

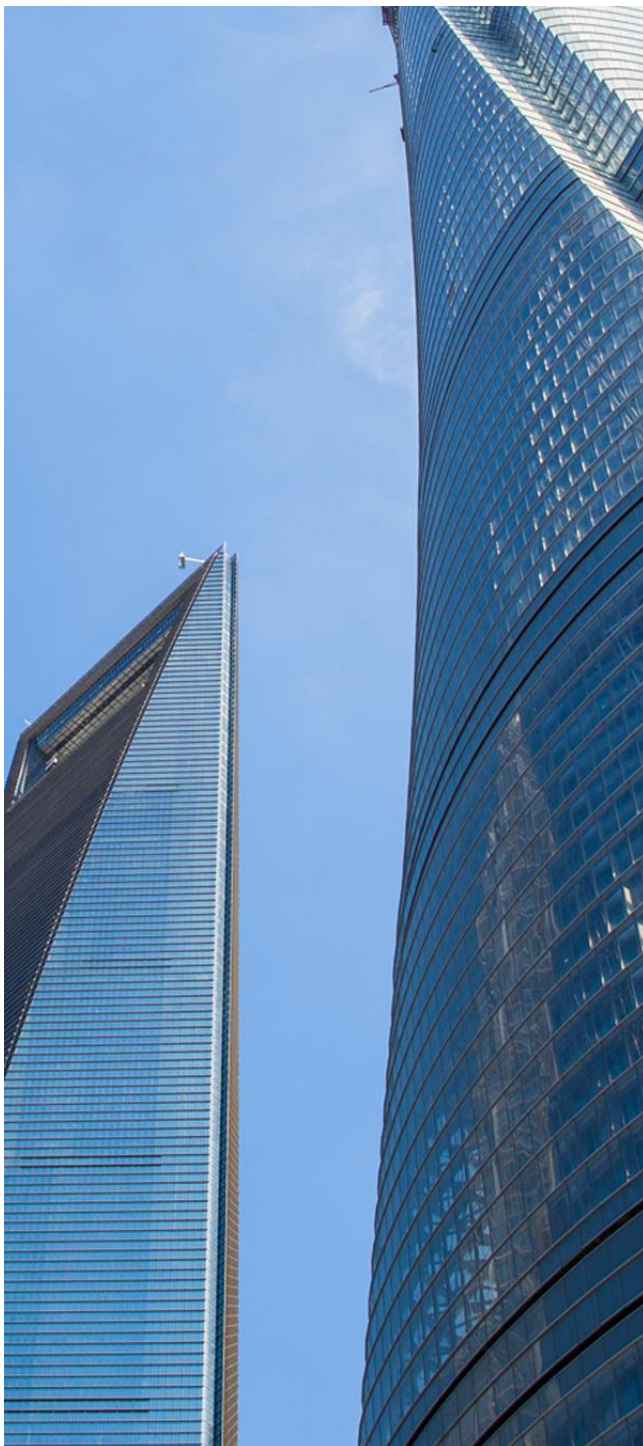
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# China offices

Legal flash

January 2020

*This issue covers legislation published in December 2019*



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## Index

- > Implementing Regulations for Foreign Investment Law issued
- > Supreme People's Court interpretation of several issues concerning the application of the Foreign Investment Law of the People's Republic of China issued published
- > Draft Civil Code of the People's Republic of China published for public comment
- > Methods for identifying apps' unlawful collection and use of personal information released



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## Implementing Regulations for Foreign Investment Law issued (外商投资法实施条例发布)

On November 1, 2019, a draft of the Implementing Regulations was issued by the Ministry of Justice for public comment (the "Draft"). For analysis of the Draft, see our Legal Flash of November 2019 ("Public comment sought on the Implementing Regulations of Foreign Investment Law").

On December 31, 2019, the State Council formally issued the Implementing Regulations for the Foreign Investment Law of the People's Republic of China (the "Implementing Regulations") revising the Draft and effective January 1, 2020.

