

How Should Foreign Investors Adapt to China's New Company Law

China's legislative body issued the amended *Company Law of the People's Republic of China* ("**Company Law**") on December 29, 2023, which will take effect on July 1, 2024. The amended Company Law has updated a series of regulatory measures to enhance the regulations on limited liability companies and companies limited by shares, which may impact many aspects of corporate governance.

This article focuses on the main changes of the amended Company Law with an aim to help foreign-invested enterprises ("**FIEs**") in China quickly stay current with the updates and adjust their corporate governance systems and documents accordingly. Additionally, given most of FIEs are incorporated in the form of limited liability companies, the term "company" or "companies" hereinafter refers to a limited liability company or limited liability companies.

I. Necessary Adjustment of Articles of Association ("**AoA**")

Among all the corporate documents, the AoA is the most significant one, which is the constitutional document of a company setting out the fundamental rules relating to the company's establishment, corporate governance matters, rights and liabilities of the board members and shareholders, liquidation and de-registration, etc. Under the amended Company Law, the following provisions of the AoA may need to be adjusted.

	Requirements in the Previous Company Law	Main Changes under the Amended Company Law	Proposed Changes to AoA
Registered Capital			
Deadline for Capital Contribution (" Contribution Deadline ")	There is no time limit for capital contribution by shareholders. <i>(Article 26 of the previous Company Law)</i>	All the capital contribution subscribed by the shareholders must be paid up within five years as of the establishment date of the company. <i>(Article 47 of the amended Company Law)</i>	<u>Mandatory</u> : If the Contribution Deadline specified in the current AoA is more than five years from the establishment date, the company should adjust the Contribution Deadline to be within five years.

			However, it is still unclear how such requirement should be implemented for companies established before the effective date of the amended Company Law. More detailed implementation rules have yet to be issued by the government.
Method of Non-monetary Contribution	Assets in kind, intellectual properties, land use rights or any other non-monetary assets can be used as non-monetary capital contributions. <i>(Article 27 of the previous Company Law)</i>	Make it clear that both equity and debt can be used as non-monetary capital contributions. <i>(Article 48 of the amended Company Law)</i>	<u>Optional</u> : The company may adjust the method of capital contribution specified in the current AoA to include equity or debt contributions, if needed.
Corporate Governance			
A. Shareholders			
Duties and Powers of Shareholders	The previous Company Law lists ten statutory items to be decided by shareholders.	The following are no longer the statutory items to be decided by shareholders: (1) deciding on the business direction and investment	<u>Optional</u> : (1) The company may remove Items (1) and (2) in the left column from the duties and powers of shareholders

	<p><i>(Article 37 of the previous Company Law)</i></p>	<p>plans of the company;</p> <p>(2) reviewing and approving the annual financial budget and financial accounting plan of the company; and</p> <p>(3) shareholders may authorize the board of directors to resolve on the issuance of corporate bonds.</p> <p><i>(Article 59 of the amended Company Law)</i></p>	<p>specified in the current AoA.</p> <p>(2) As resolved by shareholders, the company may remove item (3) in the left column from the duties and powers of shareholders specified in the current AoA, and add item (3) to the matters to be resolved by the board of directors.</p>
Shareholders' Meetings	<p>The previous Company Law only lists matters that must be adopted by shareholders representing 2/3 or more of the voting rights¹. As for the other matters, the previous Company Law remains silent on the minimum votes needed for the resolutions (“Ordinary</p>	<p><u>Minimum votes for an Ordinary Resolution:</u></p> <p>The amended Company Law stipulates that an Ordinary Resolution must be adopted by shareholders representing more than 1/2 of the voting rights.</p> <p><i>(Article 66 of the amended Company Law)</i></p>	<p><u>Mandatory:</u> The company should adjust the current AoA to meet the requirements for the minimum votes for an Ordinary Resolution.</p>

¹Pursuant to the previous Company Law, the following matters should be approved by shareholders representing 2/3 or more of the voting rights: (i) any amendment to the AoA; (ii) increasing or decreasing the registered capital; (iii) the acquisition, split, dissolution of a company; and (iv) change of a company's incorporation form.

