环球律师事务所 GLOBAL LAW OFFICE

LexisNexis

Regarding: Foreign Investment Compliance Guidelines

Version：Version 1

Date：February 2020

Foreign Investment Compliance Guidelines

（2020.02 Version 1）

GLO 环球律师事务所 | LexisNexis 律商联讯

Exclusive Partnership

Disclaimer

This report and its contents do not represent the legal opinions of Global Law Office on related issues. At the same time, we do not guarantee that the relevant content will be updated after the stated date. We do not recommend that the reader make any decision solely on the basis of all or part of the content of this report, and therefore the consequences will be left to the actor. If you require legal or other expert advice, we recommend that you seek professional help from a qualified professional.

Contact Us

If you want to know more about the contents of this report, you can contact the following partners of our law firm (these partners are the partners who wrote this report, sorted in the order of the chapters of this report), or you can contact other partners and lawyers of our law firm：

LIU JINRONG
刘劲容
liu@glo.com.cn

LIU CHENGWEI
刘成伟
alliu@glo.com.cn

REN QING
任清
renqing@glo.com.cn

LIU ZHAN
刘展
jliu@glo.com.cn

LIU SHUJUN
刘淑珺
liushujun@glo.com.cn

KANG QIUNING
康秋宁
qnkang@glo.com.cn

SUN HAISHAN
孙海珊
sunhaishan@glo.com.cn

GUO SHIFANG
郭仕芳
guoshifang@glo.com.cn

ZHANG XIN

张昕

zhangxin@glo.com.cn

ZHU LI

朱莉

zhuli@glo.com.cn

LI ZHANKE

李占科

lizhanke@glo.com.cn

Foreign Investment Compliance Guidelines

（2020.02 Version 1）

GLO 环球律师事务所 | LexisNexis 律商联讯

Part A New Era of Foreign Investment Regulation

Chapter I New Foreign Investment Regulatory Framework

Liu Jinrong/ Liu Chengwei/ Ren Qing

1.1. "Foreign Investment Law" Takes Effect, "Three Laws on Foreign Investment" Abolished

Since January 1, 2020, the Foreign Investment Law of the People's Republic of China (Presidential Decree No. 26, issued on March 15, 2019) ("FIL") and the Implementation Regulation for the Foreign Investment Law of the People's Republic of China (State Council Decree No. 723, issued on December 26, 2019) (the "Implementing Regulations of the FIL") came into effect.

The three laws on foreign investment were abolished simultaneously from the date when the FIL came into effect. According to Article 42 of the FIL, the Law of the People's Republic of China on Sino-foreign Joint Ventures, the Law of the People's Republic of China on Foreign-invested Enterprises, and the Law of the People's Republic of China on Sino-foreign Cooperative Enterprises (collectively referred to as the "Three Foreign Investment Laws") were simultaneously abolished on January 1, 2020. According to Article 49 of the FIL, the Regulations of the People's Republic of China on the Implementation of the Law on Sino-foreign Joint Ventures, the Interim Provisions on the Contract Term of Sino-foreign Equity Joint Ventures, the Detailed Rules for the Implementation of the Law of the People's Republic of China on Foreign-invested Enterprises, and the Detailed Rules for the Implementation of the Law of the People's Republic of China on Sino-foreign Cooperative Enterprises were simultaneously abolished on January 1, 2020.

Since then, the "three pillars" era of foreign supervision has come to an end. After entering the era of FIL, for foreign-invested enterprises, whether it is a Wholly Foreign-Owned Enterprise ("WFOE") or a Sino-Foreign Equity Joint Venture ("EJV") or a Sino-Foreign Cooperative Joint Venture ("CJV") (collectively referred to as "FIE"), the form of organization and institutional framework will be the same as those of domestic-funded enterprises, which will be applicable to the Company Law of the People's Republic of China ("Company Law") or the Partnership Enterprise Law of the People's Republic of China ("Partnership Enterprise Law") and other related laws and regulations, while the negative list management system will be implemented for its industry access or business operations. For those not involved in the negative list, it will be treated the same as domestic enterprises without imposing any additional restrictions or controls and fully enjoy full "national treatment".

1.2. Fully Entered into a New Era of "Pre-entry National Treatment Plus a Negative List Management"

With the formal entry into force of the FIL and the Implementing Regulations of the FIL, foreign investment supervision has fully entered the era of "pre-entry national treatment plus a negative list management".

According to Article 4 of the FIL, the so-called "pre-entry national treatment" refers to the treatment given to foreign investors and their investment at the stage of investment admission no less than that to domestic investors and their investments. The manifestation of the measures is that the competent department of commerce canceled the approval and filing system for the establishment and change of FIE. The establishment of FIE is the same as the establishment of domestic-funded enterprises and the Company Law or the Partnership Enterprise Law is applicable. As a major achievement of the reform of "decentralization, management and services" in the field of foreign investment, the commercial department, together with the market supervision and management department, have established a foreign investment information reporting system in accordance with the requirements of the new foreign investment legal system. In addition, there will no longer be any additional procedures for the approval or filing of foreign investment access by the commercial department. (See Chapter III below for more analysis)

On the other hand, another important component of the new foreign investment legal system is "negative list management". According to Article 4 of the FIL, the so-called " negative list management" refers to the special management measures that are adopted for the admission of foreign investment in specific areas. As of now, the latest version of the negative list is the Special Administrative Measures (Negative List) for the Access of Foreign Investment (2019) jointly issued by the National Development and Reform Commission ("NDRC") and the Ministry of Commerce of the People's Republic of China ("MOFCOM") on June 30, 2019 and implemented on July 30, 2019 (Order No. 25 of the MOFCOM and the NDRC, "Negative List 2019"). There are a total of 40 areas listed in the "Negative List 2019" involving special management measures for foreign investment. It is worth noting that, in addition to the negative list of specific management measures applicable on an industry-by-industry basis, the Negative List 2019 specifically refers to a matter that should be subject to special management on the basis of type of transaction, i.e., "affiliated mergers and acquisitions". According to item 5 of the statement part of "Negative List 2019", if a domestic company, enterprise or natural person merges a domestic company with which it is affiliated with a company that is legally established or controlled abroad and involves a foreign investment project or the establishment or alteration of an enterprise, it shall be handled in compliance with related existing provisions. (See Chapter IV below for more analysis regarding affiliated mergers and acquisitions) In addition to the national version of the negative list, the NDRC and the MOFCOM also updated the negative list applicable to the free trade zone on June 30, 2019 – special management measures for foreign investment access in the pilot free trade zone (negative list) (version 2019) (Decree No. 26 of the NDRC and the MOFCOM, "FTA Negative List 2019").

In particular, it is worth mentioning that although the approval and filing procedures of foreign investment access by competent commercial departments is no longer implemented and has been replaced by the new foreign investment information reporting system, the project approval and filing procedures of the competent development and reform department is still applicable. Article 36 of the Implementing Regulations of the FIL clearly stipulates that if foreign investment needs to be approved or filed for investment projects, it shall be implemented in accordance with relevant state regulations. However, it should be noted that, unlike the approval and filing procedures for foreign investment by competent commerce department that have been replaced, the approval and filing procedures of the competent development and reform department for investment projects are not specific to foreign investment, but are also applicable to domestic-funded enterprise. In this regard, the competent development and reform department's review does not actually involve the issue of "foreign investment access", but rather the relevant

procedures applicable to all enterprises, including domestic and foreign enterprises. The approval and filing of investment projects by the competent development and reform department mainly involves the following rules: Regulations on the Administration of the Approval and Filing of Enterprise Investment Projects promulgated by the State Council in November 2016 and effective from February 1, 2017 (Order No. 673 of the State Council), List of Government-approved Investment Projects (2016 edition) issued by the State Council in December 2016 (Guofa [2016] No. 72), and the Administrative Measures on the Approval and Filing of Enterprise Investment Projects promulgated by the NDRC in March 2017 and effective from April 8, 2017 (Order No. 2 of the NDRC).

In addition to the competent development and reform department 's review of investment projects, foreign investment may also involve the approval of competent industry authorities, such as investments in the financial industry. Of course, such industry approval or filing requirements are not only for foreign investment, but are applicable to domestic and foreign enterprises. According to Article 35 of the Implementing Regulations of the FIL, where a foreign investor invests in an industry or field that requires a license in accordance with the law, unless otherwise provided by laws and administrative regulations, the relevant competent authority responsible for implementing the license shall review the foreign investor's license application in accordance with conditions and procedures consistent with domestic investment, and shall not set discriminatory requirements on foreign investors in terms of licensing conditions, application materials, review procedures, review time limits, etc. In this regard, some existing foreign investment management measures targeted at specific fields or industries, such as the Regulations on the Administration of Foreign-invested Telecommunications Enterprises, the Interim Measures on the Management of Sino-foreign Joint Ventures and Cooperative Medical Institutions, the Regulations on Sino-foreign Cooperation in Running Schools, Chinese Foreign Banking Supervisory Rules, Regulations on the Administration of Foreign Insurance Companies, and so on, are facing the fate that needs to be adjusted, revised or even abolished to truly implement the principle of equal national treatment of domestic and foreign investment required by the FIL and the Implementing Regulations of the FIL.

In short, under the framework of the new foreign investment management system, the state grants national treatment to foreign investment that is not on the negative list. For the supervision of foreign investment, the new management system can be summarized as "**the registration of companies/enterprises under the market supervision and management department + the foreign investment information report to the commercial department + the approval or filing by the development and reform department or the competent department of the industry (if applicable)**".

Finally, it should be mentioned that in addition to the negative list management, the state still continues to encourage and guide policies on the direction of foreign investment. According to Article 11 of the Implementing Regulations of the FIL, in accordance with the needs of the national economy and social development, the state shall formulate a catalogue of industries that encourage foreign investment, setting out specific industries, fields and regions that encourage and guide foreign investors to invest. As of now, the latest catalogue related to foreign investment encouragement industries is the Catalogue for Encouraging Foreign Investment (2019 Edition) jointly issued by the NDRC and the MOFCOM on June 30, 2019 and effective on July 30, 2019 (Order No. 27 of the NDRC and the MOFCOM, "Encouraged Catalogue 2019"). In addition, the NDRC also issued an updated version of the "Industrial Structure Adjustment Guidance Catalogue (2019 Edition)" in October 2019 (Fagai Difang Gui [2019] No. 1683, "Structure Adjustment Catalogue 2019"). The Structure Adjustment Catalogue 2019 came into effect on January 1, 2020, and will also apply to domestic and foreign-funded enterprises. It lists

encouraging and restricted projects, which will have important reference significance when the development and reform department approves or puts on record the investment projects.

1.3. Former Supporting Rules of the Three Laws on Foreign Investment Abolished

After the implementation of the FIL and the Implementing Regulations of the FIL, a certain number of previous special provisions on foreign investment may face the fate of being adjusted or abolished. For example, in Article 49 of the FIL, in addition to simultaneous abolishment of the implementation regulations for Three Foreign Investment Laws, the Interim Provisions on the Contract Term of Sino-foreign Equity Joint Ventures are also explicitly repealed, which was promulgated in October 1990 by the Ministry of Foreign Trade and Economic Cooperation("MOFTEC", which function was inherited by the MOFCOM). As for the aforesaid provisions, considering that they were approved by the State Council in the legislative process, the State Council will also repeal them when the Implementing Regulations of the FIL came into force.

On the other hand, most of the relevant supporting rules applicable to foreign investment are formulated by the MOFCOM or its former Ministry the MOFTEC, except for some industry rules related to negative list management (such as foreign investment in telecommunications, etc.) and foreign exchange regulations. As for the adjustment or abolition of supporting rules after January 1, 2020, it needs to be clarified by the MOFCOM or other competent departments in combination with the progress of combing relevant rules gradually. For example, 6 departmental regulations have been abolished by the decision of the MOFCOM on Abolition of Some Regulations (the MOFCOM Order No. 3, issued on December 28, 2019), and 56 regulatory documents have been repealed by the notice from the MOFCOM on Repealing Some Regulatory Documents (the MOFCOM Notice No. 59, issued on December 25, 2019). The foresaid repealed supporting rules may involve the following aspects:

1.3.1 FIE Organizational Form and Corporate Governance Structures

Organizational form: leasing equipment capital contribution, operating period, adjustment of aggregate investment and registered capital and application for extension filed.

Corporate governance structures: directors not attending the board of directors' meetings.

Sino-foreign co-operative enterprises: the Notice on Issuing the implementation of Certain Articles of the Detailed Rules for the Implementation of the Law of the People's Republic of China on Sino-foreign Cooperative Enterprises.

Foreign investment companies limited by shares: the Provisional Regulations on Several Issues concerning the Establishment of Foreign Investment Companies Limited by Shares and the Letter of General Office of MOFCOM on Issues concerning the Transformation of Sino-foreign Equity Joint Equity Ventures and Other Types of Enterprises into Foreign Investment Companies Limited by Shares.

Investment FIE: investment companies and venture capital.

FIE liquidation: termination of liquidation, specific issues of liquidation as well as dissolution and liquidation.

A series of notices and announcements on the adjustment of foreign investment review

permissions over the years.

1.3.2 Regulations Related to Foreign Investment and M&A

Stock equity alternation: the Several Provisions on Changes in Equity Interest of Investors in Foreign-invested Enterprises and the Reply of the General Office of the MOFCOM on the Relevant Issues Concerning Stock Equity Alternation of Foreign-invested Enterprises.

Capital contribution in the form of equity: the Interim Provisions of MOFCOM on Capital Contribution in the Form of Equity by Foreign Investment Enterprises.

Mortgage: the Reply of the MOFTEC on the foreign mortgage of the property or rights and interests of foreign Investment enterprises.

Investment in listed companies: the Opinions on Issues relating to Foreign-invested Listed Companies, Issues relating to Transfer of State-owned Shares and Legal Person Shares of Listed Companies to Foreign Investors, the Notice on Relevant Issues Concerning Application Procedures for Transfer of State-owned Shares of Listed Companies to Foreign Investors and Enterprises with Foreign Investment and the Notice of the MOFCOM on Conversion of Non-Listed Foreign Investment Shares of Foreign-Invested Joint Stock Companies into Tradable B Shares.

1.3.3 Specific Industry

Industry of technology of telecommunications: online sales and vending machines.

Industry of real estate: regulations on filing of foreign investment companies.

Industry of commercial circulation: logistics business, commercial business and import licenses.

Industry of finance: financial assets, disposal of non-performing assets, financing guarantees, commercial Factoring and finance lease.

Industry of energy and infrastructure: mineral exploration and foreign investment by means of BOT.

Miscellaneous: overcapacity, for-profit service for the elderly and funeral service.

1.4. Adjustment of Supporting Rules or Formulation of New Rules Under the FIL

In general, the FIL and the Implementing Regulations of the FIL belong to the principle or programmatic provisions, and the implementation of specific systems requires the formulation of corresponding supporting rules. In addition, as mentioned above, in the case that a large number of former supporting rules have been abolished, the connection and implementation of relevant policies need further policy modification or formulation.

On the one hand, with regard to the new foreign investment information reporting system mentioned above, the MOFCOM jointly issued the Measures on Reporting of Foreign Investment Information (MOFCOM, State Administration for Market Regulation Order No. [2019] No. 2) ("Measures on Reporting"). The Measures on Reporting came into force on January 1, 2020, and replace the Provisional Measures on Administration of Filing for Establishment and Change of Foreign Investment Enterprises. On December 31, 2019, the

MOFCOM further issued Announcement of the MOFCOM on Matters Relating to Reporting of Foreign Investment Information (MOFCOM Announcement [2019] No. 62), which clarified relevant matters of information report system, and issued the report forms of foreign investment initial report and change report, foreign investment annual report and other declaration documents.

On the other hand, it remains to be seen how existing supporting rules will be adjusted or whether these will be abolished. For example, a large number of provisions have been repealed as mentioned in Section 1.3 above, but the author also notes that the following relevant rules on foreign M&A are not listed: the Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors, the Interim Provisions on Investment Inside China by Foreign Investment Enterprises, the Provisions on Merger and Division of Foreign Investment Enterprises as well as the Administrative Measures on Strategic Investment in Listed Companies by Foreign Investors. Some of the above supporting rules may be in the process of further adjustment and revision in accordance with the latest provisions of the FIL and the Implementing Regulations of the FIL, while others may be abolished when they are still in the process of countersignature or consultation among the relevant departments. Further observation is needed.

Chapter II Adjustments and Transitional Arrangements with respect to Existing FIEs

Liu Zhan

2.1. Requirements during the Transition Period and Non-compliance Consequences

With the Foreign Investment Law ("FIL") taking effect on January 1, 2020, the three laws on foreign investment were also abolished. Per article 42 of the FIL and article 44 of the Implementing Regulations of the FIL, after "the unification of three laws into one", the "organizational form and corporate governance structure" of FIEs shall be governed by the Company Law, the Partnership Enterprise Law, and other relevant laws and regulations that govern the domestic enterprises.

As to the existing FIEs, the FIL grants a five-year transition period from the effectiveness date of the FIL for such existing FIEs to adjust their organizational form and corporate governance structures to gradually comply with the Company Law or Partnership Enterprise Law, as applicable. During the transition period, the existing FIEs may keep their original organizational form and corporate governance structure.

Per article 44 of the Implementing Regulations of the FIL, after 2025, for the existing FIEs that have not completed the legally required change procedures, the market regulation authorities will refuse to process the applications for any other registration matters of such FIEs, and will put on public notice of such non-compliance. After the transition period ends, i.e., from January 1, 2025, the existing FIEs shall operate in accordance with the principle of *same treatment to domestic and foreign investment*, with their operating by-laws such as internal governance structure, rules of procedure, and voting mechanisms fully unified with those applicable to domestic enterprises. The laws will cease to be segregated based on the source of the capital. The shareholders may negotiate, formulate and implement various rights protection mechanisms and rules in a more flexible way.

Notwithstanding the foregoing, as to the existing FIEs with their articles of association or joint venture contracts including the equity interest transfer method, dividends distribution method, residual assets distribution method not in line with the Company Law, article 46 of the Implementing Regulations of the FIL, in the spirit of freedom of contract, allows such existing FIEs to operate with respect to such matters based on the original agreement, provided that their organization form and corporate governance structure are adjusted per the law.

2.2. Adjustments Requirements for Corporate Governance by Existing FIEs

For the existing FIEs in the form of WFOEs, except a limited number of WFOEs formed without legal person status, the majority of the WFOEs have been established as limited liability companies, with their shareholders' meeting being their highest authority in compliance with the Company Law.

However, the FIL will mostly affect those existing EJVs and CJVs. In the following, we

will first take EJVs as an example to discuss the adjustment requirements for their corporate governance upon the implementation of the FIL:

2.2.1 Highest Authority Adjustment

For an EJV, the fundamental change required is the change to its highest authority. The previous biggest feature of an EJV in its corporate governance is that the board of directors is the highest authority deciding all major matters of the company. With the abolishment of three laws on foreign investment, EJVs must establish shareholders' (general) meetings to *inherit* the powers from their board of directors. The responsibilities and powers of the shareholders' meeting and the board of directors will be assigned in accordance with the Company Law. With this change, EJVs will establish a "three-tier" corporate governance structure, i.e., shareholders' meeting - board of directors – executive, the same as applicable to domestic companies.

Such change to the highest authority will trigger a series of adjustment requirements:

a) Adjustment to the appointment and removal methods of directors. The appointment and removal of directors is adjusted from being determined through negotiations by the EJV shareholders to the EJV by referencing their respective capital contribution ratios to being determined by the shareholders' meeting.

b) Adjustment to the term of directors. The term of directors of an EJV is changed from a fixed term of four years to a term of no more than three years as specified under the Company Law.

c) Adjustment to the quorum requirement for board meetings. Under the EJV Law, the quorum for a board meeting is two-thirds. After the change of the company's highest authority to the shareholders' meeting, the quorum requirement of board meetings can be freely agreed by the shareholders in the company's articles of association.

The aforementioned adjustments will undoubtedly bring greater flexibility to the existing FIEs' corporate governance. On one hand, the unified administration of both domestic and foreign investment ends the previous dual-track system, thus improving the management visibility of the existing FIEs. On the other hand, the "three-tier" corporate governance structure will bring the mechanism of check and balance into the existing FIEs.

2.2.2 Adjustment to Voting Mechanism for Statutorily Reserved Matters

After the implementation of the FIL, the statutorily reserved matters (i.e., amendment to the company's articles of association, increase or decrease of the registered capital, merger, division, dissolution, and change to the company's form) will no longer be subject to unanimous approval of the board of directors, but will be subject to approval of shareholders representing two-thirds or more of the voting rights.

This adjustment would help avoid corporate deadlock; however, if a shareholder has less than one third of the equity interest in the EJV, such shareholder would no

longer have veto right with respect to those aforementioned statutorily reserved matters.

2.2.3 Adjustment to Equity Transfer Restrictions

Pursuant to the EJV Law and its Implementing Regulations, when transferring all or part of its equity to a third party, a shareholder must obtain consent from all the non-transferring shareholders. With the abolishment of the three laws on foreign investment, equity transfer shall be governed by article 71 of the Company Law, which only requires the transferring shareholding to obtain consent from more than half of the non-transferring shareholders. In addition, the Company Law grants the company freedom and powers to formulate different provisions on equity transfer in its articles of association.

2.3. Special Matters with respect to CJVs

For the existing CJVs with legal person status, similar to the EJVs mentioned above, the highest authority of these CJVs should be adjusted from the board of directors or joint management committee to the shareholders' meeting. The term of the directors or members of the joint management committee is already consistent with the Company Law and therefore does not entail adjustment. The appointment and removal of directors should be adjusted from being determined by the parties to the cooperation to being determined by the shareholders' meeting. The adjustment of the quorum for board meetings is the same as that to the EJVs, i.e., to be governed by the articles of association. Besides, the adjustments to the voting mechanism for statutorily reserved matters and equity transfer restrictions are the same applicable to the EJVs.

For the exiting FIEs without legal person status (mainly CJVs), the FIL and its Implementing Regulations do not include specific provisions addressing the organizational form adjustment requirements. Our understanding is that, after the implementation of the FIL, the organizational form of all FIEs shall be subject to the Company Law or the Partnership Enterprise Law. Therefore, the exiting FIEs without legal person status will also be subject to the adjustments to organizational form. These existing FIEs may choose to restructure themselves into partnerships, limited liability companies or companies limited by shares in accordance with the relevant laws during the transition period. After such adjustments, their organizational structure and operation by-laws shall comply with the Company Law, Partnership Enterprise Law, or other applicable laws and regulations.

2.4. Summary

In summary, the three laws on foreign investment and the Company Law have substantive differences with respect to corporate governance provisions. Since the seat allocation of the highest authority and voting mechanism of the exiting FIEs might not fully comply with the provisions under the Company Law, it is foreseeable that the shareholders will likely start a new round of negotiations on such terms as separation of powers and corporate governance, in conjunction with adjusting the powers and responsibilities of the shareholders' meeting and the board of directors, in order to amend the articles of association, joint venture contracts, cooperative contracts or shareholders' agreement in accordance with the Company Law.

