

# China Legal Update

New PRC Foreign Investment Law  
and Its Implementing Regulations

Presented by

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# **PART ONE**

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## **Introduction**

# Introduction

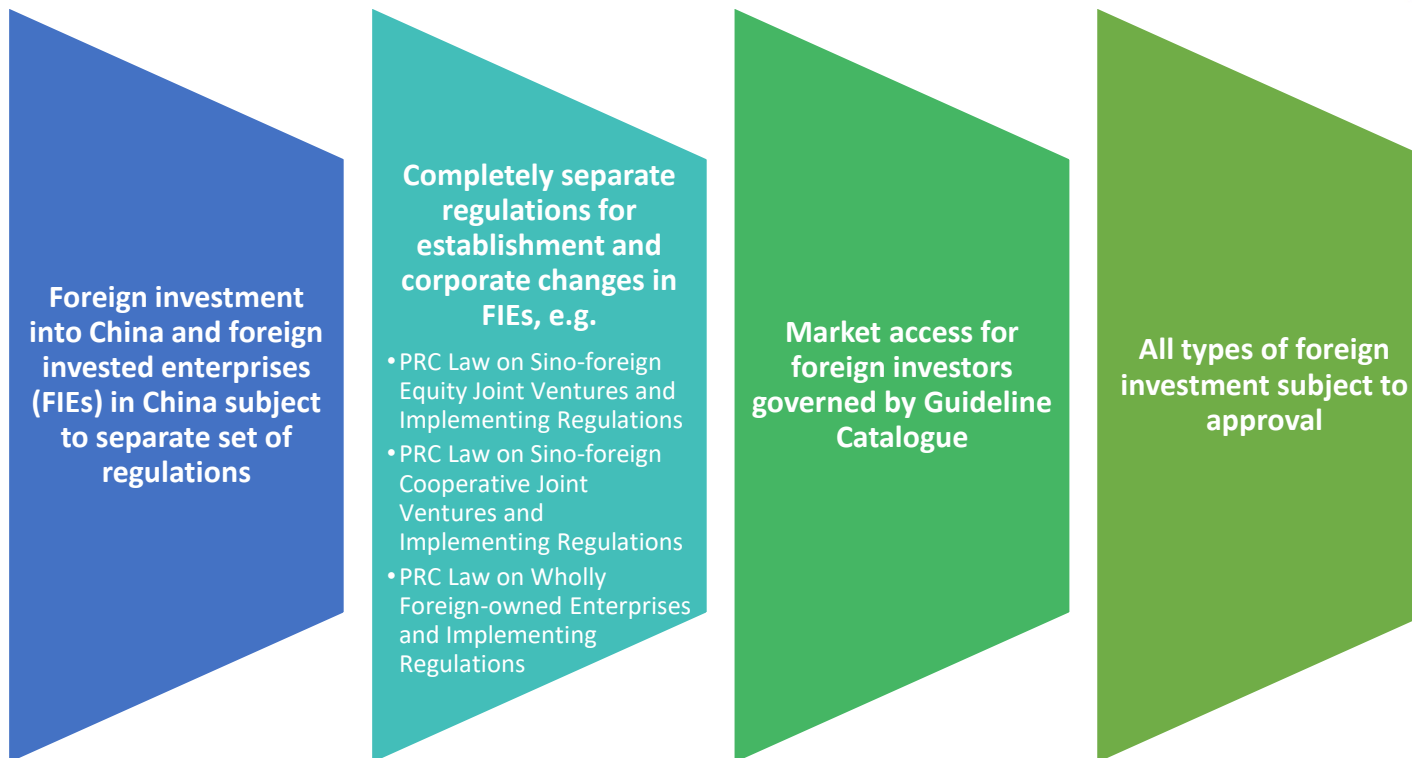
## Content of Presentation

-  Past Regulations
-  New Foreign Investment Law
-  Implementing Regulations to the Foreign Investment Law
-  Details of Changes
-  Main Impact on Companies
-  New Developments due to Impact of COVID-19

