

Comments Sought on the Foreign Investment Law (Draft)

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December 26, 2018

The Foreign Investment Law of the People's Republic of China (Draft) has been deliberated at the seventh session of the Standing Committee of the 13th National People's Congress of the People's Republic of China. The Foreign Investment Law of the People's Republic of China (Draft) is hereby released on www.npc.gov.cn. The public may directly log onto www.npc.gov.cn to give opinions, or post opinions to the Commission of Legislative Affairs of the Standing Committee of the National People's Congress (No. 1 Qianmen West Avenue, Xicheng District, Beijing Municipality, postcode: 100805. Mark "comments sought on the draft of the Foreign Investment Law" on the envelope).
Deadline for comments: February 24, 2019.

Foreign Investment Law of the People's Republic of China (Draft)

Chapter I General Provisions

Article 1 The Law is hereby formulated in a bid to further expand opening-up, actively boost foreign investment, protect the legitimate rights and interests of foreign investors, impel the formation of a new pattern of comprehensive opening-up and promote the sound development of the socialist market economy.

Article 2 Foreign investment within the territory of the People's Republic of China ("within the territory of China") shall be subject to the Law.

For the purpose of the Law, foreign investment refers to investment activity directly or indirectly conducted by foreign natural persons, enterprises and other organizations (the "foreign investors"), including the following circumstances:

1. a foreign investor invests in any new construction project, establishes a foreign-funded enterprise or increases investment independently or together with any other investor;
2. a foreign investor acquires shares, equities, property shares or any other similar rights and interests of an enterprise within the territory of China by means of merger and acquisition; and
3. a foreign investor invests within the territory of China in any other way stipulated under laws, administrative regulations or provisions of the State Council.

For the purpose of the Law, a foreign-funded enterprise refers to an enterprise incorporated under Chinese laws within the territory of China and with all or part of its investment from a foreign investor.

Article 3 The State shall persist in the basic state policy on opening-up, encourage foreign investors to invest within the territory of China, and enhance the quality and level of use of foreign capital.

The State shall implement policies on high-level investment liberalization and convenience, establish and improve a foreign investment promotion mechanism, and create a stable, transparent and foreseeable investment environment.

Article 4 The State shall implement the management systems of pre-establishment national treatment and negative list for foreign investment; save as otherwise provided under international treaties or agreements that the People's Republic of China concludes or joins in, such provisions shall prevail.

For the purpose of the preceding paragraph, the negative list refers to special administrative measures for access of foreign investment in specific fields as stipulated by the State. The negative list will be issued by or upon approval by the State Council.

Article 5 The State shall protect foreign investors' investment, earnings and other legitimate rights and interests within the territory of China according to the law.

Article 6 Foreign investors and foreign-funded enterprises shall observe Chinese laws and regulations, and shall not impair China's security or damage public interests.

Article 7 The competent department for commerce and the competent department for investment under the State Council shall, as per the division of duties, push forward, protect and manage foreign investment; and, other relevant departments under the State Council shall, within the scope of their respective duties, take charge of the promotion, protection and management of foreign investment.

The relevant department under the local people's government at or above the county level shall push forward, protect and manage foreign investment according to laws and regulations and the division of duties determined by the people's government at the same level.

Article 8 Employees of a foreign-funded enterprise shall, according to the law, establish a trade union, conduct trade union activities, and maintain the legitimate rights and interests of employees. A foreign-funded enterprise shall provide necessary activity conditions for its trade union.

Chapter II Investment Promotion

Article 9 Save as otherwise stipulated under laws and administrative regulations, the State shall support the equal application of all policies on the development of national enterprises to foreign-funded enterprises.

Article 10 Opinions and suggestions of foreign-funded enterprises shall be listened to in regard to the formulation of laws, regulations and rules relating to foreign investment.

Normative documents and judicial judgments relating to foreign investment shall be published according to the law in due time.