Chapter III Establishment, change and deregistration of foreign invested enterprises under the new regulatory framework

Kang Qiuning/ Liu Shujun

3.1. Procedure: Establishment, Change and Deregistration of FIE under the New Foreign Investment Policy and the Negative List

Before the Foreign Investment Law comes into force, the administrative system for foreign investment of China has changed from "case-by-case examination and approval " to "negative list management and record-filing" nationwide, which is marked by the promulgation of the Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign Invested Enterprises in October 2016. In other words, the examination and approval system shall still apply to the establishment and change of foreign invested enterprises (hereinafter referred to as the "**FIEs**") which are subject to special administrative measures for foreign investment access, and the record-filing system shall apply to the FIEs which are not subject to special administrative measures for foreign investment access. Following such significant changes (hereinafter referred to as the "**Foreign Investment 2.0 Era**"), the procedures for the establishment, change, and deregistration of FIEs had been significantly simplified. However, the relationship among all the regulatory lines involved in foreign investment are still unclear or contradictory.

Table 1: Major Supervision Procedures for the Establishment and Change of FIEs in 2.0 Era

Generally Applicable Supervisory Procedures	Competent Authorities	Major Responsibilities
Project Management	Competent Investment Authorities (NDRC)	Approval or Filing of Foreign Investment Projects Based on the Administrative Measures on Approval and Filing for Foreign Investment Projects
Foreign Investment Access	Competent Commerce Departments	Based on the Special Administrative Measures for Foreign Investment Access (Negative List), case-by-case examination and approval shall be carried out for establishment and change of FIEs which are involved in the Negative List, and establishment and change of FIEs which are not included in the

		Negative List shall be subject to filing administration.
Industry Access	Competent Industrial Authorities	Examination of qualifications of FIEs based on industry access requirements, issuance of the relevant industry permits
Enterprise Registration	Administrative department for market regulation (formerly known as administrative department for industry and commerce)	Processing of registration and filing for establishment and change of FIEs
Declaration of the Concentration of Undertakings and National Security Review		

After the implementation of the Foreign Investment Law on 1 January 2020, principle of "national treatment" and " same treatment to domestic and foreign investment" will replace "governmental approval" system in terms of the foreign investment administration in China, and the foreign investment administrative system in China will be further fundamentally changed from "negative list administration and filing " to "pre-establishment national treatment plus negative list administration" (Article 4 of the Foreign Investment Law).

Based on the Implementation Regulations for the Foreign Investment Law and the Implementation Regulations for the Foreign Investment Law (hereinafter referred to as the "**Implementation Regulations**") and the new provisions implemented synchronously below, on the basis of sorting out the new system for administration of foreign investments, taking into account the main changes in establishment, change and deregistration procedures of FIEs following the implementation of the new law, this Chapter will highlight procedural matters which foreign investors and FIEs may concern.

- Interpretations of the Supreme People's Court on Several Issues Relating to Application of the Foreign Investment Law of the People's Republic of China (Fa Shi [2019] No. 20, promulgated on 26 December 2019, and implemented with effect from 1 January 2020)
- Notice on Implementation of the "Foreign Investment Law" and Registration of Foreign Invested Enterprises (Guo Shi Jian Zhu [2019] No. 247, promulgated on 28 December 2019, implemented on 1 January 2020, hereinafter referred to as the "**Notice on Registration**")
- Measures on Foreign Investment Information Reporting (Ministry of Commerce and State Administration for Market Regulation Order [2019] No. 2, promulgated on 30 December 2019 and implemented with effect from 1 January 2020)

- Announcement on Issues concerning Foreign Investment Information Reporting (Ministry of Commerce Announcement [2019] No. 62, promulgated on 31 December 2019 and implemented with effect from 1 January 2020)

3.2. Reshaping the Foreign Investment Regulatory System

Based on the institutional and principled requirements of "pre-establishment national treatment plus negative list management" and "same treatment to domestic and foreign investments", the Foreign Investment Law and its Implementation Regulations have reshaped the regulatory system for foreign investments in China.

In the Foreign Investment Law era, from the perspective of procedures for establishment, change and deregistration of FIEs, the main functions of investment administrative authorities, commerce administrative authorities and other authorities (such as industry administrative authorities, market regulation authorities) may be briefly sorted out pursuant to the provisions of the Foreign Investment Law and its Implementation Regulations as follows:

Table 2: Division of Functions of Major FIE Regulatory Authorities Under the Foreign Investment Law

Department	Major Functions and Relevant Provisions
Competent Investment Authorities	• Joint Formulation and Promulgation of the Negative List for Foreign Investment Access (Article 4 of the Implementation Regulations). • Joint Formulation and Promulgation of the Catalogue for the Guidance of Foreign Investment Industries (Article 11 of the Implementation Regulations). • Approval and Filing of Foreign Investment Projects (Article 29 of the Foreign Investment Law and Article 36 of the Implementing Regulations).
Competent Commerce Departments	• Joint Formulation and Promulgation of the Negative List for Foreign Investment Access (Article 4 of the Implementation Regulations). • Joint Formulation and Promulgation of the Catalogue for the Guidance of Foreign Investment Industries (Article 11 of the Implementation Regulations). • Establishment, coordination and implementation of the working mechanism for complaints from FIEs (Article 29 of the Implementation Regulations). • Authority to Receive, Management and Punish Foreign Investment Information Reports (Articles 34 and 37 of the Foreign Investment Law, Article 38 and Article 39 of the Implementation Regulations).

Competent Industrial Authorities	• Monitoring the implementation of the Negative List (Article 34 of the Implementation Regulations). • Industry Access Permit (Article 30 of the Foreign Investment Law, and Article 35 of the Implementation Regulations)
Market Regulation Departments	• Registration of FIE (Section1 of Article 37 of the Implementation Regulations). • Coordination and Implementation of the Foreign Investment Information Reporting System (Article 38 of the Implementation Regulations, Section 1 of Article 39 of the Implementation Regulations) .

The new division of functions of the main regulatory departments for FIEs in the Foreign Investment Law era deserves attention as follows:

(1) Competent commerce departments shall withdraw from the "foreground" under foreign investment access administration, and the establishment and change of FIEs, whether involving a negative list for foreign investment access or not, are no longer subject to the examination and approval or record-filing by competent commerce departments.

It can be seen from Table 2 above that the Foreign Investment Law and its Implementation Regulations do not grant the competent commerce department the authority to review foreign investment access conditions and relevant commercial agreements set forth in the negative list for foreign investment access. After the implementation of the new law, in addition to participating in the formulation of the negative list for foreign investment access and the catalogue for the guidance of industries in which foreign investment is encouraged, the competent commerce department will become the main supervisor responsible for work related to foreign investment information reporting and complaints from FIEs. This means that the competent commerce authorities governing foreign investment over a long period of time will withdraw from the "foreground" for foreign investment access administration, and the situation that the "dual tracks" exist for the approval/record-filing of foreign investment access by the competent commerce authorities and the approval/record-filing of foreign investment projects by the competent investment authorities will be broken, making the special procedures for foreign investment access review in Table 1 of this Chapter that the competent commerce authorities were once responsible for becoming history.

Compared with the "negative list administration and filing system" implemented in 2016, under the system of "pre-access national treatment plus negative list administration" in the Foreign Investment Law era, the establishment and change of FIEs are no longer subject to the approval or filing of competent commerce departments, whether they are involved in the foreign investment access negative list or not.

In this regard, the Ministry of Commerce has stipulated in Article 6 of the Announcement on Issues concerning Foreign Investment Information Reporting that: "For FIEs which are not subject to special administrative measures stipulated by the State on admission of foreign investments, if they have completed establishment registration formalities with market regulatory authorities before 31 December 2019, or a change stipulated in Article 6 and Article 7 of the Provisional Measures on Administration of Filing for Establishment

and Change of Foreign Invested Enterprises occurs but they have not completed filing for such change, they may still complete filing formalities through the foreign investment integrated administration system before 31 January 2020."FIEs established or changing after 1 January 2020 are not required to handle the record-filing of the incorporation or change for FIEs, but need to report investment information in accordance with the Measures for the Reporting of Foreign Investment Information and the Announcement. "

(2) The foreign investment information reporting system will replace the existing system of examination and approval, record-filing, and joint reporting of FIEs, but it is not an administrative examination and approval newly established for foreign investors or FIEs, and the submission of investment information is not a prerequisite for the registration of FIEs either.

The Foreign Investment Law and the Implementation Regulations have specifically stipulated that the foreign investment information reporting system shall be an important legal system for standardising administration of foreign investments. Also, as outlined above, competent commercial authorities will be the major authorities for the establishment and implementation of the said system. However, submission of investment information is not in itself a prerequisite for foreign investors or FIEs to complete enterprise registration or other formalities, and is not an administrative examination and approval for new establishment of foreign investors or FIEs.

In addition, the State Administration for Market Regulation (hereinafter referred to as the "**SAMR**") also clarifies in Article 3 of the Notice on Registration that: "Submission of foreign investment information report is not a prerequisite for registration of a foreign invested enterprise. The Registration Authorities do not review the foreign investment information report. Upon submission of an enterprise registration application, the applicant may continue to fill in the foreign investment information report information. "

(3) The role of foreign investment "gatekeepers" that ensure the implementation of the negative list for foreign investment access will be jointly shared by several "relevant competent departments" in the process of performing their duties by law

The provisions of Article 4 of the Explanation for the Special Administrative Measures for Foreign Investment Access (Negative List) (Edition 2019) (promulgated on 30 June 2019 and implemented as of 30 July of the same year), which are still in effect at present, stipulate that "Investment in non- prohibited fields covered in the Negative List for Foreign Investment Access shall be subject to foreign investment access permission". In that case, after the functions and roles assumed by the competent commerce departments in the foreign investment regulatory system have undergone significant changes in the foregoing (1) and (2), who will assume the role of "gatekeeper" of foreign investment and ensure the implementation of the negative list for foreign investment access has become a matter of great concern.

In this regard, in the Foreign Investment Law and its Implementation Regulations as well as the supporting provisions promulgated before the deadline of this chapter, there is no new special competent authority and corresponding procedures in connection with the so-called "foreign investment access permission". As indicated in Table 2 above, after the implementation of the new Law, the approval and filing procedures for foreign investment projects (Article 29 of the Foreign Investment Law and Article 36 of the Implementing Regulations) and the industry access permission procedures for the competent industry authorities (Article 30 of the Foreign Investment Law and Article 35 of the Implementing Regulations) will continue to be retained. The market regulation authorities are, as before,

responsible for the registration of FIEs, while the competent investment authorities (NDRC), the competent industry authorities and the market regulation authorities can supervise and control whether a project complies with the Negative List or not in the process of approval/filing of investment projects, industry permit and enterprise registration, and strengthen interim and ex post regulation.

Thus it can be seen that in the Foreign Investment Law era, after the withdrawal of the competent commerce department from the "foreground" for foreign investment access administration, the role of the foreign investment "gatekeeper" that guarantees the implementation of the negative list for foreign investment access will be jointly shared by several "relevant competent departments" such as the competent investment department, the competent industry department and the market regulation department in the process of performing their duties in accordance with the law.

Such institutional arrangements for sharing the role of "gatekeepers" of foreign investment imply that multiple departments may be involved in the review of foreign access. Will this result in overlapping functions of multiple regulatory authorities? In this regard, the SAMR specifies in Article 2 of the Notice on Registration that: "Where competent industrial departments have approved relevant enterprise-related business license in accordance with the law prior to the registration, the registration authorities do not need to repeatedly review whether the enterprise meets the conditions stipulated in the special access administrative measures." However, in practice in the future, it remains to be seen how the division and coordination of examination and approval of foreign investment access will be carried out among the approval/filing procedures for foreign invested projects, the procedures such as the industrial permit of competent industry authorities and the registration procedures of market regulation authorities.

3.3. Key procedural matters to pay attention to the establishment or change of a FIE

3.3.1 Approval and Filing of Foreign Investment Projects

Firstly, according to the aforesaid existing Administrative Measures for the Approval and Record-filing of Foreign Investment Projects (Revised in 2014), the Catalogue of Investment Projects Subject to Governmental Approval (2016 Edition) and the Circular on Effectively Implementing the Catalogue of Investment Projects Subject to Governmental Approval (2016 Edition) before the promulgation of the relevant new provisions on the approval and record-filing of foreign investment projects, and in combination with the provisions of the Special Administrative Measures for Foreign Investment Access (Negative List) (2019 Edition), the Market Access Negative List (2019 Edition), the Administrative Regulations on the Approval and Record-filing of Enterprise Investment Projects (Revised in 2017) and the Administrative Measures for the Approval and Record-filing of Enterprise Investment Projects (Revised in 2017), the "investment projects" as mentioned in "foreign investment shall be subject to approval or record-filing of investment projects" refer to fixed asset investment projects invested in and constructed by enterprises within the territory of China, and the circumstances under which foreign investment is required to be subject to approval or record-filing of investment projects may be summarized as follows:

① Projects with a total investment (including capital increase) of USD300 million or above which are not prohibited by the Special Administrative Measures for Foreign Investments Access (Negative List) (2019 Edition) shall be subject to examination and approval by the NDRC; among them,

investment projects with a total investment (including capital increase) of USD2 billion and above shall be filed with the State Council for record;

② Projects with total investment (including increase in capital) below US $300 million which are not prohibited by the Special Administrative Measures for Foreign Investments Access (Negative List) (2019 Edition), shall be subject to examination and approval by the provincial development and reform commission;

③ The foreign investment projects other than those stipulated in ① and ② listed in item 1 to 10 of the Catalogue of Investment Projects Subject to Governmental Approval (2016 Edition) shall be approved according to items 1 to 10 thereof;

④ Foreign investment projects beyond the aforesaid scope of approval shall be subject to filing, and filed with the development and reform commission at the location of the project.

After the implementation of the Foreign Investment Law, whether the aforesaid relevant provisions will be updated and integrated, whether the new provisions on the approval and record-filing of foreign investment projects will be issued, and whether the practical operation of relevant departments such as the NDRC will be changed, will still be a continuing concern.

Prior to implementation of the Foreign Investment Law, the approval/filing procedures for foreign investment projects by the NDRC are not necessarily prerequisites for industry and commerce registration, and in practice, whether NDRC's approval/filing is required before such registration needs to be further confirmed based on the catalogue of prerequisites for industry and commerce registration. If there are no relevant requirements specified in the said catalogue, FIEs may first register with market regulation authorities and later complete the approval procedures for investment projects in accordance with the law as needed before carrying out operations. After the implementation of the Foreign Investment Law, we understand that this will still be retained. The SAMR has also specified in Article 2 of the Notice on Registration that: "Competent industrial departments have already approved relevant enterprise-related business licensing items in accordance with the law prior to the registration", the registration authorities do not need to repeat the review on whether the relevant enterprise meets the conditions specified in the special access administrative measures, but they do not specially mention the procedures for approval/record-filing for the foreign investment projects. It remains unclear that how this will be processed in the future.

3.3.2 Industry Permit

In addition to the Special Administrative Measures for Foreign Investment Access (Negative List) and the restrictive provisions on foreign investment that are still scattered in many industrial norms, foreign investors and FIEs should also pay attention to the fact that, according to the Opinions of the State Council on Implementing the Market Access Negative List System (Guo Fa [2015] No.55, promulgated on 2 October 2015 and implemented on 1 December of the same year) and other requirements, China currently adopts the Market Access Negative List System (the latest version is the Market Access Negative List (2019 Edition).

Different from the Special Administrative Measures for Foreign Investment Access (Negative List) (2019 Edition) specially regulating the access of foreign

investment, the Market Access Negative List (2019 Edition) is an administrative measure consistently applicable to both domestic and foreign investors and a unified requirement of market access management for all types of market players.

Therefore, after the implementation of the Foreign Investment Law, foreign investors and FIEs shall, in addition to complying with the Special Administrative Measures for Foreign Investment Access (Negative List) and the special requirements for foreign investment that may still exist in the industrial norms, first satisfy the requirements of the Market Access Negative List based on the principle of "same treatment to domestic and foreign investments" when they intend to invest in and operate in certain industries, fields or businesses.

From the perspective of whether enterprise registration formalities with market regulation authorities should be handled before or after such industry access permits, such permits (namely the licensing requirements in the Market Access Negative List) can be divided into two categories, namely the pre-registration approval items and post registration approval items (including registration of establishment and registration of changes).

3.3.3 Registration of Enterprises

As for the registration of establishment of FIEs after the implementation of the Foreign Investment Law, in addition to the Administrative Regulations on Company Registration (promulgated by the State Council and implemented on 6 February 2016) and the Administrative Measures for the Registration of Partnership Enterprises, the Notice on Registration also provides for the registration method, examination standard, arrangement of transition period, requirements for application materials, etc.

Concerning registration methods and review standards, in accordance with Articles 1 and 2 of Part I of the Notice on Registration, FIE registrations shall be conducted via the online enterprise registration system, and the registration authority shall conduct a formal review of the relevant application materials. An investor shall undertake that it complies with the requirements of the Negative List, and based on the actual conditions, select the industries and sectors included in the Negative List; where licensing by the industry administrative authorities is required, relevant document shall be submitted for approval.

With regards to the registration rules for enterprise types, pursuant to the provisions of Article 9 of Part IV of the Notice on Registration, an enterprise can be registered as a "limited liability company", a "company limited by shares" or a "partnership enterprise", and shall also indicate whether it is "foreign invested or Hong Kong, Macau and Taiwan invested". Existing Sino-foreign equity joint venture enterprises and Sino-foreign cooperative joint venture enterprises applying for change of organisation form or organisation structure shall be subject to the applicable rules for existing enterprise types.

3.3.4 Foreign investment information reporting

Article 34 of the Foreign Investment Law explicitly stipulates that the State shall establish a foreign investment information reporting system. The entities, contents, methods, supervision and management, legal liabilities and other particulars of the information reporting are specified in the Measures on Foreign Investment

Information Reporting and the Announcement on Issues Concerning the Reporting of Foreign Investment Information.

The foreign investment information reporting system includes the initial report, change report, deregistration report and annual report. The details of the respective reports are as follows:

	Initial Report	Change Report	Annual Report
Reporting Entity	**Foreign Investor**	**Foreign Invested Enterprise**	**Foreign Invested Enterprise**
Application Situation	(1) establishment of FIEs (including resident representative offices engaging in manufacturing and business activities) by foreign investors in China; (2) Equity Mergers and Acquisitions by Foreign Investors of Domestic Non-FIEs	(1) change in the information of the initial report (not applicable where FIEs are converted to domestic enterprises); (2) Foreign invested listed companies and companies listed on the National Equities Exchange and Quotations may report changes in investors and their shareholding only when there is an accumulated change of more than 5% in shareholding of foreign investors or a change of control or relative control of foreign investors.	After the establishment of a FIE
Means of Submission	Enterprise Registration System		National Enterprise Credit Information Publicity System
Reporting time	While handling the establishment registration of FIEs/while handling the	Vary according to change of information	January 1 to June 30 each year

	change registration of merged or acquired enterprise		
	Where a FIE which does not involve special administrative measures for foreign investments access has completed establishment registration formalities with the market regulatory authorities before 31 December 2019, or a change stipulated in Article 6 and Article 7 of the Provisional Measures on Administration of Filing for Establishment and Change of Foreign Invested Enterprises occurs but has not completed filing for establishment or change of FIE, it may still complete filing formalities through the foreign investment integrated administration system before 31 January 2020.		
Content of Report	Basic enterprise information, information on investors and their actual controllers, investment transaction information, etc.	Changes in the basic information of the enterprise, information of investors and their actual controllers, investment transaction information and other information (only changed items are required and other unchanged items are not required to be filled in)	Basic enterprise information, information on investors and their actual controller, information on business operation and assets and liabilities of the enterprise, and information on obtaining relevant industry permit (where the special administrative measures for foreign investments access are involved).

	The specific contents shall be determined in accordance with the principle of necessity and in combination with the actual conditions of foreign investment and relevant provisions on enterprise registration and enterprise information publicity, and be released by the Ministry of Commerce in the form of announcement.
Legal Liabilities	Whoever fails to submit investment information in accordance with the law and fails to make a supplementary report or correction after being notified by competent commerce departments shall be ordered by competent commerce departments to make corrections within a prescribed time limit; whoever fails to make corrections within the prescribed time limit may be subject to a fine of not more than CNY500,000.

3.3.5 Declaration of the Concentration of Undertakings

Article 33 of the Foreign Investment Law stipulates: "Foreign investors acquiring domestic enterprises or participating in concentration of undertakings by any other means shall be subject to examination of concentration of undertakings pursuant to the provisions of the Anti-monopoly Law of the People's Republic of China".

According to Article 21 of the existing Anti-monopoly Law, where a concentration of business operators reaches the threshold for declaration prescribed by the State Council, the business operators concerned shall make a declaration to the anti-monopoly enforcement authority of the State Council in advance, and shall not implement the concentration in the absence of such declaration. According to Article 48 of this Law, where an undertaking implements concentration in violation of the provisions of this Law, the anti-monopoly enforcement agency of the State Council shall order the undertaking to stop implementing concentration, dispose the shares or assets within a stipulated period, transfer the business within a stipulated period and adopt other necessary measures to reinstate the pre-concentration status, and may impose a fine of not more than RMB500,000.

The SAMR not only details the illegal implementation of operator concentration, but also raises the fine amount from the "a fine of less than CNY500,000" stipulated in the existing law to "a fine of less than 10% of the sales revenue of the previous year", according to Article 55 of the Revised Draft of the Anti-monopoly Law (Draft for Public Comment) released on 2 January 2020. This also reflects the determination of the anti-monopoly law enforcement authorities of China to continue to step up efforts to investigate and punish illegal concentration of undertaking in the future.

Because the time required for the declaration procedure of the concentration of undertakings is relatively long (the statutory total review time limit is 180 days after the case is filed, usually it takes about three to six weeks from the submission of declaration materials to the time before the filing is accepted), and the illegal consequences are serious, whether declaration is required may have very significant impact on the transaction schedule, transaction structure and even specific transaction conditions. Therefore, we suggest that at the beginning of the

transaction that may involve change of corporate control, whether declaration of the concentration of undertakings shall be conducted and how to conduct such declaration shall be studied and confirmed as the top priority.

3.3.6 National Security Review

As for the national security review of foreign investment, prior to the promulgation of the Foreign Investment Law, only principle provisions are scattered and mentioned in few articles of laws. In this context, Article 35 of the Foreign Investment Law stipulates that: "The State establishes a foreign investment security review system to conduct security review on foreign investments which have or may have an impact on national security." The safety review decision made in accordance with the law is final", and the safety review system for foreign investment is officially established at the level of law for the first time. The Implementation Regulations also mention in Article 40 that the State will establish a security review system for foreign investments. Under the background of the rise of global protectionism, major western countries such as Europe and the United States are strengthening the national security review for foreign investment, and Article 40 of the Foreign Investment Law also explicitly stipulates that China may take corresponding and equivalent measures against other countries in terms of discriminatory restrictions and prohibitions on investment as the case may be, which means that the security review mechanism may also become a countermeasure of China to respond to international investment and trade conflicts. Therefore, Chinese regulatory authorities are expected to have separate legislation for the security review of foreign investment in the future, refine the rules of relative principle, and establish a more complete security review system for foreign investment, so as to ensure the national economic security.

