and the approval of the contracts for and articles of association of FIEs should be changed to administration by record filing.

Furthermore, the draft Foreign Investment Law will integrate the scattered rules relating to foreign investment into one law, with the objective of resolving issues concerning enterprise type, industry access, equity transfer, investment term and domestic reinvestment. Once the law is formally promulgated and implemented, it will grant foreign investors national treatment when it comes to access, thereby achieving equal treatment of Chinese-invested and foreign-invested enterprises to the greatest extent possible.

4. What are the latest updates regarding the regulation of VIE structures?

Pursuant to the draft Foreign Investment Law, China will treat the variable interest entity (VIE) structures erected by Chinese investors and those by foreign investors differently. VIE structures are usually set up by Chinese investors for the purpose of seeking foreign listings, whereas foreign investors use them for the purpose of circumventing the restrictions and prohibitions of the *Foreign Investment Industrial Guidance Catalogue* (Catalogue). Once the Foreign Investment Law

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enters into effect, enterprises controlled by Chinese investors will be deemed Chinese investors, thereby resolving the issue of the lawfulness of VIE structures erected by Chinese investors. Furthermore, in line with the greater diversity in the domestic capital markets, the motivation for Chinese investors to further use the structure will greatly weaken. However, once the Foreign Investment Law enters into effect, VIE structures established by foreign investors in sectors that still restrict or prohibit foreign investment will face the issue of lawfulness, blocking the road for foreign investors' further use of the structure.

5. What are the 2015 Foreign Investment Catalogue's specific changes to foreign ownership requirements in certain industries?

The 2015 version of the Catalogue further reduces restrictions on foreign investment access, with the prominent degree of relaxation in sectors such as real estate, e-commerce, education, wholesale/retail, etc. drawing particular attention. For example, in the real estate industry, there are no longer any restrictions on foreign investment, although the laws and regulations that place restrictions on foreign investment in real estate remain in effect, e.g. the *Opinions on Regulating the Entry of Foreign Investment into the Real Property Market and the Administration Thereof*. How the relationship between the Catalogue and the existing laws and regulations is to be harmonised still needs to be clarified by the authorities. In the e-commerce sector, the Catalogue relaxes the shareholding percentage on foreign investment in e-commerce business. Foreign investors can now engage in e-commerce business in the form of WFOEs, but are still required to satisfy the requirements of the *Provisions for the Administration of Foreign-invested Telecommunications Enterprises*. The Catalogue also shows a relatively large degree of relaxation in sectors such as education, culture, leisure and services.

6. What legal developments in M&A and restructuring affect corporate governance and shareholder/board structure?

Several representative policy documents on the reform of state-owned enterprises (SOEs) that have been issued recently have highlighted the adjustment of equity structures and the development of the mixed ownership system as their key focus. In these policies and plans, there is hope for greater relaxation in terms of the industries and sectors in which private and foreign capital can enter, as well as a reduction in shareholding percentage restrictions. Senior officers and directors will be engaged through more market-oriented means of enterprise reform. Stimulated by these policies, there is hope of brisker M&A and restructuring activities in relevant regions and industries/sectors,

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as well as hope of continued optimisation of the equity structures and governance structures of enterprises, giving rise to a situation in which the various forms of capital act as effective restraints on each other. There is also hope that the objective of enhancing the market competitiveness of state-owned capital while simultaneously enhancing the operational efficiency of the enterprises set by decision-makers will be achieved.

7. What is the role of the “legal representative”?

The term “legal representative” means the officer who, in accordance with Chinese laws or the articles of association of the legal person, represents the legal person in exercising functions and powers. China implements a sole legal representative system – a legal person can only have one legal representative. In enterprises organised as companies, the company’s chairman of the board, executive director or general manager may serve as the legal representative in accordance with the company’s articles of association, while in enterprises not organised as companies, the factory manager will generally serve as legal representative. According to Chinese laws, the acts carried out by the legal representative in the name of the legal person are generally seen as acts of the legal person and the legal consequences arising from such acts are also borne by the legal person. The legal person also may not oppose a *bona fide* third party based on the restrictions internally placed on the functions and powers of the legal representative.

8. Has there been any new legislation to regulate offshore structures and activity of both Chinese and foreign entities?

The Ministry of Industry and Information Technology recently issued document *Gong Xin Bu Tong* [2015] No.196, which relaxes the shareholding percentage of foreign investors engaging in for-profit e-commerce to 100%. According to the new policy, there will no longer be any restriction on the percentage of the equity in a domestic enterprise engaging in such business directly held by foreign investors, and domestic enterprises that sought to circumvent the restriction on shareholding percentage by way of a VIE will consider dismantling the relatively unreliable structures so as to further stabilise their governance structures. Furthermore, relevant domestic enterprises will no longer be required to spend time and effort in erecting VIE structures in preparation for offshore listings, thereby reducing offshore financing costs. Under these circumstances, simplified and transparent corporate structures will give enterprises greater flexibility in choosing their place of listing without having to worry about the requirements with respect to the legal structures of enterprises in those locations. This allows the company to prioritise obtaining a high valuation when selecting the place of listing.