	<p>Resolutions”) on such matters.</p> <p><i>(Article 43 of the previous Company Law)</i></p>		
B. Board of Directors (“Board”)			
Composition of the Board	<p>(1) The Board of companies must comprise 3 to 13 members.</p> <p>(2) A company invested and incorporated by two or more state-owned enterprises, or two or more other state-owned investment entities must have employees’ representative(s) on its Board.</p> <p><i>(Article 44 of the previous Company Law)</i></p>	<p>(1) No cap on the number of members of the Board.</p> <p>(2) A company with more than 300 employees must have employees’ representative(s) on its Board.</p> <p><i>(Article 68 of the amended Company Law)</i></p>	<p>1. <u>Optional</u>: The company may increase the number of members of the Board to any number it sees fit, if needed.</p> <p>2. <u>Mandatory</u>: A company with more than 300 employees should have employees’ representative(s) on its Board.</p>
Duties and Powers of the Board	<p>(1) The Board should make the annual financial budget and financial accounting plan of the company.</p>	<p>(1) The amended Company Law no longer requires the Board to make the annual financial budget and financial</p>	<p><u>Optional</u>: The company may remove Item (1) in the left column from the duties and powers of the Board specified in the current AoA</p>

	<p>(2) The AoA may authorize the Board to exercise other duties and powers.</p> <p><i>(Article 46 of the previous Company Law)</i></p>	<p>accounting plan of the company.</p> <p>(2) The Board may exercise other powers as authorized by the AoA or the shareholders.</p> <p>(3) The restrictions imposed by the AoA on the Board may not be used against a bona fide counterparty.</p> <p><i>(Article 67 of the amended Company Law)</i></p>	<p>and add new duties and powers of the Board as authorized by the shareholders.</p>
Board Meetings	<p>The previous Company Law does not set quorum or minimum votes for a resolution of the Board.</p> <p><i>(Article 48 of the previous Company Law)</i></p>	<p>(1) Quorum: The quorum for a Board meeting must be more than 1/2 of all the Board members.</p> <p>(2) Minimum votes for a resolution: The Board resolutions must be adopted by more than 1/2 of all the Board members.</p> <p><i>(Article 73 of the amended Company Law)</i></p>	<p><u>Mandatory:</u> The company should adjust the current AoA to meet the requirements for the quorum of a Board meeting and the minimum votes for a Board resolution.</p>

C. Supervisors & Audit Committee			
Audit Committee in Lieu of Supervisors	The previous Company Law does not provide regulations for the setup of an audit committee.	In lieu of a board of supervisors or a single supervisor, a company may set up an audit committee composed of directors to exercise the duties and powers of the board of supervisors or a single supervisor. <i>(Article 69 of the amended Company Law)</i>	<u>Optional</u> : The company may set up an audit committee to replace the board of supervisors or a single supervisor.
Requirements for Small-scale Companies	A company with a small scale or a small number of shareholders may appoint one to two supervisors instead of a board of supervisors. <i>(Article 51 of the previous Company Law)</i>	(1) A company with a small scale or a small number of shareholders may have one supervisor instead of a board of supervisors. (2) With the unanimous consent of all shareholders, a company may have no supervisor. <i>(Article 83 of the amended Company Law)</i>	<u>Optional</u> : The small-scale company may (i) cancel the position of supervisor(s) with unanimous consent of all shareholders; or (ii) have one supervisor.
D. Manager			

Duties and Powers of the Manager ²	<p>The previous Company Law lists seven duties and powers of the manager, on top of which, the manager should also exercise its duties and powers in accordance with the AoA and as authorized by the Board.</p> <p><i>(Article 49 of the previous Company Law)</i></p>	<p>The amended Company Law repeals certain statutory duties and powers that were previously vested in the manager. The manager of a company is now only required to exercise his or her duties and powers in accordance with the AoA and the authorization of the Board.</p> <p><i>(Article 74 of the amended Company Law)</i></p>	<p><u>Optional</u>: The company may more freely adjust the duties and powers of the manager specified in its current AoA.</p>
Legal Representative			
Mandatory Items to be stipulated in the AoA	<p>The AoA of a company must stipulate the legal representative of the company.</p> <p><i>(Article 25 of the previous Company Law)</i></p>	<p>The AoA of a company must stipulate how to appoint and change its legal representative.</p> <p><i>(Article 46 of the amended Company Law)</i></p>	<p><u>Mandatory</u>: The AoA must specify how the legal representative will be appointed and changed.</p>
Titles of the Legal Representative	<p>The chairman of the Board, the executive director (where there is no Board), or the manager can act as the legal representative of the company in</p>	<p>Any director (instead of only the chairman of the Board) who performs the company's affairs on behalf of the company or the manager can act as the legal</p>	<p><u>Optional</u>: The company may amend the current AoA to allow any director (instead of only the chairman of the Board) to act as</p>

² The manager under the Company Law typically is the “president” or “general manager” of a company.