Pursuant to the provisions of the Foreign Investment Law and the Implementation Regulations and from the perspective of current practice, national security review will become a link that may bring important impact on foreign investment. Affected by complicated policy consideration factors, the application of foreign investment security review system is uncertain to some extent. We suggest that foreign investors and FIEs pay close attention to the legislative and practical trends to better strengthen compliance and transaction process management.

3.4. Key procedures on deregistration of a FIE

3.4.1 Liquidation

Before the Foreign Investment Law comes into effect, the applicable laws for liquidation and deregistration of enterprises with foreign investment are mainly the laws on Sino-foreign equity joint venture enterprises, Sino-foreign cooperative joint venture enterprises and wholly foreign owned enterprises (hereinafter referred to as the "**Laws on Three Types of FIEs**"), the Company Law and the Regulations on the Administration of Company Registration. In terms of the dissolution and liquidation of FIEs (not including bankruptcy liquidation), one of the main differences in liquidation between the laws on Sino-foreign equity joint venture enterprises, Sino-foreign cooperative joint venture enterprises and wholly foreign owned enterprises and the Company Law is the provisions on the name of liquidation organization (hereinafter referred to as the "liquidation committee" and "liquidation team") and its composition, the specific contents are as follows (only taking a limited liability company for example):

"Liquidation Committee" under the Laws on Three Types of FIEs		Liquidation team under the Companies Law
Sino-foreign joint venture	**Wholly Foreign-owned Enterprises**	**Limited Liability Company**
Generally elected among the directors. In the circumstance that the directors cannot serve or are unsuitable to serve, the joint venture may appoint registered accountants and lawyers in China. (Article 92 of the Regulations for the Implementation of the Law on Sino-foreign Equity Joint Ventures)	It shall be composed of the legal representative of the wholly foreign-owned enterprise, representatives of the creditors and representatives of the relevant competent authorities, and Chinese certified accountants and lawyers shall be invited to participate. (Article 72 of the Implementing Rules of the Law on Wholly Foreign-owned Enterprises)	It shall be composed of shareholders. Where the liquidation team is not established within the stipulated period, the creditors may apply to the court to appoint a liquidation team. (Article 183 of the Company Law)

Before the implementation of the Foreign Investment Law, in practice, some cities (such as Beijing) requires FIEs to set up liquidation groups comprising of shareholders, which is the requirement under the dissolution and liquidation provisions of Company Law; while other cities (such as Shanghai) still adhere to the provisions of the Laws on Three Types of FIEs, deeming it sufficient to establish liquidation committees for the liquidation of FIEs.

After the Foreign Investment Law comes into force, for the FIEs in the form of companies (excluding foreign invested partnership enterprises), in the Foreign Investment Law era and in accordance with the Company Law, the main procedures of liquidation are as follows:

① establishment and filing of liquidation team;
② notification of creditors, reporting and registration of claims;
③ formulation and confirmation of the liquidation plan;

④ liquidation, distribution of the remaining properties or application for bankruptcy;
⑤ preparation and confirmation of the liquidation report.

3.4.2 Deregistration

Upon completion of liquidation, the FIE shall apply to the original company registration authorities for deregistration. Pursuant to the provisions of the Notice on Registration and the Measures on Foreign Investment Information Reporting, where the laws and administrative regulations stipulate that prior to deregistration of an enterprise, licensing by the industry administrative authorities is required, the foreign investor or the FIE shall submit the relevant approval document to the market regulation authorities at the time of application for deregistration.

According to Article 13 of the Measures on Foreign Investment Information Reporting and the Announcement on Issues concerning Foreign Investment Information Reporting, where a FIE is deregistered or converted into a domestic-invested enterprise, it shall be deemed that the deregistration report has been submitted after the deregistration of the enterprise or change of the registration of the enterprise, and the related information shall be pushed by the market regulation department to the competent commerce department. The FIE does not need to submit such report separately.

In addition, with respect to the deregistration of FIEs within the transitional period of five years after the implementation of the Foreign Investment Law, Article 12 of Part V of the Notice on Registration stipulates that where FIEs established in accordance with the law before 1 January 2020 apply for deregistration according to the original organization form, organization organ and deliberation and voting mechanism, the registration authorities shall accept the deregistration application. That is, FIEs that intend to be deregistered in the transitional period are not required to first adjust their enterprise structures before filing deregistration applications so as to complete deregistration formalities.

Part B M&A, Reorganization by Foreign Investors

Chapter IV M&A by Foreign Investors: the M&A Rules, Affiliated M&A and Cross-border Exchange of Equity Interest

Sun Haishan

4.1 M&A by Foreign Investors under M&A Rules: Approval System

On August 8, 2006, Ministry of Commerce (the "**MOFCOM**"), State-owned Assets Supervision and Administration Commission of the State Council, State Administration of Taxation, State Administration for Industry and Commerce, China Securities Regulatory Commission (the **"CSRC")** and State Administration of Foreign Exchange promulgated the Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors (the "**M&A Rules**"), which took effect on September 8 and was amended by the Order of Ministry of Commerce [2009] No. 6 promulgated by MOFCOM on June 22, 2009.

The M&A Rules defines two types of mergers and acquisitions of domestic enterprises by foreign investors to be applied，respectively Equity M&A and Asset M&A. Equity M&A shall mean a foreign investor purchases the equity interest of the shareholder, or subscribes the capital increase, of a non-foreign-invested enterprise in the PRC(or **"domestic company"** defined under the M&A Rules), for which the domestic company is converted into a foreign-invested enterprise (the **"FIE"**), while the following two circumstances could either constitute an Asset M&A: (i) a foreign investor establishes a FIE, and this FIE then purchases the assets of a domestic enterprise and operates them, or (ii) a foreign investor purchases the assets of a domestic enterprise and uses such assets as investment to establish a FIE to operate the assets.

According to the M&A Rules, where a FIE is to be established due to an Equity M&A or Asset M&A, it shall be subject to the approval of the competent department of commerce accordingly and go through registration with the registration authority for alteration or establishment particulars.

4.2 M&A by Foreign Investors after the New Policies: From Record-Filing System to Information Reporting System

The promulgation of the Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises (the "**Interim Administrative Measures**") on October 8, 2016 has made a breakthrough to the previous approval system

regarding FIE, according to which the establishment or change of a FIE involving no special administrative measures for access is not required to get an approval from the department of commerce any more, but subject to the record-filing procedures instead. And the amendment of the Interim Administrative Measures on July 30, 2017 further specified that the breakthrough also applied to the area of foreign mergers and acquisitions. Pursuant to the decision promulgated by MOFCOM on July 30, 2017 to amend the Interim Administrative Measures, where a foreign investor merges or acquires a domestic non-foreign invested enterprise or makes strategic investment in a listed company, record-filing administration shall be applied if such investment does not involve the special administrative measures for access prescribed by the state or the Affiliated M&A (see definition below).

On December 26, 2019, the Implementing Regulations of the Foreign Investment Law of the People's Republic of China (the Order of the State Council of the People's Republic of China No. 723, or the "**Implementing Regulations of the Foreign Investment Law**") was promulgated by State Council. On December 30, 2019, the Measures for Reporting of Information on Foreign Investment was promulgated by Ministry of Commerce and took effect on January 1, 2020, which replaced the Interim Administrative Measures mentioned above. According to Article 9 of the Measures for Reporting of Information on Foreign Investment, where a foreign investor acquires a domestic non-foreign-invested enterprise by equity, it shall submit an initial report through the enterprise registration system when handling the change registration for the acquired enterprise. The implementation of the Implementing Regulations of the Foreign Investment Law and the Measures for Reporting of Information on Foreign Investment means that the administration methods of Foreign M&A have further changed from the record-filing system to the reporting system.

In addition to the changes to the abovementioned administration mechanism, the laws and regulations on foreign investment have been continuously updated. As the M&A Rules has not been revised since 2009, some of its provisions concerning special administration on M&A by foreign investors, such as rules on the pricing or the time limit for contribution (see Articles 14 and 16 of the M&A Rules for details)[1], are no longer applicable due to their conflicts with other laws or regulations, or their applicability need to be further confirmed in practice with the competent authorities.

In summary, the present administration of M&A by foreign investors is mainly subject to the general regulations on foreign investment and the higher-level laws such as the Company Law[2]. However, as for the applicability of the special provisions on affiliated

[1] According to the information we have learned from our previous projects, some of the local commerce authorities no longer make mandatory requirements for asset evaluation and payment deadlines for foreign mergers and acquisitions.

[2] The regulations on the establishment of the FIE would be further discussed in Chapter III. The Administrative Measures for Strategic Investment by Foreign Investors in Listed Companies shall be applied when it comes to the foreign M&A concerning strategic investment of foreign investors in A-shares company, which would be further discussed in Chapter IV.

mergers and acquisitions (**"Affiliated M&A"**) under the M&A Rules, it requires further observation and analysis based on the future adjustment of the M&A Rules after promulgation of the new policies on foreign investment.

4.3 Affiliated M&A

4.3.1 Affiliated M&A under the Negative List

According to Article 11 of M&A Rules, Affiliated M&A refers to the domestic companies, enterprises or natural persons merging or acquiring domestic companies which have something to do with them in the name of the companies in foreign countries legally established or controlled by them, and requiring that the companies, enterprises or person concerned shall not evade from the above requirements by domestic investment of the FIEs or by other means.

Despite that the applicability of the M&A Rules remains to be further observed, the relevant rules are still applicable and important in case of Affiliated M&A. It is specified under the Special Administrative Measures for Access of Foreign Investment (Negative List) (2019 Edition) that, where a M&A of affiliated domestic companies by domestic companies, enterprises or natural persons via the companies legally established or controlled overseas thereby involves matters relating to the establishment or change of foreign-invested projects and enterprises, the existing provisions shall apply, which means that implementation of Affiliated M&A still requires the approval by the MOFCOM under Article 11 of the M&A Rules.

4.3.2 Small Red Chip Reorganization Path under "Affiliated M&A" Supervision

Considering the fact that there are seldom cases of Affiliated M&A had obtained the approvals from the MOFCOM, for domestic private enterprises which propose to adopt an overseas red-chip structure (the "**Small Red Chip Model**"[3]) to obtain overseas financing, it is scarcely possible for them to obtain the approval from the MOFCOM if Affiliated M&A is involved during the process of reorganization. As a result, these domestic private enterprises have to design the respective path of reorganization based on their own situations so that the administration mechanism for Affiliated M&A won't be triggered. In this regard, as we can learn from those successful cases of Small Red Chip Model, "Slow Walk Plan", "Identity Change Plan" and "VIE Structure" are the three main methods among them.

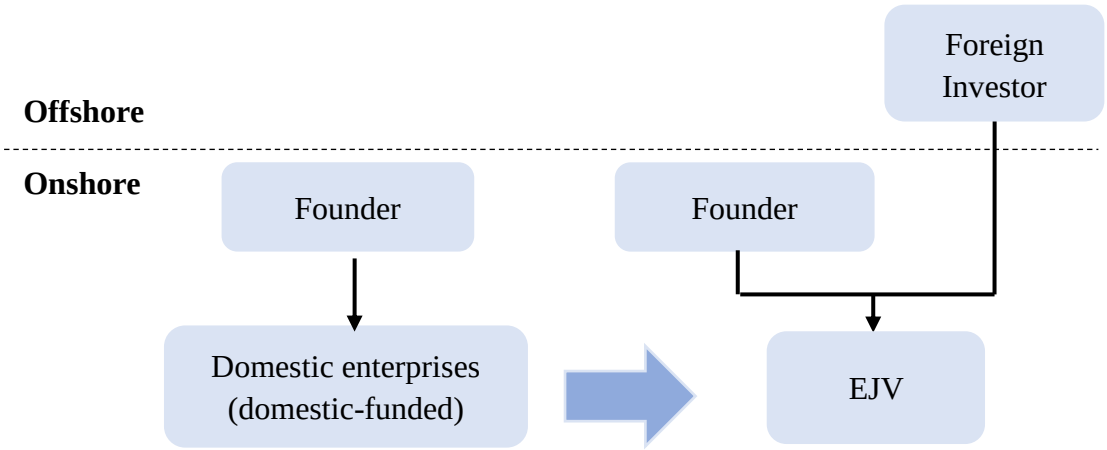
1)Slow Walk Plan

For those domestic private enterprises adopting Slow Walk Plan, the first step is to find a non-affiliated foreign investor to invest in the domestic enterprise by way of acquisition of equity interest or subscribing increased capital contribution, after which the domestic enterprise will be converted into a Sino-Foreign Equity Joint Ventures (**"EJV"**). After the overseas structure under the Small Red Chip Model is completed[4], there comes the second step: a foreign company under the overseas

[3] The Small Red Chip Model would be further discussed in Chapter VIII.

[4] A domestic resident holding entities of a domestic company shall complete the foreign exchange registration formalities for overseas investment for the newly established special purpose company that is intended to be used

structure will, directly or via its newly established wholly foreign-owned enterprise, acquire the entire equity interest of the EJV[5] so that the EJV will be further converted to a Wholly Foreign-Owned Enterprise (**"WFOE"**) or a WFOE's wholly-owned subsidiary after the second step. As a result, the rights and interests of the domestic enterprise will ultimately be incorporated into the structure for overseas financing. A simplified illustration of the above steps related to "Slow Walk Plan" is as follows[6]:

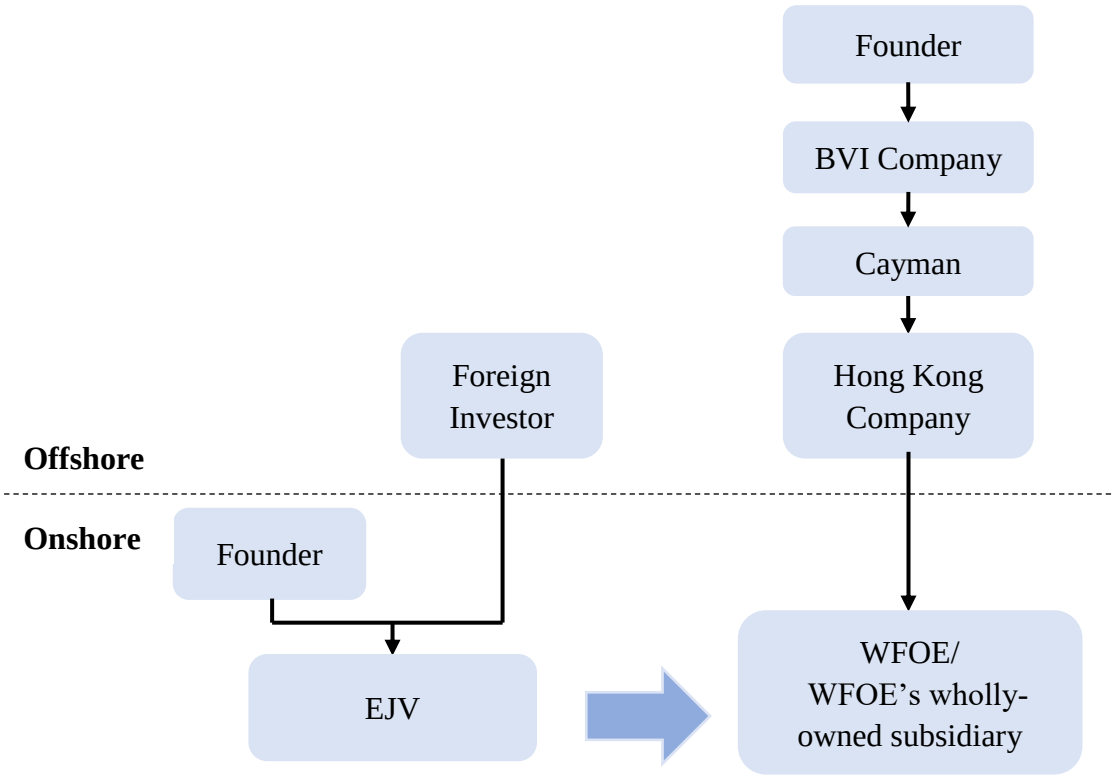


First Step: Introduction of a non-affiliated foreign investor to convert the domestic enterprise to a Sino-Foreign Equity Joint Ventures (EJV).

for future return investments in the bank where the domestic equity is located (**"Registration under Circular No. 37"**).

[5] According to the Guidance Manual for Foreign Investment Access Management Promulgated by the Foreign Investment Department of the Ministry of Commerce, the established FIE in China shall transfer equity to the foreign party without reference to merger and acquisition regulations, regardless of whether there is a related relationship between the Chinese and foreign parties, and whether the foreign party is an original shareholder or a new investor. As a result, in the second step, M&A Rules shall not be applied to the transfer of the entities of the EJV since M&A Rules shall govern mergers and acquisitions of non-foreign-invested enterprises. Relevant regulations on equity transfer of FIEs, such as Several Provisions on the Alteration of Investors' Equities in Foreign Investment Enterprises and the Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises, shall be applied.

[6] The simplified illustration of the steps only displays the basic model of setting up red-chip structure under Slow Walk Plan. In practice, cross-border financing entities should adjust restructuring plans according to their own circumstances.



Second Step: a foreign company or a newly established wholly foreign-owned enterprise to acquire the entire equity of the EJV so that the EJV becomes a WFOE.

It should be noted that the "Slow Walk Plan" cannot completely exclude the risk that those restructuring steps in aggregate may be deemed to constitute a substantial Affiliated M&A by the competent department of commerce. In this case, the PRC lawyers would usually advise the entities which intend for overseas financing to obtain a confirmation on the legality and compliance of the restructuring steps from the competent department of commerce.

2)Identity Change Plan

"Identity Change Plan" requires the actual controller of the domestic enterprise to obtain foreign nationality and foreign passport and cancel his/her PRC nationality or domestic household registration before the restructuring. Therefore, the actual controller is no longer a "domestic resident" as defined in Article 11 of the M&A Rules. However, since Identity Change Plan involves more consideration and takes longer time, it has been less adopted in the recent cases.

3)VIE Structure

"VIE Structure" refers to structure which could incorporate the interests in the domestic enterprises into the overseas financing structure by contractual arrangement (**"VIE Model"**) instead of equity holding. Firstly, the shareholders of the domestic enterprise, as an operating company (**"OPCO"**), will also build up the overseas structure with a series of overseas enterprises, one of which will then set up a new WFOE. Then a series of agreements will be signed among the

newly formed WFOE, the OPCO and the OPCO's shareholders, in order to ensure the SPV's actual control and the financial consolidation over the OPCO. In this situation, there's no direct change of equity of the domestic enterprise. However, it is noted that the VIE Model has its inherent deficiencies (such as structural instability) compared with the structure controlled by direct equity holding. Therefore the offshore securities regulatory authorities also pay attention to the Pre-IPO companies which have adopted VIE Model in varying degrees and make restrictions in this regard accordingly[7].

4.4 Cross-border Exchange of Equity Interest

4.4.1 Cross-border Exchange of Equity Interest under M&A Rules

"Cross-border Exchange of Equity Interest" can be broadly understood as using the equity interest (usually shares) of a foreign company as the method to pay the consideration for purchasing the equity interest of a domestic enterprise. But when it comes to the law and regulations in the PRC, except for the Interim Administrative Measures, relevant contents of which will be further clarified below, the only corresponding provisions are the M&A Rules, which regulate cross-border exchange of equity interest in case of M&A by foreign investors.

According to Article 27 of the M&A Rules, Cross-border Exchange of Equity Interest under M&A by foreign investors, or known as foreign investors' M&A of domestic companies by payment of **equities**, means that the shareholder of an overseas company purchases the inventory equity interest or increased shares of a domestic company and pays with its equity interest or the increased shares of the overseas company. The M&A Rules stipulate that foreign investors' M&A of domestic companies by payment of equities shall be reported to the MOFCOM for approval. Further, Article 28 and 29 of the M&A Rules set out certain requirements for the overseas company and the equity interest of the domestic/overseas company in this case, among which the overseas company shall be a listed company or the special purpose venture (the "**SPV**") as defined under Section III of the M&A Rules. The M&A Rules also clarify the overseas investment procedures required in the Cross-border Exchange of Equity Interest. As a conclusion, although the M&A Rules allow the foreign investors' M&A of domestic companies by payment of equities, there are meanwhile strict conditions for application.

According to the Article 9 of the Measures for Reporting of Information on Foreign Investment, which have been implemented on January 1, 2020, where a foreign investor acquires a domestic non-foreign-invested enterprise by equity, it shall submit an initial report through the enterprise registration system when handling the change registration for the acquired enterprise.

There are no clear rules in current regulations concerning the feasibility and the specific operation of the cross-border exchange of equity interest which does not fall into the regulation of the M&A Rules, for which further communication and confirmation with the local competent authorities on a case-by-case basis may be necessary.

[7] The VIE model would be further discussed in Chapter VIII.

4.4.2 Brief Analysis on Recent Cases of Cross-border Exchange of Equity Interest

As mentioned above, the M&A Rules is the first regulation which has brought in the conception of "Cross-border Exchange of Equity Interest" in 2006, pursuant to which the foreign investor as a qualified overseas company's shareholder is allowed to purchase the equity interest of a domestic enterprise with the equity interest in the overseas company. However, the precedents of "Cross-border Exchange of Equity Interest" have rarely been seen since the first case occurred in 2009 when Tianjin Port (Group) Co., Ltd. acquired new shares of Tianjin Port Development Holdings Limited (3382.HK) with the consideration of the inventory shares it held in Tianjin Port Holdings Co., Ltd. (600717.SH). The relevant parties in most of such precedents are related to the state-owned enterprises, or the transactions were practically internal restructuring under common control. More recently, the typical cases of "Cross-border Exchange of Equity Interest"[8] include the Acquisition of Home Inns by BTG Hotels (600258.SH) in 2016 where the foreign investor exchanged the shares it held in an offshore company for the shares of a listed company in the PRC, the Acquisition of All Circuits S.A.S by Aerospace Hi-Tech (000901.SZ) by way of issuing additional shares in 2016, which was practically a shareholder's contribution made by the de facto controller of Aerospace Hi-Tech as both parties of this transaction are controlled by China Aerospace Science and Industry Corporation (CASIC), as well as the Acquisition of China National Chemical Equipment (Luxembourg) S.à. r.l by Tianhua Institute (600579.SZ)[9] by means of share issuance in 2018 , which also belongs to the internal restructuring under common control (of China National Chemistry Corporation Ltd). Therefore, it is hard for those private domestic enterprises which long for overseas financing to use such precedents for reference.