# Introduction

## Background

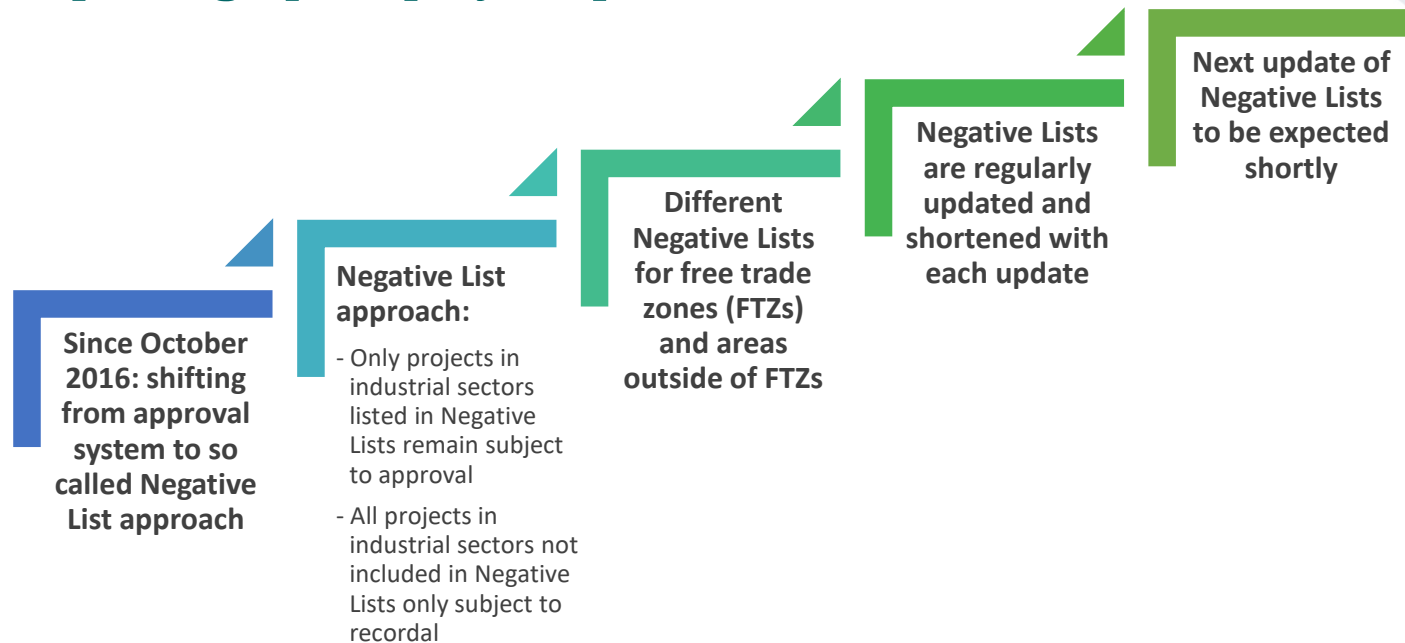
### 📌 For Decades



# Introduction

## Background

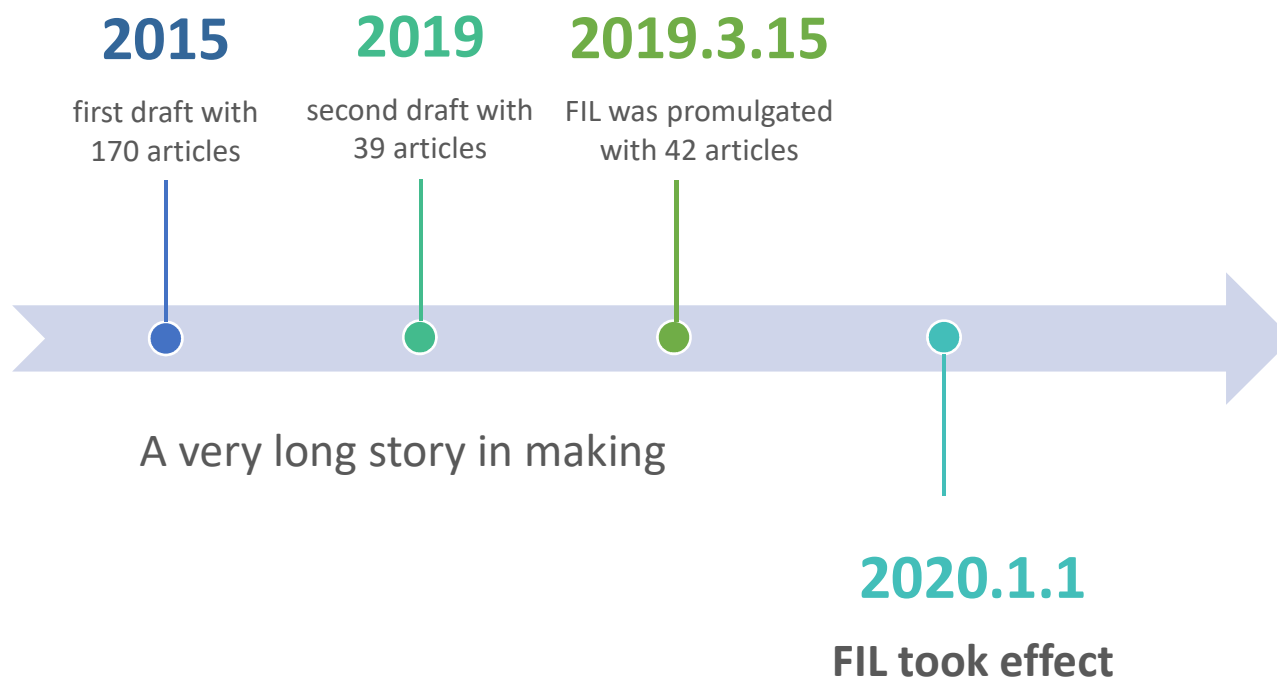
### 📌 Opening up Step by Step



# Introduction

## Background

### 📌 New Foreign Investment Law (FIL)



# **PART TWO**

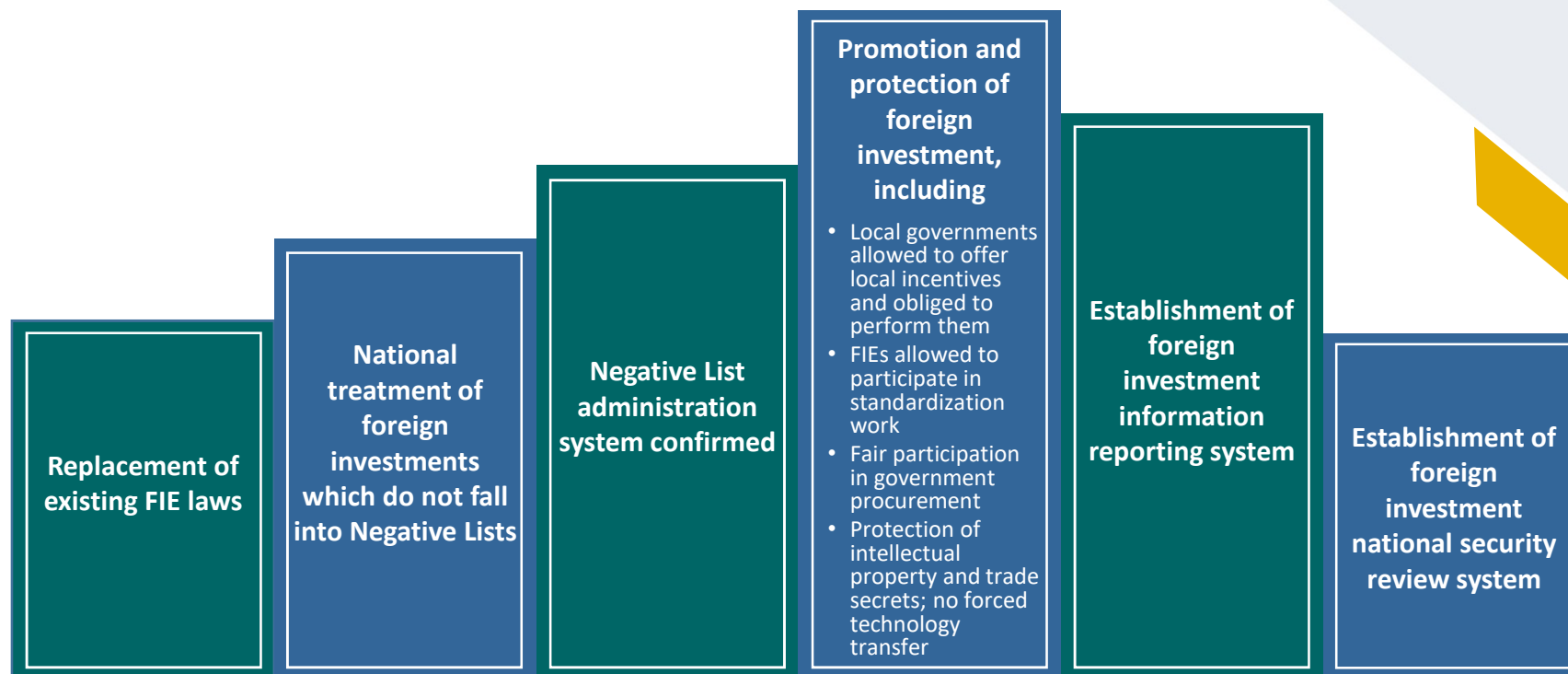
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**FIL**

# FIL

## Main Content

### 📌 Main Content





# FIL

## Main Content

### 📌 **FIL – a Great Leap Forward or just a Small Step Sideways?**

- In 2019 increasing calls of foreign investors and foreign governments for national treatment of FIEs and open market access
- FIL reads like an answer to complaints of Trump administration; all key words are included

#### PLUS

- FIL is an improvement compared to old FIE laws
- Special laws for FIEs abolished

#### MINUS

- FIL only contains general principles
- Stipulations are relatively general, short and vague
- Details need to be provided in implementing rules and ancillary regulations

# **PART THREE**

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## **New Foreign Investment Regime**

# New Foreign Investment Regime

## Details

### 📌 Flesh to the Bones

Implementing Regulations of FIL:  
effective since 1 January 2020;  
49 articles

Various other supporting  
regulations on foreign  
investment; all effective since 1  
January 2020; inter alia:

Interpretations of the PRC Supreme People's Court on  
Several Issues Concerning the Application of the FIL

Measures for the Reporting of Foreign Investment  
Information

Announcement on Matters Concerning the Reporting of  
Information on Foreign Investment

Circular on Effective Work on Registration of Foreign –  
invested Enterprises for the Implementation of the FIL

