



THE US-CHINA BUSINESS COUNCIL

美中贸易全国委员会

US-China Business Council Comments
on the
People's Republic of China's Foreign Investment Law Implementing Regulations
(Draft for Comment)

November 6, 2019

On behalf of the more than 200 members of the US-China Business Council (USCBC), we appreciate the opportunity to engage with the Ministry of Justice (MOJ) with regards to the draft Foreign Investment Law Implementing Regulations (“draft regulations”). USCBC represents companies with significant operations in China, and as such, has a strong interest in the continued advancement of China’s economic reform initiative by allowing the market to play a decisive role in the economy. We are pleased that MOJ is taking significant steps to reform China’s foreign investment regime. These reforms are essential for China’s future economic development and can play an important role in spurring more foreign investment.

The MOJ’s draft regulations contain many positive elements. We are encouraged to see the inclusion of various mechanisms for strengthening IP protection for foreign-invested enterprises (FIEs) and foreign investors. While the provisions that address forced technology transfer set up the foundation to develop a system that protects trade secrets and ensures administrative measures will not be used to coerce unwanted transfers of technology, the determining factor will be how these measures are implemented. We look forward to further positive developments on these fronts.

While the draft regulations take positive steps towards creating a domestic business environment attractive to foreign investment, there is room for improvement. The draft regulations contain vague language on several issues of critical importance to our member companies, leaving key concerns only partially addressed. In particular, we would like to highlight the following suggestions:

- **Clarify the national security review mechanism:** Our member companies were very interested in further clarification of the foreign investment national security review mechanism included in Article 35 of the *Foreign Investment Law*, but no further clarification was provided in the draft regulations. We encourage MOJ to add further detail to the implementing regulations to on the security review process that establishes narrow, clearly-defined national security review criteria that balance the need for an open foreign investment environment and national security concerns. We also suggest the implementing regulations establish a rules-based mechanism for appealing national security review decisions.
- **Clarify important terms:** As suggested in our previous comments to the National People’s Congress on draft versions of the FIL, the implementing regulations should clearly define all essential terms, including “foreign investors” and “indirect involvement.” For example, the term “other investors” from Article 2 of the FIL remains undefined, which leaves uncertainty over whether Chinese natural persons

can establish new FIEs with foreign investors. The use of such imprecise phrasing allows room for misunderstanding and misinterpretation that could otherwise be avoided.

- **Ensure a public comment period:** We encourage the implementing regulations to increase opportunities for foreign participation in the public comment process for new laws and regulations related to foreign investment for a period of no less than 30 days, and ideally at least 60 days.
- **Expedite drafting of related measures:** We are pleased to see that the State Administration for Market Regulation (SAMR) will be responsible for issuing further clarification regarding the information reporting system and the five-year transition period for company formation. We encourage SAMR to release these related measures as soon as possible to ensure a smooth transition, and to include a dedicated public comment period. Sharing a public timetable for publishing such information would help improve transparency.
- **Consolidate information reporting systems:** We are pleased to see that the government will make efforts to ensure that the existence of multiple information reporting systems does not pose an undue burden for FIEs. However, we encourage implementing regulations to consolidate the existing departmental information reporting systems into a single unified platform.
- **Level the government procurement playing field:** Further clarity on the definition of “domestic product” is needed to ensure the government procurement process is fair for foreign invested firms. We encourage the implementing regulations to establish legal mechanisms and remedies for foreign invested firms who are unfairly denied access to the government procurement process.
- **Increase openness and transparency in standards setting:** The draft regulations provide some additional clarification about the ability of FIEs to participate in different stages of standards drafting, but leave many questions about their rights and responsibilities in standards setting unanswered. To improve transparency in standards setting, we suggest that China create a designated unified channel to make draft versions of all standards, standards-related policies, and regulations available for public comment for a period of at least 60 days.

In addition to the key points raised above, we are pleased to address these and other concerns in greater detail below.

Detailed Article-by-Article Comments

Chapter I: General Principles

Article 2

Comments:

The original text emphasizes improving the foreign investment environment, but what foreign investors need is improvement of China's overall business environment, including greater mechanisms for protection and enforcement of intellectual property rights, and equal enforcement of laws and regulations.

Suggestions:

We recommend revising Article 2 to the following:

The State shall improve relevant policies and measures, continuously increase its opening up to the outside world, optimize **the business environment**, and encourage and actively promote foreign investors to invest in mainland China.

Article 3

Comments:

1) Several terms and concepts related to "foreign investment" are not adequately defined, including the terms "foreign investors," "other organizations", "indirect foreign investment", "other equivalent interest", other ways of investment provided in Article 2 of the FIL, and whether foreign investment using a VIE structure is expressly covered under FIL etc.

2) While this article clarifies that Chinese natural persons can be regarded as "other investors," this is inconsistent with the Chinese constitution, which does not stipulate that Chinese natural persons can form joint ventures with foreign companies.

Specifically, Article 18 of the Chinese constitution states that: "the People's Republic of China allows foreign enterprises and other economic organizations or individuals to invest in China in accordance with the laws of the People's Republic of China and to conduct various forms of economic cooperation with Chinese enterprises or other economic organizations."

Suggestions:

1) We would like further clarification on the following terms and issues:

- "Foreign investors";
- "Other organizations";
- "Indirect foreign investment";
- "Other equivalent interest";
- "Other ways of investment prescribed by law, regulation and the State Council"; and
- Whether foreign investment using a VIE structure is still expressly covered under FIL.