Successful cases of "Cross-border Exchange of Equity Interest" were rarely seen in the past, which is partially due to the incompleteness of the relevant regulations in the PRC as well as the prudent attitude of the competent authorities in this regard. However, as the Interim Administrative Measures provided that eligible Cross-border Exchange of Equity Interest that does not involve the implementation of special administrative measures for access is also subject to the record-filing administration (while the MOFCOM's approval is not required) and those conditions provided under the M&A Rules have not been stipulated in the provisions regarding foreign investors making strategic investments by payment of their overseas companies' equities under the Administrative Measures for Strategic Investment by Foreign Investors in Listed Companies (Draft for Comment) issued by the MOFCOM, the CSRC together with other four departments on July 30, 2018, the relevant authorities may have showed their attitude to lift the restrictions on "Cross-border Exchange of Equity Interest" in the recently updated regulations or drafts. Under such circumstances, there occurs the first case where "Cross-border Exchange of Equity Interest" implemented by a private domestic enterprise has been approved by the CSRC in November 2019, namely, Shanghai RAAS (002552.SZ) has purchased 45% shares of Grifols Diagnostic Solutions Inc. from an overseas listed company Grifols by means of

[8] The relevant transaction in these cases are not the type of "Cross-border Exchange of Equity Interest" as defined in the M&A Rules because the equity interest of overseas companies paid as consideration of the relevant acquisitions did not belong to offshore listed companies or SPV. And the relevant approvals made by the MOFCOM in these cases were based on the Administrative Measures for Foreign Investors' Strategic Investment in Listed Companies, not on the M&A Rules.

[9] The abbreviation of this stock is currently known as "Krauss".

share issuance[10]. This precedent might indicate that there would be more chance for the transaction of "Cross-border Exchange of Equity Interest" in the future, especially for the private enterprises.

4.4.3 Expectation on Cross-border Exchange of Equity Interest

As part of the supporting regulations of the Foreign Investment Law, the Implementing Regulations of the Foreign Investment Law, which took effect on 1 January, 2020, provides that the registration of FIEs shall be handled by the State Administration for Marketing Regulation or any local administrations for market regulation authorized by the state administration. The State Administration for Market Regulation has also issued the Guiding Opinions on Effectively Implementing the Administration of the Registration of FIEs in Accordance with the Law (Draft for Comment) on November 6, 2019, which provides that local market regulation departments are responsible to review the relevant materials submitted by foreign investors or FIEs and to decide whether they have met the conditions of special administrative measures as set out in the Negative List (if applicable). A foreign investment involving no special administrative measures shall be administered according to the principle of "consistency between domestic and foreign investments". Therefore, the foreign investors' M&A by means of "Cross-border Exchange of Equity Interest" might just need to go through the registration procedure with the local market regulation departments. Further, according to the Foreign Investment Law and the Measures for Reporting of Information on Foreign Investment, both of which took effect on 1 January, 2020, the administration system by approval (for foreign investments falling within the Negative List) and by record-filing (for those involving no restrictions under the Negative List) have been replaced by the reporting system. We understand that provisions regarding the approval for Cross-border Exchange of Equity Interest under the M&A Rules should be further adjusted in the short future, and special restrictions on Cross-border Exchange of Equity Interest may be gradually lifted.

[10] The CSRC has approved this transaction on December 25, 2019 according to the public announcement disclosed by Shanghai RAAS while the record-filing procedures have not been completed by now at the local commerce department (Shanghai Municipal Commission of Commerce) for overseas investment and for strategic Investment in listed companies by foreign Investors.

Chapter V Strategic Investment in A-share Listed Companies by Foreign Investors

Guo Shifang

5.1 Adjustment to the Regulatory Policies Governing Strategic Investment by Foreign Investors

Under the existing regulatory framework, the Administrative Measures for Foreign Investors' Strategic Investment in Listed Companies (hereinafter referred to as the **"Strategic Investment Measures"**) shall apply to the obtaining of shares of A-share listed companies (hereinafter referred to as the **"Listed Companies"**) by foreign investors through medium-term and long-term strategic mergers or acquisitions or investments of a certain scale.

The currently effective Strategic Investment Measures were promulgated on December 31, 2005, with slight adjustments made to the examination and approval procedures on October 28, 2015, that the sequential approval from the Ministry of Commerce and the China Securities Regulatory Commission (hereinafter referred to as the "**CSRC**") was changed to the parallel approval. Due to the early formulation of the existing Strategic Investment Measures, the qualification, investment proportion and lock-up period requirements for foreign investors are stricter, making it increasingly difficult to meet the practical needs. Therefore, the Ministry of Commerce has once promulgated Notice of the Ministry of Commerce on Soliciting Public Opinions for the " Measures on the Administration of Strategic Investment in Listed Companies by Foreign Investors (Draft for Comments)" (hereinafter referred to as the **"2013 Draft for Comments"**) for solicitation of public opinions in September 2013. Although the provisions on the qualifications of foreign investors are more friendly in the 2013 Draft for Comments, but the relevant provisions in the 2013 Draft for Comments are not incorporated into the revised Measures for Strategic Investment in 2015.

In the general context of the reform of the foreign investment management system, the Ministry of Commerce issued Notice of the Ministry of Commerce on Soliciting Public Comments on the "Decision on Revising the Administrative Measures for Foreign Investors' Strategic Investment in Listed Companies (Draft for Comments)" (hereinafter referred to as the **"2018 Draft for Comments**") on July 30, 2018, and the 2018 Draft for Comments has not yet been officially promulgated for implementation. The specific adjustments still remain to be seen.

5.2 The Main Means of Strategic Investment by Foreign Investors

As for the means of strategic investment by foreign investors in Listed Companies, the Basic Information of Strategic Investment by Foreign Investor in Listed Companies released by the Ministry of Commerce enumerates four means as follows:

□ Private Placement

□ Transfer through Agreement

□ Tender offer

□ Other means

Although the mean of "Tender Offer" mentioned above are specified in the 2013 Draft for Comments and the 2018 Draft for Comments, it did not specify in the current Strategic Investment Measures in 2005. However, in practice, a tender offer has always been one of the means commonly used by foreign investors to invest in A-share listed companies, and is also one of the main means of acquisition of Listed Companies as specified in Article 62 of Law of the People's Republic of China on Securities (Revised in December 2019, Order No.37 of the President) (hereinafter referred to as the **"Securities Law"**).

Moreover, we noticed that the 2013 Draft for Comments also includes two circumstances where foreign investors indirectly acquire A-shares in the scope of foreign strategic investment, i.e. "an investor that acquires A shares by participating in the reorganization of a Listed Company through a foreign-invested enterprise it invests in" and "an investor that intends to obtain the actual controlling power of a Listed Company by engaging in the M&A of a shareholder of the Listed Company ". However, there is no relevant provision in the 2018 Draft for Comments released subsequently. As for whether the subsequent increase of A shares through block trading and other secondary market transactions by foreign investors who have opened A-share securities accounts through foreign strategic investment or capital contribution prior to listing shall meet the requirements for foreign strategic investment, there is no clear provisions in both the Strategic Investment Measures and the subsequent drafts for comment. In practice, in 2015, the SEB increasing the holding of SUPOR shares through block trading and other cases of foreign investment fulfilled the approval process.

5.3 Examination and Approval Procedures for Foreign Strategic Investment

Except where internal examination and approval procedures of Listed Companies are required (such as shareholders' meetings, directors' meetings, etc., if applicable), before the implementation of the Interim Measures for Record-filing Administration of the Establishment and Change of Foreign-invested Enterprises (2017 Revision) (hereinafter referred to as the **"Filing Measures"**) revised on July 30, 2017, foreign strategic investment shall be subject to the approval by the Ministry of Commerce, the approval by the relevant authorities (e.g. financial industry requires approval by financial regulatory authorities, State-owned enterprises are required to complete the relevant examination and approval formalities for State-owned assets) and the approval by the CSRC (e.g. issuance of new shares).

After the implementation of the Filing Measures, for industries that the special administrative measures for admission of foreign investments are not involved, the Ministry of Commerce has changed the pre-approval procedures to post-filing, i.e. completing filing change formalities with the commerce administrative authorities within 30 days after the securities registration with the securities depository and clearing institution and obtaining the approval of the relevant administrative authorities (if applicable) and the CSRC (e.g. issuance of new shares). If the foreign investors plan to control Listed Companies via transfer through agreement, they shall also submit the Listed Companies' takeover reports and related documents that have been legally confirmed by the stock exchange to the CSRC. After being examined and approved by the CSRC, the

foreign investors shall go through the procedures for confirmation of share transfer with the stock exchange.

After the implementation of the Measures for Foreign Investment Information Reporting (the "**Reporting Measures**") on January 1, 2020, the relevant procedures involving commerce departments is changed into the reporting system, that is, submitting investment information to competent commerce departments via the online enterprise registration system and the national enterprise credit information disclosure system, and the investment information will be submitted in the form of initial report, change report, cancellation report and annual report, etc. Among them, a foreign-invested Listed Company or a company listed on the National Equities Exchange and Quotations is only required to report changes of its investors and their shareholding when the shareholding percentage of foreign investors has experienced changes of over 5% cumulatively or when the status of foreign investors as controlling or relative controlling shareholders changes.

5.4 Requirements for Strategic Investment by Foreign Investors as Set forth in the Current Rules (Strategic Investment Measures, 2005)

The purpose of the current Strategic Investment Measures is to meet the financing needs of Listed Companies and introduce foreign investment with advantages in management, technology and capital. Therefore, there are relatively high requirements for the capital, investment proportion and lock-up period of foreign investors.

Any foreign investor or its parent company that obtains shares in a Listed Company must be a legal person or other organization but not a foreign natural person, and it or its parent company's real overseas assets must be no less than USD 100 million or assets under it or its parent company's management must be no less than USD 500 million, with a sound governance structure and good internal control system, and it has not been subject to severe punishment imposed by domestic and overseas regulatory authorities (including its parent company) in the last three years.

Besides, a foreign investor shall hold no less than 10% of the shares in a Listed Company upon completion of its initial investment, unless otherwise specified in a special industry or approved by the relevant competent authority. Besides, foreign investors must not transfer their shares of listed firms within 3 years after they acquired the shares.

5.5 Relevant Adjustments of the New Policies ("Reporting Measures" and the "2018 Draft for Comments")

According to the 2018 Draft for Comments, the major changes of regulatory rules on foreign strategic investment are as follows:

Firstly, in terms of the examination and approval authority, the Strategic Investment Measures stipulates that all foreign strategic investment shall be submitted to the Ministry of Commerce for examination and approval, while the 2018 Draft for Comments specifies that the examination and approval authority for foreign strategic investment below the threshold shall be delegated to competent commerce departments at the provincial level. Meanwhile, according to the Reporting Measures, where the merger and acquisition of domestic non-foreign-invested enterprises and the strategic investment in Listed Companies by foreign investors, which do not involve special administrative measures and

affiliated merger and acquisition, initial reports shall be submitted through the enterprise registration system.

However, affiliated mergers and acquisitions shall still be subject to approval by the Ministry of Commerce pursuant to the Provisions on Foreign Investors' Merger with and Acquisition of Domestic Enterprises. (hereinafter referred as **"M&A Provisions"**)

Strategic Investment Measures	2018 Draft for Comments
Article 3 Subject to the approval of the Ministry of Commerce, the investors may make strategic investment in the Listed Companies pursuant to these Measures.	Article 3 The strategic investment not involving special market entry management measures as prescribed by the State shall apply the record-filing administration; The Ministry of Commerce of the People's Republic of China or the competent departments of commerce of provinces, autonomous regions, municipalities directly under the Central Government, cities separately designated in the State plan and the Xinjiang Production and Construction Corps (hereinafter referred to as the "provincial competent departments of commerce") shall, according to the authority prescribed by the State Council, be responsible for examination, approval and administration of the strategic investment involving special market entry management measures as prescribed by the State. Specifically, the provincial competent departments of commerce shall be responsible for examination, approval and administration of the strategic investment below the designated scale.

Secondly, with respect to the qualification of subjects, foreign natural persons are allowed to act as subjects of foreign strategic investment, and as for the assets, the restriction is relaxed to that actual total assets of the foreign investor or its actual controller shall be no less than USD 50 million or the actual total assets managed by the foreign investor shall be no less than USD 300 million. However, if a foreign investor becomes the controlling shareholder of a Listed Company, it still needs to meet the requirement that its actual assets shall be no less than USD 100 million or the actual total assets managed by it shall be no less than USD 500 million. Assets do not distinguish between domestic or overseas. The adjustment of relevant requirements is shown in the table below:

Strategic Investment Measures	2018 Draft for Comments
Article 6 An Investor shall meet the following requirements: (1) It shall be a foreign legal person or other organization lawfully incorporated and operated with prudent finance, good credit standing, and mature management experiences;	Article 5 A foreign investor shall meet the following requirements: (1) It shall be a foreign companies, enterprises or other economic organizations lawfully incorporated and operated with prudent finance, good credit standing, and mature management experiences and has a

(2) The total amount of its actual **overseas** assets is not less than USD 100 million or the total amount of its managed actual **overseas** assets is not less than USD 500 million; or the total amount of actual **overseas** assets of its parent company is not less than USD 100 million or the total amount of the actual **overseas** assets managed by its parent company is not less than USD 500 million; (3) It has a solid governance structure and well-developed internal control system, and its business operation activities are in compliance with the standards; (4) It has not been subject to any severe penalty by its regulatory authority in or outside China during the latest three-year period, nor has its parent company.	solid governance structure and well-developed internal control system, and its business operation activities are in compliance with the standards; **foreign natural persons shall have corresponding capacity for identifying and bearing risks;** (2) The actual total assets of the foreign investor shall be not less than USD 50 million or the actual total assets managed by the foreign investor shall be not less than USD 300 million; or the actual total assets of **the actual controller** of the foreign investor shall be not less than USD 50 million or the actual total assets managed by the actual controller of the foreign investor shall be not less than USD 300 million; Specifically, if the foreign investor **becomes the controlling shareholder of the Listed Company**, its actual total assets shall be not less than USD 100 million or the actual total assets managed thereby shall be not less than USD 500 million; or the actual total assets of its **actual controller** shall be not less than USD 100 million or the actual total assets managed by its actual controller shall be not less than USD 500 million; (3) The foreign investor or its actual controller has not been subject to any major punishment by domestic and foreign regulatory authorities in the past three years; if it is less than three years from its establishment, such time period shall start from the date of its establishment; **if the foreign investor is a foreign natural person, the certificate of no criminal record in the past three years shall also be provided**.

In addition, it is worth mentioning that from the fourth item of the Reporting Form of Initial and Change of Foreign Investment, the Basic Information of Strategic Investment by Foreign Investor in Listed Companies released by the Ministry of Commerce, still lists the relevant columns about the assets of foreign investors or their parent companies. Therefore, with regard to strategic investment by foreign investors into Listed Companies, the Ministry of Commerce may still retain the corresponding asset threshold requirements

in the Strategic Investment Measures to be revised, rather than completely cancel the threshold. The specific setting of these thresholds, as well as other possible adjustments, remains to be seen.

Thirdly, with respect to the shareholding proportion, the requirement that the proportion of the shares obtained after the completion of the initial investment shall not less than 10% of the shares issued by the company is deleted; however, it shall be noted that such provisions of the Securities Law and the CSRC and stock exchanges on the restricted stock trade period shall still be complied with, for example, the minimum proportion of shares for acquisition by tender offer and transfer through agreement is 5%.

Fourthly, the lock-up period has changed. The lock-up period for shares of Listed Companies held by foreign investors is shortened from 3 years to 12 months; however, it should be noted that if there are any provisions of the Securities Law, the CSRC and stock exchanges on the lock-up period, they shall still be complied with. For instance, in the case of obtaining the controlling power of Listed Companies through strategic investment by foreign investors, the lock-up period for shares of Listed Companies held by foreign investors is still 3 years.

Strategic Investment Measures	2018 Draft for Comments
Article 5 The Investors' Strategic Investment shall meet the following requirements: … (III) The obtained A shares of a Listed Company shall not be transferred within three years;	Article 7 A foreign investor shall not transfer the A shares of a Listed Company it has obtained by way of strategic investment within 12 months; where the lock-up period of shares is otherwise provided for in the Securities Law and by the CSRC and stock exchanges, such provisions shall apply.

Fifthly, procedural requirements for subsequent changes are revised. The 2018 Draft for Comments specifies that where a foreign investor makes investment on continuous basis in a Listed Company of which it has already held shares, the foreign investor shall fulfill record-filing or examination and approval formalities in accordance with strategic investment measures when the proportion of its shareholding exceeds 5% cumulatively or its controlling or relative controlling status changes, while according to the existing Strategic Investment Measures, any increase in shareholding shall fulfill record-filing or examination and approval formalities in accordance with strategic investment measures.

Strategic Investment Measures	2018 Draft for Comments
Article 11 Where an investor continues to make strategic investment in a Listed Company wherein the investor holds shares, the methods and procedures set forth in these Measures shall apply.	Article 15 Where a foreign investor makes investment on continuous basis in a Listed Company of which it has already held shares through transfer by agreement, private placement of new shares by Listed Companies, tender offer or any other method, the foreign investor shall fulfill record-filing or examination and approval formalities in accordance with Article 3

	hereof when the proportion of its shareholding exceeds 5% cumulatively or its controlling or relative controlling status changes.

Sixth, the Strategic Investment Measures do not apply to the investments made through the qualified foreign investors system (QFII and RQFII), the Shenzhen Stock Connect or the Shanghai Stock Connect.

5.6 Strategic Investment by Foreign Investors and the Application of M&A Provisions

In addition to strategic investment by foreign investors in the form of purchasing the shares of Listed Companies with cash, when Listed Companies purchase the equity of foreign-related enterprises (including domestic foreign-invested enterprises and overseas enterprises) by issuing shares as consideration, the Strategic Investment Measures shall also apply because the foreign parties have obtained the shares of Listed Companies. Due to the stricter standards for strategic investment by foreign investors, when the Listed Companies merge and acquire domestic foreign-invested enterprises by shares, breakthroughs have been made in practice in the shareholding proportion, lock-up period and qualification of strategic investment by foreign investors. There is possibility settle on a "case by case" basis by commercial departments.

For example, regarding the requirement for foreign investors to hold 10% of the shares of a Listed Company, in the middle of 2011, in a case in which China Fiberglass Co., Ltd (600176, renamed China Jushi thereafter) completed the purchase of 49% of the equity of Jushi Group by issuing shares, Zhencheng International, a company under foreign company Hony Capital which is one of the counterparties, meets the requirements for foreign investors' qualifications and shareholding proportion after the investment, but the other offshore company controlled by Tang Xinghua, a Chinese American, does not meet the requirements of the Strategic Investment Measures in terms of assets and shareholding proportion after the investment. Similar cases include China Grand Auto's backdoor listing through Merro Pharm (600297), Firstar Panel Technology (300256) purchasing the equity of Shenzhen Lianmao by issuing shares, Kaile Technology's (600260) acquisition of Shanghai Vanzo, etc.

In the lock-up period, there are some cases also indicating the shares held by some foreign investors are locked for only 12 months or 24 months. For instance, in 2015, in the case of Focus Media's backdoor holding through Hedy, the lock-up period of some foreign shareholders is only 12 months. Similar cases include the acquisition of Ark Pha Ltd by Lanfeng Biotechnology (002513), etc.

When the target enterprise of the merger and acquisition is an overseas company and the Listed Company merges and acquires an overseas company by cross-border stock-for-stock, since the foreign investor acquires the shares of the Listed Company in the form of equity of the overseas company as consideration (i.e. subscription to increase in capital in

the form of equity as consideration), it shall also be regarded as merger and acquisition of a domestic enterprise by a foreign investor under the M&A Provisions, and in addition to the Strategic Investment Measures, the relevant provisions of the M&A Provisions shall also apply. For details, please see the Chapter IV "Cross-Border Stock Swap" of this brochure. More importantly, the shares of an overseas company which a foreign investor gives as consideration in a cross-border stock swap as stipulated in Article 6 of the 2018 Draft for Comments are not required to be the shares of an overseas listed company as stipulated in Article 29 of the M&A Provisions, but only require the overseas company to be lawfully established and registered with a complete legal system on company management, and the shares of the overseas company are legally held by the foreign investor and transferable. If Article 29 of the M&A Provisions are not revised accordingly after the effectiveness of the 2018 Draft for Comments, the issue of how to apply the inconsistent provisions in these two rules is still subject to further interpretation by the regulatory authorities.

2018 Draft for Comments	M&A Provisions
Article 6 A foreign investor that uses the equity it holds in an overseas company or uses additional shares issued thereby as the means of payment to make strategic investment in a Listed Company shall additionally satisfy the following conditions: (1) The overseas company is legally established, and the place of its registration has sound corporate legal system and the overseas company or its management has not been subject to major punishment by regulatory authorities in the past three years; (2) The foreign investor legally holds and can transfer in accordance with the law the shares of the overseas company; and (3) The foreign investor complies with relevant provisions of the CSRC.	Article 29 With respect to a foreign investor's M&A of a domestic company, the equity interests in the overseas company and the domestic company involved therein shall meet the following conditions: (1) They are legally held by the shareholders and transferable under the law; (2) They are free of any ownership dispute and free of any pledge or other encumbrance; (3) The equity interests in the overseas company shall be listed for exchange on an overseas securities exchange market that is open and lawful (excluding over-the-counter markets); (4) The exchange price of the equity interests in the overseas company for the latest one-year period shall be steady.

Chapter VI Reinvestment by Foreign-invested Enterprises in China

Guo Shifang

6.1 Overview of Supervision Over Reinvestment by Foreign-invested Enterprises in China

Domestic reinvestment by foreign-invested enterprises refers to the activities of Sino-foreign equity joint ventures, Sino-foreign cooperative joint ventures, wholly foreign-owned enterprises in the form of limited liability companies and foreign-invested joint stock companies established in China in accordance with the law to invest to set up new enterprises or purchase the equity of other existing enterprises (hereinafter referred to as the "**Investee Companies**") in China.

The main document regulating the reinvestment of foreign-invested enterprises within the territory of China is the Interim Provisions for Industry and Commerce on the Domestic Investment of Foreign-invested Enterprises (hereinafter referred to as the "**Interim Provisions**"), which was first issued in July 2000 jointly by the Ministry of Foreign Trade and Economic Cooperation and the State Administration for Industry and Commerce. Up to the present, the aforesaid Interim Provisions have not been explicitly repealed, and in combination with the implementation of the Foreign Investment Law and the Implementing Regulations of the Foreign Investment Law, whether the aforesaid Interim Provisions will be repealed or how to adjust them still need to be further observed.

This part only discusses the circumstances of ordinary foreign-invested enterprises, excluding foreign-invested investment companies, foreign-invested business-starting investment enterprises and foreign-invested equity investment enterprises and other investment-oriented foreign-invested enterprises.

6.2 Requirements for domestic reinvestment of foreign-invested enterprises

In accordance with the requirements of the Interim Provisions, a foreign-invested enterprise shall meet the following requirements for carrying out domestic reinvestment: (1) the enterprise starts to make profits; and (2) the enterprise operates in accordance with the law and has no record of illegal operation. A foreign-invested enterprise which does not satisfy the aforesaid criteria shall not be allowed to make reinvestments.

