

**China's New Legislative  
Framework of Cross-Border  
Transaction Regarding  
Foreign Investment and  
Enterprises' Cross-Border  
Compliance Management**



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## Introduction:

In recent years, for the purpose of building a more open economy system, China has deepened the implementation of the “Go Global” strategies and has promoted “The Belt and Road Initiative”. As the significant player of the “Go Global” strategies, Chinese enterprises have achieved remarkable results in conducting foreign investment cooperation. However, problems like lack of experience, nonstandard behavior, and ignorance of host countries’ laws etc. exist at the same time. Besides, various countries have become stricter in their supervisions on the multinational enterprises. As a result, China started to build a new development frame at the calling of this era by introducing a number of laws and regulations to guide the foreign investment and compliance management on enterprises’ cross-border transaction.

Therefore, this article will analyze China’s legislative framework of cross-border transaction in two complementary parts, the first part is about foreign investment, and the second part is about the legislation of enterprises’ cross border compliance management.

As for foreign investment, the *Foreign Investment Law* has become the basic law on foreign investment in China. With its huge progress in five perspectives, it has laid a good institutional framework for the promotion, protection, and administration of foreign investment.

As for enterprises’ cross border compliance management, the Chinese government has strengthened guidance on cross-border compliance management of Chinese companies and attached importance to the supervision of business activities of multinational enterprises in China.

**Keywords:** Foreign Investment Law; Foreign investment; Foreign-invested enterprises; Foreign investor; Compliance management; Multinational enterprises; Cross-border business activities; Laws and regulations

## I. The Foreign Investment Law

### A. The birth of the Foreign Investment Law

In China, the main laws concerning foreign investment used to be the *Law of the PRC on Chinese-Foreign Equity Joint Ventures*, *Law of The PRC On Foreign-Capital Enterprises* and *Detailed Rules for the Implementation of the Law of the PRC on Sino-Foreign Contractual Joint Ventures* (hereinafter referred to as “three foreign enterprise laws”). Although they had made great contributions to both China’s further opening up process and better utilizing of the foreign capitals, they are not capable to adapt to the needs of building an applicable system of a more open economy in this new era. Thus, the *Foreign Investment Law* is called to solve the problem.

On March 15, 2019, the Second Session of the 13th National People's Congress passed the *Foreign Investment Law*, which will come into effect on January 1, 2020, replacing the three foreign enterprise laws to become the basic law on foreign investment in China. The new law will establish basic principles and legal norms in order to assure foreign investment access and promote foreign investment as well as protect the interests of foreign investors and foreign-invested enterprises, which are very worthy recognized.

### B. Five new changes in the Foreign Investment Law

Compared with the three foreign enterprise laws, there are mainly five changes in the *Foreign Investment Law*:

The first is the change in the scope of application. The *Foreign Investment Law* clarifies its scope of application as “foreign investment in the territory of the People’s Republic of China” and gives definitions to “Foreign investors”, “Foreign investment”, and “Foreign-invested

enterprises”. However, the definition of “Foreign investors” is vague about investors from Hong Kong, Macao, and Taiwan. It neither specifies whether these investors, whose investment were operated as foreign capital in the past, shall be included, nor does it indicate whether the *Foreign Investment Law* shall apply to these investors.

The second is the improvement of the administration system of foreign investment access. China’s legislation has started exploring new methods of the foreign investment administration since 2013 by promulgating the *Notice on Issuing the Overall Plan of China (Shanghai) Pilot Free Trade Zone*. By adopting Pre-establishment National Treatment and Negative List in Shanghai Pilot Free Trade Zone and other Zones, China’s legislation has showed the spirit that anything that is not forbidden is allowed.

However, this administration system is not applied nationwide until the passing of the *Foreign Investment Law*. This law rebuilds the system by introducing the Pre-establishment National Treatment policy plus Negative List policy as well as eliminating the outdated case-by-case approval policy. Explicitly, the foreign investors shall not invest in the fields prohibited by the Negative List, while they shall invest in accordance with the Negative List when investing in the restricted fields regulated in the List; as for the fields not included in the Negative List, both domestic and foreign investments shall be administrated in accordance with the principle of consistency.