Article 4

Comments:

We appreciate that the draft regulations provide further clarification on the definition of “new projects” mentioned in the third item under the second paragraph of Article 2 of the FIL. However, this definition of “investment in a new project” covers foreign investment in a form other than by new establishment or merger and acquisition, which is still very general and it is unclear what specific types of projects will fall within this category.

Furthermore, indirect investment could be either overseas transactions that result in the transfer of the control of the domestic enterprise to foreign investors or reinvestment in China by FIEs who enjoy control over domestic enterprises. We hope that the implementing regulations can clarify whether either or both will be deemed indirect investment.

It is also unclear how foreign investment that solely relies on contractual relationships can use foreign investment management systems (such as the information reporting and security review systems) given that “investing in new projects” currently excludes equity participation.

Suggestions:

We suggest the implementing regulations provide further guidance and clarification on what “investment” in a new project means. Similarly, the term “specific projects” could use further clarification.

With these points in mind, we suggest revising Article 4 to the following:

(1) Foreign indirect investment within the territory of China, mentioned in the second paragraph of Article 2 in the Foreign Investment Law, refers to the investment of foreign-invested enterprises within the territory of China. The relevant administrative measures shall be separately prescribed by the relevant competent authorities of the State Council in accordance with the principles of the Foreign Investment Law and these Regulations.

(2) Investing in new projects within the territory of China, mentioned in the third item under the second paragraph of Article 2 in the Foreign Investment Law, refers to foreign investors investing in projects that are ready for construction but have not yet commenced within the territory of China, but not establishing foreign-invested enterprises or acquiring shares, equity, property, or other similar rights and interests of enterprises within the territory of China.

We also recommend clarifying how foreign investment that relies solely on contractual relationships will fit into the foreign investment management system.

Article 5

Comments:

1) In this scenario, the details around registration are vague and unclear. Furthermore, the wording leaves potential for disparity in treatment between foreign and domestic enterprises.

2) The division of authority between State level and local level is also unclear, e.g. under what circumstances does the market regulation department of the State Council handle the

registration of FIEs and under what circumstances does the local market regulation department handle the registration of FIEs.

Suggestions:

1) We suggest that the implementing regulations clarify the specific norms and regulations applicable to registration, as well as to reiterate that domestic and foreign invested enterprises will receive identical treatment. To this end, we suggest the following revisions to Article 5:

The registration of foreign-invested enterprises shall be handled by the market regulation department of the State Council or the market regulation department of the local people's government authorized by the State Council **according to the regulations on the administration of enterprise registration.**

2) Additionally, we would also recommend including detailed rules on the division of authority between the market regulation department of the State Council and local level, so that foreign investors do not have to consult and check on a case-by-case basis.

Article 7

Comments:

1) This Article only provides a general principle. It is unclear which set of legal demands take priority, and there is potential for the State to defer to domestic laws over international treaties and agreements.

2) The scope of international treaties and agreements that China has concluded or participated in is quite large. A comprehensive unified platform accessible to enterprises would be conducive to better understanding.

Suggestions:

1) To align with the general legal principle accepted in Chinese laws, we recommend revising Article 7 to the following:

The State protects the investment, income, and other legitimate rights and interests of foreign investors in mainland China in accordance with laws, regulations, and international treaties and agreements it has concluded or participates in. **In the event of conflict between Chinese laws and regulations and relevant international treaties and agreements, the international treaties and agreements shall prevail.**

2) We suggest the implementing regulations call for the full listing of all related international treaties and international agreements on a comprehensive uniform platform so that enterprises can get access to all documents.

Article 8

Comments:

1) The complaints work of foreign-invested enterprises is an important task. This work will directly affect foreign business' stability, long-term development, and business confidence in China.

2) Excluding exceptional cases, most foreign investors establish new investments by registering foreign-invested enterprises or through a merger or acquisition. According to current rules, MOFCOM is responsible for the regulation of foreign companies. NDRC is responsible for managing foreign-invested investment projects. The draft regulations do not specify if these regulators will continue in these roles.

Suggestions:

1) We recommend revising Article 8 to the following:

The State Council commerce authorities, investment authorities, and other relevant departments shall, in accordance with their division of labor, cooperate closely and coordinate with each other to jointly **handle the complaints** and conduct the promotion, protection, and management of foreign investment.

Local people's governments at or above the county level shall strengthen the organization and leadership of the promotion, protection, **handling of complaints**, and management of foreign investment; support and supervise relevant departments to carry out foreign investment promotion, protection, and management in accordance with laws, regulations, and division of labor; and coordinate and resolve major problems in the promotion, protection, **handling of complaints**, and management of foreign investment.

2) To ensure consistency in foreign investment management, we recommend the implementing regulations clarify that MOFCOM will remain responsible for the management of foreign investors and NDRC for managing foreign investment projects. If other regulators will manage foreign investment in the future, we recommend that scope of responsibilities and regulatory authority be clearly defined.

Chapter II: Investment Promotion

Article 10

Comments:

1) The draft's language is vague as to how these channels will be managed and how feedback will be incorporated, and does not require the government to ensure these channels are open to all FIEs.

2) The language around the publishing of normative documents is vague, for example the term "timely manner". Furthermore, there is no specification as to what languages the documents will be published in.

3) The draft regulations do not address the suggestion from our previous submission to require a single, unified public channel for collecting feedback open for at least 60 days.