Important changes made to the Draft:

➤ Foreign-invested partnership in restricted sectors

The negative list of foreign investment contains several restricted sectors where the percentage of equity a foreign investor can hold is limited. Under the current regulations, a foreign investor that intends to invest in these restricted sectors is not allowed to establish a foreign-invested partnership. However, under the Draft, foreign-invested partnerships are allowed, provided the percentage of voting rights held by the foreign investor in the foreign-invested partnership does not exceed the maximum percentage of equity shares allowed.

The Implementing Regulations are silent on this issue, so foreign-invested partnerships are still forbidden in the restricted sectors where there is a limit on the proportion of equity held by a foreign investor.

➤ Transitional arrangements of existing foreign-invested enterprises (FIEs)

Both the Draft and the Implementing Regulations set out a five-year transition period for FIEs to adapt to the organizational forms and governance structure under the Company Law. The Draft provides a six-month grace period, so FIEs must file the changes with the company registration authorities by July 1, 2025.

However, the Implementing Regulations have brought forward the deadline by six months, to January 1, 2025, and FIEs failing to file the changes will be barred from registering any other



changes with the company registration authorities and the situation will be disclosed to the public.

➤ Arrangements under EJV and CJV contracts

The Implementing Regulations provide that, after the organizational forms and the governance structure etc. of the existing FIEs are duly adjusted pursuant to the law, certain arrangements under contracts between the original parties of the equity joint ventures (EJV) and cooperative joint ventures (CJV), such as those concerning the transfer of equity or interests, profit distribution and the distribution of the remaining assets between the original parties of the EJV and CJV may still be valid.

This contrasts with the Draft, under which adapting to the new organizational forms and governance structure in accordance with the law is not a prerequisite to keep such agreements valid, and such agreement may be valid only within the existing business term of the FIEs.

➤ Applicability to the reinvestment by FIEs

Under the Implementing Regulations, when a FIE invests in China, the provisions of the Foreign Investment Law and the Implementing Regulations will apply, and the FIEs' reinvestments in China are subject to the negative list management.

Importantly, the Implementing Regulations expressly provide that the Foreign Investment Law and the Implementing Regulations will prevail over the conflicting regulations on foreign investments made before January 1, 2020.

In fact, to guarantee the full implementation of the Foreign Investment Law, particularly the principle of equality between domestic and foreign investment, the government is taking steps to abolish the conflicting rules and regulations. For example, on December 26 and 28, 2019, MOFCOM issued, respectively, the Announcement on Abolishing Certain Regulatory Documents (MOFCOM Announcement [2019] No. 59) and the Decision on Abolishing Certain Regulations (MOFCOM Order [2019] No. 3) to abolish 6 department regulations of the State Council and 56 regulatory documents that were in conflict with the Foreign Investment Law.



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## Supreme People's Court interpretation of several issues concerning the application of the Foreign Investment Law of the People's Republic of China published (最高人民法院关于适用《中华人民共和国外商投资法》若干问题的解释发布)

On December 26, 2019, the Supreme People's Court issued its interpretation of several issues concerning the application of the Foreign Investment Law of the People's Republic of China (the "Judicial Interpretation") effective January 1, 2020, the same day the Foreign Investment Law came into effect.

After the Foreign Investment Law came into effect, the Ministry of Commerce ("MOFCOM") or its local counterparts are no longer empowered to approve investment contracts in the course of foreign investment in China. In line with this change, the Supreme People's Court issued the Judicial Interpretation to clarify that the validity and effectiveness of investment contracts will not be subject to MOFCOM approval.

### Highlights

#### > Definition of investment contracts

According to the Judicial Interpretation, investment contracts will refer to those entered into for direct or indirect investments in China by foreign investors, i.e., foreign individuals, enterprises or other organizations, including contracts for establishing foreign investment enterprises, share transfer contracts, equity transfer contracts, contracts for transfer of assets or other similar interests and contracts for new projects.

