

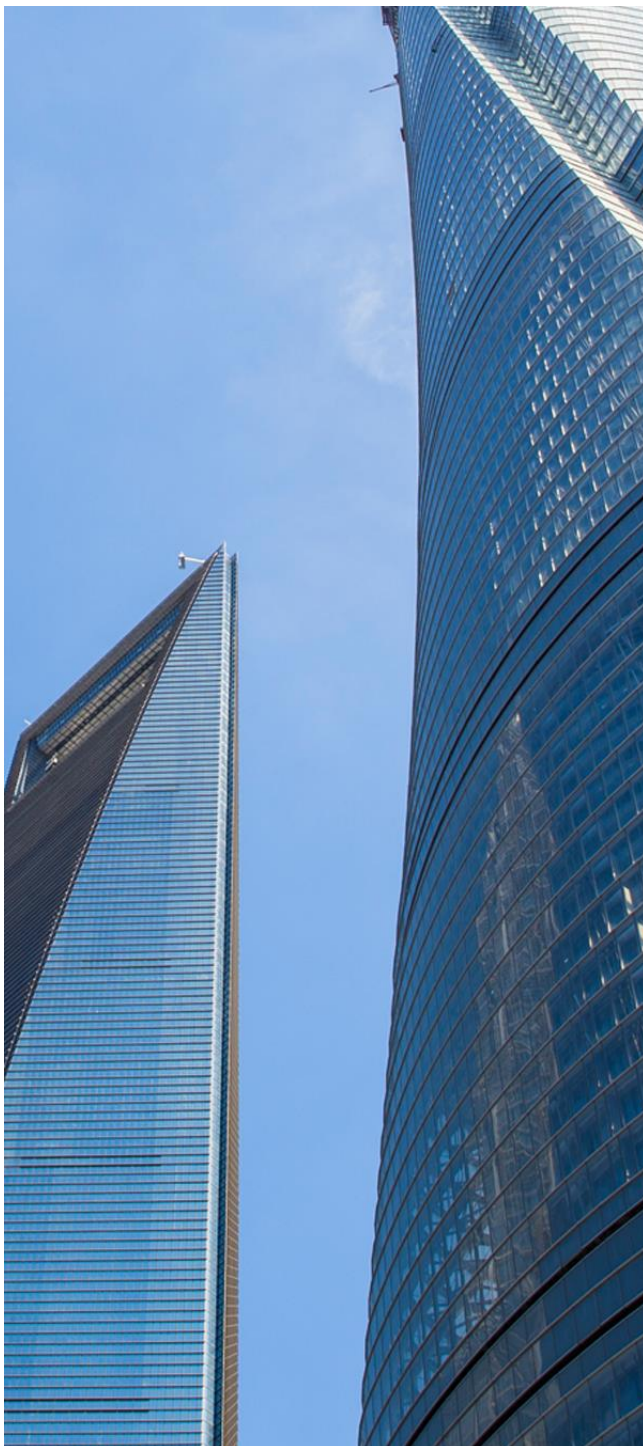
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# China offices

Legal flash

February 2019

*This issue covers legislation published in January 2019*



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## Update on Draft Foreign Investment Law (《外商投资法草案》最新消息)

On January 30, 2019, in an extraordinary meeting, the Standing Committee of the National People's Congress ("NPC") decided on the legislation proposal to submit the Draft Foreign Investment Law (the "Draft") to the NPC to be held next month in Beijing, meaning the Draft could be passed by March 2019.

The Draft is currently open to public comments, which ends on February 24, 2019 (see our January 2019 edition).

We will look out for any updates.

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## Draft Revised Provisions on Prohibition of Monopoly Agreements published for public comments (《禁止垄断协议行为的规定》征求意见)

On January 3, 2019, the State Administration for Market Regulation (the "SAMR") published the Draft Revised Provisions on Prohibition of Monopoly Agreements for public comments, which ends on February 3, 2019 ("Draft Revisions").

In March 2018, the anti-monopoly departments of the National Development and Reform Commission and the Ministry of Commerce merged into the SAMR (previously the State Administration for Industry and Commerce), becoming the unified anti-trust enforcement department under the SAMR, consolidating (i) the enforcement of merger review, (ii) price-related antitrust investigations, and (iii) non-price related investigations.

The Draft Revisions are based on the previous 2010 version and the NDRC's Provisions on Anti-Price Monopoly (2010)

Highlights:

- Establishing a safe harbor rule for horizontal agreements between market competitors with a combined market share of no more than 15% in the relevant market(s), as well as for vertical agreements between operators each with a market share of no more than 25% in the relevant markets that can be presumed not to eliminate or restrict competition.



- > Providing detailed investigation and tip-off clauses as measures to be taken by the SAMR, or the provincial subsidiaries the SAMR authorizes to investigate these cases.
- > Stipulating when it is possible to suspend investigations.
- > Deleting two clauses from the previous 2010 version that i) can exempt first operators from administrative penalties that proactively reported the reason for entering into the monopoly agreement and provided important evidence and thoroughly and actively cooperated during the investigation; and ii) can reduce administrative penalties, or exempt operators from them, if they end monopoly agreements on their own initiative.
- > Adding a clause entitling operators to be granted lighter or mitigated penalties that entered into a monopoly agreement because the administrative authorities and authorized organizations abused their administrative power, and the operator is able to prove it bears no responsibility.