Notice on the Reform of Multi-Report Integration of  
Annual Reports

# New Foreign Investment Regime

## Details

### ✦ Foreign Investment with Participation of Chinese Individuals

- ▶ Chinese individuals allowed to directly establish joint venture companies together with foreign investors
- ▶ New policies already confirmed by local regulations, e.g. in Shanghai, Jiangsu, Anhui and Zhejiang
- ▶ Foreign entities controlled by Chinese entities still deemed as foreign investors
  - Article 35 of initial draft for comments of the FIL Implementing Rules was not implemented in the actual FIL Implementing Rules: A round-trip invested entity would have been exempted from the Negative List regulations under the FIL and, thus, de facto be treated as a domestic company, if its investor is an offshore entity which is wholly-owned by Chinese individuals, entities or other organizations, and such investment was reviewed by a state-level authority and approved by the State Council

# New Foreign Investment Regime

## Details

### 📌 Negative Lists and National Treatment

#### Negative Lists

- *Special Administrative Measures for Access of Foreign Investment*
  - Started to be implemented since October 2016
  - Current version from 2019
- Foreign investors shall not invest in any sectors in which foreign investment is forbidden by the Negative List. Foreign investors shall meet the investment conditions stipulated under the Negative Lists for any restricted sector

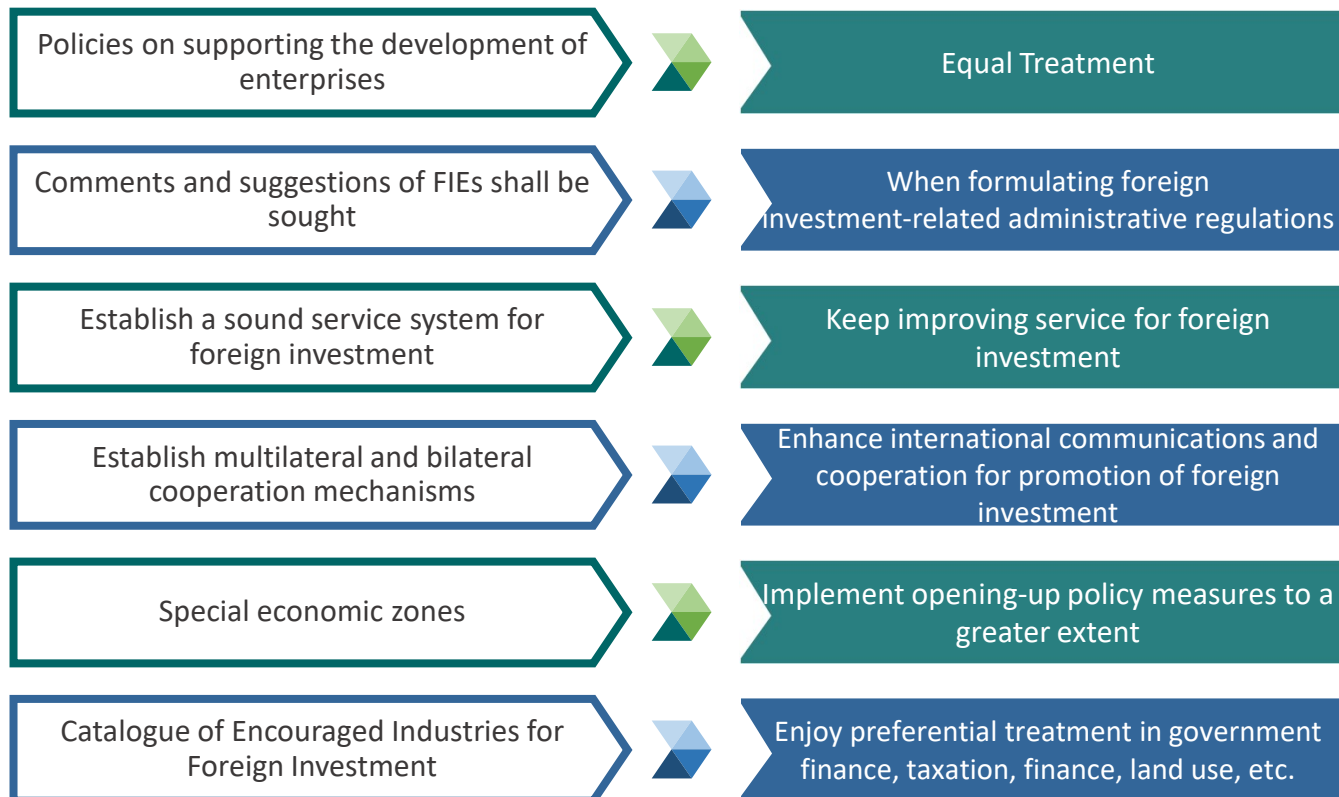
#### Equal treatment

- State shall give national treatment to foreign investments which do not fall into the Negative Lists
- FIEs shall receive equal treatment as domestic companies

