CHINA'S 'NEW' FOREIGN INVESTMENT LAW

Date: 16 March 2020

Asia Corporate Alert

By: Amigo L. Xie, Carrie Yijia Luo

THE *FOREIGN INVESTMENT LAW OF CHINA* (THE FIL), TOGETHER WITH ITS IMPLEMENTATION RULES AND RELATED PEOPLE'S REPUBLIC OF CHINA (PRC) SUPREME PEOPLE'S COURT INTERPRETATION, CAME INTO EFFECT ON JANUARY 1, 2020.

THE FIL PROVIDES A CONSOLIDATED BODY OF LAWS ON A SIGNIFICANT NUMBER OF FOREIGN INVESTMENT LAWS AND REGULATIONS IN CHINA. THE OBJECTIVE OF THE FIL IS TO PROMOTE A TRANSPARENT AND ROBUST FRAMEWORK FOR FOREIGN INVESTMENTS IN THE PRC, IN A BID TO EXPAND MARKET ACCESS AND PROMOTE FOREIGN INVESTMENT, AND FURTHER PROTECT THE RIGHTS AND INTERESTS OF FOREIGN INVESTORS. THE UNDERLYING LEGISLATIVE INTENT OF THE FIL IS TO ALLOW FOREIGN INVESTORS TO ENJOY NO LESS FAVORABLE MARKET ACCESS TREATMENT THAN DOMESTIC INVESTORS IN CHINA.

NEGATIVE LIST

China had gone through the history of a "Foreign Investment Catalogue," first published by the then Ministry of Commerce of the PRC (MOFCOM) in 1995, where industries in China were classified into "encouraged," "restricted," or "prohibited" for purposes of access to foreign investments. An industry not listed in that catalogue was seen to be "permitted" for foreign investment.

The Foreign Investment Catalogue was later replaced by the concept of a "negative list," first piloted in the Shanghai Free Trade Zone in 2013 and later implemented nation-wide in 2018 (the Negative List). In 2013, the Negative List had 190 "restricted" or "prohibited" industries. When last updated in 2019, the Negative List had only 40 industries.

MOFCOM continues the efforts of updating and revising the Negative List, and MOFCOM has actually announced on February 27, 2020, that the work for further revision of the list has commenced. Under the FIL, foreign investors will continue to be subject to the Negative List. However, the FIL marks the first time that the Negative List is referred to in a nation-wide legislation as promulgated by the People's Congress of the PRC, the highest legislative body of the PRC. Any revisions to the Negative List proposed by MOFCOM are now subject to the

©2005-2026 K&L Gates LLP. All Rights Reserved.

review of the State Council of the PRC.

It is widely anticipated that the Negative List will continue to be shortened over time, particularly in the financial sector, by relaxing foreign ownership restrictions in securities, investment management, and insurance companies. In the U.S.-China Phase One Trade Deal, China has committed to removing foreign ownership restrictions to allow U.S. companies to have 100 percent ownership in the life, pension, and health insurance sectors and in the securities, fund management, and futures sectors, no later than April 1, 2020.

STRENGTHENING PROTECTION OF FOREIGN INVESTMENT

To promote a transparent and level-playing environment, the FIL spells out several provisions that would go to strengthening protection of foreign investment:

- there is no "forced" transfer of technology or divulgence of trade secrets of foreign-invested enterprises;
- any lawfully obtained income in the PRC by the foreign investor can be freely converted into foreign currency;
- foreign investors will have equal right of participation in bidding for government procurement projects;
- government commitments on preferential investment policies granted to foreign investors are reinforced; and
- there will no expropriation of foreign investments, except in exceptional circumstances, and in which case, fair and reasonable compensation must be given.

PRACTICAL CHANGES

A. Reporting in lieu of Pre-approval

MOFCOM has long been the gatekeeper for the admission of foreign investments into China. Not too long ago, the "approval" of MOFCOM was required before a foreign-invested enterprise could be established in China, and MOFCOM was able to review the substance of the terms of establishment, especially where a Chinese partner was involved. Over the years, that system advanced from a "pre-approval" system into a "pre-filing" or "post-filing" system with varying local practices.

With the FIL, MOFCOM's role as the gatekeeper for the admission of foreign investments is further reduced. Instead of a separate "filing" to MOFCOM, foreign investors are now only required to "report" certain information to MOFCOM on the establishment and operation a foreign-invested enterprise. This "reporting" obligation can be performed concurrently with the registration process at the State Administration of Market Supervision of the PRC (previously known as the State Administration for Industry and Commerce) (the SAMR), given the information-sharing platform between MOFCOM and the SAMR. Completion of the reporting obligation no longer generates a "filing receipt" issued by MOFCOM, nor would it constitute a prerequisite for effecting registration with SAMR.

B. Repealing of Laws

The FIL replaces and repeals several regulations governing the foreign investment regime in China, such as the *Sino-foreign Equity Joint Ventures Laws, Sino-foreign Cooperative Joint Ventures Laws*, and *Law on Wholly*

©2005-2026 K&L Gates LLP. All Rights Reserved.

Foreign-Owned Enterprises (the "FIE Laws"). However, it does not repeal the *Regulations on Mergers & Acquisitions of a Domestic Enterprise by Foreign Investors* promulgated by MOFCOM in 2009 and this is inviting attention from the legal fraternity in China.

At a practice-level, other than market access considerations, any foreign-invested enterprises established on or after January 1, 2020, will have to comply with the *PRC Company Law*, as to their corporate structure and governance. Under the FIL, for foreign-invested enterprises, including Sino-foreign joint ventures, established before January 1, 2020, that had adopted a corporate governance structure under the FIE Laws, and which differs from the requirements of the *PRC Company Law*, there is a five-year transition period to having this rectified.

In contrast with the FIE Laws, the PRC Company Law has a more flexible corporate governance structure, for example, as it relates to shareholder voting arrangements and right to dividends. Accordingly, a foreign joint venture partner may consider proposing changes to the joint venture contract and/or articles of association of the Sino-foreign joint venture enterprise on the basis of the FIL, to take advantage of the provisions of the PRC Company Law.

FORWARD STATEMENT

The FIL is a reflection of the Chinese government's commitment to open up its economy and streamline the foreign investment framework, and is a welcomed-change from a structural and procedural perspective, initiated by the People's Congress of the PRC.

Details are lacking in the form of implementation rules and guidelines at this stage. For example, it is unclear how the foreign exchange rules and industry-specific regulations will overlap with the FIL, to achieve the principle of "no less favorable treatment" for foreign investors. At this juncture, empirical evidence of the impact of the FIL on the foreign investment environment in China is also lacking, particularly given the impact of the COVID-19 outbreak over China in recent months.

However, foreign investors are encouraged to keep a close eye on the regulatory development spearheaded by the FIL. It is widely anticipated that further implementation rules and regulations will be rolled out, opening up opportunities for foreign investments, particularly in areas where previously restricted by industry-specific regulators.

KEY CONTACTS



AMIGO L. XIE
PARTNER OF K&L GATES LLP AND REGISTERED FOREIGN LAWYER

HONG KONG
+852.2230.3510
AMIGO.XIE@KLGATES.COM



CARRIE YIJIA LUO
ASSOCIATE

BOSTON
+1.617.951.9183
CARRIE.LUO@KLGATES.COM

©2005-2026 K&L Gates LLP. All Rights Reserved.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.