

## **Regulation for Implementing the Foreign Investment Law of the People's Republic of China**

### **❖ Background**

On December 31<sup>st</sup>, 2019, the State Council of China issued the Regulation for Implementing the Foreign Investment Law (the “Regulation”), which is one of the most significant regulations supporting the enforcement of the Foreign Investment Law. As was stated by premier Li KeQiang at the 2019 World Economic Forum Summer Davos, the purpose of enacting a set of sub-provisions and rules of the Foreign Investment Law is to create a more stable, transparent and predictable environment for foreign capital to invest. The regulation comes into force on January 1<sup>st</sup>, 2020.

### **❖ Summary**

- ❖ A natural person of Chinese nationality can be a shareholder of a foreign-funded enterprise

The item 1 of Article 2 of the Foreign Investment law provides that a foreign investor may set up a foreign-funded enterprise in China alone or jointly with other investors, however, leaving it unclear whether natural persons of Chinese nationality are covered by the concept of ‘other investors’. The Article 3 of the Regulation clarifies that a natural person of Chinese nationality is included in the scope of other investors, which means Chinese citizens have an equal right to invest in and be a shareholder of a foreign-funded company.

- ❖ Investment by investors from Hongkong, Macao and Taiwan shall be handled by referring to the rules of the Foreign Investment Law

The Foreign Investment Law does not mention whether it is applicable to investors from Hongkong, Macao and Taiwan. The Article 48 of the Regulation provides that Investment in Mainland China by investors from Hong Kong and Macau shall be handled with reference to the Foreign Investment Law and the Regulation;

where the laws, administrative regulations or the State Council stipulate otherwise, such provisions shall prevail; the provisions of the Law on the Protection of Investment by Taiwanese Compatriots ("Taiwanese Compatriot Investment Protection Law") and its Implementation Regulations shall apply to investment in Mainland China by investors from Taiwan; matters not stipulated in the Taiwanese Compatriot Investment Protection Law and its Implementation Regulations shall be handled with reference to the Foreign Investment Law and the Regulation.

✧ The provision regarding round-tripping investment is not adopted in the Regulation

The Article 35 of the Request for Public Comments on the Regulation for Implementing the Foreign Investment Law ('Request for Public Comments') provides that upon examination by the relevant competent department of the State Council and approval by the State Council, any wholly-owned enterprise established outside China by a Chinese natural person, legal person or any other organization that invests in China may be exempted from the relevant restrictions of special administrative measures for market access stipulated in the negative list for foreign investment market access; 'legal person or any other organization' as mentioned in the preceding paragraph does not include foreign-invested enterprises. As many issues about 'wholly-owned enterprises' and 'approval by the State Council' remain unclear, the above provision about round-tripping is not adopted by the Regulation.

✧ The Regulation follows the provision that foreign-funded enterprises established before the implementation of the Foreign Investment Law may keep their original organizational forms for five years

The Foreign Investment Law stipulates that foreign-funded enterprises, established in accordance with the Law of the People's Republic of China on Sino-foreign Equity Joint Ventures, the Law of the People's Republic of China on Wholly Foreign-owned Enterprises or the Law of the People's Republic of China on Sino-foreign Cooperative Joint Ventures before the implementation of the Foreign Investment Law, may keep their original organizational forms for five years after the enactment of the Foreign Investment Law. The Regulation strictly follows the provision on the five-year transitional period.

✧ The Regulation alters the concept of 'overseas Chinese'

The Article 44 of the Request for Public Comments uses the concept of ‘overseas Chinese’, providing that investment made in China by overseas Chinese shall be governed by the Foreign Investment Law. The Regulation alters ‘overseas Chinese’ to ‘Chinese citizens residing abroad’, further clarifying the scope of the application of the Regulation.

✧ The Regulation adds the liability that administrative organs and staff shall bear for breaking the law

Only the Article 39 of the Foreign Investment Law provides the illegal responsibility that government officials shall assume in case of breaking laws in terms of promotion, protection and management of foreign investment. The Regulation adds a whole Chapter, specifying the illegal responsibilities that government officials shall bear for breaking the regulation and simultaneously enhancing the protection of foreign investors in terms of equal treatment and intellectual property protection.



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