4) The *Notice on Fully Hearing the Opinions of Enterprises, Industry Associations, and Chambers of Commerce in the Process of Formulating Administrative Regulations and Administrative Normative Documents*—issued by the General Office of the State Council—should be quoted here. The spirit of the *Implementing Opinions on Establishing and Improving Entrepreneur Participation in Policy-making Mechanisms for Enterprises* should be reflected in the text of Article 10 as well.

Suggestions:

1) We recommend further clarification as to the management structure of the feedback channels, along with further details on how the feedback will be incorporated. Similarly, the implementing regulations should require that these channels are open to all FIEs. Also, we recommend clarifying what the “appropriate means” would be for providing feedback.

2) We suggest that normative documents should be published within a specified number of days after their promulgation. There should not be any restrictions against the public accessing of such publications, such as subscription, membership, and other similar measures. We also suggest specifying that all laws, regulations, rules, normative documents, and court judgements related to foreign investment should be published in both Chinese and English.

3) We recommend the implementing regulations create a designated unified channel to make draft versions of all policies (national, industry, local, et. al.) set by government or government-affiliated organizations available to domestic, foreign-invested, and foreign-based companies for public comment for a period of no less than 30 days and ideally at least 60 days. Procedures for how FIEs and foreign chambers of commerce should participate in the consultation and provide comments or opinions should be specified as well.

We also recommend adding language that requires all non-governmental bodies and organizations involved in drafting policies and guidelines to increase transparency by making draft versions of these documents freely available for public comment by all stakeholders regardless of nationality.

4) To ensure that a unified channel is provided and that Article 10 aligns with previous documents issued by the State Council and NDRC, we recommend revising Article 10 to the following:

根据国务院办公厅《关于在制定行政法规规章行政规范性文件过程中充分听取企业和行业协会、商会意见的通知》，外国投资者、外商投资企业、外国商会、行业协会平等参与政府及其有关部门起草有关的涉企法律、法规、规章、规范性文件。政府及其有关政策起草部门应当深入调查研究，遵守国际规范和原则，在政策形成各个阶段，采取各种有效的方式，听取包括外商投资企业以及外国商会等方面的意见。涉企政策在制定过程当中，应邀请政策涉及行业及企业，通过采用书面征求意见、召开座谈会、论证会等方式，广泛听取外商投资企业以及外国商会等方面的意见。对于相对集中或者涉及外商投资企业重大权利义务问题的意见，政策起草部门要认真对待涉企外资的诉求并给予充分考虑，不得拒绝接受外商投资企业的合理诉求和建议。当利益相关方有重大利益不一致时，政府有关部门应及时组织包括外资企业、外国商会在内的利益相关方进行更加深入的论证。确属难以采纳的，政策起草部门应立即向上一级国家政

府机关汇报，请求讨论并形成意见；此后应及时将不予采纳意见的原因、处理意见，处理依据等信息，以文字形式通过正式渠道予以反馈。

国家规范性文件应当通过政府公报、政府网站、[全国一体化在线服务平台](#)等依法及时予以公布。未经公布的不得作为实施外商投资管理的依据。

Article 11

Comments:

1) We appreciate the creation of a “one-stop shop” via the national integrated online platform where all the publication will be made available, but it does not appear to be a platform meant to solicit comments and feedback but rather solely for disseminating information.

2) Separately, due to lack of detailed definition of responsibilities, there is risk of competency overlap between different authorities.

3) It remains unclear what “consulting and guidance services” will be provided for foreign investors and FIEs and how they will be provided.

Suggestions:

1) We suggest making it clear that any documents or policies that are not published on the national integrated online platform shall not be used as the basis for the implementation of foreign investment management.

Sectoral and regional guidelines referred to under Article 21 should also be published on the platform.

2) We recommend clarifying which ministry or agency is responsible for providing which services to further define the Foreign Investment Service System and clarify how it is implemented.

3) We would appreciate additional clarity on what “consulting and guidance services” include and what channels will be available to foreign investors and FIEs to utilize these services.

Article 12

Comments:

1) We appreciate the inclusion of specificity around the term special economic zone. Still, more clarity could be added due to the variety of different special economic zone policies within China.

2) It is unclear what promoting experimental policies and measures in other regions or across the country “according to actual conditions” means. It seems that the government has the sole discretion to decide whether experimental policies and measures should be promoted in other regions or across the country.

Suggestions:

1) We suggest the implementing regulations further clarify what the term “special economic zone” refers to, especially in relation to other terms such as economic development zone, free trade zone, and free trade port.

2) We recommend deleting “according to actual conditions” in the second paragraph of Article 12.

Article 13

Comments:

1) The phrase “the needs of national economic and social development” is too general and vague.

2) The second paragraph mentions that foreign investors in specific industries may enjoy preferential treatment, however details on what that treatment is or what would trigger such treatment is missing. Adding to the confusion is lack of clarity on whether the remaining administrative regulations, departmental rules, and normative documents based on the three laws that the FIL will abolish will still remain effective.

3) The purpose of the Catalogue of Industries Encouraged for Foreign Investment is unclear. Does it entail that all foreign investors and FIEs listed in the Catalogue will enjoy preferential treatment, whereas foreign investors and FIEs in industries not covered by the Catalogue will not?

4) These measures could be implemented, but the bottom line is that investment activities are market behaviors. Thus, the government should clarify the boundaries with the market and clarify that foreign investors and foreign-invested enterprises should have the right to choose their investments in the relevant industries, fields, and regions.

Suggestions:

1) We suggest either offering further clarification or else deleting the phrase “in accordance with the needs of national economic and social development” at the beginning of the Article 13.

