

Client Alert

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China's Foreign Investment Law and related regulations mark a new era for foreign investment in China

On January 1, 2020, the *Foreign Investment Law of the People's Republic of China* (FIL), which China's State Council enacted on March 15, 2019 (see our alert [here](#)), took effect. On the same day, several related regulations and notices, which were issued at the end of 2019, also took effect. The new FIL and related regulations mark the beginning of a new era for foreign investment in China.

Implications for Foreign Investors

The new legislation establishes a new legal framework for the management and promotion of foreign investment in China. Foreign investors and their subsidiaries in China will need to stay abreast of and familiarize themselves with the new regime in order to comply with and benefit from it.

The Latest Regulatory Developments

FIL Implementing Regulation

The State Council adopted the *Regulation on the Implementation of the Foreign Investment Law of the People's Republic of China* (the "**Implementing Regulation**") on December 12, 2019, and it took effect on January 1, 2020. The Implementing Regulation provides additional details and clarity on several general provisions and principles set out in the FIL. The Implementing Regulation:

- requires national treatment for foreign invested enterprises (FIEs) in many important areas, including government funding, land supply, tax reductions and exemptions, permitting, standards formulation, public procurement, and project approvals;
- sets out the rights of FIEs to participate in rule-making, standards formulation and government procurement;
- requires government authorities to take measures and establish systems for transparency in rule-making and administration, providing consulting services and guidance for foreign investors and FIEs, and handling complaints by FIEs or their investors; and
- provides further details regarding expropriation of foreign investors' investments, protection of intellectual property, the new "negative list" system for administration of the establishment of and changes to FIEs, information reporting, and the transitioning of existing FIEs.





MOFCOM and SAMR Regulations on FIE Information Reporting and Administration

The Ministry of Commerce (MOFCOM) and State Administration for Market Regulation (SAMR) also issued new regulations that took effect on January 1, 2020 and lay the groundwork for administration of FIE establishment and changes.

MOFCOM and SAMR jointly issued the *Foreign Investor Information Reporting Measures* (the “**Reporting Measures**”) on December 30, 2019, and MOFCOM issued the *Notice Regarding Foreign Investor Information Reporting Related Matters* (the “**Reporting Notice**”) on December 31, 2019. Under the Reporting Measures and the Reporting Notice, the MOFCOM recordal system is replaced by a reporting system that applies to FIEs, foreign invested partnerships, foreign enterprises engaging in operation and production in China, and representative offices of foreign enterprises. The Reporting Measures and the Reporting Notice cover information reporting with respect to establishment of FIEs and their subsidiaries, changes to FIEs and their subsidiaries, and annual reporting. Reporting will be done through the SAMR registration system to consolidate and avoid duplicative reporting and penalties are increased for failure to report the required information. Further details regarding the new annual reporting system for FIEs are set out in the *Notice on Completing Annual Reporting “Multiple Reports in One” Reform Related Work* issued by MOFCOM, SAMR and the State Administration of Foreign Exchange on December 16, 2019.

On December 31, 2019, SAMR also issued the *Notice on Effective Work on Registration of Foreign Invested Enterprises for the Implementation of the Foreign Investment Law*, which took effect on January 1, 2020. The Notice provides important details regarding how SAMR will handle registration of FIE establishment and changes under the negative list system established by the FIL and Implementing Regulations. It also addresses SAMR's role in the FIE information reporting system and provides guidance on registering changes to pre-existing FIEs during the five-year transition period provided by the FIL for existing FIEs to meet the corporate structure and governance requirements of the FIL.

Supreme People's Court Interpretation of FIL

On December 26, 2019, the Supreme People's Court of the People's Republic of China issued the *Interpretation on Certain Issues Regarding the Application of the Foreign Investment Law*, which also took effect on January 1, 2020. The Interpretation provides guidance on questions relating to the effectiveness and enforceability of foreign investment related agreements, such as shareholder agreements, share transfer agreements, and project contracts that may arise under the new negative list system for administration of foreign investment. According to the Interpretation, with respect to agreements for investments in sectors that are not restricted under the negative list, Chinese courts should not uphold a claim that an agreement is void or invalid because the parties have not completed relevant registration and approval procedures. However, with respect to agreements for investments in sectors that are prohibited by the negative list and agreements that violate the restrictions set out in the negative list, Chinese courts should support a claim that the agreement is invalid.



Various FIE Regulations Repealed

On January 1, 2020, two separate notices issued by MOFCOM took effect and repeal various regulations, notices and other ministerial documents that had governed FIEs and their administration, including the *Certain Questions on the Establishment of Foreign-funded Companies Limited by Shares Tentative Provisions* of 1995 and the *Several Provisions on the Alteration of Investors' Equities in Foreign Investment Enterprises* of 1997. We expect that there will be additional notices repealing many more existing FIE related regulations issued in the near future.

Actions to Consider

Foreign investors and their subsidiaries are advised to consider the following in light of the changes that the FIL and these new regulations entail for them:

- Monitor the new regulations taking effect and the old regulations being superseded and repealed;
- Review the new regulations and related announcements and guidance issued by the authorities;
- Consult with local authorities regarding the specific systems and requirements being put in place locally to implement the new regime; and
- Seek professional advice on the implications of the new regulations for your business and steps you should take adapt to and comply with the new regime.

Conclusion

With the effectiveness of the FIL and these various supporting regulations, the laws and regulations that have governed foreign investment in China for the last several decades fall away and the foundations for a new regime to take their place is laid. They mark a new era for foreign investment where foreign invested enterprises will be treated the same as domestic enterprises in many important respects, and new systems will come online to manage and service foreign investors with increased transparency, efficiency and accountability. While there will no doubt be additional regulations and guidance forthcoming by the various authorities to further implement and perfect the new regime, the issuance of the FIL and these first batch of regulations and notices represent a momentous first step.

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