Besides, before the Ministry of Commerce released the Decision on Revising Certain Regulations and Normative Documents to revise the Interim Provisions on October 2015, if a foreign-invested enterprise re-invests in the territory of the People's Republic of China, its accumulated investment shall not exceed 50% of its own net assets; and the capital increase from the profits of the Investee Companies after the investment shall not be involved.

6.3 Source of funds for domestic reinvestments by foreign-invested enterprises

Firstly, where the foreign-invested enterprise starts to make profits in the course of domestic operations, such profits and income shall generally be RMB funds. The foreign-invested enterprise may use the profits for reinvestment, and shall not be required to obtain approval of the foreign exchange bureau or the bank.

Secondly, if the foreign-invested enterprise reinvests with capital funds, it needs to meet a series of regulations on foreign exchange supervision. Including:

6.3.1. Notice of the State Administration of Foreign Exchange on Reforming the Administrative Approach Regarding the Settlement of the Foreign Exchange Capitals of Foreign-invested Enterprises (Hui Fa [2015] No.19) (hereinafter referred to as the "Document No.19")

Article 1 of Document No. 19 currently in effect provides that a foreign-invested enterprise may, at its discretion, settle 100% of its foreign exchange capital funds with a bank based on its actual business needs. Article 3 stipulates that a foreign-invested enterprise shall truthfully use its capital funds for its own operational purposes within the scope of business. It shall not, directly or indirectly, use its capital funds and the RMB funds obtained from foreign exchange settlement for expenditure beyond its business scope or expenditure prohibited by State laws and regulations. Meanwhile, Article 4 of Document No.19 further provides that ordinary foreign-invested enterprises shall be governed by the prevailing provisions on domestic re-investment if they make domestic equity investment by transferring their capital funds in the original currencies. Where such an ordinary foreign-invested enterprise makes domestic equity investment with the amount of foreign exchanges settled, the invested enterprise shall first go through domestic re-investment registration and open a corresponding Account for Foreign Exchange Settlement Pending Payment with the foreign exchange bureau (or bank) at the place of registration, and the enterprise making the investment shall thereafter transfer the RMB funds obtained from foreign exchange settlement to the Account for Foreign Exchange Settlement Pending Payment opened by the invested enterprise according to the actual amount of investment. The foregoing principles shall apply if the invested enterprise continues to make domestic equity investment.

Pursuant to the provisions of the aforesaid laws, where the business scope of an ordinary foreign-invested enterprise includes the wording "investment", the enterprise may transfer its capital funds in the original currency or make foreign exchange settlement to carry out equity investment in China, but foreign-invested enterprises which do not have the wording "investment" in their business scope shall not make equity investment directly using their capital funds. In practice, it is usually difficult for ordinary foreign-invested enterprises to add the word "investment" to their scope of business.

6.3.2. Notice of the State Administration of Foreign Exchange on Further Promoting the Facilitation of Cross-border Trade and Investment (Hui Fa [2019] No. 28) (hereinafter referred to as the "Document No. 28") and Notice of the State Administration of Foreign Exchange on Reducing Foreign Exchange Accounts

(Hui Fa [2019] No. 29) (hereinafter referred to as the "Document No. 29")

On October 23, 2019, the State Administration of Foreign Exchange released the Document No. 28 and the Document No. 29, clearly cancelling the restrictions on domestic equity investment of capital funds by ordinary foreign-invested enterprises. Document No.28 stipulates that non-investment oriented foreign-invested enterprises shall be allowed to use capital funds for domestic equity investment in accordance with the law under the premise of not violating the existing special management measures for entry of foreign investment (negative list) and the authenticity and compliance of their domestic invested projects. Where a non-investment oriented foreign-invested enterprise makes domestic equity investment by way of transfer of the capital funds in original currency, the Investee Companies shall go through the registration of domestic reinvestment and open the capital account for receipt of funds in accordance with relevant provisions without handling the entry registration of cash contribution; where a non-investment oriented foreign-invested enterprise makes domestic equity investment by way of foreign exchange settlement of capital funds, the Investee Companies shall go through the registration of receipt of domestic reinvestment and open the "Capital Account –Account for Foreign Exchange Settlement Pending Payment" for receipt of corresponding funds in accordance with relevant provisions.

Document No.29 and its appendix Operational Guidance for Handling Relevant Foreign Exchange Business under Capital Account by Banks (hereinafter referred to as the "**Operational Guidance**", effective as of January 1, 2020) further clarify the ways for non-investment oriented foreign-invested enterprises to carry out domestic equity investment in the form of the transfer of original currencies or the settlement of capital funds. Furthermore, the Operational Guidance provides that where a domestic institution receives the foreign exchange funds reinvested by the domestic entity or the equity transfer consideration paid with foreign exchange, it shall not open the foreign exchange capital account until it has filed an application for registering the basic information about the receipt of domestic reinvestment with a bank at its place of registration; Where a domestic institution receives reinvestment funds or equity transfer consideration in RMB from a non-investment oriented foreign-invested enterprise (the scope of business may not include the word "investment") (including RMB funds in the direct exchange settlement income or exchange settlement pending payment account), it shall, upon application to complete registration formalities for receipt of basic information of domestic reinvestment with the bank at its place of registration and opening of the exchange settlement pending payment account, then the enterprise making the investment shall transfer the RMB funds obtained from exchange settlement based on the actual investment scale to the exchange settlement pending payment account opened by the investee or the domestic entity which receives the equity transfer consideration; where a domestic institution receives reinvestment funds or equity transfer consideration from two (or more) different investment entities, it shall complete registration formalities based on the different source entities and (or currency) respectively and open a foreign exchange capital account or foreign exchange settlement pending payment account.

The Operational Guidance further provides that the foreign exchange receipts under capital accounts of domestic institutions and the RMB funds obtained from foreign exchange settlement may be used by domestic institutions for expenditures under current accounts within their business scope, or for expenditures under

capital accounts permitted by laws and regulations. However, the following expenditures are prohibited: (1) shall not be directly or indirectly used for expenditures beyond the business scope of an enterprise or expenditures prohibited by laws and regulations of the State; (2) shall not be directly or indirectly used for securities investments or other investments or wealth management other than banks' principal-protected products, unless otherwise expressly provided by laws and regulations; (3) shall not be used for granting loans to non-affiliated enterprises, unless expressly permitted in the business scope; and (4) shall not be used for constructing or purchasing real estate not for self-use (except for real estate enterprises).

The Document No. 28 and Document No. 29 conform to the legislative purpose of promoting foreign investment as prescribed in the Foreign Investment Law, and have provided convenience in terms of foreign exchange procedures for the domestic reinvestment of ordinary foreign-invested enterprises.

6.4 Access Restrictions for Domestic Reinvestments by Foreign-invested Enterprises

Article 47 of the Regulation on the Implementation of the Foreign Investment Law clearly stipulates that, “The relevant provisions of the Foreign Investment Law and this Regulation shall apply to investment made by foreign-funded enterprises within China.” Therefore, within the existing legal framework, foreign-invested enterprises shall still comply with the restrictions on foreign investment access for their domestic reinvestments.

The Special Management Measures for the Market Entry of Foreign Investment (Negative List) (2019 Version) (hereinafter referred to as the "**Negative List**") stipulates that foreign investors shall not invest in the fields in which foreign investment is prohibited under the Negative List; market entry licensing of foreign investment shall be required for the investment in the fields that are included in the Negative List and in which investment is not prohibited; fields not included in the Negative List for the Market Entry of Foreign Investment shall be managed according to the principle of equal treatment of domestic and foreign investment. Therefore, if the business scope of the Investee Company is any field not set out in the Negative List, administration shall be conducted pursuant to the principle of consistency between domestic and foreign investment; if the business scope of the Investee Company is any field prohibited for foreign investment set out in the Negative List, the foreign-invested enterprise shall not make investment in the Investee Company ; if the business scope of the Investee Company is any field not prohibited for investment but set out in the Negative List, the domestic reinvestment of the foreign-invested enterprise may be subject to foreign investment access permission, the specific identification of the relevant departments is needed in practice.

6.5 Examination and Approval Procedures for Domestic Reinvestments by Foreign-invested Enterprises

In accordance with the Interim Provisions, where a foreign-invested enterprise makes investment in any encouraged or permitted sector to establish any company, the foreign-invested enterprise shall file an application with the company registration authority of the place where the Investee Company is located; where the registration is approved, a Business License of an Enterprise Legal Person shall be issued, with the words "Invested by a Foreign-Invested Enterprise" added in the column of enterprise type therein. That is, if the Investee Company is not subject to foreign investment access restrictions, the

foreign-invested enterprise may directly complete establishment registration formalities with the administration for industry and commerce and obtain an annotated Business License of an Enterprise Legal Person.

In addition, in accordance with the Interim Provisions, where a foreign-invested enterprise makes investment in a restricted sector to establish a company, the foreign-invested enterprise shall file an application with the provincial authority for foreign economic relations and trade of the place where the Investee Company is located. After receiving the application from a foreign-invested enterprise for its investment in and establishment of a company in a restricted sector, the provincial examination and approval authority shall, seek opinions from the same-level or state industry administration department and after it receives the opinions, it will issue a written reply. A foreign-invested enterprise may apply for the establishment registration with the company registration authority of the place where the Investee Company is located only after obtaining a response on consent by the provincial examination and approval authority. Within 30 days of the date of establishment, the foreign-invested enterprise concerned shall report the establishment to the original examination and approval authority for record-filing.

However, according to the Measures for Foreign Investment Information Reporting issued by the Ministry of Commerce on December 30, 2019, for foreign investors' direct or indirect investment activities within the territory of China, foreign investors or foreign-invested enterprises are required to submit investment information to the competent commerce departments in accordance with the above measures.

Chapter VII Merger and Division of Foreign-invested Enterprises

Guo Shifang

7.1 Overview of Merger and Division of Foreign-invested Enterprises

Merger and division of foreign-invested enterprises shall mainly refer to merger and division of Sino-foreign equity joint venture enterprises, Sino-foreign cooperative joint venture enterprises with legal person status, wholly foreign-owned enterprises, foreign-invested joint stock companies (hereinafter referred to as the "**foreign-invested enterprises**" or "**companies**") established in China pursuant to the laws of China, and shall also include merger between foreign-invested enterprises and domestic enterprises in China.

At present, the legal requirements concerning the merger and division of foreign-invested enterprises are mainly stipulated in the Company Law of the People's Republic of China (hereinafter referred to as the "**Company Law**"), the Provisions on the Merger and Division of Foreign-invested Enterprises issued by MOFCOM (hereinafter referred to as the "**Merger and Division Provisions**") and the judicial interpretations of the Supreme People's Court.

According to the above regulations, merger of foreign-invested enterprises refers that two or more companies are combined into one single company through the conclusion of agreements in accordance with relevant provisions of laws, which mainly includes merger by absorption and merger by consolidation. Thereinto, (1) merger by absorption means that a company absorbs another company or companies into this company, the absorbing company continues to exist and the absorbed company is dissolved; (2) merger by consolidation means that two or more companies merge and establish a new company, and the companies being merged are dissolved.

The division of a foreign-invested enterprise refers to one company which is divided into two or more companies through resolution by the highest authority of the company in accordance with relevant laws, which mainly includes surviving division and dissolution division. Thereinto, (1) surviving division means that a company is divided into two or more companies and all of the companies are validly existing after the division; (2) dissolution division means that a company is divided into two or more companies and the divided company dissolves and establishes two or more new companies.

7.2 Operation Flow of Merger and Division

In accordance with existing regulations, certain compliance procedures and approval and reporting procedures shall be completed for the merger and division of a foreign-invested enterprise, including:

7.2.1. Formulation of Plan of Merger or Division

Foreign-invested enterprises shall first formulate an internal merger or division scheme to determine the specific arrangements in the merger or division, which shall mainly include the following matters:

A. Form of Merger or Division

As described above, the merger of a foreign-invested enterprise includes a merger by absorption and a merger by consolidation, and division includes surviving division and dissolution division. Foreign-invested enterprises shall determine the form of merger or division to be adopted and the company to be validly existing (hereinafter referred to as the "**Surviving Entity**") and the company to be deregistered (hereinafter referred to as the "**Deregistered Entity**") after such merger or division.

B. Corporate Nature of the Surviving Entity

In respect of merger, the Merger and Division Provisions specify the nature of the Surviving Entity after the consummation of the merger. Specifically:

Nature of the Company before the Merger		Nature of the Company After the Merger
Limited Liability Company + Limited Liability Company	→	Limited Liability Company
Joint Stock Limited Company + Joint Stock Limited Company	→	Joint Stock Limited Company
Listed Joint Stock Limited Company + Limited Liability Company	→	Joint Stock Limited Company
Unlisted Joint Stock Limited Company + Limited Liability Company	→	Joint Stock Limited Company or Limited Liability Company

In respect of division, there are no explicit provisions. Based on practical experience, the nature of the company after the division is generally the same as that of the company before the division.

C. Registered Capital and Total Investment of the Surviving Entity

In respect of a merger, the foreign-invested enterprise shall calculate and expressly agree upon the registered capital and total investment of the surviving company after the completion of the merger. In accordance with the Merger and Division

Provisions, the general rules for calculating the registered capital and total investment are as follows:

Method of Merger	Registered Capital after Merger	Total Investment
Limited Liability Company + Limited Liability Company → Limited Liability Company	Total Amount of Registered Capital of Original Companies in the Merger	No Explicit Provision
Joint Stock Limited Company + Joint Stock Limited Company →Joint Stock Limited Company		
Unlisted Joint Stock Limited Company + Limited Liability Company →Limited Liability Company		
Listed Joint Stock Limited Company + Limited Liability Company →Joint Stock Limited Company	Conversion of the net assets of the original Limited Liability Company into shares according to the net assets per share of the Joint Stock Limited Company to be merged + the total shares of the original Limited Liability Company	
Unlisted Joint Stock Limited Company + Limited Liability Company →Joint Stock Limited Company		

In addition to the above general circumstances, if a Chinese domestic enterprise merges with a foreign-invested enterprise and becoming a foreign-invested enterprise, then the following special calculation rules shall be followed:

Method of Merger	Registered Capital after Merger	Total Investment
Foreign-invested enterprise + Chinese domestic enterprise →	Registered capital of the original foreign-invested enterprise + Registered capital of the Chinese domestic enterprise	Total investment = Total investment of the foreign-invested enterprise + Total assets of the enterprise recorded in the audit report of

Foreign-invested enterprise		the Chinese domestic enterprise.

Special Notes:

1、 The proportion of the registered capital to the total amount of investment of the company after the merger shall comply with Provisional Regulations for the Proportion of Registered Capital to Total Amount of Investment of Joint Ventures Using Chinese and Foreign Investment (hereinafter referred to as the "**Provisional Regulations for the Proportion**") of the SAIC; where the Provisional Regulations for the Proportion are inapplicable in special circumstances, approval from the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) together with the State Administration for Industry and Commerce (SAIC) is required.

In accordance with the Provisional Regulations for the Proportion, the proportion of registered capital to the total amount of investment of a Sino-foreign equity joint venture shall comply with the following provisions: (1) If the total amount of investment of a Sino-foreign equity joint venture is less than US$ 3 million (including US$ 3 million), its registered capital shall be at least 7/10 of the total investment. (2) If the total amount of investment of a Sino-foreign equity joint venture is from US$ 3 million to US$ 10 million (including US$ 10 million), the registered capital shall be at least one-half of the total amount of investment; within this, if the total amount of investment is less than US$ 4.2 million, the registered capital shall not be less than US$ 2.1 million. (3) If the total amount of investment of a Sino-foreign equity joint venture is from US$ 10 million to US$ 30 million (including US$ 30 million), the registered capital shall be at least 2/5 of the total amount of investment; within this, if the total amount of investment is less than US$ 12.5 million, the registered capital shall not be less than US$ 5 million. (4) If the total amount of investment of a Sino-foreign equity joint venture is more than US$ 30 million, the registered capital shall be at least 1/3 of the total amount of investment; within this, if the total amount of investment is less than US$ 36 million, the registered capital shall be not less than US$ 12 million.

2、 According to the project experiences of merger of domestic enterprises by foreign-invested enterprises we completed recently, in case the registered capital and total investment calculated according to the above formulas fail to meet the requirements in Provisional Regulations for the Proportion, foreign-invested enterprises, under the full communication with the industrial and commercial registration authorities of the places where they are registered, may appropriately adjust the total investment under the guidance of the industrial and commercial registration authorities of the places where they are registered without submitting the adjustment to the MOFTEC and the SAIC for approval.

In the case of a division, the amounts of the registered capital of the companies

after the division shall be determined by the highest authority of the original company in accordance with the provisions of the laws, administrative regulations and the provisions of the relevant registration department in connection with foreign-invested enterprises. However, the sum amount of the registered capital of the companies after the division shall be equal to the amount of the registered capital of the original company before the division.

D. Shareholding Arrangement by Shareholders

The foreign-invested enterprise shall determine in advance the shareholding arrangement of every original shareholder in the Surviving Entity after the completion of merger or division. There is no explicit calculation standard available under the current laws for the shareholding proportion of the shareholders in the Surviving Entity, and generally the shareholding proportion may be determined by the shareholders through consultation, based on the audit or appraisal results.

However, based on our experience, the industrial and commercial registration authorities in some regions have special requirements for the calculation of the shareholding proportion of shareholders. For example, some branches of the Hebei administration of industry and commerce require the original shareholders' paid-in capital to remain unchanged without considering the appraisal value of the equities. Therefore, foreign-invested enterprises shall maintain good communication with the local industrial and commercial registration authorities when determining the shareholding arrangements in order to avoid obstacles in the process of operation.

E. Creditor’s Rights and Debts Succession Plan

Foreign-invested enterprises shall determine the plan for succession of creditor’s rights and debts after the merger and division. In accordance with the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases of Civil Disputes Related to Enterprise Restructuring (Fa Shi [2003] No.1) (hereinafter referred to as the "**Judicial Interpretation on Enterprise Restructuring** "):

For merger, the creditor’s rights and debts shall be borne by the Surviving Entity of the merger, that is, in the case of merger by absorption of a foreign- invested enterprise, the debts of the merged enterprise shall be borne by the merging party; in the case of merger by consolidation of a foreign- invested enterprise, the debts of the merged enterprise shall be borne by the Surviving Entity which is newly established.

For division, the parties participating in the division shall formulate a plan for the succession of creditor’s rights and debts in advance and obtain approval of creditors. Otherwise, in accordance with the Judicial Interpretation on Enterprise Restructuring, if a creditor asserts a claim against the Surviving Entity after division, the Surviving Entity after the division shall bear joint and several liabilities. After the enterprises arising from division have assumed the joint and several liabilities, where there is agreement on succession of the original enterprise's debts between the enterprises arising from division, the debts shall be

handled in accordance with the agreement; if there is no agreement, or the agreement is unclear, the debts shall be borne by the enterprises in proportion to their assets at the time of division.

7.2.2. The Internal Authorized Body Makes A Resolution and Executes the Merger or Division Agreement

After the plan of merger or division is finalized, the parties to the merger or division shall have their respective internal authority resolution on the plan of merger or division and enter into a merger or division agreement with respect to the merger or division.

The merger or division agreement shall take effect after the execution by the parties hereto, and shall take effect from the date on which the approval from the competent governmental authorities is acquired. In accordance with the Merger and Division Provisions, the merger agreement and the division agreement shall at least contain the following necessary terms:

Merger Agreement	Division Agreement
1) Names, domiciles and legal representatives of the parties to the merger agreement; 2) Name, domicile and legal representative of the company surviving the merger; 3) The total investment and registered capital of the company surviving the merger; 4) The form of merger; 5) The plans of the parties to the merger agreement for the succession of the creditor's rights and debts; 6) Arrangement of reallocating the employees; 7) Liabilities for breach; 8) The method of dispute resolution; 9) The date and place for signing the agreement; 10) Other matters deemed necessary by the parties to the merger agreement.	1) Names, domiciles and legal representatives proposed by the parties to the division agreement; 2) The total investment and registered capital of the company surviving the division; 3) The form of division; 4) The partitioning plan of the proposed divided company's assets, agreed by the parties to the division agreement; 5) The plan of the parties to the division agreement for the succession of the creditor's rights and debts of the company to be divided; 6) Arrangement of reallocating the employees; 7) Liabilities for breach; 8) The method of dispute resolution; 9) The date and place for signing the agreement; 10) Other matters deemed necessary by the parties to the division

	agreement.

7.2.3. Public Announcement and Notification to Creditors

Foreign- invested enterprises shall notify their creditors within 10 days of the date on which the merger or division resolution is made, and shall publish public notices three times in nationally circulated newspapers at or above the provincial level. For the foreign-invested enterprises which need the prior approval of the commercial authorities or the competent industrial authorities, the aforementioned notification and announcement shall be made after obtaining the relevant approvals. The public announcement shall generally contain the names of the companies involving in merger or division, the shareholding proportion of the shareholders after merger or division, changes in registered capital and total investment amount and debt succession plan.

With respect to the public announcement period, the Merger and Division Provisions provide that the public announcement period for merger and division of a foreign-invested enterprise shall be at least ninety days, while the Company Law requires that the public announcement period shall be forty-five days. Based on our experience, the industry and commerce registration authorities in different regions differ in their practices with regard to the announcement period, and some industry and commerce registration authorities recognize that the announcement period for foreign-invested enterprises may comply with the forty-five days stipulated in the Company Law.

7.2.4. Adjustment to Succession of Creditor's Rights and Debts

Creditors of the company, within thirty days from the date on which it receives the notice of merger, or the creditors who has not received the notice of merger within ninety days from the date of the first announcement, shall have the right to request the company to modify its debts succession plan or pay off its debts or provide corresponding guarantee. If creditors of the company fail to exercise the rights provided above, it shall be deemed that such creditors agree to the plan for succession of creditor's rights and debts of the company proposed to be merged or divided, and the claims of such creditors shall not affect the progress of the merger or division of the company.

If the industrial and commercial registration authorities recognize that a foreign-invested enterprise may apply the forty-five-day announcement period stipulated in the Company Law, the creditors may, within thirty days from receipt of notification or within forty-five days from the announcement if they do not receive notification, request that the company pay off its debts or provide corresponding guarantee.

7.2.5. Deregistration of Deregistered Entity

After the end of the announcement period and the completion of adjustment to succession of creditor's rights and debts, the deregistered entity in such merger or division shall go through deregistration procedures with the authorities for taxation, industry and commerce, commerce and obtain a deregistration certificate.

7.2.6. Change of registration of Surviving Entity

After the expiration of the announcement period and the completion of adjustment to the succession of creditor's rights and debts, the Surviving Entity in such merger or division shall complete the registration with the authorities for industry and commerce and the information reporting to the commercial authorities, mainly including amending the registered capital, shareholding proportion as well as type of the Surviving Entity and obtain the updated business license. In addition, if there is any change in the directors, supervisors, officers or other matters (such as the name and the registered address of the Company) occurs to the Surviving Entity in the course of merger or division, the amendment registration of such change may be completed at the same time.