2) We suggest further clarification regarding what industries and requirements will allow for preferential treatment for foreign firms, as well as the details of what that treatment will entail.

Specifically, we recommend prioritizing rectification of existing foreign investment regulations in the fields of business, development, industry and commerce, foreign exchange, and finance and taxation.

3) Since the industries where foreign investors are restricted or prohibited to invest in are fully included in the Negative List, foreign investors should be free to invest in all other industries, and should receive the same treatment as domestic enterprises.

4) We recommend revising Article 13 to the following:

The State shall, in accordance with the needs of national economic and social development, formulate the Catalogue of Industries Encouraged for Foreign Investment, and encourage and guide foreign investors and foreign-invested enterprises to invest in specific industries, fields, and regions. **Foreign investors and foreign-invested enterprises should have the right to choose their own investments in the relevant industries, fields, and regions.** The Catalogue of Industries Encouraged for Foreign Investment shall be formulated by the relevant investment authorities of the State Council in conjunction with the relevant commerce authorities of the State Council and relevant local people's governments, and shall be published and implemented after being approved by the State Council.

Article 14

Comments:

It is unclear if the reference to “preferential treatment” has the same meaning as that under Article 13?

Suggestions:

Please clarify whether the reference to “preferential treatment” is the same as that under Article 13.

Article 15

Comments:

While it is positive that the draft emphasizes equal treatment in standards setting, FIEs continue to face numerous challenges in participation:

Transparency: The draft outlines commitments that could improve the ability of foreign companies to participate in agenda setting for standards projects and provide input in the drafting stage, which member companies have identified as areas of difficulty. However, companies also cite challenges with public comment periods being too short to provide meaningful technical input and difficulty locating relevant standards.

Participation in government-led standards setting: Although China has previously committed to allow FIEs equal participation in standards development activities (e.g., in 2017 State Council Circular No. 5 and the FIL itself), FIEs are not consistently permitted full participation in China’s standards development process, including as full voting members of technical committees responsible for standards setting. For example, despite no rules existing to bar their participation, FIEs are unable to participate in certain TC260 working groups.

Due process: In many sectors, foreign companies' products and technologies represent a small proportion of the market, yet have a higher level of innovation and quality than their domestic competitors. Therefore, representation on technical committees only by headcount does not give appropriate weight to those participants with the strongest capability for drafting standards.

Social organization standards: The circumstances under which FIEs can participate in the formulation of social organization standards remains unclear. For example, if an FIE is not a

member of a trade association or other social organization, can it still participate in their standards setting initiatives?

Enterprise standards: Sometimes the legal validity of enterprise standards is not officially recognized by authorities. Therefore, during quality checks, some departments simply apply national standards, which the companies do not follow or use when their enterprise standards are higher. Such practices run the risk of misleading the public on product quality and could lead to unnecessary reputational damage for companies.

Suggestions:

We believe that the following suggestions would help FIE's ability to participate in China's standards setting on a more level playing field, benefitting all market participants and China's industrial development by creating more balanced, higher-quality standards:

Transparency: We recommend that China create a designated unified channel to make draft versions of all standards (national, industry, and other types of standards) and standards-related policies and regulations set by government or government-affiliated organizations available to domestic, foreign-invested, and foreign-based companies for public comment for a period of at least 60 days. It is challenging for companies to coordinate between different R&D and engineering teams internally to provide high-quality technical input in a short timeframe, and these challenges are compounded when draft standards and comments must be translated to and from Chinese.

Additionally, it would greatly increase the opportunities for foreign investors to engage in the standard setting process to add language that requires all non-governmental bodies and organizations that set standards and standards-related policies and guidelines to increase transparency by making draft versions of these documents freely available for public comment by all stakeholders regardless of nationality.

Due process: We recommend regulators adhere to WTO principles on standards-setting to ensure the process is open, transparent, impartial, and consensus-driven. Similar to international standards setting processes, China's domestic processes should be governed by strong rules that ensure the fair consideration of proposals based on their technical merits.

Permitting FIEs to participate in standards-setting activities on an equal footing with their domestic counterparts would promote a more robust standards-setting process that ultimately results in higher-quality standards that can aid industrial development.

Social organization standards: Please clarify under what circumstances FIEs can participate in the formulation of "social organization standards." In particular, if FIEs do not join any trade associations or other social organizations, can they still participate in the formulation of relevant social organization standards?

Enterprise standards: We suggest that in rules regarding FIE participation in standards setting, language should be added to specify that "the legal validity of enterprise standards employed by legally registered FIEs should be recognized."

Finally, the term “work unit” is vague and appears multiple times throughout the text of the draft regulations. We suggest that this term is clearly defined to include all government agencies, party bodies, state-owned enterprises, public institutions, and other relevant organizations.

Article 16

Comments:

We welcome and appreciate the underlying premise of Article 16. However, details are lacking on how the ranking of standards for stringency will be evaluated. In some cases, professional judgement may be required to determine which set of standards are the highest.

Suggestions:

First, at a minimum we recommend revising Article 16 to the following:

Except for where the technical requirements of the standards that foreign-invested enterprises disclose **and promise to abide by** are higher than relevant technical requirements in mandatory standards, the relevant government departments shall not apply technical requirements higher than those in mandatory standards to foreign-invested enterprises, and shall not force or disguisedly force foreign-invested enterprises to adopt recommended standards or social organization standards.

Furthermore, we suggest clarifying how standards will be determined to be more or less stringent than one another. We suggest mechanisms for seeking professional judgement in standards rankings, particularly with respect to environmental, health, and safety standards.