# New Foreign Investment Regime

## Details

### ✦ Promotion of Foreign Investment



# New Foreign Investment Regime

## Details

### 📌 Promotion of Foreign Investment

#### Standardization work

- Equal participation in setting standards in accordance with the law
- Mandatory standards developed by State shall apply equally to FIEs and domestic enterprises

#### Government Procurement

- No government or relevant department may obstruct or restrict any FIE from freely accessing government procurement
- FIEs can inquire and question relevant procurers and procurement agencies about any government procurement activity, and lodge complaints
- Strengthen the supervision and inspection of government procurement activities
- Needs to be seen in combination with China's planned accession to UN Convention on Government Procurement

# New Foreign Investment Regime

## Details

### 📌 Promotion of Foreign Investment

#### Intellectual Property Rights

- Punishment of intellectual property infringements
- Technology cooperation on the basis of free will and business rules
- No forced technology transfer

#### Trade Secrets – Obligations of Authorities

- Keep confidential any trade secret of foreign investors or FIEs
- Limit the provision of materials or information involving trade secrets
- Establish internal management system and take effective measures to protect trade secrets



# New Foreign Investment Regime

## Details

### 📌 Promotion of Foreign Investment

#### Policy Commitments by Local Authorities

- Strictly keep their policy commitments made to foreign investors and FIEs
- Perform all contracts entered into in accordance with the law

#### Transparency of Normative Documents

- Normative documents relating to foreign investment shall be published in accordance with the law in due time
- Unpublished foreign investment related normative documents shall not be used as basis for implementing administrative management on foreign investment

# New Foreign Investment Regime

## Details

### ✦ Protection of Foreign Investment

#### Expropriation

- Must follow statutory procedures
- To be carried out in a non-discriminatory manner
- Compensation shall be timely made based on fair and reasonable market value of expropriated investment

#### Complaint Mechanism

- Joint conference system involving different ministries concerning complaints filed by FIEs shall be set up
- Department or agency to accept complaints filed by FIEs or their investors within the local area shall be designated
- Foreign investors and FIEs may apply for administrative review or administrative litigation

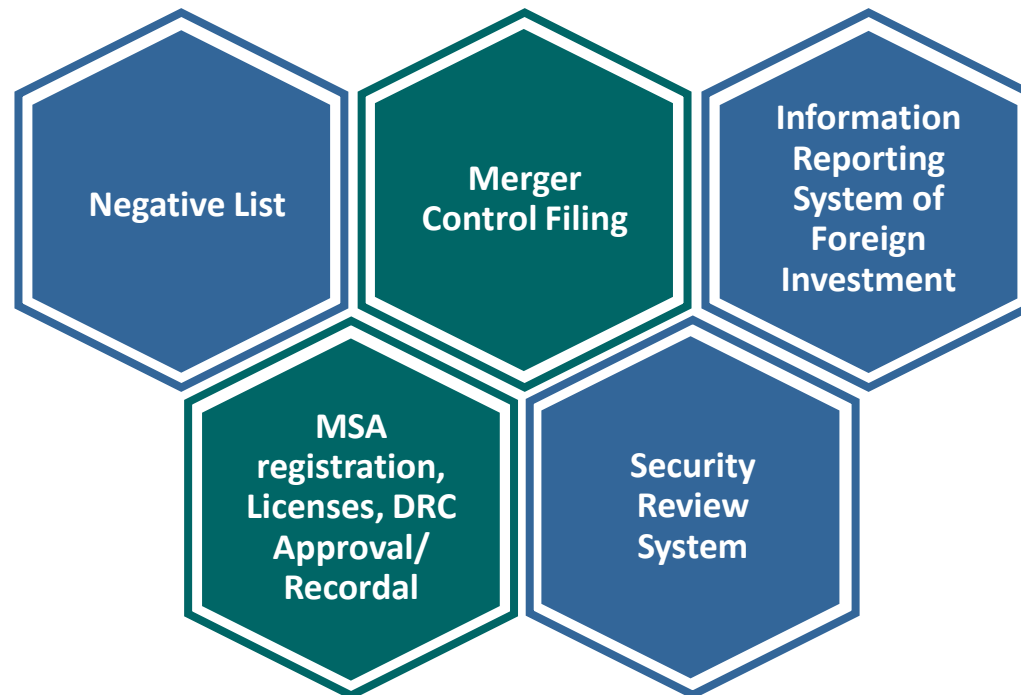
#### Legal Liabilities of Government and Officials

- In case of unequal treatment, imposing higher technical standards, failing to fulfill policy commitments, forced technology transfer, unequal treatment in government procurement, etc.
- **Scope:** not stated in FIL Implementing Regulations; details currently unclear

# New Foreign Investment Regime

## Details

### 📌 Management of Foreign Investment



# New Foreign Investment Regime

## Details

### 📌 Information Reporting System

- Applies to all projects
- Basically shift from former recordal requirement to mere reporting obligation, if project does not fall into Negative Lists
- Practical impact
  - Content wise no big change from recordal procedure
  - Slightly less red tape; registration with MSA and reporting can now, generally, all be done in one online application