9. Can you describe the progress of the SOE reform?

The reform of SOEs in China is currently at the pilot stage in key industries and sectors. The approved reform intensification plan of the Bank of Communications is mainly focused on improving its equity structure, bringing in private capital, establishing a management and employee shareholding mechanism, promoting a professional management system, etc. SOE reform in Shanghai is keying on promoting the compliant operation of a state-owned asset trading platform, promoting the listing of group companies in their entirety, developing the mixed ownership system and establishing long-term and effective incentive and restraint mechanisms. Additionally, M&A and restructurings of SOEs are being carried out through capital markets to promote their dormant asset portfolios. On the basis of these pilot projects, a number of high-level design plans for the SOE reform are currently at the formulation and improvement stages, and are expected to be published soon. There is hope for the comprehensive rollout of the reform.

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10. What legal developments regarding corporate governance are in the pipeline? How can they be effectively implemented?

Since the publication of the draft for comments in 2011, the judicial interpretation of the Company Law (4) still remains at the stage of discussion within the court system and practice circles, and has yet to take final form. The judicial interpretation will address the application of the law to disputes involving the invalidity and cancellation of meeting resolutions of company authority bodies, the right to know of shareholders, offerings of new shares, the right to request a profit distribution, equity transfers, shareholder representative lawsuits, etc. Its formal issuance will have a material impact on current corporate governance standards. The interpretation may reflect provisions relating to the reform of the company registered capital registration system and of the foreign investment laws. Whether it will neatly integrate with the newest developments in commercial law practice will determine to a great extent its enforceability.

适应转变中的治理框架

中伦律师事务所的闵敏律师阐述了公司治理的最新改变，包括股东和VIE结构、外资企业和国企，以及对《外国投资法》的期望

1. 过去12个月，有什么影响公司治理的主要法规出台？

根据中国商务部公布的《外国投资法》草案（征求意见稿），中国将结束现行的外商投资分散立法模式，转而走向由《外国投资法》与《公司法》统一监管外商投资的道路。在《外国投资法》草案生效后，目前实施的三资企业法将予以废止，外商投资设立企业时应按公司法的规定采取有限或股份有限公司形式，并按照公司法的规定组建公司治理结构。此外，《外国投资法》草案规定对外商投资实行统一的管理制度，如在外商投资准入阶段根据其投资行为决定是否适用准入许可与安全审查制度，在外商投资企业设立后应实行统一的信息报告制度等。

2. 去年修改的《公司法》有没有妥善处理公司治理的问题？

此次《公司法》修改的主要内容有：(1) 除银行业等特殊行业外，取消注册资本最低限额要求，不再限制公司设立时发起人首次出资及货币出资比例。(2) 实行注册资本认缴登记制。不再登记公司实收资本，亦不要求公司在设立或增资时提交验资报告。(3) 建立统一的企业信用信息公示平台，公开企业的登记、备案及行政处罚等信息。(4) 取消企业年检制度。《公司法》的修改减少了法律的强制性规定，赋予公司较大自治权，公司治理具有更大灵活性，但此次修改尚未涉及股东欺压及由此可能导致的公司僵局等公司治理难题。

3. 在中国设立独资企业已相对容易，但下一步有什么举措可让外国投资者在中国营运更为畅顺？

如欲进一步促进外资企业在中国的发展，势必要推广上海自贸区确立的负面清单管理模式。对负面清单之外的领域，应将外商投资项目由核准制改为备案制，将外商投资企业合同章程审批改为备案管理。进一步地，商务部发布的《外国投资法》草案（征求意见稿）将与外商投资相关的分散而多变的规则整合到一部法律之中，意在重点解决企业类型、行业准入、股权转让、投资期限和境内再投资等相关问题。该法的正式颁布实施后，将在准入门槛上给予外资国民待遇，从而在最大程度上实现内外资企业的平等待遇。

4. 在VIE结构监管方面，有什么最新的发展？

根据中国商务部公布的《外国投资法》草案（征求意见稿），中国将对中国投资者与外国投资者搭建的VIE结构区别对待。中国投资者搭建VIE结构多是为境外上市，而外国投资者搭建VIE结构多是为规避《外商投资产业指导目录》的限制或禁止规定。《外国投资法草案》生效后，受中国投资者控制的企业将被认