Article 11 The State shall establish and perfect a foreign investment service system, and provide foreign investors and foreign-funded enterprises with consultation and services in respect of laws and regulations, policies and measures, investment project information and so on.

Article 12 The State shall establish multilateral and bilateral cooperation mechanisms for investment promotion with other countries, regions and international organizations, so as to reinforce international communications and cooperation in the investment field.

Article 13 The State shall, as per opening-up requirements, implement foreign investment test policies and measures in specific areas, thereby promoting foreign investment.

The State Council may establish a special economic area to advance foreign investment and expand opening-up.

Article 14 The State shall, as per the requirements of national economic and social development, take preferential measures, and encourage and guide foreign investors to invest in specific industries, fields and areas.

Article 15 Foreign-funded enterprises shall equally participate in standardization work, and information disclosure and social supervision shall be reinforced for the formulation of standards. The compulsory standards formulated by the State shall equally apply to foreign-funded enterprises.

Article 16 The State shall guarantee foreign-funded enterprises' fair participation in government procurement activities. Products produced by foreign-funded enterprises within the territory of China shall be equally treated under government procurement.

Article 17 A foreign-funded enterprise may conduct financing by means of the public offering of shares, corporate bonds and other securities and so on.

Article 18 Local people's governments at all levels may formulate foreign investment promotion policies within the respective statutory authorities.

Article 19 People's governments at all levels and their relevant departments shall, under the principle of convenience, efficiency and transparency, further enhance foreign investment services. Relevant competent departments shall prepare and publish foreign investment guidelines, and provide foreign investors and foreign-funded enterprises with services and convenience.

Chapter III Investment Protection

Article 20 The State shall not expropriate foreign investment; where the State expropriates foreign investment as per public benefit requirements in a special circumstance, statutory procedures shall be followed, and fair and reasonable compensation shall be paid.

Article 21 A foreign investor may, according to the law, freely transfer out its contributions, profits, capital gains, royalties of intellectual property rights, lawfully acquired compensation or indemnity and so on within the territory of China in Renminbi or a foreign currency.

Article 22 The State shall, according to the law, protect the intellectual property rights of foreign investors and foreign-funded enterprises, protect the legitimate rights and interests of holders of intellectual property rights and the relevant right holders, and encourage technology cooperation on the basis of free will and business rules.

In the process of foreign investment, technology cooperation conditions shall be determined by all investment parties upon negotiation, and no administrative organ or functionary working therein shall force the transfer of technologies by administrative means.

Article 23 In formulating normative documents concerning foreign investment, the people's governments at all levels and their relevant departments shall comply with laws and regulations, and shall not illegally impair the legitimate rights and interests or increase any obligation of a foreign-funded enterprise, illegally set any market access and withdrawal conditions, or illegally intervene or affect any normal production and operation activity of a foreign-funded enterprise.

Article 24 Local people's governments at all levels and their relevant departments shall strictly keep policy commitments lawfully made to foreign investors and foreign-funded enterprises and perform all contracts entered into according to the law.

If any policy commitment or contract needs to be changed due to national interests or public interests, legal authority and procedures shall be followed strictly, and the foreign investor or

foreign-funded enterprise concerned shall be compensated for losses incurred thereby according to the law.

Article 25 The State shall establish a complaint mechanism for foreign-funded enterprises, coordinate the improvement of major policy measures for complaints from foreign-funded enterprises, and responsively solve problems encountered by foreign-funded enterprises.

Where a foreign-funded enterprise deems that the administrative behavior of an administrative organ or functionary working therein infringes its legitimate rights and interests, it may seek resolution thereof through the complaint mechanism for foreign-funded enterprises.

Article 26 A foreign investor or foreign-funded enterprise may legally establish and freely join in a chamber of commerce or association, conduct relevant activities according to laws, regulations and the articles of association thereof, and maintain the legitimate rights and interests thereof.