The third is the requirements to transform the organizational form of foreign-invested enterprises. The organizational form and structure of foreign-invested enterprises shall be governed by the *Company Law* and the *Partnership Enterprise Law*, etc. The foreign-invested enterprises established in accordance with the three foreign enterprise laws in the past may continue to maintain their original organization form within five years after the implementation of the new law. Consequently, the old companies established under the three foreign enterprise laws which have the special organizational forms need to be modified according to the *Company Law* and the *Partnership Enterprise Law* in order to be consistent with domestic companies.

The fourth is the establishment of a series of measures to promote foreign investments. The new measures including applying equal policies to both foreign and domestic enterprises. Foreign-invested enterprises shall enjoy the right to participate in all standardized work on an equal footing. Besides, the *Foreign Investment Law* provides clear guidance for governments and institutions at all levels to put foreign investment promotion into practice.

The fifth is the more effective protection of foreign investors and foreign-invested enterprises' investment interests. A series of provisions are made in response to investment protection, including expropriation and compensation, profit remittance, intellectual property protection, no compulsory technology transfer, no impairment of legal rights and interests or increase of obligations, establishment of complaints mechanism for foreign-invested enterprises, and local governments' compliance of commitment, etc., which altogether provide more solid legal protection for foreign investors and foreign-invested enterprises to protect their legitimate rights and interests.

From the analysis above, we can see that the *Foreign Investment Law* clearly sends the signal of protecting, supporting and promoting foreign investment. Its content also expresses the requirements to transform government functions. Nowadays, the government need to streamline administration, delegate powers, and improve regulation and services rather than controlling every detail. It is of great significance to encourage foreign investments and protect their legitimate rights and interests as well as create a legalized internationalized and convenient business environment.

### **C. Essential legal issues in the Foreign Investment Law**

According to the *Foreign Investment Law*, the essential legal issues concerning foreign-invested enterprises is that they shall enjoy equal legal statue while remain their relative particularity.

As discussed in the fourth change, the legislative purpose of the *Foreign Investment Law* has been completely realized by clarifying the principle of equal application. And the foreign-invested enterprises could realize their equal legal statue by simply complying with the relevant provisions.

Besides, the *Foreign Investment Law* contains provisions specialized for foreign-invested enterprises, such as foreign investment access, national security review and etc. Based on practical experience, operational detailed provisions are necessary here to provide clear guidance for legal practice. However, instead of baring all these functions on the basic law, it is more appropriate to have relevant departments to issue regulations or normative legal documents for elaboration.

## II. Enterprises' cross-border Compliance Management

### A. The laws, regulations, and rules for compliance management of enterprises operating overseas

In May 2017, the Central Leading Group for Central Comprehensive and Deepening Reform issued the *Several Opinions on Regulating Enterprises' Overseas Business Behavior*, proposed the requirement to regulate the business behavior of overseas enterprises and enhance the compliance management system of overseas enterprises. China's cross-border enterprises compliance management kicked off.

In December 2017, the government issued two documents about the compliance management. First is the *Regulations on Outbound Investment and Business Activities of Private Enterprises*, requiring private enterprises to obey the laws and regulation of China and the host country (region), and also the relevant treaty provisions and other international practices when conducting their overseas investment and business activities. The other is the *Compliance Management Systems—Guidelines* which is the translation equivalent to ISO 19600:2014, IDT.

In 2018, two more new documents were issued respectively, providing overall guidance for compliance management of enterprises:

In February 2018, seven departments jointly issued the *Guidelines on the Compliance Management of Enterprises' Overseas Operations*. This document is a basic, targeted and systematic guideline for compliance management of overseas enterprises.

In November 2018, the *Guidelines on Compliance Management for Central State-owned Enterprises (for Trial Implementation)* established a sound compliance management system for central enterprises, in which the guidelines specified that compliance management of overseas investment operations should be strengthened.