	<p>accordance with the AoA.</p> <p><i>(Article 13 of the previous Company Law)</i></p>	<p>representative of a company.</p> <p><i>(Article 10 of the amended Company Law)</i></p>	<p>the legal representative.</p>
Change of Legal Representative	<p>Where there is a change of legal representative of the company, registration formalities must be completed to reflect such change.</p> <p><i>(Article 13 of the previous Company Law)</i></p>	<p>(1) If a director or the manager who concurrently serves as the legal representative resigns, he or she must be deemed to have stepped down as legal representative at the same time.</p> <p>(2) If the legal representative resigns, the company must appoint a new legal representative within 30 days from the date of resignation of the legal representative.</p> <p><i>(Article 10 of the amended Company Law)</i></p>	<p><u>Mandatory</u>: The AoA should be amended accordingly to include the new requirements under the amended Company Law.</p>
Transfer of Shares			
Transfer to an outsider	<p>A shareholder proposing to transfer its equity interests to an</p>	<p>For a share transfer from a shareholder to an outsider, the amended Company</p>	<p><u>Optional</u>: The company may amend the current AoA to allow the</p>

	<p>outsider (i.e., who is not a shareholder) must obtain the consent of more than half of the other shareholders.</p> <p><i>(Article 71 of the previous Company Law)</i></p>	<p>Law no longer requires the transferor to obtain the consent of more than half of the other shareholders.</p> <p><i>(Article 84 of the amended Company Law)</i></p>	<p>shareholders to transfer their shares to an outsider without the other shareholders' consent.</p>
Liquidation			
Liquidation Committee	<p>The liquidation committee of a company should be formed by the shareholders.</p> <p><i>(Article 183 of the previous Company Law)</i></p>	<p>(1) Directors should perform the liquidation obligations. If they fail to perform the liquidation obligations in time and cause losses to the company or creditors, they should be liable for compensation.</p> <p>(2) Unless otherwise specified in the AoA or resolved by shareholders, the liquidation committee should consist of directors (instead of shareholders).</p> <p><i>(Article 232 of the amended Company Law)</i></p>	<p><u>Mandatory:</u> The company should adjust the liquidation rules in the current AoA to transfer the liquidation obligations from shareholders to directors.</p>

II. Adjustment of Other Corporate Documents

A. Capital Contribution Certificate (“Certificate”)

A company needs to issue the Certificates to its shareholders in the form as specified in the Company Law.

The amended Company Law has stipulated the following new requirements³ as for the content and execution of the Certificates, and the company should adjust its Certificates accordingly:

- (1) The updated Certificates should indicate the amount of both subscribed and paid-up capital contribution.
- (2) The updated Certificates should specify the method of capital contribution.
- (3) In addition to being sealed with the company chop, the updated Certificates need to be signed by the legal representative of the company.

B. Register of Shareholders (“ROS”)

A company needs to prepare a ROS in the form as specified in the Company Law.

The amended Company Law stipulates the following new requirements⁴ for the contents of the ROS, and the company should adjust its ROS accordingly:

- (1) The updated ROS should specify the amount of both subscribed and paid-up contribution of each shareholder.
- (2) The updated ROS should specify the method and date of capital contribution.
- (3) The updated ROS should include the date when a shareholder becomes or ceases to be a shareholder.

III. New Obligations and Liabilities of Directors, Supervisors, and Senior Management Staff⁵

The amended Company Law has significantly increased the responsibilities and

³ Article 55 of the amended Company Law

⁴ Article 56 of the amended Company Law

⁵ Under the Company Law, “senior management staff” refers to the manager, deputy manager, and financial manager of a Company and other management staff stipulated in the AoA.

liabilities of directors, supervisors, and senior management staff, requiring stricter accountability from these roles. Below is a summary of the new obligations and liabilities under the amended Company Law.