Chapter IV Investment Management

Article 27 A foreign investor shall not invest in any field with investment forbidden by the negative list of access of foreign investment.

A foreign investor shall meet the investment conditions stipulated under the negative list for any field with investment restricted by the negative list of access of foreign investment.

Concerning fields not mentioned in the negative list of access of foreign investment, management shall be conducted under the principle of consistency of domestic and foreign investment.

Article 28 The verification and record-filing of foreign investment projects shall be subject to relevant state provisions.

Article 29 With respect to industries and fields with licenses necessary to be obtained lawfully for investment by foreign investors, relevant licensing formalities shall be handled according to the law.

Save as otherwise stipulated under laws and administrative regulations, relevant competent departments shall review the licensing applications of foreign investors as per conditions and procedures the same as those for domestic investment.

Where licensing formalities need to be handled by several organizations of one competent department, one organization shall be appointed to uniformly accept the licensing application, and uniformly deliver the licensing decision; where licensing formalities need to be respectively handled by two or more competent departments, such competent departments shall optimize and integrate the handling processes, and facilitate the foreign investors in license applications by such means as unified acceptance, joint handling and information sharing.

Article 30 The registration, tax, accounting, foreign exchange and other matters of foreign-funded enterprises shall be subject to relevant laws, administrative regulations and relevant state provisions.

Article 31 The State shall establish a foreign investment information report system, with the contents and scope of information report to be determined under the principle of necessity and strict control. A foreign investor or foreign-funded enterprise shall submit investment information to the competent department for commerce concerned through the enterprise registration system and the enterprise credit information publicity system; the investment information able to be obtained by interdepartmental information sharing shall not be required to be submitted again.

Article 32 Save as otherwise stipulated under laws, relevant competent departments shall conduct supervision and examination for foreign-funded enterprises under the principle of consistency of domestic and foreign investment.

Article 33 The State shall establish a safety review system for foreign investment, under which the

safety review shall be conducted for foreign investment influencing or probably influencing the state security.

A decision on safety review made according to the law shall be final.

Chapter V Legal Liability

Article 34 Where a functionary of a relevant government department abuses his/her functions and powers, neglects his/her duties or engages in malpractice for personal gain during the promotion, protection and management of foreign investment, a penalty will be imposed upon him/her according to the law; if a crime is constituted, he/she will be investigated for criminal liability.

Article 35 Where a foreign investor invests in a field with investment forbidden by the negative list of access of foreign investment, the relevant competent department shall order the said investor to stop the investment activity, dispose of the shares and assets thereof or take any other necessary measures within a prescribed time limit, and restore the state before the investment; if there is any illegal gain, it shall confiscate the gain.

Where an investment activity of a foreign investor breaches any special administrative measure for restrictive access provided in the negative list of access of foreign investment, the relevant competent department shall order the investor to make corrections, and take necessary measures to meet the requirements of the aforesaid measure; if the investor refuses to do so, the preceding paragraph shall be followed.

Article 36 The relevant department shall lawfully investigate and treat violations of laws and regulations by foreign investors and foreign-funded enterprises, include the violations in the relevant credit information system as per related state provisions, and impose joint punishments.

Chapter VI Supplementary Provisions

Article 37 Where any country or region takes any discriminatory prohibitive, restrictive or other similar measure against the People's Republic of China in terms of investment, the People's Republic of China may take corresponding measures against the said country or region in light of the actual conditions.

Article 38 Where the State has any other provisions on foreign investors' investment in industries of banking, securities, insurance, etc. or the financial markets such as securities market and foreign exchange market within the territory of China, such provisions shall prevail.

Article 39 The Law shall come into force as of MM/DD/YYYY. 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 and the Law of the People's Republic of China on Sino-foreign Cooperative Joint Ventures shall be annulled simultaneously.

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 and the Law of the People's Republic of China on Sino-foreign Cooperative Joint Ventures before the implementation of the Law, may keep retaining their original organizational forms for five years after the implementation of the Law.