Having consolidated the departments, in 2019, the SAMR has published (and will continue to publish) revisions and draft revisions to combine existing regulations further and to streamline the antitrust administration and enforcement.

Date of issue: January 3, 2019. Deadline for comments: February 3, 2019

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## Draft Amendments to PRC Patent Law published for public comments (《专利法（修正案草案）》征求意见)

On January 4, 2019, the Standing Committee of the National People's Congress published the Draft Amendments to the PRC Patent Law for public comments (the "Draft Amendments"), which ends on February 3, 2019. The current version of the PRC Patent Law dates back to 2008:

- > The Draft Amendments **extend the design patent term** from 10 to 15 years, calculated from the date the patent application is submitted. The Draft Amendments also allow **design patents to have priority** over any application on the same subject filed with the China National Intellectual Property Administration ("CNIPA") within six months **from its application in China**. The Draft Amendments also extend the period to submit copies of patent application documentation from 3 to 16 months when **claiming priority for an invention patent or utility model**.



- > For invention patent applications for **innovative drugs**, to compensate the drug approval process with the National Medical Products Administration, the State Council can decide to **extend the patent term for five years**, given that those innovation drugs seek concurrent approval in China and abroad. However, once approved, the total patent term will not exceed 14 years.
- > The Draft Amendments introduce the **open license regime**, which enables patentees to grant an open license under certain payment terms and standard of royalty by presenting a written statement to the CNIPA, which will then announce the open license. However, during the open license term, the patentees must **not grant exclusive or sole license**.
- > As proposed by the Draft Amendments, the court can grant between RMB 100,000 and 5,000,000 **compensation for patent infringement**, if it is difficult to determine (i) the losses the patentee incurred, (ii) the profits the infringing party made, or (iii) the patent royalties. The current range is between RMB 10,000 and 1,000,000.
- > To calculate losses, the Draft Amendments include a clause that allows the court to **shift the burden of proof** to the alleged infringer to provide account books or data.
- > To reflect the key provisions of the **PRC E-Commerce Law**, the Draft Amendments add a clause of (i) active protection act for patentees to notify network service providers to take necessary measures, including deleting, blocking or cutting links with infringed products, and (ii) passive protection act for authorities to notify network service providers to take the same measures (see our special edition on PRC E-Commerce Law, November 2018).

When enacted, the Draft Amendments will be the fourth revision of the PRC Patent Law, aiming to encourage innovation and crack down on patent infringement in China.

Date of issue: January 4, 2019. Deadline for comments: February 3, 2019



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## Hong Kong SAR and the Mainland sign Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (《关于内地与香港特别行政区法院相互认可和执行民商事案件判决的安排》签署)

On January 18, 2019, the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of Hong Kong SAR was signed between the Supreme People's Court and the Hong Kong SAR Government ("Arrangement"). The Arrangement is the sixth arrangement between Mainland China and Hong Kong SAR on mutual judicial assistance in civil and commercial matters.

Highlights:

- The Arrangement applies to the reciprocal recognition and enforcement of legally effective judgments in civil and commercial matters under the laws of both the Mainland and Hong Kong SAR, excluding non-judicial proceedings and judicial proceedings relating to administrative or regulatory matters. It excludes:
  - bankruptcy (insolvency) cases;
  - cases confirming the validity of an arbitration agreement or setting aside an arbitral award;
  - cases recognizing and enforcing judgments or arbitral awards of other countries or regions;
  - cases on certain matrimonial, family and succession issues;
  - cases on certain IP issues (e.g., patent infringements and royalties);
  - cases on certain marine issues; and
  - preservation measures, injunctions and interim relief orders.
- On the Mainland, legally effective judgments include (i) judgments of the second instance, and (ii) judgments of the first instance where no appeal is allowed or the appeal period has ended. There are no restrictions in Hong Kong SAR.



- > The Arrangement covers both monetary and non-monetary judgments.
- > Before or after accepting an application under the Arrangement, a court of the requested place may impose property preservation or mandatory measures under the law of that place.

The Arrangement will be announced to begin once both sides have completed the necessary procedures, and it will apply to judgments made on and after the start date.

Date of issue: January 4, 2019. Deadline for comments: February 3, 2019

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## Vehicle Purchase Tax Law approved (《车辆购置税法》通过)

On December 29, 2018, the seventh session of the Standing Committee of the 13<sup>th</sup> National People's Congress ("NPC") approved the Vehicle Purchase Tax Law (the "VPT Law"), effective July 1, 2019. The VPT Law will replace the current Interim Measures on Vehicle Purchase Tax (the "Interim Measures"), which took effect on January 1, 2001.

This is another milestone in the Chinese legislative agenda to enforce the statutory taxation principle and modernize its tax system. Owing to the stable implementation of the Interim Measures, only several provisions were amended in the new VPT Law and the tax rate remains unchanged.