7.2.7. Handover of Business and Assets

Upon completion of the industrial and commercial modification procedure, the Surviving Entity shall continue to complete modification of business qualifications, asset transfer and handover, personnel transfer, change of the parties executing the business contract and other matters based on the actual situation of the company. Also, the company must pay attention to the connection between business qualification modification procedure and the industrial and commercial and taxation modification procedure. For certain businesses that require prior approval prior to their operation, for example, production-oriented enterprises may only continue their production after obtaining the production permits, the company must communicate in advance with the competent business authorities on the issues concerning merger and division, so as to confirm the modification procedure and time limit of the production qualifications, and to prevent the business interruption or production suspension due to the failure to obtain the modified production qualifications in a timely manner.

Part C Specialized Analysis on Foreign Investment

Chapter VIII New Policies' Influence on VIE and Red Chip Reorganization

Sun Haishan

8.1 Overview on "Small Red Chip Model"

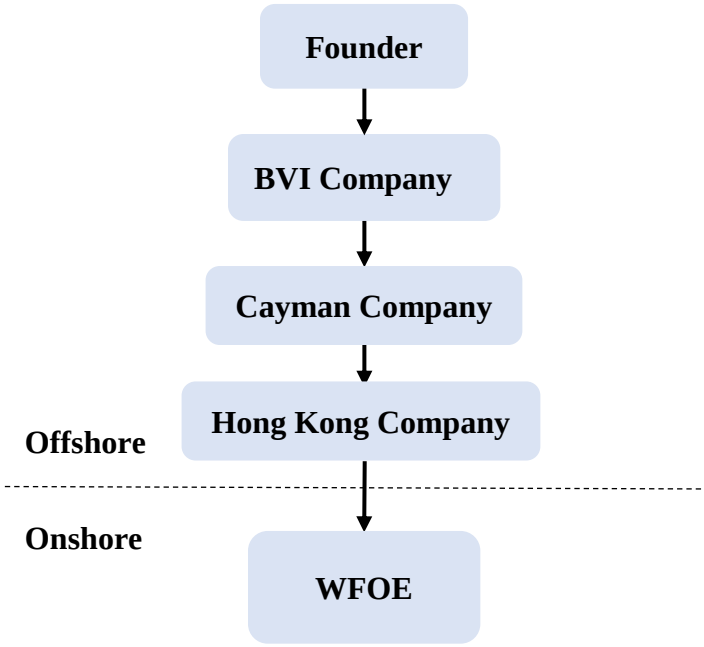
"Red Chip Model" refers to the model where, for overseas financing purpose, the shareholders of the domestic enterprises whose main operating assets and business are located within the PRC would set up holding companies incorporated outside the PRC (normally registered under the jurisdiction of Cayman Islands, Bermuda Islands or British Virgin Islands), which act as the vehicles for receiving offshore financing, to control their onshore entities by shareholding or contractual arrangement. In such cases, "Small Red Chip Model" normally means the "Red Chip" structure controlled by natural person with PRC nationality while the "Big Red Chip" structure is usually controlled by onshore entity[1].

1) Control by Shareholding

For a domestic enterprise which intends to set up "Small Red Chip" structure to accept offshore financing, if the business it conducts involves no special administrative measures as set out in the Negative List[2], it could adopt the "Small Red Chip Model" during reorganization where the equities of onshore entities are controlled by the offshore holding companies by shareholding.

[1] Circular of the State Council on Further Strengthening Management of Issuance and Listing of Shares Overseas (**"Guidelines of Red Chip"**) promulgated and taking effect on June 20, 1997 has provided the basic definition of the "Big Red Chip". The enterprises who adopt the "Big Red Chip" structure and would be listed overseas shall obtain the approval from the PRC government and CSRC, therefore the shareholders of onshore enterprises who intend to set up red chip structure through foreign investments by onshore entities shall be cautious in case the structure could fall within the scope of "Big Red Chip" defined in Guidelines of Red Chip.

[2] Please refer to Chapter I for the relevant regulation regarding the Negative List.

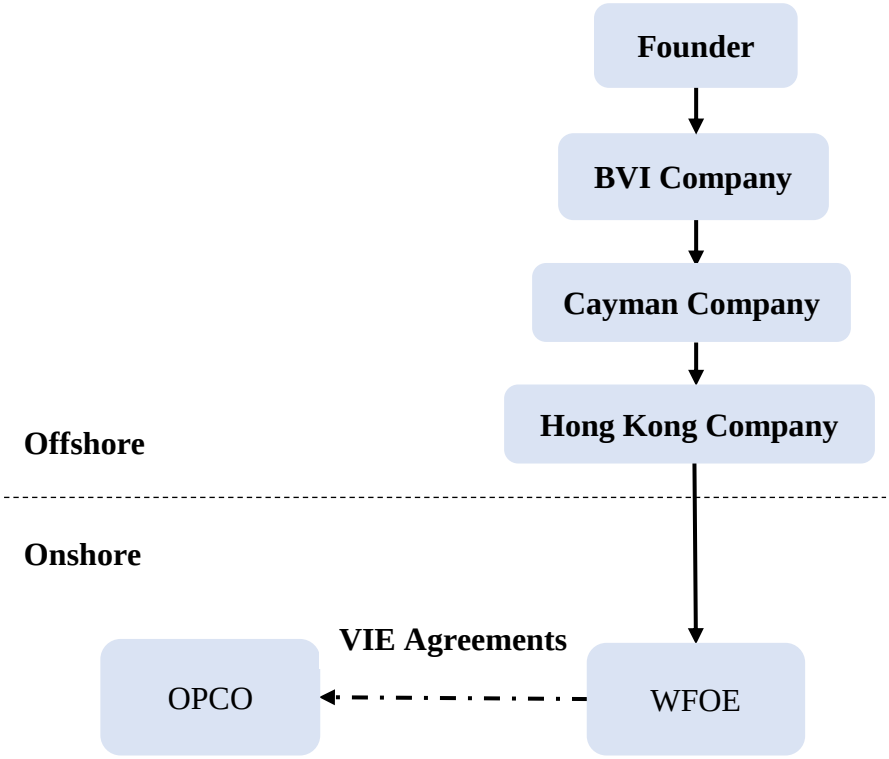


Simplified Diagram of "Red Chip Model" Controlled by Shareholding

2) Control by Contractual Arrangement

The model of Contractual Arrangement, also known as Variable Interest Entity (**"VIE"**), is usually adopted by the domestic enterprises whose business involves certain industries where investments by foreign investors are prohibited or restricted, in which case, a Hong Kong enterprise held directly or indirectly by the vehicle receiving offshore financing would establish an onshore wholly foreign owned enterprise (**"WFOE"**) and then a series of agreements (usually including the equity pledge agreement, the exclusive consulting service agreement, the exclusive equity purchase option agreement, the power of attorney from the shareholders, etc.) would be signed among the WFOE, the onshore operating company (**"OPCO"**) and its shareholders, so that the OPCO could be effectively controlled by the WFOE and consolidated in financial aspect. But as mentioned in the Chapter IV that VIE model has its inherent defects (such as instability of its structure) compared with "Small Red Chip Model" with control by shareholding, the offshore securities regulatory authorities have already paid attention to the VIE model to different degrees and provided various regulations in this regard. For example, Hong Kong Exchanges and Clearing Limited (**"HKEx"**) has issued relevant listing decisions and guidelines[3] to clarify that the adoption of VIE Model is subject to the principle of "Narrowly Tailored", namely, such structure could be adopted to the extent where it's not feasible for foreign investors to hold the equity of onshore entities in certain industries pursuant to the relevant laws and regulations or policies. The U.S. Securities and Exchange Commission (**"SEC"**) pays more attention to the legitimacy issue of VIE and would require the companies applying for listing to provide adequate reasons for adoption of VIE structure and to make comprehensive and sufficient disclosures of the relevant risk factors accordingly.

[3] The concrete could been seen in HKEx Listing Decision (HKEX-LD43-3) and HKEx Guidance Letter (HKEx-GL77-14), which have been recently updated in April 2018.



Simplified Diagram of VIE Structure

8.2 New Policies' Influence on "Red Chip Model"

The Foreign Investment Law as well as its supporting regulations (including the Implementing Regulations of the Foreign Investment Law and the Measures for Reporting of Information on Foreign Investment so far) has taken effect on January 1, 2020. Though more specific supporting regulations shall be promulgated to practically implement the Foreign Investment Law, it is expected that the round-trip investments or establishment of domestic enterprises (by means of shareholding or contracts) made by the offshore entities during the reorganization for "Small Red Chip Model" would be subject to this law and its supporting regulations.

1) More Convenience for Establishment of "Red Chip" Structure

Foreign Investment Law explicitly provides the "Pre-establishment National Treatment plus Administration based on the Negative list" as the regulation system on foreign investment. Specifically, pursuant to the Implementing Regulations of the Foreign Investment Law and the Measures for Reporting of Information on Foreign Investment, registration for the FIEs is handled by the administrations for market regulation. The previous requirements of approval (regarding investments within the Negative List) and record-filing (regarding investments beyond the Negative List) are replaced by a new system of reporting, and more time and other procedural costs for restructuring under the "Small Red Chip Model" will be saved.

On the other hand, Article 31 of Foreign Investment Law clearly states that the organization form, institutional framework and standard of conduct of a FIE shall be subject to the provisions of the Company Law and other laws, according to which the

requirements on capital verification or minimum paid-in capital are no longer existed. Thus, under the "Small Red Chip Model", financing burden for the offshore companies which control their onshore equities by shareholding would be alleviated to some extent as they don't need to raise abundant amount of overseas money in a short time to purchase equities or assets within the PRC.

2) More Freedom to Transfer Foreign Exchange

Article 21 of Foreign Investment Law clarifies that the capital items of the FIEs such as contributions, capital gains, income from asset disposal, lawfully obtained compensation or indemnity, income from liquidation could be freely transferred inward and outward within the PRC, which would make it more convenient for "Red Chip" enterprises to make onshore investments.

3) Regarding VIE Structure

The Requesting Public Comments on Foreign Investment Law (Draft) promulgated by the MOFCOM on January 19, 2015 had brought in the concept of "actual control", which identifies the investment of an foreign investor under the control of PRC investors as an investment by PRC investors and meanwhile also defined the control on domestic enterprises or interests in any domestic enterprise by contract, trust or other means as "foreign investment" as well. Therefore, the draft had arisen great controversy and discussion about what effects it would brought to the VIE model since its disclosure. However, it is noted that the final released version of the Foreign Investment Law does not include such content, while Article 2 of this law provides that foreign investments include those investments made by foreign investors in any other way stipulated by laws, administrative regulations or provisions of the State Council, which leaves the space for the administration over VIE structure in the future. The clause which involves VIE in the draft for comments of the Implementing Regulations of the Foreign Investment Law[4] has also not been adopted in the officially published version thereof.

[4] Please refer to the Article 35 in the draft for comment of the Implementing Regulations of the Foreign Investment Law promulgated by the Ministry of Justice on November 1, 2019, which provides that the investment within the territory of the PRC made by a wholly-owned enterprise that is established outside the PRC by a Chinese natural person, legal person or any other organization may, after review by the relevant competent department under the State Council and approval by the State Council upon submission, be exempted from the restriction of relevant special administrative measures for access as specified in the foreign investment access negative list. The "legal person" or "other organization" as provided for in the preceding paragraph shall exclude foreign-invested enterprises.

Chapter IX Foreign-invested Funds

Guo Shifang

9.1 Introduction

On October 25, 2019, the State Administration of Foreign Exchange promulgated Notice of the State Administration of Foreign Exchange on Further Promoting the Facilitation of Cross-border Trade and Investment (Hui Fa [2019] No.28) (hereinafter referred to as the **"Document No.28**"). The promulgation and implementation of the Document has a significant impact on the equity investment made by overseas funds in China. This article will introduce the path for overseas funds to make equity investment in China indirectly through investment platforms such as establishment of foreign-invested private-raised equity investment funds (hereinafter referred to as the **"Foreign-invested funds"**) before and after to the promulgation of the Document No.28.

9.2 The Period Before Document No. 28

9.2.1. Limitation on Foreign Exchange Settlement

In the past 10 years, the State Administration of Foreign Exchange imposed strict restrictions on the use of foreign exchange revenue under capital accounts of domestic institutions and the RMB funds obtained from their foreign exchange settlement, which shall be used only for the current account expenditures within the business scope of an enterprise. This means that if the businesses which are related investment are not included in the business scopes of foreign-invested enterprises, they are not able to use their foreign exchange capitals for equity investment in China, no matter via new establishment or M&A.

The Reforming the Administrative Approach Regarding the Settlement of the Foreign Exchange Capitals of Foreign-invested Enterprises (Hui Fa [2015] No. 19) (hereinafter referred to as the **"Document No. 19"**) promulgated by the State Administration of Foreign Exchange stipulates that "except for the transfer of equity investment payments in their original currencies, a foreign-invested enterprise whose main business is investment (including a foreign-invested investment company, foreign-invested business-starting enterprise or foreign-invested equity investment enterprise) is allowed to directly settle its foreign exchange capital or transfer the RMB funds under its Account for Foreign Exchange Settlement Pending Payment to the account of an invested enterprise according to the actual amount of investment, provided that the relevant domestic investment project is real and complies with the relevant regulations."

Notice of the State Administration of Foreign Exchange on Reforming and Standardizing the Administrative Provisions on Capital Account Foreign Exchange Settlement (Hui Fa [2016] No. 16) stipulates that "a domestic institution shall use foreign exchange earnings under capital account within its business scope and in a truthful manner for proprietary purposes. A domestic institution may use

its foreign exchange earnings under capital account and the RMB funds obtained from the settlement thereof for current account expenditure within the scope of its business, as well as for capital account expenditure permitted by laws and regulations. A domestic institution shall comply with the following provisions in using its foreign exchange earnings under capital account and the RMB funds obtained from the settlement thereof: (1) It shall not, directly or indirectly, use the foregoing funds for expenditure beyond its business scope or expenditure prohibited by State laws and regulations; (2) Unless otherwise expressly prescribed, it shall not, directly or indirectly, use the foregoing funds for securities investment or investment and wealth management products other than principal-protected products issued by banks; (3) It shall not use the foregoing funds for disbursing loans to non-affiliated enterprises, except under circumstances expressly permitted by its business scope; and (4) It shall not use the foregoing funds for constructing or purchasing real estate not for self-use (unless it is a real estate enterprise)."

It can be seen that under the foreign exchange regulatory system before the Document No.28, except for foreign-invested investment companies with investment as their main business such as foreign-invested investment companies, foreign-invested business-starting enterprises and foreign-invested equity investment enterprises, other ordinary foreign-invested enterprises may use the RMB funds obtained from the settlement of foreign exchange capital for domestic equity investment only when their business scope includes "investment" or other relevant business. However, in practice, it is difficult to add the "investment" or other relevant business in the business scope. In recent years, many cities across the country have issued notices to suspend the industrial and commercial registration of investment institutions. For example, in 2016, Beijing suspended the registration of investment business such as "project investment", "equity investment", "investment management", "investment consulting", "investment advising", "capital management", "asset management", "financial leasing" and "non-financing guarantee", and the registration of investment-oriented companies in Shanghai was also suspended. Although registration of investment-oriented enterprises has been resumed in many cities successively at the operational level, generally speaking, the scope of investment-oriented business may not be included at the industrial and commercial registration level until the local financial service office made examination and approval prior to industrial and commercial registration. For example, in 2018, we successfully helped clients set up foreign-invested partnership enterprises in Xiamen with both corporate name and business scope including "equity investment" as their investment platforms. This enterprise has obtained the examination and approval of its business scope of investment from the Xiamen Financial Service Office before its industrial and commercial establishment registration. The foreign exchange capital provided by the overseas partner has been settled successfully after the enterprise is established and used for domestic equity investment projects.

9.2.2. Three Kinds of Foreign-invested Investment Enterprises

Under the circumstance that the utilization of foreign exchange settlement are limited and it is difficult to break through such limitations by expanding the business scope directly, the foreign equity investment platforms with clear legal basis mainly cover three categories: foreign-invested investment companies, foreign-invested business-starting investment enterprises and foreign-invested

equity investment enterprises.

A. Foreign-invested Investment Company

According to the Provisions on the Establishment of Investment Companies by Foreign Investors (Revised by Order [2015] No.2 of the Ministry of Commerce) issued by the Ministry of Commerce, a foreign-invested investment company means a company engaged in direct investment established in China by a foreign investor, with the form to be either a wholly foreign-owned enterprise or an equity joint venture with any Chinese investor. The form of the company shall be limited liability company or a joint stock limited company.

An application for the establishment of such foreign-invested investment company shall satisfy the following conditions: (1) (a) The foreign investor has good credit standing and the financial strengths necessarily required to establish an investment company, and its total assets shall be no less than USD 400 million for the year prior to the application, with a foreign-invested enterprise established in China by that investor and its actual paid-up capital contribution to the registered capital exceeding USD 10 million, or (b) the foreign investor has good credit standing and the financial strengths necessarily required to establish an investment company, with ten or more foreign-invested enterprises established in China by that investor and its actual paid-up capital contribution to the registered capital exceeding USD 30 million; (2) To establish an investment company in the form of an equity joint venture enterprise, a Chinese investor shall have good credit standing and the financial strengths necessarily required to establish an investment company, and its total assets shall be no less than CNY 100 million for the year prior to the application; and (3) The registered capital of the investment company shall not be less than USD 30 million. The foreign investor that applies to establish an investment company shall be a foreign company, enterprise, or economic organization. Where there are two or more foreign investors, at least one that holds the majority equity interests shall comply with the provisions of Item (1).

At the same time, establishment of foreign-invested investment companies shall also complete examination and approval formalities with the financial service office of the local government. According to the Measures for Foreign Investment Information Reporting (hereinafter referred to as "**Measures for Foreign Investment Reporting**") and the Announcement on Relevant Matters of Foreign Investment Information Reporting (hereinafter referred to as **"Announcement on Foreign Investment Reporting"**) issued by the Ministry of Commerce on December 31, 2019 and been effective on January 1, 2020, foreign-invested investment companies shall report the investment information with reference to the provisions of the general types of foreign-invested enterprises. In other words, after completing examination and approval formalities with the financial service office of the local government, the foreign-invested investment company to be established shall submit an initial report via the enterprise registration system in accordance with the Measures for Foreign Investment Reporting. The initial report is shared by the State Administration for Market Regulation to the Ministry of Commerce, and the enterprise does not need to submit the same separately. In practice, most foreign-invested investment companies are the investment or controlling platform of large transnational industrial enterprises in China. For instance, Wal-Mart (China) Investment Co., Ltd., Want Want (China) Investment Co., Ltd. and Microsoft Mobile (China) Investment Co., Ltd. belong to this type

of companies.

B. Foreign-Invested Business-starting Investment Enterprises

According to the Administrative Provisions for Foreign-Invested Business-starting Investment Enterprises (Revised by Announcement [2015] No. 2 of the Ministry of Commerce), a foreign-invested business-starting investment enterprise (hereinafter referred to as **"FBIE"**) shall mean a foreign-invested enterprise established in China, by a foreign investor, either independently or jointly with a company, enterprise, or any other economic organization registered and incorporated under the law of China, with business-starting investment as its business activities. Business-starting investment shall mean an investment form which is to make equity investment primarily in the unlisted high and new technology enterprises and to provide entrepreneurial management services for them so as to obtain capital gains.

The establishment of a FBIE shall meet the following conditions: (1) The number of investors shall be no less than two and no more than 50, and at least one of them shall be a requisite investor; (2) The Foreign Investors make capital contribution with freely convertible currencies and the Chinese Investors make capital contribution in RMB; (3) The FBIE has an explicit organizational form; (4) The FBIE has a clear and lawful investment direction; (5) Unless the business activities of the FBIE are authorized to be managed by a business-starting management company, the FBIE shall have at least three professionals experienced in business-starting investment practice; and (6) Other conditions required in the laws and administrative regulations.

Among them, a requisite investor shall meet the following conditions: (1) Business-starting investment shall be its major business; (2) The accumulative amount of its managed capital for the three years prior to the application shall be no less than USD 100 million, with at least USD 50 million already used in business-starting investment, and for the purposes of this Paragraph, the requirements for operational performance, when the requisite investor is a Chinese investor, are that the accumulative amount of its managed capital for the three years prior to the application shall be no less than CNY 100 million, with at least CNY 50 million already used in business-starting investment; (3) It has at least three professional management personnel with three or more years of experience in business-starting investment practice; (4) If an affiliated entity of one of the investors satisfies the aforesaid conditions, that investor is permitted to apply for becoming a requisite investor, (**"affiliate entity"** shall mean an entity that controls, or is controlled by, such investor or an entity that is under the common control, with such investor, of another entity and **"control"** shall mean that the controlling party owns more than 50% of the voting rights of the controlled party); (5) Neither a requisite investor or any of its affiliated entities as mentioned above shall have been prohibited by a judicial authority or any other relevant regulatory authority of its own country from engaging in business-starting investment or investment consulting services or imposed with any penalty due to fraud or other reasons; and (6) The subscribed and actual capital contribution of a requisite investor in a non-legal person FBIE shall respectively be no less than 1% of the total subscribed and actual capital contribution of the investors, with the requisite investor to be severally liable for the FBIE's debts, and the subscribed and actual capital contribution of a requisite investor in a Company FBIE shall respectively be no

less than 30% of the total subscribed and actual capital contribution of the investors.

As the provisions about foreign-invested investment companies mentioned above, the establishment of a FBIE shall also submit its initial report online via the enterprise registration system.

C. Foreign-invested equity investment enterprises (hereinafter referred to as the "QFLP Funds")

QFLP funds, as the typical privately raised equity investment funds, are enterprises whose main business is to invest in unlisted equities and are subject to the regulation and filing with the Asset Management Association of China (hereinafter referred to as the **"AMAC"**) or the relevant authorities. The organizational form adopted by QFLP funds can be company or limited partnership, but currently, the more common organizational form is the limited partnership of the QFLP funds. The pilot program of QFLP funds was launched firstly in Shanghai at the end of 2010, and later policies for the pilot program of QFLP funds were launched in Beijing, Tianjin, Shenzhen, Qingdao, Chongqing, Guizhou (Guiyang Comprehensive Bonded Zone), Pingtan of Fujian and other places. In practice, QFLP funds are the main way for overseas investors to participate in domestic privately raised equity funds.

The requirements for establishment of a QFLP fund are relatively higher. Various places with registration service have set threshold conditions for the registered capital, investor qualifications, senior executive qualifications of the fund and so on, and generally, the pre-approval process of the local financial service office and other departments shall be gone through before the industrial and commercial registration of establishment. Some requirements for the establishment of the Shenzhen, Zhuhai and Shanghai pilot areas are briefly listed below.