Article 17, 18

Comments:

We welcome the draft regulations’ work to ensure the government procurement system is open to both foreign invested and domestic firms. However, we believe various aspects of Article 17 lack necessary language to ensure fair access.

1) The regulations do not specifically say that FIEs are free to both enter and leave the government procurement market of a region or industry. Similarly, the “unreasonable conditions” mentioned in Article 17 are missing important aspects such as place of production and track records. Furthermore the draft regulations fail to provide clarification on what will be considered a “domestic product” for procurement purposes.

2)The draft regulations do not address the treatment of discriminatory requirements in tenders (e.g. that a product be “secure and controllable”) or provide any remedy measures for when companies are denied equal participation.

Suggestions:

1) We suggest that the implementing regulations should clarify that foreign firms are free to enter and exit the procurement market. Similarly, the regulations should consider adjusting the “unreasonable conditions” to include location and track record.

Furthermore, the implementing regulations should detail specifically what is meant by “products manufactured by foreign-invested enterprises in mainland China” (mentioned in Article 16 of the FIL). We recommend that products sold by foreign invested enterprises in China, be afforded equal treatment in government procurement, not just products manufactured by foreign-invested enterprises in mainland China. These products should be classified as “domestic products” in government procurement processes. We further recommend that “products manufactured by foreign-invested enterprises in mainland China” be defined with reference to China’s Customs’ regulations on “Country of Origin.” In addition, products manufactured by FIEs that are eligible for government procurement activities should include products that are manufactured by foreign-invested enterprises inside and outside of mainland China.

To these ends, we recommend revising Article 17 to the following:

The products produced by foreign-invested enterprises investing in China are domestic products and can participate in bidding and government procurement projects on an equal basis. No work unit or individual may use any means to obstruct or restrict foreign-invested enterprises from freely entering **or leaving** the **bidding or** government procurement market of a region or industry.

The government procurement supervision and management department, the purchaser, or the procurement agency shall, in accordance with the relevant laws and administrative regulations for government procurement, ensure that foreign-invested enterprises participate in government procurement activities through fair competition. They shall not apply differential treatment or discriminatory treatment to foreign-invested enterprises or the goods and services they provide through unreasonable conditions such as restricting the supplier's ownership, organizational form, shareholding structure, investor nationality, products place of production, or controllable safety factors in terms of the publication of government procurement information, determination of supplier conditions, qualification review, evaluation criteria, etc. **The central government departments and relevant departments of the people's governments at all levels shall strengthen supervision of bidding and government procurement according to law, and correct and investigate violations of laws and regulations according to law.**

2) We also suggest the implementing regulations contain language articulating rules or remedies for foreign enterprises when they are denied equal participation in government procurement activities. FIEs should be able to report differential or discriminatory treatment to the government procurement supervision and management department for review. If substantiated, the procurement activities should be terminated and the award of the bid or deal voided. The purchaser should then undertake a new invitation for procurement. This process should also feature timelines for appeals to ensure timely rectification.

The implementing rules should also require that current documents containing discriminatory articles—such as technologies be “secure and controllable”—be rescinded within six months.

Article 19

Comments:

We welcome the strong reforms to the financial sector outlined in Article 19. However, it is unclear whether previous restrictions to total investment or the registered capital ratio will remain in place.

Suggestions:

We suggest the implementing regulations specify whether or not the total investment or registered capital ratio have been fully abolished.

Article 20

Comments:

1) It is unclear what kinds of foreign investment promotion policies local governments are authorized or unauthorized to formulate. When local governments develop foreign investment promotion policies or make promises that are beyond their authority in order to incentivize and attract foreign investment, foreign investors should be compensated for any actual damages they incur.

2) The term "policies and measures" is vague, as it may refer to the local governmental "party directives and government guidance" instead of official local regulations.

Suggestions:

1) We suggest that the implementing regulations detail the scope of local authority in foreign investment promotion, adding remedy channels if an incentive is revoked.

We also suggest that transparency be guaranteed in the promotion policy-making process and a comprehensive list of local policy incentives be developed.

2) We suggest the implementing regulations clarify language of the term "policies and measures" to ensure that the actions taken are official and legally binding rather than suggestive directives that may potentially be ignored.

Article 21

Comments:

Foreign investment guidelines should be published on the website of the government department and updated in a timely manner.

Suggestions:

We recommend that publishing such guidelines on the national integrated online platform for government services, as referred to in Article 11.

Chapter III: Investment Protection

Article 22

Comments:

1) Regarding circumstances where the State is permitted to expropriate a foreign investment, the terms “special circumstances,” “public interest,” “legally prescribed procedures” and “fair and reasonable compensation” are extremely vague.

2) The mechanism for deciding what constitutes fair and reasonable compensation is not specified, which could lead to abuse.

Suggestions:

1) We recommend implementing rules clarify the terms “special circumstances” and “public interest,” and follow the principle of non-discriminatory legal procedures.

2) In cases of expropriation, we recommend that a principle of full and perfect equivalent for the property—what a willing buyer would pay a willing seller—be used as the standard for assessing value. If fair market value does not exist or cannot be calculated, other data agreed upon by an independent panel of experts should be used to assess fair compensation.

If property is expropriated before payment is made, just compensation should include an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking.

Article 23**Comments:**

The current foreign exchange management and bank control in practice are very strict, uncertain, and time-consuming. Furthermore, although the FIL emphasizes that RMB can be exchanged and remitted abroad without restrictions, remittance is usually subject to the window guidance of banks or even approval from the local office of the State Administration of Foreign Exchange.