#### IN THE PAST

recordal certificate required by various other authorities and institutions, e.g. SAFE and banks – may lead to problems on a case by case basis;

#### NOW

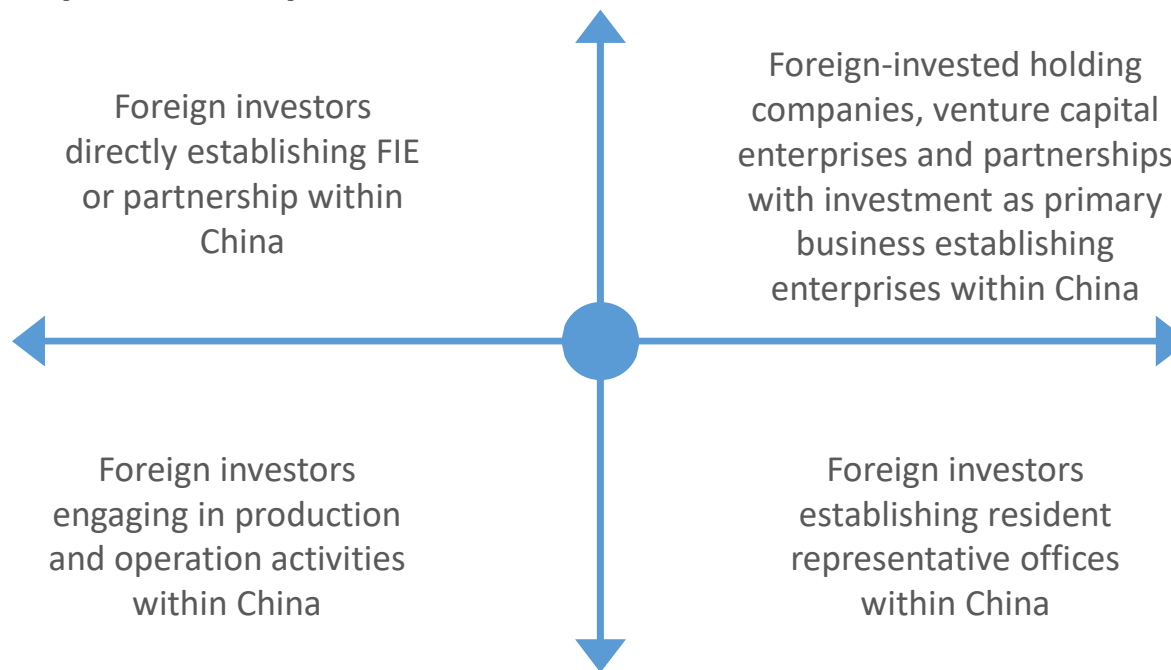
however: now other authorities should have access to relevant information through a shared online system

# New Foreign Investment Regime

## Details

### Information Reporting System

#### Scope to be Reported



# New Foreign Investment Regime

## Details

### ✦ Examples of Reporting

#### ▶ Initial Reports

- Establishment
- Acquisition of equity interests of domestic enterprises

#### ▶ Change Reports

- E.g. capital increases, share transfers, etc.
- Registration with Market Supervision Authority (MSA)
- Reporting only to Authority of Commerce (within 20 days of change, e.g. change of ultimate controller, information changes in tax relief for imported equipment)

#### ▶ De-registration Reports

#### ▶ Annual Reports (Customs, Tax, MSA, SAFE and MOT)

# New Foreign Investment Regime

## Details

### ✦ Main Impact on Companies

#### ▶ Old FIE laws cease to be effective

- Since 1 January 2020, FIE Laws have been abolished and the FIL now is the main legal basis for foreign investment in the PRC.

#### ▶ Organization Form of FIEs to be Adjusted

- Since 1 January 2020, organization form, institutional framework and standard of conduct of FIEs subject to the *PRC Company Law*, the *PRC Partnership Enterprise Law*, and other laws.
- **Consequences:** organization form, institutional framework and standard of conduct of the existing FIEs, which are not consistent with the *PRC Company Law* or the *PRC Partnership Law*, shall be changed.
- **Major impact** on Sino-foreign Equity Joint Ventures (“EJVs”) and Sino-foreign Cooperative Joint Ventures (“CJVs”).

#### ▶ Grace period of 5 years

- Existing FIEs have a **grace period of five years, i.e. until 31 December 2024**, during which they may retain their original organizational form before they must adapt to the new legal requirements.

