Legal Alert:

ANOTHER POLICY ENCOURAGING FOREIGN CAPITAL TO INVEST IN FOR-PROFIT SENIOR CARE INSTITUTIONS

By: ***Michael Qu, Joe Christian***

Seldom does an industry draw frequent attention from legislative bodies—the senior care industry is one of the few exceptions. Recently, the Ministry of Commerce ("MOFCOM") and the Ministry of Civil Affairs ("MCA") jointly issued a Notice, (2014 No. 81) regulating activities for foreign investment in the senior care sector. It sets forth the procedure for the establishment of for-profit senior care institutions and policies encouraging the engagement in senior care services by foreign investors, among other issues. The Notice marks another big step toward the opening-up and providing a favorable investment environment for foreign investors who are interested in tapping into the senior care industry. Although very few details on "encouraging" policies can be found in the contents of the Notice, the Notice does add clarity to several very critical points where previous policies are "blurry" and inconsistent at different levels of government bodies. Therefore, the Notice is well worth studying for interested foreign investors, in particular in the following respects:

Clarified establishment procedure

The examination and approval process, as well as the

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--Deal with issues on intellectual property, licensing, general liabilities and employment.

procedure for foreign investors to establish for-profit senior care institutions, are further defined and clarified in the Notice. As we have previously noted, the setting up of a senior care institution is within the jurisdiction of the administrative departments of both the MCA and MOFCOM, who will issue the Establishment License and the Approval Certificate, respectively, for a foreign-invested senior care institution. The difficulty is that, in practice, the order of priority between the two departments for examination and approval differs among locales. For a period, pursuant to *Measures for Establishment and Licensing of Senior Care Institution*, announced in July, 2013[1], a "pre-approval license" from the local counterpart of MCA has been a pre−requisite for investors to apply for a business license from MOFCOM and AIC (Administration of Industry and Commerce). This procedure is inconsistent with the recent company registry reform, which advocates a "License Granted Before Certificate" system in the process of corporate registry. As we have previously noted in many occasions during the senior living conferences, this inconsistency has created much confusion among foreign investors.

With the issuance of the Notice, foreign investors in this sector will now apply first for examination and approval by the provincial level of MOFCOM of the Sino-foreign Equity Joint Venture, Sino-foreign Cooperative Joint Venture or Wholly Foreign-owned Enterprise that is proposed to operate a senior care institution in the applicable province. Upon the approval by MOFCOM in that province, an *Approval Certificate for Foreign-invested Enterprises* would be granted with a permission to "operate until Establishment License of senior care institution is obtained" within the appropriate business scope. Within one month after obtaining the Approval Certificate, the foreign investor would then proceed with the registration formalities in the local counterpart of AIC in order to obtain a business license.

The Notice explicitly prohibits the institution from providing accommodation or senior care services or charging fees to prospective residents before an Establishment License from the provincial level of MCA is granted. However, the Notice does provide foreign investors with significant convenience in the pre-opening period when capital contributions, hiring and training staff, construction planning and renovation, execution

[1] For more details, please refer to our previous article: http://www.lawviewer.com/upload/file/13735030049369.pdf

of agreements (other than residency contracts) and payment to third parties, among many other tasks in the pre-opening phase, that, prior to the Notice, would not be able to proceed before receipt of the Approval Certificate and Business License.

Reaffirmation of some national policies for foreign investment

According to the Notice, these national policies include: (a) Encouraging foreign investors to participate in the restructuring of public senior care institutions where for-profit services to senior citizens will be provided. This opportunity seems very similar to the reform of the healthcare/hospital sector in recent years, where we've seen quite a few significant mergers and acquisitions in China's public hospital restructuring; (b) A foreign-invested, for-profit senior care institution can enjoy the same preferential or exemption policies in respect to tax and administrative charges as are enjoyed by domestic investors; and (c) Foreign-invested, for-profit senior care institutions can engage in domestic investment related to senior care service. Foreign investors are also encouraged to develop senior care institutions into a scaled operation, with numerous locations within the country, to capitalize on their high-quality senior care brands.

If you are not new to the market, you may agree with us that these so-called encouraging policies are by now more formal than essential. For foreign investors, breaking the policy barrier in the senior care industry that grants more subsidies and preferential treatments to "non-profit" than to "for-profit" institutions over the long term still needs further supportive policies. Meanwhile, realizing a large-scale operation with numerous locations for a foreign brand, or attracting foreign investors to participate in the restructuring of public senior care institution depends not only on the incentives of policies, but also the market environment itself, which may play a bigger role. At the end of the day, profitability is what foreign capital looks for. Our view of the senior care market in China is that there is still a long way to go to attract significant foreign investment into the industry. Business models are still being explored; consumers need more education, to demonstrate to them the marked difference between the "new" senior living projects that foreign operators are bringing to the market and the "senior houses" that have been a last resort for the elderly in China for so many years; a shift from the traditional concept of filial piety has yet to fully occur; and, lastly, the acute shortage of properly trained geriatric health care workers[2] must be remedied.

Reiterating the distinction between the construction of senior care facilities and real estate development

The Notice further stipulates that local authorities should not permit any foreign-invested real estate company to change the land usage, the plot ratio or other specifications of the land use rights that specify construction of a senior care facility. Foreign-invested for-profit senior care institution will not be permitted to engage in a business such as helping seniors to realize senior living by means of utilizing personal houses. What is meant by this provision is unclear, as discussed below in our conclusions.

For many years, China has had in place a very strict examination and approval system for foreign investment in the real estate sector, so as to prevent "hot money" from flowing into the real estate market on a large scale, which would overheat the housing market. On the other hand, in order to lessen the amount of investment capital for private investors in senior care facilities, the National Land Resource Bureau has implemented specific provisions for senior housing[3], by which investors can expect to acquire land use rights at a lower price than if the land use rights permitted ordinary residential or commercial development. In light of the facts that senior housing is to some extent over-heated but the real estate market in general is cooling down, the central government is concerned that some foreign capital will flow into the real estate market in the guise of investing in the senior care industry. The central government is also concerned that local authorities might change the approval of specific land provision for a senior care facility into the development of a real estate project, which would make the national policy of land provision for senior housing a futile gesture.

When it comes to the provision prohibiting "helping seniors to realize senior living by means of utilizing personal houses", it looks very general and vague in language and hard to understand. Does it refer to prohibition of "house-for-pension"[4] arrangements or mean something else broader than that? Lawmakers need to further explain these

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[2] It is estimated that there are only 300,000 geriatric care workers in China, only 10% of whom are trained.

[3] For more information, please refer to http://www.lawviewer.com/uploads/20140429/535f3a1f464f2.pdf

[4] House-for-pension is currently under a pilot scheme, which is implemented in four cities, i.e. Shanghai, Beijing, Wuhan and Guangzhou. Only insurance companies who can meet certain requirements are permitted to engage in the pilot scheme.

provisions in the implementation of the Notice.

Conclusion

As we said at the beginning of this article, particularly of late, the senior care industry has been under constant legislative reform in China. It is important to keep track of the legislative dynamic—but the situation has the potential to get investors lost in this nascent market, where lawmakers have, on the one hand, relatively ill-defined plans and policies intended to attract investors, while on the other hand also desiring to protect the interests or meet the demands of the general public. Until immersing themselves in the market, foreign investors will not have an understanding of the complexities and ambiguities of the senior care market in China. But for what we can tell from early foreign entrants, the growing pains are inevitable, and most likely worth the pain and effort.

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