Further clarification is needed on:

- Whether foreign employees include persons from Hong Kong, Macau and, Taiwan
- Whether foreign employees and their employers should pay social insurance fund and housing fund before their wages are remitted out of China

Suggestions:

We suggest that there be specific implementing regulations covering the issues raised, so that lawful capital transfer activities of foreign companies are not limited, and not subject to prior government approval.

Furthermore, foreign investors should be able to choose the currency of transfer no matter what currency was contributed previously.

We also recommend deleting the word “illegally” in the phrase “No party or individual may illegally restrict the currency, the amount, and the frequency of transfer”.

Article 24

Comments:

Article 24 only provides a general principle for the protection of IP of foreign investors and FIEs. Furthermore, punitive damages for IP infringement should be supported by law and court, and sufficiently severe enough to disincentivize IP misappropriation. Currently, only the PRC Trademark Law (to be effective starting November 1, 2019) provides for this type of punitive damages system.

Suggestions:

We recommend the implementing regulations provide further guidance and clarification on:

- Which authority or authorities will be responsible for establishing the punitive damages system, rapid collaborative protection mechanism, diversified settlement mechanism and the assistance mechanism mentioned in Article 24
- How this system and mechanisms will connect with current IP laws and regulations

We also suggest that foreign investors or FIEs should participate in the formulation or establishment of such system and mechanisms.

We further recommend amending the PRC Copyright Law and PRC Patent Law to include punitive damages system.

Article 25

Comments:

We would like more clarification on the definition of “administrative organs.”

Furthermore, the terms “transfer” and “performance of duties” are too vague and do not reflect the variations of the actual situations encountered.

Suggestions:

We suggest the implementing regulations clarify which agencies fall under “administrative organs,” and include any relevant units indirectly controlled by government agencies as well as government agencies themselves.

We also recommend expanding the term “transfer” to include publication, disclosure, license, sublicense, and unauthorized use of technology.

We also suggest making the following revisions to article 25:

Administrative organs and their employees may not use registration, investment project approval or filing, administrative licensing, and the implementation of supervision and inspection, administrative punishment, administrative compulsion, **or any other** actions while

performing administrative duties **or by any other means**, to force or disguisedly force foreign investors and foreign-invested enterprises to transfer technology.

Article 26

Comments:

Acknowledging the confidentiality of foreign inventors' technical information is a critical first step. However, information is lacking in the draft regulations as to under what circumstances the administrative organs will share information with other administrative agencies.

Furthermore, there is no mention of meaningful sanctions against officials who violate the confidentiality obligation with respect to foreign inventors' information.

Suggestions:

We suggest that the implementing regulations specify the circumstances under which administrative organs will share information with other administrative agencies.

We also recommend that the implementing regulations provide specific examples of prohibited disclosures such as not allowing disclosure of trade secrets to industry experts employed, affiliated or retained as consultants by any commercial entity. The implementing rules should also prohibit disclosure of trade secrets both in the contexts of where the regulator or employee believes the disclosure might help the agency administering the law, or where the intention is to inform or benefit the person to whom such information would be disclosed. Furthermore, the scope of trade secrets required should be confirmed in advance, and it should be clear which information is designated as trade secrets.

To complement this, there should be sufficiently severe sanctions in place to incentivize recognition and respect of trade secret rights.

To these ends, we recommend revising the second paragraph of Article 26 to the following:

Administrative organs shall establish and improve their internal management systems and take effective measures to protect the trade secrets of foreign investors and foreign-invested enterprises that are learned during the course of performing their duties. Where it is necessary to disclose information about duties and responsibilities according to law, **after confirmation with foreign investors and FIEs**, it shall not contain the contents of trade secrets. Where it is necessary to share information with other administrative agencies **according to the provisions of laws and administrative regulations**, aside from where laws and administrative regulations stipulate otherwise, the business secrets contained in the information shall be dealt with accordingly to prevent leakage

Article 28

Comments:

We welcome the language in the draft regulations prohibiting local governments from making policy commitments to foreign investors outside of their legal capacity. Still, such actions can have serious negative consequences on FIEs. Therefore, it would be beneficial to install

mechanisms encouraging accountability from the local governments and related departments.

Suggestions:

We suggest making the following changes to article 28:

Local people's governments at all levels and their relevant departments shall not make policy commitments to foreign investors or foreign-invested enterprises beyond their statutory authority. Policy commitments should be in written form, and the content should comply with laws and regulations and relevant national policies. **If by overstepping their legal rights and therefore causing policy promises made by local people's governments and relevant departments to be unexecutable, the local people's government and related departments shall offer fair and reasonable compensation to the foreign invested enterprise.**

Article 29

Comments:

While the draft follows USCBC's proposal to add more precise language in this section, it still left vague what terms like "national interests" and "social public interests" mean in this context. It also neglects to stipulate that local governments will be held liable if contracts are breached without proper compensation.

Suggestions:

The implementing rules should provide more clarity on the terms "national interest" and "social public interests" when local governments and related departments are authorized to breach contract terms with FIEs.

We suggest that the implementing regulations clarify that foreign investors will be compensated for actual damages incurred by policy commitments or contracts which are out of local government's authorities or unilaterally changed by the local government. We also suggest that the implementing regulations stipulate local governments' liability if compensation is not made.