# New Foreign Investment Regime

## Details

### ✦ Main Impact on Companies

#### ▶ Example: EJVs

Matters	Before: according to <i>PRC Sino-foreign Equity Joint Venture Law</i>	After: according to <i>PRC Company Law</i>
Highest Authority	Board of Directors	Shareholders' Meeting
Quorum	At least two thirds of directors	None (unless otherwise stipulated in Articles of Association)
Voting on significant matters*	Unanimous approval by all directors	Approval by shareholders holding at least two thirds of voting rights
Legal Representative	Chairman of Board of Directors	Chairman of Board of Directors, Executive Director or General Manager

*\*Significant matters include amendment of Articles of Association, increase or reduction of registered capital, merger, demerger, change of company form, dissolution.*

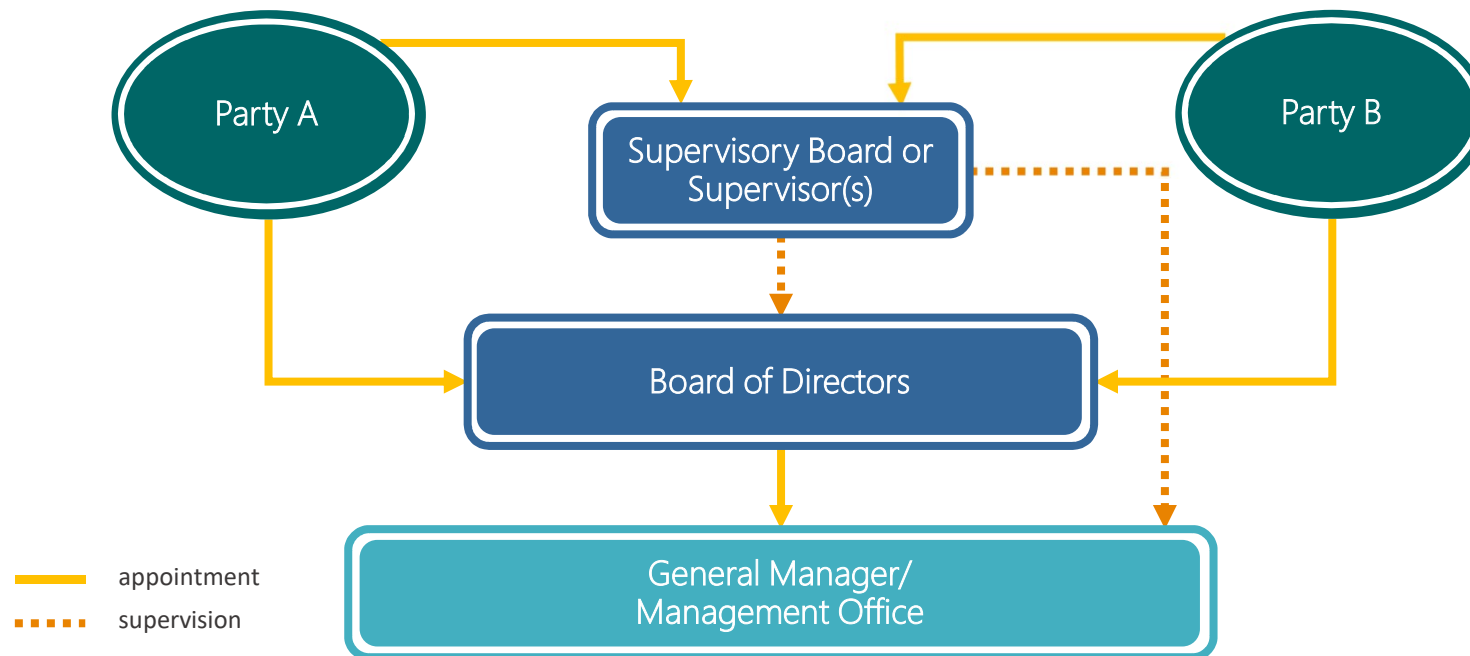


# New Foreign Investment Regime

## Details

### ✦ Corporate Governance of EJV Before FIL

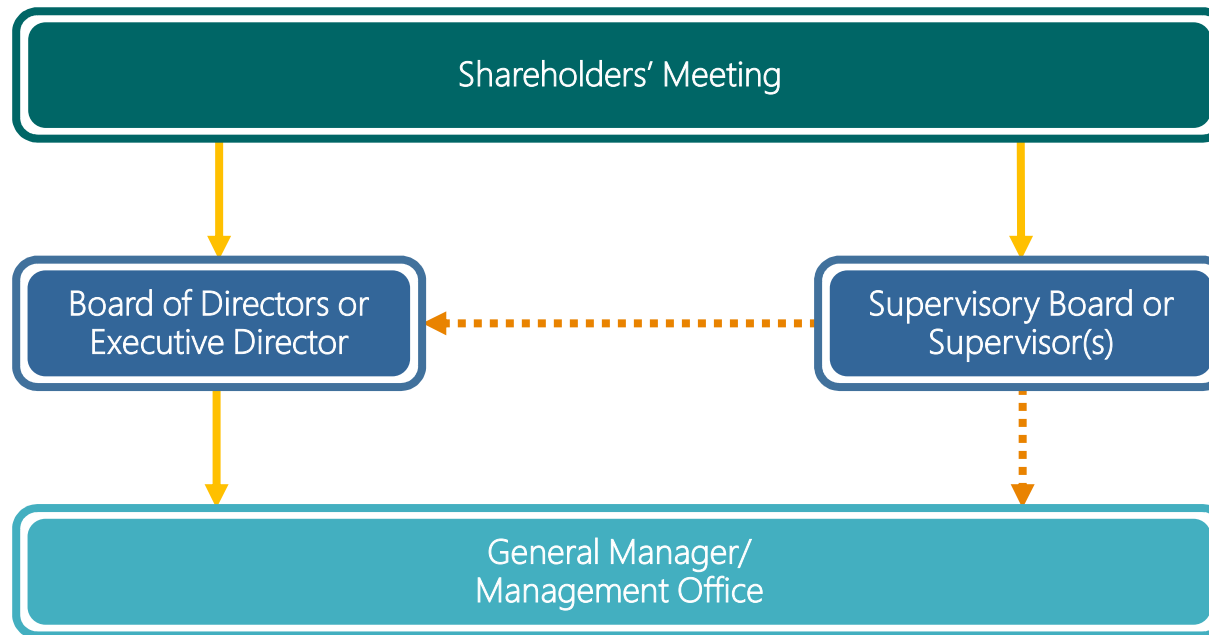
Parties appoint Directors and Supervisor(s)