	Obligations & Liabilities under the amended Company Law
Capital Contribution Verification	<p>(1) The Board should verify the capital contribution paid by the shareholders;</p> <p>(2) if a shareholder has not fully paid the capital contribution before the Contribution Deadline, the company should issue a demand letter to the shareholder;</p> <p>(3) if the company suffers losses as result of the Board's failure to fulfill the obligations outlined in (1) and (2) in a timely manner, the director(s) responsible for such losses should be liable for compensation.</p> <p><i>(Article 51 of the amended Company Law)</i></p>
Withdrawal of Contribution	<p>If a shareholder withdraws any portion of its capital contribution and thus causes losses to the company, the directors, supervisors, and senior management staff responsible for such losses should be jointly and severally liable with the shareholder for compensation.</p> <p><i>(Article 53 of the amended Company Law)</i></p>
Reduction of Registered Capital	<p>If the company suffers any loss due to the reduction of the company's registered capital that is in violation of the Company Law, the shareholders and the directors, supervisors, and senior management staff responsible for such losses should be liable for compensation.</p> <p><i>(Article 226 of the amended Company Law)</i></p>

Profit Distribution	<p>If a company distributes profits to shareholders in violation of the Company Law and causes losses to the company, the shareholders, the directors, supervisors, and senior management staff responsible for such losses should be liable for compensation.</p> <p><i>(Article 211 of the amended Company Law)</i></p>
Fiduciary Duties	<p>(1) Duty of Loyalty: Directors, supervisors, and senior management staff should (i) take measures to avoid conflicts between their own interests and those of the company and (ii) should not use their powers to seek improper interests.</p> <p>(2) Duty of Diligence: Directors, supervisors, and senior management staff should exercise their duties in the best interests of the company with all reasonable care they normally should have.</p> <p><i>(Article 180 of the amended Company Law)</i></p>
Performance of Duties	<p>(1) If directors or senior management staff cause damages to third parties during their performance of their duties, the company should be liable for such damages.</p> <p>(2) Directors and senior management staff who have committed intentional misconduct or gross negligence should also be liable for the damages.</p> <p>(3) If the controlling shareholder/actual controller instructs directors and senior management staff to engage in any act that will harm the interests of the company or shareholders, they should be jointly and severally liable with directors and senior management.</p> <p><i>(Articles 191 & 192 of the amended Company Law)</i></p>
Liability	<p>The company may purchase liability insurance for the</p>

Insurance	<p>directors to cover the liabilities they may incur for the performance of their duties for the company.</p> <p>After the company has purchased the liability insurance for the director or renewed the insurance, the Board must report to the shareholders the insured amount, coverage, and premium rate of the liability insurance.</p> <p><i>(Article 193 of the amended Company Law)</i></p>
Liquidation Liabilities	<p>As introduced in Part I, if directors fail to perform liquidation obligations in time and thereby cause losses to the company or creditors, they should be liable for the damages.</p> <p><i>(Article 232 of the amended Company Law)</i></p>

IV. Our Suggestions

The amended Company Law has changed many regulatory requirements on FIEs. Therefore, a timely update of AoA and other corporate documents is needed. In addition, some foreign shareholders often appoint foreigners as directors, supervisors, and senior management staff in FIEs to facilitate better control over operations. However, these foreign appointees, typically based overseas, may have limited knowledge of relevant Chinese laws, which makes it challenging for them to fulfill their duties effectively and promptly. Furthermore, many serve in nominal roles and are not actively involved in the company's operations in China. In some extreme instances, due to delays in filing with corporate registration authorities, certain individuals may remain registered with corporate registration authorities even after their departure.

To enhance the effectiveness of FIEs in complying with the amended Company Law and to safeguard their directors, supervisors, and senior management staff from potential risks, the following measures are recommended:

- (1) Updating Corporate Documents: Revise the AoA and other corporate documents to meet the requirements of the amended Company Law, ensuring legal compliance and updated governance practices;

- (2) Training Programs: Implement comprehensive training for directors, supervisors, and senior management staff to ensure a thorough understanding of their responsibilities, obligations, and liabilities;
- (3) Active Participation: Appoint individuals who will actively engage in the company's operations and guarantee that they fulfill their duties and obligations promptly;
- (4) Timely Registration Updates: Promptly update the relevant corporate registration authorities when there are changes in directors, supervisors, or senior management staff, whether due to resignation or removal; and
- (5) Liability Insurance: Acquire liability insurance for directors, supervisors, and senior management staff to cover potential compensation liabilities arising from their roles within the company.