In January 2019 the General Office of the China Banking and Insurance Regulatory Commission issued the *Guiding Opinions on Strengthening the Establishment of Long-term Compliance Management Mechanisms for Overseas Agencies of Chinese-funded Commercial Banks*, and proposed the compliance management of overseas agencies of Chinese-funded commercial banks.

## **B. The laws, regulations, policies and international conventions related to the compliance management on multinational enterprises in China.**

On the one hand, China's compliance management construction is aimed at strengthening the above-mentioned guidance for Chinese enterprises' overseas investment. On the other hand, it also focuses on strengthening the management of cross-border enterprises that conduct business activities in China. The Chinese supervisions consist of the follow aspects.

## 1. Tax compliance

The laws and regulations governing taxation involved in cross-border transactions and the international conventions that China has acceded to are as follows:

In December 2014, the State Administration of Taxation issued the *Administrative Measures for the General Anti-Avoidance Rule (for Trial Implementation)* to implement special tax adjustments for the tax avoidance arrangements engaged by the enterprises in cross-border transactions and payments, which is lack of reasonable commercial purposes but obtain tax benefits. In March 2017, the State Administration of Taxation specify the method of implementing special tax adjustment by issuing the *Administrative Measures for Special Tax Audits and Adjustments and the Mutual Agreement Procedure*. The tax authorities shall take the measures like related report auditing, concurrent data management, and profit monitoring etc.

In January 2017, the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters* was implemented in China. The parties to the Convention shall provide mutual assistance in tax-related matters. China adopted the method of information exchange.

In September 2014, approved by the State Council, China promised to implement the *Standard for Automatic Exchange of Financial Account information in tax matters (CRS)*. In May 2017, six departments issued the *Administrative Measures for the Due Diligence of Non-Resident Financial Account Information in Tax Matters* to implement the CRS. In September 2018, the State Administration of Taxation changed information for the first time with tax authorities from other countries (regions). The implementation of the standard will enable the contracting parties to systematically and regularly disclose the foreign citizens economic situations in their own countries; by deepening global tax cooperation, the tax transparency will be increased, and tax evasion and money laundering through cross-border financial accounts will be cracked down.

In April 2019, the *Wuzhen Declaration* was published, which established the mechanism of tax collection and management cooperation of “The Belt and Road Initiative”. The parties of this mechanism agreed to jointly promote the *Wuzhen Action Plan (2019-2021)* by strengthening the corporation of tax collection and management as well as encouraging tax departments to share their experience in order to promote the construction of a growth-friendly tax environment.

## **2. Anti-corruption compliance**

At present, China has no law specifically dealing with corruption and bribery of cross-border enterprises. The relevant regulations are scattered among the following laws and regulations.

In November, 1996, the *Interim Regulations of the State Administration for Industry and Commerce on Prohibition of Commercial Bribery* made overall regulation on commercial bribery, illegal liability, and supervisory authorities. Also, According to Article 164 of the revised *Criminal Law*, overseas bribery is a criminal offence and will be punished the same as the crime of bribery in China by the Chinese judicial authorities. Besides, the Article 7 of the *Anti-Unfair Competition Law* stipulates that a business shall not seek transaction opportunities or competitive edges by bribing the entities or individuals specified by this article with property or by any other means.

In order to improve the global cooperation, China has signed several international treaties, like the *United Nations Convention Against Transnational Organized Crime* ratified in August 2003 and the *United Nations Convention against Corruption* ratified in October 2005.

Meanwhile, China’s policies for various industries also involve enterprises anti-corruption compliance. For example, in the pharmaceutical industry, China has introduced various reform

measures, such as the “two-invoice system” reform, the “medical representative filing system” and so on. These measures aim to beat commercial bribery in the pharmaceutical industry by regulating the internal behavior of the industry, reducing intermediate links and strengthening transparent procurement. But these measures are still in the process of completion.

### 3. Anti-Money Laundering Compliance

China has always attached importance to anti-money laundering work and continuously increased its supervision in different fields in recent years.