# New Foreign Investment Regime

## Details

### 📌 Corporate Governance of EJV after FIL



- appointment
- - - supervision

# New Foreign Investment Regime

## Details

### ✦ Main Impact on Companies

#### ▶ Example: EJVs

Matters	Before: according to <i>PRC Sino-foreign Equity Joint Venture Law</i>	After: according to <i>PRC Company Law</i>
Distribution of Profits	In proportion to contribution to the registered capital  (mandatory; different arrangement only possible for CJVs)	In proportion to paid-in contribution to the registered capital, unless otherwise agreed by shareholders
Transfer of equity interests to a third party which is not a current shareholder	Unanimous approval by all other shareholders	Approval by more than 50% of other shareholders, unless otherwise stipulated in Articles of Association
Total Amount of Investment	Currently, in practice, concept of the total amount of investment of a FIE (which is a theoretical amount only which does not need to be actually paid in by shareholders, but which has relevance for financing capacity of a FIE via loans from abroad) still applies and needs to be stipulated in the Articles of Association. <b>Note however:</b> total amount of investment will no longer be registered by MSA	

# New Foreign Investment Regime

## Details

### 📌 Overall Assessment of Changes

#### Good

- Separate legal regime for FIEs abolished
- Important principles confirmed:
  - Equal treatment
  - Participation in government procurement
  - Protection of IP and no forced technology transfer

#### Still Scope for Further Improvement

- Negative List approach not abolished – still no full and unrestricted market access for foreign investors
- Many stipulations still general and vague
- Only part of special regulations for foreign investment abolished, e.g. Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors still exist – leads to uncertainties
- Replacement of recordal by reporting system basically mainly name change

# **PART FOUR**

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## **Impact of COVID 19**

# Foreign Investment

## New Developments due to Impact of COVID-19

- **Central and local governments eager to stabilize foreign investment**
- **Various regulations promise supporting policies, e.g.**



- Circular on Further Expanding Reform and Opening up to Stabilize Foreign Investment during COVID-19 Epidemic of MOFCOM of 1 April 2020



- Several Measures on Implementing the Opinions of the State Council on Further Improving the Use of Foreign Capital of Shanghai Government of 8 April 2020

# Foreign Investment

## New Developments due to Impact of COVID-19

### ✦ Main Content



- MOFCOM will fully support FIEs in resumption of normal production and operation
- MOFCOM will speed up revision of Negative Lists and Catalogue of Encouraged Industries for Foreign Investment – number of items in Negative Lists will be reduced; sectors in which foreign investment is encouraged will be expanded, e.g. advanced manufacturing industries, energy saving and high-tech technologies, environmental protection, telecommunication
- Foreign investment in central, western and north-eastern regions are encouraged
- National Economic and Development Zones to play a driving role in stabilizing foreign investment and foreign trade
- MOFCOM will delegate decision powers further down to Authorities of Commerce at lower levels
- Service information platforms for foreign investment to be created or improved, e.g. [www.fdi.gov.cn](http://www.fdi.gov.cn)
- In Shanghai: qualified FIEs to be allowed to facilitate certain payments from capital account without having to provide supporting documents in advance

# Foreign Investment




## New Developments due to Impact of COVID-19

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### **Important**

-  Some outdated regulations on foreign investment will be revised or abolished
-  FIEs shall enjoy the same preferential policies issued due to COVID-19 as domestic enterprises

### **Assessment**

-  Above regulations mainly serve as comprehensive summary of various policies issued in the past 3 months
-  Are directed to government entities and provide for working plans
-  Announced plans still to be implemented






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> 8,000

Lawyers

> 4,800

Partners

> 1,100

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WORKING ACROSS  
OFFICES

Operating in

70 cities

Across

43 countries

EUR 1.36bn  
turnover for 2018

49 NEW PARTNERS IN 2019, TAKING THE TOTAL TO OVER 1,100

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