中国将结束现行的外商
投资分散立法模式

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定为中国投资者，中国投资者搭建的VIE结构的合法性问题将得到解决。此外，因目前中国内地资本市场的多样化，中国投资者再搭建VIE结构的动力也将大大减弱。但《外国投资法》草案生效后，外国投资者已搭建的VIE结构若仍涉及禁止或限制外国投资领域，则其搭建的VIE结构将面临合法性问题；而外国投资者再搭建VIE结构的道路也将难以行通。

5. 2015年版的外商投资目录对特定行业的外资持股比例有什么具体的变更？

2015版《指导目录》进一步减少对外商投资的准入限制，尤其是房地产、电子商务、教育、批发零售等领域的对外开放程度引人注目。如在房地产行业，目前已没有限制性规定，但已经颁布的对外商投资房地产的限制性法律法规仍然有效，如《关于规范房地产市场外资准入和管理的意见》等，如何协调既存法律法规与《指导目录》之间的关系，仍有待国家主管部门进一步明确。在电子商务领域，《指导目录》放开外商投资电子商务业务的持股比例限制，目前外资可以外商独资企业的形式经营电子商务业务，但仍应满足《外商投资电信企业管理规定》的要求。在教育、文娱和服务业等其他领域，《指导目录》亦有较大程度的开放。

6. 在并购重组方面，有什么影响公司治理、股东/董事会结构的新法规出台？

近期出台的多份具有代表性的国企改革政策性文件都将调整股权结构、发展混合所有制作为改革重点。在上述政策规划中，民营资本与外资进入的行业领域有望进一步放宽，持股比例限制有望降低。参与改革企业的高管及董事也将通过更加市场化的方式进行选聘。受上述政策激励，相关地域和行业领域的并购重组活动有望更加活跃，企业的股权结构和治理结构也有望得到持续优化，并形成各类型资本之间的有效相互制约的局面。决策层提出的在增强企业市场竞争力的同时提升国有资本运营效率的目标也有望实现。

7. 法定代表人的角色是什么？

法定代表人是指依照中国法律或者法人组织章程的规定，代表法人行使职权的负责人。中国实行单一法定代表人制度，即一个法人仅可有一位法定代表人。在公司制企业中，可根

据公司章程规定由公司董事长或执行董事或总经理担任法定代表人，而在非公司制企业中，一般由厂长担任法定代表人。根据中国法律的规定，法定代表人以法人名义所为的行为一般被视为法人的行为，由此引起的法律后果亦由法人承担，且法人不得以其内部对法定代表人职权的限制性规定来对抗善意第三人。

8. 在中外企业的境外结构和活动方面，有没有新的法规出台？

工业和信息化部于近日颁布了工信部通[2015]196号文，将经营类电子商务的外资持股比例放宽至100%。按照上述新政策，外资直接持有境内从事相关业务企业的股权比例将不再受到限制，通过VIE结构规避原有持股比例限制的境内企业将会考虑解除相对不可靠的VIE结构，以进一步稳定企业治理架构。而相关境内企业为准备境外上市也不必耗费时间与精力搭建VIE结构，能够在一定程度上降低境外融资成本。在此情况下，简单化、透明化的企业架构也将使企业在上市地点的选择上更具灵活性，无需过多考虑上市地点对企业法律结构的要求，而是将提高公司估值作为选择上市地的最重要考量因素。

境内企业为准备境外上市也不必耗费时间与精力搭建VIE结构，能够在一定程度上降低境外融资成本

9. 您能为我们描述一下国企改革的进展吗？

目前中国的国企改革正处在重点行业、重点领域的试点阶段。交通银行已被批准的深化改革方案主要集中在完善股权结构、引入民营资本、建立管理层和员工持股机制、推行职业经理人制度等方面。而上海国企改革正重点推动国资流动平台规范运作、推动集团公司整体上市、发展混合所有制与建立长效的激励约束机制。与此同时，以促进存量组合为目标的国企并购重组也正通过资本市场进行。在上述试点的基础上，国企改革的多项顶层设计方案正处在制定与完善阶段并预期于近期发布，国企改革有望全面铺开。

10. 公司治理方面有什么法规正在筹备当中？这些法规如何能有效执行？

自2011年发布征求意见稿以来，《公司法司法解释四》仍然处在法院系统和实务界的探讨之中，尚未正式成型。该司法解释拟对公司机关会议决议无效和撤销、股东知情权、新股发行、利润分配请求权、股权转让、股东代表诉讼等各类型纠纷案件的法律适用作出规定。其正式出台将对现行的公司治理规范产生重大影响。最终出台的司法解释可能将反映公司注册资本登记制度改革和外资法律改革的相关内容。而能否与商事法律实践的 latest 发展相结合，将在很大程度上决定该司法解释的可执行性。