Highlights:

- > Taxpayer and tax object

VPT taxpayers are individuals and entities that purchase taxable vehicles for personal use within the territory of China.

Compared to the Interim Measures, the VPT Law removes the appendix of the taxable vehicle scope, and revises it to cover all automobiles, tramcars, trailers and motorcycles with an emission volume exceeding 150 ml.

- > Tax rate and taxable base

The VPT Law maintains the 10% tax rate, but amends the taxable base in the following circumstances:



- For self-produced taxable vehicles, the taxable base should be determined based on the selling price of similar taxable vehicles produced by the taxpayer, excluding VAT.
- For taxable vehicles obtained through a gift, an award or other methods, the taxable base should be determined based on the price stated on the vouchers when purchasing the vehicles, excluding VAT.

### > Tax-exempt vehicles

Compared to the Interim Measures, the VPT Law adds two types of vehicles to the tax-exempt scope:

- national comprehensive fire rescue vehicles with a special number plate for emergency rescue; and
- public auto and electric vehicles purchased by urban public transport companies.

Under the VPT Law, the State Council can provide other circumstances eligible for VPT exemption or reduction, which should be filed with the Standing Committee of the NPC.

### > Special situations

The VPT Law adds further provisions for two exceptional situations:

- When vehicles that were eligible for tax exemption or reduction no longer qualify for that exemption, taxpayers should pay VPT before transferring those vehicles or changing their registration.

It also states that the taxable base in this situation should be in line with the taxable base determined in the first declaration, with a 10% deduction for each year.

- When the vehicles that have been charged VPT are returned to their manufacturers or sales companies, the taxpayers can apply for a tax refund from the tax authorities.

The VPT refund amount will be calculated based on the tax payment amount with a 10% deduction for each year, starting from the date the tax was paid and ending on the date the application for the tax refund was submitted.

Date of issue: December 29, 2018. Effective date: July 1, 2019



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## Farmland Use Tax Law approved (《耕地占用税法》通过)

On December 29, 2018, the seventh session of the Standing Committee of the 13<sup>th</sup> NPC approved the Farmland Use Tax Law, effective on September 1, 2019. The Farmland Use Tax Law will replace the current Interim Measures on Cultivated Land Occupation Tax, which took effect on January 1, 2008.

The tax subjects of the farmland use tax are individuals and entities that build structures (or non-agricultural structures) on farmland.

Farmland use tax will only be collected once, and it will be based on the farmland the taxpayers occupy, multiplying the applicable tax rate.

The Farmland Use Tax Law maintains the original tax rate ranges. The regional governments can propose the applicable rates within the prescribed ranges based on the average farmland per capita and the economic development status in the region, which must be (i) approved by the same level Standing Committee of the People's Congress, and (ii) filed with the Standing Committee of the NPC.

The Farmland Use Tax Law also provides an average tax rate table for each region, and the average tax rate that each region applies must not be lower than the rates provided in the table.

Date of issue: December 29, 2018. Effective date: September 1, 2019

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## Preferential tax policies for small and low-profit enterprises updated (小微企业普惠性税收减免新政策出台)

To reduce the tax burden on small and low-profit enterprises, and to support their development, on January 17, 2019, the Ministry of Finance and the State Administration of Taxation jointly released tax circular Cai Shui [2019] No. 13 ("Circular 13"), which provides a new round of preferential tax policies for small and low-profit enterprises.

Circular 13 replaced previous tax circulars Cai Shui [2017] No.76 on preferential value-added tax ("VAT") policies and Cai Shui [2018] No.77 on preferential enterprise income tax ("EIT") policies, effective from January 1, 2019, to December 31, 2021.

Highlights:





- > VAT exemption applies to small-scale VAT taxpayers with a monthly turnover of up to RMB 100,000 (versus the previous monthly turnover of up to RMB 30,000).
- > The tax reduction applies to small-scale VAT taxpayers on resource tax, city maintenance and construction tax, real estate tax, urban land use tax, stamp duty, farmland use tax, and education and local education surcharges.

Provincial governments can set the tax reduction rate (within 50% of the tax amount) based on local conditions and economic needs.

- > New EIT reduction rates applying to small and low-profit enterprises:

Taxable income	Tax reduction rate	Tax rate	Effective tax rate
Up to RMB 1 million	25%	20%	5%
From RMB 1 million to RMB 3 million	50%	20%	10%

Circular 13 also modifies the criteria for qualified small and low-profit enterprises that:

- do not engage in industries that are restricted or prohibited by the State;
- have an annual taxable income of up to RMB 3 million (versus the previous income of up to RMB 1 million);
- have up to 300 employees (versus the previous limit of up to 100 employees for manufacturing enterprises, and up to 80 employees for other enterprises); and
- have total assets of up to RMB 50 million (versus the previous limit of up to RMB 30 million for manufacturing enterprises, and up to RMB 10 million for other enterprises).

Date of issue: January 1, 2019. Effective date: January 1, 2019 – December 31, 2021



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