#### > Applicability of the rules

The rules for determining the validity and effectiveness of investment contracts set out under the Judicial Interpretation will apply to investment contract disputes and those contractual disputes arising from, e.g., foreign investors acquiring interests as a result of a gift, division of assets, merger or division of enterprises.



- Rules on the validity and effectiveness of investment contracts:
- For an investment contract in sectors not on the negative list of foreign investment, including those contracts that were signed before the Foreign Investment Law came into effect while the People's Court has not made an effective judgment until the effectiveness of the Foreign Investment, where a party concerned claims that the investment contract is void or ineffective because it has not been approved by or registered with the administrative authorities, the People's Court will not uphold the claim.
  - For an investment contract in the prohibited sectors of the negative list of foreign investment, where a party concerned claims that the investment contract is void, the People's Court will uphold the claim.
  - For an investment contract in the restricted sectors of the negative list of foreign investment, where a party concerned claims that the investment contract is void because of breach of the special administrative measures for restricted access of foreign investment, the People's Court will uphold the claim. However, if the party concerned takes necessary corrective measures to meet the requirements of the special administrative measures for access before an effective judgment is issued, the People's Court will uphold the claim that the investment contract is valid.
  - For an investment contract that failed to comply with the requirements of the negative list of foreign investment when it was signed, the People's Court will still uphold the claim that the contract is valid if the relevant prohibitions or restrictions are lifted by any subsequent adjustment to the negative list before an effective judgment.

Date of issue: December 26, 2019. Effective date: January 1, 2020

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### **Draft Civil Code of the People's Republic of China published for public comment (《中华人民共和国民法典（草案）》征求意见)**

The Draft Civil Code of the People's Republic of China ("Draft Civil Code" and "PRC") was deliberated at the recently held Fifteenth Session of the Standing Committee of the



Thirteenth National People's Congress (“NPC”). On December 28, 2019, the full text of the Draft Civil Code was published for public comment on the NPC’s website.

The Draft Civil Code consists of general provisions and six sections on property, contracts, personality rights, marriage and family, inheritance and tort.

The Draft Civil Code is scheduled to be submitted to next year's annual session of the NPC for deliberation. If passed, a unified civil code will substitute the current Marriage Law, Law of Succession, General Principles of the Civil Law, Adoption Law, Security Law, Contract Law, Real Right Law, Tort Law and General Provisions of the Civil Law.

The Draft Civil Code is open for public comment until January 26, 2020

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### **Methods for identifying apps’ unlawful collection and use of personal information released (APP 违法违规收集使用个人信息行为认定办法公布)**

On November 28, 2019, the Secretariat of Cyberspace Administration of China, the General Office of the Ministry of Industry and Information Technology, the General Office of the Ministry of Public Security and the General Office of the State Administration for Market Regulation (the “Four Departments”) jointly issued the Methods for Identifying Apps’ Unlawful Collection and Use of Personal Information (the “Methods”). The Methods became available to the public on December 30, 2019.

App’s collection and use of personal information is subject to the general rules under the Cybersecurity Law, E-commerce Law and the Law on the Protection of the Rights and Interests of Consumers. Before the Methods were released, the *Self-Assessment Guide for Illegal Collection and Use of Personal Information through Apps* (the “Guide”) issued by the Four Departments in March 2019 and the *Information Security Technology - Personal Information Security Specifications*, a recommended national standard (the “Specifications”) were the two references for App operators to ensure compliance.

Drafted based on the Guide and the Specifications, the Methods define the practices of App operators when collecting and using personal information that may constitute the following specific violations:



- > Failure to disclose the rules for collecting and using personal information.
- > Failure to expressly state the purpose, manner and scope of collecting and using personal information.
- > Collecting and using personal information without users' consent.
- > Collecting personal information irrelevant to the services offered, violating the principle of necessity.
- > Providing personal information to others without consent.
- > Failure to provide the function of deleting or correcting personal information as required by law or failure to disclose complaint and reporting methods.

The Methods aim to provide more specific references for law enforcement authorities to identify Apps' violations when collecting and using personal information and for App operators to conduct self-checks and self-corrections.



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