（1） Threshold Conditions for Registered Capital of QFLP Funds Management Enterprises

Shenzhen	Zhuhai	Shanghai
Not less than USD 2 million or equivalent. 20% or more of the registered capital shall be paid up within three months from the issuance of the business licence, and the remaining portion shall be paid up within two years from the establishment of the enterprise. In practice, it is possible to communicate with Shenzhen Municipal Financial Service Office to postpone the payment of the above capital.		The relevant provisions of the Shanghai Pilot Measures are the same as those of Shenzhen and Zhuhai. However, according to the communication with the competent authority of Shanghai, in practice, the time for the enterprises to pay the registered capital is relatively longer.

（2） Minimum Registered Capital of QFLP Funds

Shenzhen	Zhuhai	Shanghai
The subscribed capital contribution of QFLP funds shall be no less than USD 15 million, and capital contribution shall be made in cash only; the partners of QFLP funds of partnership shall make capital contribution in their own name. A single investment of a foreign institutional investor shall not be less than the equivalent of USD 1 million; a single investment of a domestic institutional investor shall not be less than CNY 1 million; a single investment of a domestic or overseas individual investor shall not be less than CNY 1 million. Legal provisions do not require the timing of capital contribution. However, in practice, the	QFLP funds subscribing to capital contribution shall satisfy the following conditions: (1) The subscribed capital contribution of equity investment enterprises established with the participation of Hong Kong and Macao enterprises or individuals shall not be less than USD 6 million equivalent currency, and that of equity investment enterprises established with the participation of other overseas enterprises or individuals shall not be less than USD 15 million equivalent currency; (2) The capital contribution shall only be made in cash with legal sources. Shareholders or partners of QFLP funds shall make capital contribution by using their own money.	The subscribed capital contribution shall not be less than USD 15 million with capital contribution to be made in cash only; the partners shall make the capital contribution in their own respective names; except for general partners, the capital contribution of each of the other limited liability partners shall not be less than USD 1 million.

Financial Service Offices may require the timing of capital contribution based on specific projects.		

（3） Requirements of Investor in QFLP Funds

Shenzhen	Zhuhai	Shanghai
As a limited liability partner, a domestic or overseas investor of QFLP funds shall meet the following conditions: (1) Any institution or individual who has the corresponding ability to identify and bear risks; and (2) an institutional investor shall have a sound governance structure and a complete internal control system, and have not been punished by the judicial branch or the relevant regulatory departments of the State or region where it is located within the latest three years; its self-owned net assets shall not be less than USD 5 million, and a single investment shall not be less than USD 1 million; in the case of a domestic institutional	Domestic and overseas investors of QFLP funds acting as limited liability partners shall satisfy the requirements for qualified investors stipulated in the Guiding Opinions on Regulating the Asset Management Business of Financial Institutions and Interim Measures for the Supervision and Administration of Privately Raised Investment Funds. As the relevant conditions of Shenzhen have referred to the conditions for qualified investors of the AMAC, there is no significant difference in the specific admission threshold between Shenzhen and Zhuhai, but the Zhuhai Pilot Measures do not differentiate the conditions for domestic investors and overseas investors. Meanwhile, the Zhuhai Pilot Measures specify that	The overseas investors of QFLP funds in the foreign-invested equity investment pilot enterprises shall mainly consist of the overseas sovereignty fund, pension fund, endowment fund, charity fund, fund of investment fund (FOF), insurance company, bank, securities company and other overseas institutional investors recognized by the joint meeting. The foreign investors of the QFLP funds that apply for the pilot program shall meet the following conditions: (1) in the previous fiscal year prior to its application, the scale of its own assets shall not be less than USD 500 million or the scale of its management assets shall not be less than USD 1 billion;

investor, its net assets shall not be less than CNY 10 million, and a single investment shall not be less than CNY 1 million; (3) an individual investor needs to sign an equity investment enterprise (fund) risk disclosure statement; a domestic or overseas individual investor's financial asset are not less than CNY 3 million or average annual income in the recent three years is not less than CNY 500,000, and the amount of a single investment is not less than CNY 1 million.	fund investors shall also meet the relevant requirements set forth in the Guiding Opinions on Regulating the Asset Management Business of Financial Institutions (Yin Fa [2018] No.106) issued in 2018.	(2) it has a sound governance structure and a complete internal control system, and has not been punished by the judicial organ or the relevant regulatory organ within the latest two years (3) overseas investors or their affiliated entities shall have related investment experiences for more than five years; and (4) other conditions as required by the joint meeting. Due to the early promulgation of laws and regulations in Shanghai, the above requirements are higher than the threshold of Shenzhen and Zhuhai, there may be possibility for negotiation in practice.

In summary, although the three kinds of investment-oriented foreign-invested enterprises may settle the foreign exchange capital directly or use the RMB funds in the account of pending payment for foreign exchange settlement to invest domestic equity, the pre-approval process for the establishment of such enterprises is relatively strict and complicated, and set a higher threshold for the qualifications of foreign investors. Meanwhile, the QFLP fund is only available in a few pilot cities. Generally speaking, it is difficult to establish.

9.3 The Period of Circular No. 28

On October 25, 2019, the State Administration of Foreign Exchange promulgated the Notice of the State Administration of Foreign Exchange on Further Promoting the Facilitation of Cross-border Trade and Investment (Document No.28), Article 2 of which stipulates that "On the basis of allowing investment-oriented foreign-invested enterprises (including foreign-invested investment companies, foreign-invested business-starting

enterprises and foreign-invested equity investment enterprises) to use capital funds for domestic equity investment in accordance with laws and regulations, non-investment-oriented foreign-invested enterprises shall be allowed to use capital funds for domestic equity investment in accordance with the law under the premise of not violating the existing special management measures for entry of foreign investment (negative list) and the authenticity and compliance of their domestic invested projects." Therefore, currently foreign investors who intend to use foreign exchange capital funds to engage in equity investment within the territory of the People's Republic of China no longer need to specially establish investment-oriented foreign-invested enterprises including foreign-invested investment companies, FBIEs and QFLP funds. Foreign investors may, subject to compliance with the relevant laws and regulations, establish various investment platforms to use foreign exchange capital funds for domestic equity investments. In this regard, we have conducted anonymous consultations with several banks with foreign exchange business qualifications and the banks' reply is consistent with the provisions of Document No. 28. The specific implementation needs the relevant authorities to promulgate rules in detailed.

It is noteworthy that Document No.28 provides that "Where a non-investment-oriented foreign-invested enterprise makes domestic equity investment by way of transfer of the capital funds in original currency, the investee shall go through the registration of domestic reinvestment and open the capital account for receipt of funds in accordance with relevant provisions without handling the entry registration of cash contribution; where a non-investment-oriented foreign-invested enterprise makes domestic equity investment by way of foreign exchange settlement of capital funds, the investee shall go through the registration of receipt of domestic reinvestment and open the 'Capital Account–Account for Foreign Exchange Settlement Pending Payment' for receipt of corresponding funds in accordance with relevant provisions." Notice of the State Administration of Foreign Exchange on Reducing Foreign Exchange Accounts (Hui Fa [2019] No. 29) (hereinafter referred to as "**Document No. 29"**) promulgated on the same day as Document No. 28 stipulates that: "investment-oriented foreign investment enterprises (including foreign-invested investment companies, FBIEs and QFLP funds) are allowed to transfer the RMB funds in the Account for Foreign Exchange Settlement Pending Payment (or RMB funds obtained from exchange settlement) directly to the investee enterprise's account in accordance with the actual investment scale, subject to the prerequisite of authenticity and compliance of investment projects in China." Document No.28 and Document No.29 actually continue the provisions of Document No.19, that is, the reinvestment enterprises of foreign-invested enterprises of non-investment nature still need to open capital account or "Capital Account–Account for Foreign Exchange Settlement Pending Payment" to collect corresponding transfer or settlement funds in the original currency, while except for the qualified enterprises in pilot areas, the funds from capital account or "Capital Account–Account for Foreign Exchange Settlement Pending Payment" used by reinvestment enterprises is still subject to strict restriction on the scope of expenditure, and the materials for proving transaction authenticity shall be provided to banks in advance. Conversely, Document No.19 and the subsequent Document No.28 and Document No.29 all allow investment-oriented foreign-invested enterprises to directly settle foreign exchange capital or transfer the RMB funds in the Account for Foreign Exchange Settlement Pending Payment to the account of the investee enterprise, without further limiting the reinvestment enterprise on the expenditure scope and procedures of investment funds. From this point of view, the convenience of the reinvestment enterprise to use the investment funds may be the main significance of the establishment of investment-oriented foreign-invested enterprises after the promulgation of Document No. 28.

In addition, although Document No. 28 opens a door for domestic reinvestment of overseas funds from the perspective of foreign exchange regulation, it is necessary to pay attention to the compliance as an investment platform itself. If such investment platform constitutes a "private-raised investment fund" under the regulation of the AMAC, foreign-invested funds are also required to comply with the relevant regulatory rules of the China Securities Regulatory Commission and the AMAC, which are treated the same as pure domestic private-raised investment funds. At present, there is no uniform standard for identifying "privately-raised investment funds". With reference to Article 2 of the Interim Measures for the Supervision and Administration of Privately-Raised Investment Funds issued by the China Securities Regulatory Commission, "privately-raised investment funds shall refer to the investment funds established by way of raising capitals from investors in a non-public manner within the territory of the People's Republic of China. These Measures shall apply to the registration, record-filing, fund raising, investment and operation activities of a company or partnership enterprise that is established by way of non-public fund-raising for the purpose of engaging in investment activities, if its assets are managed by a fund manager or general partner." In practice, individual case analysis and judgment shall be conducted by considering the fund-raising method, main business activities, asset management methods and other factors of the investment platform. If it is "private-raised investment fund", the record-filing of the fund and relevant fund-raising and operation activities shall be conducted in accordance with the relevant provisions.

9.4 Industry Restrictions on Foreign-invested Funds

9.4.1. Entry Administration of The Negative List

China implements the negative-list administrative system for industry entry of foreign investment. The Special Management Measures for the Market Entry of Foreign Investment (Negative List) (2019 Version) (hereinafter referred to as the **"Negative List"**) jointly promulgated by the National Development and Reform Commission and Ministry of Commerce stipulates that foreign investors shall not invest in the fields in which foreign investment is prohibited under the Negative List for the market entry of foreign investment; market entry licensing of foreign investment shall be required for the investment in the fields that are included in the Negative List for the market entry of foreign investment and in which investment is not prohibited; a foreign-invested partnership enterprise shall not be established for investment in the fields where there are equity requirements. The Negative List covers 13 industries, including agriculture, forestry, animal husbandry, fishery, mining and manufacturing, and foreign investors' investment in China will be subject to relevant restrictions set out in the Negative List, including that foreign investors are prohibited from investing in and operating enterprises with specific business and certain industries must be controlled by the Chinese shareholders. Where overseas funds are used indirectly for equity investment in the domestic market through domestic funds or other investment platforms, although the investing subjects are domestic enterprises, they may still be deemed as foreign investments and thus subject to the market entry regulations of the Negative List.

For investment-oriented foreign-invested enterprises, the relevant laws and regulations have directly stipulated that such investment platforms shall be deemed as foreign investors, and the provisions of laws and regulations on foreign investment shall apply to their domestic investments. For example, Article 19 of the Provisions on the Establishment of Investment-oriented Companies by Foreign

Investors (Revised by the Order of the Ministry of Commerce [2015] No.2) issued by the Ministry of Commerce provides that "where an investment-oriented company invests to establish an enterprise, it shall separately report for approval in accordance with the approval authority and procedures for foreign-invested enterprises." Article 61 of the Administrative Provisions on the Registration of Foreign-invested Partnership Enterprises stipulates that "In cases where a foreign-invested partnership with investment as main business invests in the territory, it shall be subject to the laws, administrative regulations and rules related to foreign investment of the state." Article 39 of the Provisions on the Administration of Foreign-invested Business-starting Investment Enterprises prescribes that "the domestic investment of an FBIE shall be made by referring to the Provisions on Guiding the Orientation of Foreign Investment and the Catalogue of Industries for Guiding Foreign Investment."

As for the issue of whether the reinvestment in China by non-investment foreign-invested enterprises is subject to the entry restrictions set out in the Negative List, according to Paragraph 2 of Article 2 of the Foreign Investment Law of the People's Republic of China effective as of January 1, 2020, "foreign investment means the investment activities carried out directly or indirectly by foreign natural persons, foreign enterprises or other foreign organizations in China." The term "indirectly" has clarified that the indirect investment made by foreign investors within China shall also be deemed as foreign investment. However, the law does not specify which investment structure belongs to indirect investment or which layer can be penetrated by investors of indirect investment, which is still to be specifically determined by the relevant departments in practice. Based on our experience, when applying for business qualifications for restricted foreign investments such as Value-Added Telecommunications Services License, the authorities in charge will generally conduct verification of the foreign investment composition and qualifications of the applicant's investors in each layer.

9.4.2. Special Issues Concerning Foreign Investment in Real Estate Industry

In the Negative List (2019 version), the restriction of entering the real estate industry only remains that "the construction and operation of civil airports shall be subject to relative control by Chinese shareholders." It is thus clear that, generally speaking, the entry of foreign investment in the real estate industry is no longer restricted. However, it should be noted that foreign investment in the real estate industry is still subject to macro-control and foreign exchange policy restrictions. Firstly, the capital settlement of a real estate enterprise for equity investment is still under many restrictions. Document No.28 allows non-investment foreign-invested enterprises to make domestic equity investment with their capital funds in accordance with the law. However, the State Administration of Foreign Exchange explicitly stated in its speech that this measure is not applicable to the industries and fields restricted by the State macro-control such as real estate and local government financing platforms. Therefore, it is difficult for foreign investors to establish real estate enterprises as the platforms for domestic reinvestment. Secondly, Document No. 28 and Document No.29 have not canceled the provision that the foreign exchange settlement funds of foreign-invested non-real-estate enterprises shall not be used for constructing or purchasing real estate that is not for self-use, but in practice, banks often interpret this provision as a provision that non-real-estate enterprises shall not use foreign exchange settlement funds for investment in real estate enterprises. However, we

have also represented the foreign funds to invest in real estate projects successfully. Therefore, the success of similar investment depends on the structure of specific projects, the nature of the real estate invested, the understanding and operation of local banks and so on.

Chapter X Cross-border Movements - Foreign Capital, Foreign Debts and Cross-border Security

Zhang Xin/ Zhu Li

10.1 Foreign Capital

For a foreign-invested enterprise ("**FIE**"), under PRC law it is required to register with the company registry (being the local branches of the State Administration for Market Regulation, "**SAMR**") an amount of the registered capital of the FIE that its shareholders subscribe for (the "**Registered Capital**"). If some shareholders of the FIE are foreign investors, then the amount of the Registered Capital that the foreign investors subscribe for is the amount of capital that such investors can inject from offshore into the PRC (the "**Foreign Capital**").

10.1.1 Foreign Exchange Registration

The FIE will be required to complete the foreign exchange registrations necessary for the remittance of the Foreign Capital into the PRC, including the registration of the basic information of the FIE with the local branches of the State Administration of Foreign Exchange ("**SAFE**"). The FIE does not need to actually go to the offices of SAFE to apply for such registrations. Instead, they can be handled by a bank designated by the FIE and located at the place of the FIE's domicile registration.

10.1.2 Opening of Foreign Capital Account

Once the basic information of the FIE has been registered with SAFE through its bank, the FIE may open bank account(s) onshore (the "**Foreign Capital Account**") to receive the Foreign Capital remitted by the foreign investors from offshore. Currently there is neither restriction on where the Foreign Capital Account should be opened, nor restriction on the number of account that the FIE may open.

10.1.3 Conversion of Foreign Capital into RMB

The funds deposited into the Foreign Capital Account of the FIE may be converted into RMB through the method of voluntary settlement of foreign exchange (the "**Voluntary Conversion**") or the method of settlement of foreign exchange by payment (the "**Payment Conversion**").

Voluntary Conversion means, the FIE may, at its sole discretion, decide when to convert the funds into RMB and the specific proportion/amount of the funds that it wishes to convert into RMB. Once the Foreign Capital is converted into RMB, the FIE should open a "capital account – account for foreign exchange settlement pending payment" (the "**Pending Payment Account**") to receive and hold the RMB proceeds. When the FIE actually needs to pay certain amounts due and

payable to a transaction counterparty, they can pay the relevant amount from such Pending Payment Account.

Payment Conversion means that, when the FIE actually needs to pay certain amounts due and payable to a transaction counterparty, the FIE will convert the Foreign Capital into RMB just before the payment, and, upon the completion of the conversion, immediately pay the RMB proceeds to the relevant counterparty.

10.1.4 Use of Foreign Capital Proceeds

The Foreign Capital of an FIE can be used for the purposes of (i) the current account items within its business scope and (ii) the capital account items permitted under PRC law. The current account items include the transaction of goods, services, etc. The capital account items currently permitted by SAFE generally include (i) repaying the RMB loan that has been advanced to the FIE and utilised in compliance with PRC law, (ii) advancing loans to the affiliated companies of the FIE and (iii) making equity investments, provided that the relevant equity investments are not in breach of the existing special management measures on market access for foreign investors (negative list) and the relevant investment projects are genuine and do not violate PRC law.

As a general rule, the Foreign Capital cannot be used toward (i) directly or indirectly investing in securities or investment and wealth management products other than principal-protected products issued by banks, (ii) advancing loans to non-affiliated companies (unless otherwise specifically permitted in its business scope), (iii) being mortgaged or pledged for the purposes of obtaining RBM loans (iv) constructing or purchasing non-self-use real estate properties (unless in the case of real estate enterprises).

If the Foreign Capital is remitted into China by way of cross-border RMB, the People's Bank of China ("**PBOC**") has additional restrictions on the use of the relevant funds, including the funds cannot be used toward (i) investing in securities and financial derivatives (whether or not principal-protected), (ii) advancing loans to third parties and (iii) investing in time deposits or wealth management products. Moreover, it is to be further clarified by PBOC whether or not the FIEs whose business scope does not include equity investment can use such cross-border RMB to make equity investments.

10.1.5 Repatriation of Foreign Capital

If an FIE would like to repatriate its profits out of the PRC, it may process the repatriation through its account bank by providing the following information to its account bank: (i) the board resolution approving the profit distribution, (ii) the audited financial reports and (iii) the tax payment receipt.

If an FIE would like to repatriate proceeds out of the PRC after capital decrease, liquidation, early recovery of investment, transfer to onshore entities and individuals of equity interests in an FIE, etc., it should (i) complete the foreign exchange change or deregistration procedures through banks located at the place of the FIE's domicile registration, (ii) carry out the necessary company registration changes, (iii) pay the taxes due and payable, and then (iv) remit the proceeds out of the PRC through its foreign exchange bank.

10.2 Foreign Debt

For an FIE, its "**Foreign Debt**" refers to that FIE's RMB and foreign currency debt raised from a non-PRC resident pursuant to the terms of a financing agreement, and the behaviour of borrowing Foreign Debt (i.e. borrowing RMB or foreign currency funds from a non-PRC resident) is also referred to as "**Cross-border Financing**".

The Foreign Debt that an FIE may borrow will be subject to the upper limits set by PBOC or SAFE (the "**Foreign Debt Quota**"). Currently SAFE and PBOC have two management models to manage the Foreign Debt Quota, including (i) the "**Foreign Debt Borrowing Gap Model**" and (ii) the "**Macro-prudential Model**". An FIE may choose either of these two management models, and needs to file with SAFE its choice. It should be noted that, once the FIE has decided to choose the Macro-prudential Model, in principle it may not change its management model any more.

10.2.1 Foreign Debt Borrowing Gap Model

Before the introduction of the Foreign Investment Law of the PRC in 2019, FIEs in China has a unique concept of "**Total Investment**". When the establishment of an FIE is approved by, or filed with, the Ministry of Commerce or its local branches ("**MOF**"), the amounts of "Total Investment" and "Registered Capital" will need to be respectively specified by that FIE for itself. Then the difference between its Total Investment and its Registered Capital is the "**Foreign Debt Borrowing Gap**".

Subject the SAFE registration referred to below, the FIE may borrow Foreign Debts without any approval, provided that: (i) the foreign shareholder of the FIE has made its capital contributions in accordance with the timetable set out under the FIE's articles of association; and (ii) after such borrowing, the aggregate of that FIE's accumulated principal amount of medium and long-term foreign debts and the balance of that FIE's short-term foreign debts falls within the Foreign Debt Borrowing Gap.

For a general FIE, the Foreign Debt Borrowing Gap means an amount equal to the difference between its total investment and its registered capital[1]. If the FIE is registered as a foreign-invested investment holding company, the foreign debt quota may be up to four times its paid-up capital if the registered capital is between US$30 million (inclusive) and US$100 million (exclusive), or six times its paid-up capital if the registered capital is US$100 million or more. For foreign-invested lease companies, their total risk assets[2] (total risk assets = total assets – cash – bank deposit – government bonds – entrusted lease capital) should not exceed ten times the amount of their total net assets. All the capital constituted by foreign-invested lease companies' borrowing foreign debts should be treated as the risk assets.

[1] If the FIE's foreign shareholder has not paid up the entire registered capital, the foreign debt quota shall be calculated in proportion of the foreign shareholder's actually paid-up capital to the registered capital for which such foreign shareholder has subscribed.

[2] We understand that, as a matter of practice, the local SAFE office will ask the foreign-invested lease company to submit a specific auditing report on its risk assets on an annual basis and then determine the amount of foreign debts that such lease company is able to borrow in the next year. It is difficult – if not impossible – to use the real time figures to calculate the risk assets which are a moving target.

It should be noted that, due to the fact that the Foreign Investment Law of the PRC issued in 2019 no longer has the concept of "Total Investment" and the rules of MOF relevant to the concept of "Total Investment" have all been revoked now. It is to be further clarified by the authorities as to whether or not the Foreign Debt Borrowing Gap Model will continue to apply.

10.2.2 Macro-prudential Model

In 2016, PBOC and SAFE introduced the Macro-prudential Model to manage Foreign Debts. Other than real estate FIEs, an FIE may borrow Foreign Debts by using a risk-weighted approach within the specified upper limit.

Under the Macro-prudential Model, for an FIE, its aggregate risk-weighted outstanding cross-border financings (the "**Outstanding Financing**") should not exceed the upper limit of risk-weighted outstanding cross-border financings (the "**Upper Limit**"). The amounts of Outstanding Financing and Upper Limit should be respectively calculated as follows.

(1) Outstanding Financing

The amount of Outstanding Financing should be calculated in accordance with the following formula:

Outstanding Financing = Σ outstanding amount of cross-border financing in RMB and foreign currencies * the risk conversion factor of maturity * the risk conversion factor of loan category + Σ outstanding amount of cross-border financing in foreign currencies * the risk conversion factor of exchange rate.