Furthermore, we recommend revising Article 29 to the following:

All levels of government and their relevant departments shall carry out policy commitments made to foreign investors and foreign-invested enterprises in accordance with the law and the various types of contracts signed according to law. Policy commitments and contracts may not be changed except for the national interest or **major** social public interests. Contracts may not be breached due to matters like administrative division adjustment, government change, institutional or functional adjustment, and related personnel replacement.

Article 30, 32

Comments:

1) We appreciate the draft regulations' further clarification on the process for the complaint working mechanism, and we look forward to further elaboration by the implementing regulations. However, it is still not clear whether the decisions from the complaint mechanism are legally binding, and how it will operate and interact with administrative review and litigation. Clarification is also needed on the working mechanism of the body at state level and local level.

2) The Ministry of Commerce has publicly promised to improve the "inter-party joint meeting system for foreign-invested enterprises' complaints work", and at the same time, it is required to establish and improve the "complaint mechanism for foreign-invested enterprises" in various provinces, and promptly respond to and resolve the legitimate complaints of foreign-invested enterprises.

Suggestions:

1) We recommend that the implementing regulations further stipulate the leading agency, scope, processes and fees of the complaint mechanism. The mechanism should be convenient, transparent, and streamlined.

The implementing rules should clarify how the multiple channels for complaints will interact, including the new complaint mechanism, as well as administrative review and litigation. The complaint mechanism for FIEs should not be a prerequisite procedure of administrative review or litigation.

Other detailed rules on the complaint mechanism should also specify the designated central and local departments receiving the complaints, the acceptance method of complaints, and the evaluation system for the relevant departments at all levels.

Furthermore, we suggest that the complaint working mechanism be authorized to correct illegal or inappropriate specific administrative acts and compensate foreign investors for their losses, or at least be obliged to issue investigation reports which can serve as evidence in a subsequent administrative review or civil litigation.

2) We recommend that Article 30 explain how the quoted promises will affect the procedures and evaluation of the mechanism. In addition, foreign-invested enterprises should also be encouraged to use the Internet feedback channels established by various government agencies in the country. The evaluation of the complaint mechanism by foreign-invested enterprises should be directly linked to the business environment evaluation system.

In light of these comments and suggestions, we recommend revising Article 30 to the following:

The state will continue to improve the "Inter-Party Joint Conference System for Complaints and Services of Foreign-Invested Enterprises". The commerce authorities of the State Council, in conjunction with the relevant departments of the State Council, shall establish working mechanisms for complaints by foreign-invested enterprises (hereinafter referred to as the complaint working mechanism) **and widely consult and solicit opinions of foreign-invested enterprises on the mechanism's formation, improvement, and operation process, as well as the establishment of the mechanism's evaluation system. The primary government**

departments in charge of the complaints working mechanism should promptly handle the issues that have significant impact nationwide as reflected by foreign-invested enterprises or their investors, as well as other cross-departmental, complex, and policy-oriented issues, and coordinate and improve relevant policy measures to guide and supervise the complaint work of foreign-invested enterprises across the country. In addition to the use of complaints working mechanisms at all levels, foreign-invested enterprises and their investors can also report their problems through the Internet feedback channels established by the state. The evaluation system for complaint mechanisms by foreign-invested enterprises set up by the state and local government should be directly linked to the business environment evaluation system.

We also suggest that the implementing regulations should further clarify the meaning of the terms “typical” and “universal” used in Article 32.

Article 31

We suggest providing sufficient authority to the complaint mechanism for it to coordinate among the relevant central and local ministries and departments to ensure that the legal rights of FIEs are protected.

Chapter IV: Investment Management

Article 35

Comments:

- 1) Article 35 provides an exception to round-trip investments that are subject to the Negative List. Further clarification is needed for scenarios in which Chinese investors make round-trip investments together with a foreign investor in China. Whether investee companies of FIEs could be permitted to make such round-trip investment also needs to be clarified.
- 2) It is unclear whether a wholly-owned subsidiary invested by an FIE (excluding investment-holding company) would qualify as a “Legal Entity”.
- 3) It is unclear whether enterprises that are not subject to the restrictions of the Negative List are considered Chinese or foreign-invested enterprises.

Suggestions:

- 1) We recommend that further guidance and clarification be provided for scenarios where Chinese investors make round-trip investments in China together with a foreign investor as well as whether investee companies of FIEs could be permitted to make such round-trip investment.
- 2) We suggest clarifying if a wholly-owned subsidiary invested by an FIE (excluding investment-holding company) in China will be deemed as the “Legal Entity” as provided in the 1st paragraph of Article 35.
- 3) For enterprises not subject to the restrictions of the Negative List, we recommend classifying them as foreign-invested enterprises if the determination is based on the place of the direct investor and as Chinese enterprises if it is based on the actual controller.

Article 37

Comments:

We welcome the draft regulations language around parity in the licensing process. However, language around “notification and commitment” lacks specificity.

Suggestions:

We suggest the implementing regulations to further clarify what “notification and commitment in accordance with the relevant regulations” means in this context.

Article 38

Comments:

1) There remains uncertainty regarding which department will be the primary regulator, as well as to the scope, content, and authority of this regulation. There is also uncertainty as to how this review process will be different from that for entities in non-negative list fields.

2) Under the current legal system, foreign investment on the negative list will be approved on a case-by-case basis, and foreign investment outside of the scope of the negative list will only need to file for the record. When the FIL replaces the three current laws governing foreign investment, what will be the new mechanism for approval and filing?

Similarly, there is no mention in the draft regulations of a mechanism for communication between enterprises and relevant authorities.

