



China Updates

Vol. 2019/04



In this Issue

Special Edition: China's Foreign Investment Law

Main Content and Key Issues

Applicability of the Foreign Investment Law to Investors from Hong Kong, Macau and Taiwan

Adjustment of Organizational Structure by Foreign-Invested Enterprises

In response to our clients' needs for up-to-date information on the evolving legal and business environment in China, Lee and Li presents our monthly China Updates to assist our clients in understanding the latest legal and economic trends of China.

Lee and Li has provided legal services across the Greater China Area (Mainland China and Taiwan) longer than any other firm. In addition to decades of rich experience in legal services covering all disciplines, we have established the Greater China Strategic Alliance (L&L-Leaven, Attorneys-at-Law in Shanghai and Lee and Li - Leaven IPR Agency Ltd. in Beijing), providing our clients with the benefits of efficient and professional managing of legal and patent matters in the Greater China Area.

It is widely recognized by our clients that Lee and Li's integrated legal perspective and unparalleled expertise in cross-strait services significantly reduce the time and effort that many companies expend seeking trustworthy Chinese lawyers. Misunderstanding and communication costs arising out of cultural differences in legal practices between the cross-strait legal systems are avoided as well.

The PRC's Foreign Investment Law will become effective on January 1, 2020.

The Foreign Investment Law of the People's Republic of China (the "Foreign Investment Law") was deliberated and approved on March 15, 2019 at the 2nd session of the 13th National People's Congress (the "NPC") and will be effective on January 1, 2020.

The following summary will introduce the main content and key issues of the Foreign Investment Law, explore its applicability to investors from Hong Kong, Macau and Taiwan, and describe the corporate structure adjustment to be made by foreign-invested enterprises in response to this new Law.

I. Main Content and Key Issues

The Foreign Investment Law is enacted to further liberalize the market for foreign investments, protect the legitimate rights and interests of foreign investors, and provide relevant guidelines for supervising foreign investment. The main content includes:

1. Pre-Entry National Treatment and Negative List Management:

During the investment approval stage, the foreign investment shall not be treated less favorable than the domestic investment, except those fall into the industries listed in the "Market Access by Foreign Investors Special Administrative Measures (Negative List)."

2. Equal Treatment of both Domestic and Foreign Investment:

Foreign-invested enterprises may, in accordance with this Law, equally enjoy the state policies concerning the support for enterprise operation. The rights and obligations of the foreign-invested enterprises shall not be increased or decreased without legal basis. For instance, with respect to the approval required by foreign investors for the investment in specific industries, the competent authority should review the applications for approval by using the same standards and procedures as the applications by domestic investors.



**Law
Updates**

3. Investment Promotion:

The Foreign Investment Law is established to increase the transparency of investment policies, ensure that foreign-invested enterprises are granted equal access to the market (for example, governmental procurement, or the establishment and application of official or industry standards), improve the service to foreign investors, and encourage and provide guidance to foreign investors based on relevant regulations.

4. Protection and Management:

The Foreign Investment Law seeks to increase the protection to the intellectual property rights of foreign-invested enterprises. For example, administrative agencies are prohibited from forcing the foreign-invested enterprises to transfer proprietary technologies. The terms and conditions for technology cooperation shall be determined through negotiation among the investors based on the principles of fairness and equality.

II. Applicability of the Foreign Investment Law to Investors from Hong Kong, Macau and Taiwan.

While it has not been clearly provided in the Foreign Investment Law whether this Law will be applicable to investments from Hong Kong, Macau and Taiwan, it has been a long-standing practice in China that such investors are treated in accordance with the standards applicable to foreign investors.

State Council Premier Li Keqiang has clearly expressed in a press conference with domestic and international media: “The Foreign Investment Law may be used as a reference in relation to the investments from Hong Kong, Macau and Taiwan. Moreover, the institutional arrangements and actual practices that have long been in place and proven effective will go on.” The State Council will establish relevant regulations or policy documents to effectively protect the legitimate rights and interests of the investors from Hong Kong, Macau and Taiwan.



Law Updates

III. Adjustment of Organizational Structure by Foreign-Invested Enterprises

Following the Foreign Investment Law becoming effective on January 1, 2020, the three foreign investment laws (i.e., the Law of Chinese-Foreign Equity Joint Ventures, the Law of Wholly Foreign-Owned Enterprises, and the Law of Chinese-foreign Contractual Joint Ventures) will be repealed on the same date. Foreign-invested enterprises established before this date in accordance with these three laws may continue operating with their existing corporate structures for a period of five years after the enactment of this new Law. The adjustment of organizational structure has to be completed before the expiry of the five-year grace period.

Article 31 of the Foreign Investment Law stipulates that: “The organizational forms and institutional frameworks of foreign-invested enterprises shall be governed by regulations including the Company Law and the Law of the Partnership Enterprises”. However, in terms of the requirements on corporate governance, there are still significant differences between the Company Law and these three foreign investment laws, including the supreme organ of control in a company, the voting mechanisms on major issues of the enterprises, and allocation of profit and restrictions on the transfer of shares. To ensure compliance with the Foreign Investment Law, foreign-invested enterprises (particularly equity joint ventures) should review the related corporate documents, including their articles of association and joint venture agreement. For equity joint ventures, it is necessary for the parties of the joint-venture to reach agreement on the adjustments to be made. The process of negotiation and adjustment, undoubtedly, will be a battle between the interested parties.

The Foreign Investment Law (in Chinese):

http://www.npc.gov.cn/npc/xinwen/2019-03/15/content_2083532.htm



Law
Updates