In this formula:

(a) risk conversion factor of maturity: the risk conversion factor of maturity for mid-to-long-term cross-border financing with a repayment period of longer than one year shall be one, while that for short-term cross-border financing with a repayment period of not longer than one year shall be 1.5. If the loan tenor is more than one year but the loan agreement has a prepayment clause, then, unless it is specified that the prepayment can only happen after one year of the date of the loan, the relevant loan shall be viewed as a short-term cross-border financing.

(b) risk conversion factor of loan category: risk conversion factor of loan category for financing included in balance sheets shall be set as one, while that for off-balance sheet financing (contingent liabilities) shall temporarily be set as one.

(c) risk conversion factor of exchange rate: the risk conversion factor of exchange rate shall be 0.5.

(2) Upper Limit

The Upper Limit generally applicable to an FIE is two times its net assets. The amount of its net assets should be determined on the basis of its most recent audited financial reports.

After the introduction of the Macro-prudential Model, PBOC and SAFE set a one-year transition period from January 2017 to January 2018 (the "**Transition Period**") for FIEs to transit from the "Foreign Debt Borrowing Gap Model" to the "Macro-prudential Model". The plan was that:

(a) within the Transition Period, an FIE may choose either (i) the "Foreign Debt Borrowing Gap Model" or (ii) the "Macro-prudential Model"; and

(b) after the expiry of the Transition Period, PBOC and SAFE will access and decide the model(s) to be further used.

As of the date hereof, the "Foreign Debt Borrowing Gap Model" and the "Macro-prudential Model" still work in parallel. Some FIEs already chose to transit to the Macro-prudential Model, whilst others are still borrowing Foreign Debts under the Foreign Debt Borrowing Gap Model.

10.2.3 Foreign Debt Registration and Filing

The FIEs should, within 15 working days of the execution of a financing agreement and no later than 3 working days before the drawdown, register the financing agreement with SAFE for foreign debt registration in respect of the relevant financing. If there are any material revisions to the financing agreement, including the creditor, tenor of the loan, financing amount, interest rate, etc., the FIE should register such revisions with SAFE.

SAFE is introducing a pilot program to cancel the requirement that each financing agreement should do a separate registration with SAFE. An FIE in a pilot area may make a general registration with SAFE of all of its future foreign debts up to the Upper Limit and, after such registration, the FIE may enter into financing agreements to borrow Foreign Debts within the registered amount, without having to entering into the financing agreement at first and register with SAFE each financing agreement that it has entered into.

Moreover, SAFE has cancelled the management requirement that a non-bank debtor should actually go to SAFE's office for SAFE to handle the deregistration of a Foreign Debt. The non-bank debtor may directly handle the deregistration at a bank located at the place of the FIE's domicile registration.

10.2.4 Opening of Foreign Debt Accounts

Before the issuance by SAFE of the Notice of the State Administration of Foreign Exchange on Further Promoting the Facilitation of Cross-border Trade and Investment in October 2019 (the "**SAFE Notice**"), there is a requirement that an FIE can only open up to three Foreign Debt Accounts for each Foreign Debt. After the issuance of the SAFE Notice, the restriction on the number of Foreign Debts Accounts is lifted. An FIE may open one or more than one Foreign Debt Account based on its actual needs.

As a general rule the Foreign Debt Accounts should be opened at banks located at the place of the FIE's domicile registration. If the FIE wishes to open accounts at other locations, it needs to obtain verification from SAFE.

10.2.5 Conversion and Use of Foreign Debt Proceeds

The conversion of Foreign Debt proceeds into RMB and the use of such proceeds generally should follow the same rules and restrictions applying to Foreign Capital as described above. In addition, the following rules apply to the conversion and use of Foreign Debts:

(1) it should follow the terms of the financing agreement;
(2) the use of proceeds should match the tenor of the loan. For example, short-term debts normally cannot be used for the purposes of long-term project construction; and
(3) there is still restriction that the proceeds cannot be used to do equity investments in the PRC.

10.2.6 Repayment of Foreign Debts

The repayment of Foreign Debts can be directly handled by settlement banks without having to obtain any approval or complete any registration at first. There is also no special restriction on the funding source for the repayment.

The settlement bank will do a compliance check, including whether or not the amount of principal and interest match the same registered with SAFE, whether or not there is indeed prepayment clauses set out in the financing agreement (if the FIE wishes to prepay the loan), whether or not the identity of the offshore payee match the creditor registered with SAFE, whether or not the repayment currency match the currency of the loan set out under the financing agreement and the drawdown currency, etc.

10.3 Cross-border Guarantee and Security

Cross-border guarantee and security refer to the guarantee and security provided by the guarantor/security provider to a creditor that may lead to cross-border receipt and payment of funds or cross-border transfer of asset ownership and other transactions of international receipt and payment.

SAFE divides all cross-border guarantee and security into three categories on the basis of the places of registrations of the parties:

(1) Nei Bao Wai Dai (内保外贷) or outbound security;
(2) Wai Bao Nei Dai (外保内贷) or inbound security; and
(3) other types of security with a cross-border element.

We will analysis in more details the regulatory requirements on each of those three categories of guarantee and security. As a general rule, the overall compliance requirement on each of them is that the guarantor/security provider and debtor should not enter into a cross-border guarantee/security contract if it knows or should have known that the enforcement of guarantee/security obligations is sure to be triggered.

10.3.1 Nei Bao Wai Dai (内保外贷)

Nei Bao Wai Dai (内保外贷) or outbound security means a guarantee/security provided by an onshore security provider for a debt owed by an offshore debtor to an offshore creditor.

If an FIE provides outbound security, it should register the guarantee/security agreement with SAFE within 15 working days of the execution of the guarantee/security agreement, and it is recommended to complete such registration before the drawdown of the loan under the underlying financing agreement. Furthermore, if there are any material revisions to the guarantee/security agreement, such revisions also need to be registered with SAFE.

Funds guaranteed/secured by an outbound security may only be used for the relevant expenditures within the normal business scope of the debtor concerned. Such funds may not be used to support the debtor to (i) engage in transactions beyond the normal scope of business, (ii) finance offshore projects which investments are restricted under PRC law, (iii) invest in securities back into the PRC, (iv) fabricate trade background for arbitrage, and (v) other forms of speculative transactions. It should be noted that, if the underlying debt guaranteed/secured by an outbound security is a debtor's payment obligation under a bond, the offshore debtor should be an entity directly or indirectly held by an onshore entity. There is no such direct or indirect shareholding requirement if the underlying obligation is not payment obligation under a bond.

If the FIE needs to perform its payment obligations under the guarantee/security, it may purchase foreign exchanges and make payments offshore through its settlement bank. As a general principle the currency to be paid offshore should be the same currency as set out under the guarantee/security agreement. After the FIE has performed its payment obligations, the funds paid by the FIE offshore may be treated as a loan advanced by the FIE to the offshore debtor and therefore subject to the restriction that a PRC company can only advance loans to offshore in an amount up to 30% of that PRC company's net assets as shown in its most recent audited financial report.

10.3.2 Wai Bao Nei Dai (外保内贷)

Wai Bao Nei Dai (外保内贷) or an inbound security means a guarantee/security provided by an offshore security provider for a debt owed by an onshore debtor to an onshore creditor.

If an onshore FIE wishes to borrow a loan or obtain a facility from an onshore financial institution, an offshore entity or person may provide guarantee/security to secure the repayment of the loan/facility, provided that the following conditions are all met:

(1) the FIE as the debtor is a non-financial enterprise registered within the PRC;
(2) the creditor is a licensed financial institution registered within the PRC;
(3) the underlying debt is a loan or a binding facility advanced/provided by that financial institution itself to the FIE;
(4) the form of the guarantee/security in not in violation of the applicable laws and regulations.

If all of the four conditions set out above are satisfied, then an inbound security may be provided for the underlying debt without any approval. Only the financial institution that advance the loan or provides the facility needs to report the information of the inbound security to SAFE. If some of the four conditions set out above cannot be satisfied, then a SAFE approval is required for the relevant inbound guarantee/security.

It should be noted that, even if the conditions set out above have been satisfied and there is no restriction from SAFE for the provision of such inbound guarantee/security, SAFE requires that, if the offshore guarantee/security provider's payment obligation under the guarantee/security is actually triggered and the offshore guarantor/security provider would like to request the onshore debtor to repay to the offshore guarantee/security provider the amounts that it has paid to the creditor on behalf of the debtor, the amounts payable by the onshore debtor to the offshore guarantor/security provider will be treated as Foreign Debts and subject to the upper limit of the onshore debtor's quota of Foreign Debts.

10.3.3 Other types of cross-border guarantee and security

For the other types of cross-border guarantee and security, as a general rule no approval, registration or filing is required for such types of cross-border guarantee and security themselves, provided that the relevant SAFE approvals, registrations or filings for the underlying debt of the guarantee and security (such as the SAFE registration for the Foreign Debt and the SAFE registration to be completed by an FIE for the purposes of advancing loans to offshore) have been completed.

Chapter XI Cross-border Transfer, Licensing and Protection of IPR

Li Zhanke

Cross-border intellectual property transactions have special contract objects and complicated legal relationships, and the target countries are likely to set particular examination provisions for cross-border intellectual property transactions, and relevant laws also have the characteristics of taking both public interest and private interest into consideration. Therefore, in the process of the merger and acquisition of enterprises in investment, it's reasonable to exert extra attention to intellectual property transactions, and to avoid the target countries' restrictive or prohibitive norms which may eventually lead to the failure of fully implementation of trading purpose.

In recent years, with the evolution of the Sino-US trade situation, a number of laws and regulations closely related to the compliance of cross-border intellectual property transactions have been enacted, which bring new opportunities and challenges to cross-border intellectual property transactions.

This section will mainly focus on the "Regulations of the People's Republic of China on the Administration over Technology Import and Export" (hereinafter referred to as "Regulations on Technology Import and Export" or "Regulations") revised in March 2019, and the "Circular of the General Office of the State Council on Issuing the Working Measures for Outbound Transfers of Intellectual Property Rights (for Trial Implementation) (hereinafter referred to as the "Working Measures for Outbound Transfers of IPR" or "Working Measures"), to briefly introduces the issues that need to be focused on in the licensing and transfer of intellectual property rights for foreign investment projects.

11.1 Revision and Impact of the " Regulations on Technology Import and Export "

On March 18, 2019, the State Council issued the "Decision of the State Council on Revising Some Administrative Regulations", and through this decision, the "Regulations on the Administration of Technology Import and Export" that have not been substantially revised for 18 years have been revised. The revised Regulations have removed some compulsory terms on the content of technology import contracts, and thus more core terms of the contract will be negotiated by the parties to the autonomy, to reflect the purpose and goal of "optimizing the environment for foreign-related technology transfer". However, the aforementioned revision does not mean that relevant authorities have completely abandon supervision over foreign-related technology transactions, as technology import and export contract must still not contain the content which are prohibited by any other laws.

(1) Restrictions relaxed after revision of the Regulations

The substantive revision of the Regulations is mainly on the part of Chapter II (Administration over technology import), which delete some provisions on the ownership of the technology improvements and compensation liability on technology infringement this time, so that the parties to the contract could enjoy more autonomy in these two aspects.

- In the previous version, Article 27 of the Regulations stipulates that "During the term of validity of a technology import contract, the achievements made from technology improvement shall belong to the party making the improvements". The previous Articles directly ruled out the autonomy of the parties to negotiate on the ownership of technology improvements, which is conflicted with the Article 354 of the Contract Law.

  These articles have been deleted after revision of the Regulations, so the parties to the contract can negotiate on the ownership and profit-sharing schemes of the improved technology based on factors such as the purpose of the transaction, the type of contract object, and the transaction consideration. At the same time, when a dispute arises between the parties, the Article 354 of the Contract Law may be applied. Specifically, on the basis of the principle of mutual benefit, the parties may agree on the profit-sharing of technical results for subsequent improvements. If there is no agreement or the agreement is uncertain, and it is still not clear according to Article 61 of the Contract Law (that is, it cannot be determined through supplementary agreements, relevant clauses of the contract or based on trade practices), the improvement results of one party will not be shared by the other parties.

  After revision, the ownership of the technology improvement achievements of the technology import contract is included in the current "Contract Law" system without obstacles, that is, "Normally subject to the agreements; without agreements, the achievements made from technology improvement shall belong to the party making the improvement". However, although the revision has left a certain space for negotiation between the parties in the transaction, the parties' agreements are still subject to other provisions in the contract law system, such as the "Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in Trying Cases Involving Technology Contract Disputes (hereinafter referred to as "Interpretation of Technology Contracts")". The arrangements including providing improved technology for free, non-reciprocal transfers, free monopoly or share under Article 10 (1) of Interpretation of Technology Contracts all shall constitute "illegal monopoly of technology or hindrance to technology advancement" specified in Article 329 of the Contract Law.

- Paragraph 3 of Article 24 of the previous regulations stipulates that "Where the transferee of a technology import contract infringes upon the legitimate rights and interests of other parties due to exploiting the technologies provided by the transferor according to contractual agreements, the transferor shall assume corresponding liabilities in this regard". Whether this term should be applied compulsively, there have always been different voices in the theoretical and practical circles. The revision deletes this provision, and the parties to the contract have more options and negotiation space for infringement liability, which at the same time are consistent with the Article 353 of the Contract Law, that is, where the exploitation of a patent or utilization of a technical know-how by the transferee as pre-agreed infringes upon the legitimate rights and interests of others, the liability therefor shall be borne by the transferor, unless otherwise agreed upon by the parties concerned.

(2) Articles need attention after revision of the Regulations

The revised Regulations have deleted Article 29 of the previous version, that is, a technology import contract shall not contain certain restrictive clauses. However, the aforesaid deletion does not imply a substantial change in the requirements for certain restrictive clauses, because the deleted content regarding Article 29 of the previous version has more detailed regulations described in the Interpretation of Technology Contracts, Contract Law, Antitrust Law, etc. However, this change means that the question of the validity of "restrictive clauses" will be judged in the context of specific laws and regulations such as the Interpretation of Technology Contracts, Contract Law, Antitrust Law, etc.

(3) Tips on key clauses of technology transaction agreement

- Clauses of achievements of the technology improvement

  Clauses of the technology improvement mainly focus on the right to use and ownership of technology improvement. Depending on the type of target technology, such clauses may include:

  The scope and content of improvement: For example, the upgrade version of specified software is an improvement, and the patch fixing small bugs may not be an improvement;

  Arrangements on the ownership of improvement: separate ownership or joint ownership, whether or not transfer of improvement is involved. Arrangements on rights of patent application are also included: joint applications or separate applications;

Arrangements on the use of improvement: including provisions on use methods, exclusive or general licenses; arrangements on license considerations, cross-licensing or separate payment of license fees; division of geographical scope of use, distribution of profits generated by use, etc.

The parties can also negotiate on the rights protection methods, subjects of the rights protection, the rights maintenance costs, the liability of infringement, and the attribution of compensation for the improved technology.

For licensees with strong research and development capabilities, this clause may also stipulate disclosure obligations for the improvement.

- Clauses of liability of infringement

The content may include the subject of liability, the scope of liability (whether it only includes direct loss), the proportion and limit of liability, the period of the guarantee for defects, the subject responsible for responding to infringement disputes, and other agreements on dispute settlement.

11.2 Enaction and Impact of "Working Measures for Outbound Transfers of IPR"

On March 18, 2018, the General Office of the State Council issued the "Circular of the General Office of the State Council on Issuing the Working Measures for Outbound Transfers of Intellectual Property Rights (for Trial Implementation)", which will be implemented on a trial basis from the date of issue. The "Working Measures for Outbound Transfers of IPR" aims to clarify and regulate the transfer of intellectual property rights to foreign countries:

1) Review of the impact of national security;
2) Review of impact on China's capability of innovating and developing core and key technologies in significant areas.

The present Working Measures particularly specify two examination mechanisms involving the review of technology exports (especially the three types of IPR involved in technology banned or restricted from export and new varieties of plants) and IPR triggered by the safety examination for foreign investors' acquisition of domestic enterprises.

- Examination of Outbound Transfers of Intellectual Properties Involved in Technology Exports

In the examination, four types of IPR that require special "attention" are identified by way of enumeration in this Working Measures, which are: patent rights, exclusive rights of layout-designs of integrated circuits, copyright of computer software, and

new varieties of plants involved when the export technology falls into China's export-restricted technology.

When the technology exporters submit applications for exporting technologies restricted by China to the local competent trade authorities: 1) if such applications involve outbound transfers of such intellectual properties as the patent rights, exclusive rights of layout-designs of integrated circuits, local competent trade authorities shall refer relevant materials to local administrations of intellectual properties, local administrations of intellectual properties shall examine the intellectual properties and issue their opinions in writing to the local competent trade authorities, and meanwhile, submit such opinions to the competent authority of intellectual properties of the State Council for the record-filing purpose. Local competent trade authorities shall make their examination decisions, relying on the written opinions issued by local administrations of intellectual properties; 2) Outbound transfers of copyright of computer software shall be examined by local competent trade authorities and competent authorities of science and technology. If the proposed transfer is rejected upon examination, the registry of computer software shall not process formalities for the registration of changes; 3) Outbound transfers of rights to new varieties of plants shall be examined by the competent agricultural authorities and the competent forestry authorities within their duties. The examination shall focus on the impact caused by the proposed transfer of rights to new varieties of plants on China's agricultural safety, particularly the safety of grains and the seed industry.

- Examination of Outbound Transfers of Intellectual Properties Triggered by the Safety Examination for Foreign Investors' Acquisition of Domestic Enterprises

  When the safety examination institution for foreign investment are examining the safety of foreign investors' acquisition of domestic enterprises, and if such applications fall within the scope of acquisitions subject to safety examination and involves the outbound transfers of intellectual properties, the Measures clearly specifies that the authorities shall “refer relevant materials to relevant competent authorities to seek their opinions, depending on categories of intellectual properties to be transferred”, and “the safety examination institution for foreign investment shall decide on the examination under applicable rules, with reference to the written opinions issued by relevant competent authorities”.

11.3 Other issues worth attention in cross-border intellectual property transactions

- Due diligence before the transaction:

Before signing the agreement: Conduct targeted intellectual property due diligence on the subject of the agreement to completely check and verify the ownership status, whether there is a mortgage, whether it has been licensed to others (and the manner and scope of the license). At the same time, according to the purpose of the transaction, it is also reasonable to evaluate whether there is a risk of infringement of intellectual property rights in the target country.

- Obligations of withholding tax of domestic licensees

According to the "Tax Guidelines on Going-Global" issued by the State Administration of Taxation, the tax treaties signed by China clearly state that both China and the country of source of income have the right to tax royalties. In accordance with the relevant provisions of the Enterprise Income Tax Law, China levies withholding income tax on foreign royalties derived from China, and the payer withholds and pays taxes for the beneficiary owner of the royalties when the withholding obligation occurs. If in a foreign transaction, a foreign company authorizes its Chinese patent to a Chinese enterprise, the Chinese enterprise shall withhold the withholding tax on the license fee collected by the foreign company to the Chinese tax authority. Due to reason of exchange control, in practice, domestic licensees need to complete the withholding and payment obligations and obtain tax payment certificates before they can purchase foreign exchange for outbound payments. In addition, technology import contracts need to be registered with the local business department. This registration is a mandatory requirement for subsequent tax payment and foreign exchange payment operations.

- Considerations of transfer pricing

According to Article 41 of the Enterprise Income Tax Law, With regard to business transactions between an Enterprise and its affiliates which are not in conformity with the principle of independent transaction and result in reduction of the amount of taxable income or income of the Enterprise or its affiliates, the tax authority shall have the right to make reasonable adjustments thereto. In cross-border intellectual property transactions of affiliated companies, free or low-price transactions without reasonable reasons may face review and adjustment by tax authorities. In transactions involving the transfer of high-value intellectual property, such as the replacement of trademark rights owners often encountered in the field of fast-moving consumer goods, a formal intellectual property assessment is required to ensure compliance with transfer pricing

- Choice of dispute settlement institution and applicable law

Negotiation concerning foreign intellectual property rights transactions and applicable legal provisions are often the core clauses that both parties attach great importance to. Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations clearly stipulates that p Parties concerned may choose the laws applicable to the transfer and user-licensing of intellectual property rights by agreement. As a result, both parties are generally more willing to adhere to their domestic laws as applicable. It should be noted that this law also has stipulations for the ownership and infringement of intellectual property rights. It is a compulsory application that liabilities for infringement upon intellectual property rights shall be governed by laws of the place where protection is claimed. This means that once a dispute over the ownership and infringement of an intellectual property right occurs in China, then Chinese laws will apply automatically. Regarding the selection of dispute settlement bodies, in the field of intellectual property cross-border transactions, arbitration is often chosen as the method of settlement of transaction disputes, because of its confidentiality and efficiency. However, the parties to the transaction often have great disputes over the choice of arbitration institution and place of arbitration. Chinese companies often choose the more familiar CIETAC (China International Economic and Trade Arbitration Commission) or other domestic arbitration institutions, but foreign companies prefer overseas arbitration institutions. In practice, arbitration institutions and applicable laws are usually negotiated together. In many cases, both parties need to make certain concessions, and sometimes they will encounter situations that the Singapore International Arbitration Center applying Chinese law for arbitration.

About LexisNexis

LexisNexis Legal & Professional is a leading global provider of content and technology solutions that enable professionals in legal, corporate, tax, government, academic and non-profit organizations to make informed decisions and achieve better business outcomes. As a digital pioneer, the company was the first to bring legal information online with its Lexis® services. Today, LexisNexis Legal & Professional harnesses leading-edge technology and world-class content to help professionals work in faster, easier and more effective ways. Through close collaboration with its customers, the company ensures organizations can leverage its solutions to reduce risk, improve productivity, increase profitability and grow their business. LexisNexis Legal & Professional, which serves customers in more than 135 countries with 10,000 employees worldwide, is part of RELX Group PLC, a world-leading provider of information solutions for professional customers across industries.

Lexis Practical Guidance-Corporate intends to provide corporate counsels and lawyers with necessary information related to company's legal affairs. Such authoritative and timely practice support is provided throughout the whole process, from daily legal research, to contract review and writing and the execution of specific projects, which can truly promote and accelerate the settlement of legal issues in a quick and successful manner.

For more information, please scan QR code below for free trial account:

环球律师事务所

北京市朝阳区建国路81号华贸中心
1号写字楼15层&20层 邮编: 100025
15 & 20/F Tower 1, China Central Place,
No. 81 Jianguo Road Chaoyang District,
Beijing 100025, China
电话/T. (86 10) 6584 6688
传真/F. (86 10) 6584 6666

上海市黄浦区湖滨路150号企业天地
5号楼26层 邮编: 200021
26F, 5 Corporate Avenue,
No. 150 Hubin Road, Huangpu District,
Shanghai 200021, China
电话/T. (86 21) 2310 8288
传真/F. (86 21) 2310 8299

深圳市南山区深南大道9668号
华润置地大厦B座27层 邮编: 518052
27th Floor Tower B, China Resources Land Building,
No. 9668 Shennan Avenue, Nanshan District,
Shenzhen 518052, China
电话/T. (86 755) 8388 5988
传真/F. (86 755) 8388 5987