In July 2018, the General Office of the People's Bank of China promulgated the *Notice of Strengthening the Anti-money Laundering Supervision of Designated Non-financial Businesses Institutions*, which stipulates that specific non-financial institutions should fulfill their obligations of anti-money laundering and anti-terrorist financing.

In July 2018, the General Office of the People's Bank of China promulgated the *Notice on Further Enhancing the Efforts for Combating Money Laundering and Financing of Terrorism*, which clearly calls for strengthening the risk control and management of cross-border remittance business.

In October 2018, the People's Bank of China, the Banking and Insurance Regulatory Commission and the Securities and Exchange Regulatory Commission jointly promulgated the *Notice of Measures for the Administration of Combating Money Laundering and Financing of Terrorism by Providers of Internet Financial Services (for Trial Implementation)*. It is applicable to the institutions established within the territory of the People's Republic of China with the approval or filing of the competent departments, which operate the Internet financial business according to law. It standardizes the anti-money laundering and anti-terrorist financing work of the Internet financial industry.

In February 2019, the Banking and Insurance Regulatory Commission promulgated the *Administrative Measures for Anti-money Laundering and Counter-terrorism Financing for Banking Financial Institutions*. It establishes the basic framework of anti-money laundering in the banking industry from the aspects of perfecting the internal control system of banking financial institutions, perfecting the supervision mechanism and defining the market access standards.

#### **4. Privacy and personal information protection compliance**

To guide the enterprises' privacy and personal information protection compliance, the National Information Security Standardization Technical Committee issued the *Information Security Technology: Personal Information Security Specifications* in December 2017. In February 2019, the government initiated the revision of this standard. Based on the *Cyber Security Law* the international personal information and privacy protection concept, the standard provides more detailed guidance for enterprises to improve internal personal information protection systems and practical operational rules. However, it is noticeable that it is a national recommendation standard and does not have a legal effect.

In May 2019, the National Internet Information Office issued the *Administrative Measures for Data Security (Draft for Comment)* which will be the first comprehensive sectorial regulation to manage data security at the national level if adopted. It aims to safeguard national security and social public interests, protect the legitimate rights and interests of citizens, legal persons and other organizations in cyberspace, as well as secure personal information and important data. The draft specifies the responsibilities and obligations of network operators from three aspects: data collection, data processing and data security supervision and management. The network operators should specify and publicly collect usage rules for the collection and use of personal information. Besides, they shall clarify the responsible persons of data security. Moreover, the government will establish the filing system of the network

operators for collecting data and information behaviors for the purpose of management.

### **5. Export restriction compliance**

In June 2017, the Ministry of Commerce issued the *Export Control Law (Draft for Comment)*, which sought public opinions.

The draft clarifies the scope of application of *the Export Control Law*. The suitable objects contain four categories: dual-use items, military products, nuclear technology, services, and other items related to national security. There are five categories of regulated performance: Export, Re-export, Deemed export, Transit, shift and express, Export through the special customs supervision zone. Moreover, China's export control system is mainly divided into two categories, namely, the control list system and the license management system.

Besides, the draft stipulates that the export control functions shall be performed respectively by the departments appointed by the State Council and the Central Military Commission, and these qualified departments are empowered to enforcement and investigation as well as punishment. In response to violations of the *Export Control Law*, whichever act that constitutes a crime shall be subject to criminal liabilities. Also, it is worth noting that the *Export Control Law (Draft for Comment)* increases the amount of penalties for illegal acts to 5 to 10 times the amount of illegal business and adds the fines imposed on individuals.

## **III. Conclusion**

To sum up, the *Foreign Investment Law* has preliminarily laid a solid foundation for the foreign investment legal system in China. Also, the legislation of enterprises' cross-border compliance management is constantly improving. However, in practice, there is still a lot of work that needs to follow up. As discussed above, a series of supporting regulations and documents need

to be issued to better implement the *Foreign Investment Law*. Meanwhile, legislation of cross-border compliance management needs to keep advancing with times. Thus, it is in line with the development trend of China's legal and economic system to continue to introduce a series of laws and regulations to enrich the legal system for legislative framework of cross-border transaction.

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