

# China Legal Report\*

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## **I. Introduction**

In recent years, the State Council of the People's Republic of China has published several policies to open up and make use of foreign investment. On 10 June 2018, the *Notice on Several Measures Concerning the Active and Effective Use of Foreign Investment to Boost High-quality Economic Growth* ("Notice") was released and came into effect on the same day. As the very first document released in 2018 concerning foreign investment from China's top authority, the Notice covers 23 measures in six aspects: investment liberalization, investment facilitation, investment promotion, investment protection, regional open-up layout, and national-level development zone innovation enhancement.

Compared to the document issued in 2017, namely *Notice of the State Council on Several Measures for Opening Wider to the Outside World and Making Active Use of Foreign Investment*, the Notice sets out more systemical measures to attract foreign investment into China.

## **II. Highlights of the Notice**

The Notice mainly sets out the highlights as follows:

### **1 Loose Market Access**

Currently, China published two sets of Special Administrative Measures for Market Entry of Foreign Investment (hereinafter the "Negative Lists"): one for China's free trade zones ("FTZs"), and the other one for mainland China excluding FTZs. Market access negative list means foreign investors can get equal access to the industries, fields and businesses not mentioned in the market access negative list under which the State Council clearly specifies the industries, fields and businesses in which foreign investment and operations are prohibited and restricted in the territory of the People's Republic of China.

Further, according to the Notice, the following industries will be expanding and will open up: financial industry; service industry such as transportation, trade

logistics, and professional services; agriculture, mining, and automobiles, ship and aircraft manufacturing industries.

In recent years it has been the case in practice that some local governments imposed restrictions on industries/fields/businesses that were as a matter of fact not stated in the Negative Lists on foreign investment access or stipulated other guidelines for foreign investment which increased the investment thresholds. The Notice this time stresses that all regions and departments may not specifically impose restrictions on foreign investors to enter fields not included in the Negative Lists.

## **2 Convenient Investment Environment**

The Notice sets out three aspects to create a convenient investment environment for foreign investors.

### **(1) Simplify the Procedure of Establishment**

According to the Notice, the establishment and change of foreign-invested enterprises with a total investment of less than USD one billion in fields included in the Negative Lists shall be subject to the examination and approval as well as administration by provincial people's governments.

To save time and human resource, China will roll up the "one-stop service" model to enable foreign invested enterprises engaging in fields other than those included in the Negative Lists to go through commercial record-filing and industrial and commercial registration.

These measures decentralized the power of approval and simplified the enterprises establishment formalities.

### **(2) Facilitate Fund Utilization**

Furthermore, fund pool management is simplified. Banks are now allowed to handle foreign exchange collection, payment, netting and settlement for

enterprises on a centralized basis by reviewing authentic and lawful electronic documents. The record-filing conditions for the pilot centralized operations and management of foreign exchange funds by multinational companies are relaxed and multinational enterprise groups are allowed to handle cross-border two-way RMB fund pool business.

### (3) Human Resource Facility

In addition, China will promote the “one-card” pilot program for high-end foreign talents and streamline their work permit procedures. For eligible foreign talents recruited by Mainland-registered enterprises who meet the prescribed conditions, the work visas may be issued within two working days.

## **3 Investment and Financing Encouragement**

### (1) Encourage Investment

a. The Notice encourages foreign investment in modern agriculture, ecological construction, advanced manufacturing and modern services as well as in central and western regions, high-tech fields and old industrial bases located in North-Eastern China.

b. To guide domestic companies to join international cooperation, foreign investors are encouraged to invest in mergers and acquisitions ("M&A"). Qualified foreign natural person investors are allowed to invest in domestic listed companies pursuant to the law.

### (2) Broaden Financing Channel

Based on the Notice, China will broaden the financing channels for foreign invested enterprises. The measures are as follows:

a. Foreign invested enterprises in western regions and old industrial bases in North-Eastern China shall be allowed to issue RMB or foreign currency bonds overseas and repatriate the funds raised in full for

investment and business operations in their respective province of registration.

b. Financial institutions or local asset management companies established upon approval in the aforesaid regions shall, within the framework of high-caliber and macro-prudent management of cross-border financing, be supported to transfer RMB-denominated non-performing loans to overseas investors in accordance with the requirements of sound systems and controllable risks.

c. In addition, banking institutions in the aforesaid regions shall be allowed to transfer their RMB trade financing assets to overseas banks on the basis of sufficient evaluation.

(3) Lower Cost

a. China will implement the taxation policies on tax credit for the overseas incomes obtained by enterprises, those on direct investment by foreign investors with profits generated in the Mainland and those applicable to technologically-advanced service enterprises.

b. The local government may support manufacturing enterprises to lawfully add floors to their factories, renovate their premises, consolidate construction land, and expand the manufacturing or storage areas.

c. With regard to labor costs, enterprises may conclude labor contracts flexibly that expire upon the completion of certain tasks and short-term fixed-term labor contracts; moreover, enterprises may adopt the system of comprehensive calculation of working hours and flexible working hours; and China will accelerate the consultation and conclusion of multilateral and bilateral social security contribution

agreements to exempt employers and employees from dual contribution obligations with regard to the types of social insurance under such agreements.

#### **4 Investment protection**

The Notice stipulates that China will strengthen Intellectual Property Rights (“IPR”) protection.

(1) As the IPR are so ineffective that infringement is easily and frequently committed, China will carry forward the revision to the Patent Law and related laws and regulations and raise the statutory upper limit of compensation for IPR infringement. Moreover, in practice some governments use administrative means to force technology transfer. The Notice clearly prohibits administrative intervention.

To enhance assistance for parties to safeguard their rights, China will step up dispute arbitration and mediation and other legal aid. It remains to be seen whether such measures help in light of the current lack of independent and preferential judges.

(2) According to the Notice, China will improve the inter-ministerial joint conference system for complaints lodged by foreign-invested enterprises to protect their legitimate rights and interests.

### III. Conclusion

The Notice sets up a variety of measures to attract foreign investment. Furthermore, for each measure listed therein, the Notice clearly assigns the responsible authorities, which should ensure the actual implementation of such measures. However, it should be noted that except the Negative Lists detailed regulations have not been issued so far. We await further and more detailed regulations and will provide an update in due time.

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