Suggestions:

1) We would like further guidance and clarification on:

- What will be the differences in the formalities and documents reviewed by the market regulation authority for restricted foreign investment versus encouraged or permitted foreign investment.
- Whether the market regulation authority will be in charge of review as well as company registration at the same level.
- What will the review conducted on foreign investments in forms other than new establishment or M&A look like.
- What authority level will be conducting the review.

2) The regulations should clarify what the new mechanism for approval and filing will be once the FIL replaces the three current laws governing foreign investment.

Furthermore, there should be a clear procedure and time limit for soliciting opinions of the relevant authorities. The foreign investors or FIEs should be entitled to communicate with authorities in the process of soliciting opinions.

To these ends, we suggest the following revisions for Article 37:

The market regulation department shall review whether a foreign investor meets the restrictions on equity ratio and senior executives as stipulated in the negative list when registering according to law. If the relevant department has already conducted a review when handling the relevant procedures in accordance with the law, the market regulation department will not repeat the review.

Where a foreign investor invests in a field other than the fields in the negative list, the market supervision and administration department shall register in accordance with the law and share the information with relevant competent commercial department at the same level. Foreign investors are not required to carry out filings with the competent department of Commerce.

Article 39

Comments:

The draft provides few details on the information reporting system created under the FIL. The language is still uncertain as to the rules and process of information reporting.

Suggestions:

We recommend the addition of more precise language on the rules and process of information reporting.

Article 40

Comments:

Different mechanisms of information collection by separate authorities may lead to confusion and unnecessary burden to companies. The business community is concerned that the reporting mechanism in the FIL is under risk of overlapping with the Annual Joint Inspection System covered by MOFCOM, the National Bureau of Statistics, the State Administration of Foreign Exchange, the Ministry of Finance, and the State Taxation Administration.

Suggestions:

We encourage the State Council commerce authorities and SAMR to release information on the content, scope, and frequency of foreign investment information reporting as soon as possible to decrease uncertainty in the business environment.

We also would like to make the following suggestions:

- Consider consolidating all current information reporting systems into one unified platform to lessen paperwork burdens;
- Make the information collection requirements for FIEs be no more than the requirements for domestic companies;
- Allow foreign investors and FIEs to refuse to provide foreign investment information if such information was already provided to the State Council commerce authorities or if the information is beyond the extent necessary for the performance of the duties of the requesting authorities; and

- Further clarify what “other relevant parties” and what “actual necessity” refer to.

Article 41

Comments:

It is unclear what the consequence for failing to submit true, accurate or complete information by the foreign investors or FIEs would be.

Suggestions:

We suggest the implementing regulations specify the consequence for failing to submit true, accurate or complete information by the foreign investors or FIEs.

Chapter V: Supplementary Provisions

Article 42

Comments:

1) Under the FIL, FIEs are given a five-year transitional period to change their organization structures to comply with PRC Company Law or PRC Partnership Enterprise Law if they were formed in accordance with the three existing regulations governing foreign investment. However, the implementing regulations do not specify which laws will govern existing FIEs before changes are made. Requiring such changes would also be unnecessarily burdensome to companies which are satisfied with the existing legal structure and may cause unnecessary disputes among business partners.

2) Article 41 says that if the procedures for organizational changes are not handled within the time limit, the enterprise registration authority shall not handle other registration matters of the enterprise, and may publicize the relevant situation in the enterprise information disclosure system. This implies that the enterprises will not be able to pass its annual business license inspection the next year, but the regulation does not define the legal consequences thereafter.

3) It seems "only" after June 30, 2025, that any possible change of registered information of FIEs (including forms, shareholder, articles/ association, address, etc.) will trigger the necessity of EJV, CJV or WFOE to change its original organization form and corporate governance. However, the draft regulations are not crystal clear on whether the change of registered information will trigger the necessity of EJV, CJV or WFOE to change its original organization form and corporate governance during the five-year grace period or from January 1, 2025 to June 30, 2025. The draft regulations indicate that the State Council will work on the detailed measures/guidance regarding the change of organization form and structure for existing EJVs, CJVs or WFOEs later.

4) The draft does not touch on the detailed procedures for establishing, changing, or dissolving an FIE.

Suggestions:

We are pleased to see the addition of details surrounding the timing and logistics of the five year transition, although further clarification remains necessary, either in these implementing regulations or in the ensuing specific procedural measures.

1) We recommend providing the option for FIEs to indefinitely maintain their legacy legal structure under the previous three laws governing foreign investment. This would avoid unnecessary burden on these enterprises and prevent needless disputes between business partners. If this is not possible, we suggest allowing companies to apply for a three-year extension on top of the five-year transition period should they need additional time to restructure.

2) The implementation regulations should further specify the legal consequences for enterprises that fail to reorganize in accordance with the FIL. Furthermore, there should be methods of remedy for investors in such a situation.

3) We recommend further guidance and clarification on:

- Whether the change of registered information will trigger the necessity of EJV, CJV or WFOE to change its original organization form and corporate governance during the five-year grace period or January 1, 2025 to June 30, 2025 is required;
- Detailed measures/guidance regarding the change of organization form and structure for existing EJVs, CJVs or WFOEs.
- Detailed procedures for the establishment, change, and dissolution of FIEs.

Article 43

Comments:

The draft regulations do not mention the issues regarding statutory surplus reserve for EJV (i.e. how the “three funds” of EJV will be transitioned to the statutory surplus reserve under PRC Company Law).

Suggestions:

We recommend the implementing regulations provide further guidance and clarification on the issue relating to statutory surplus reserve.

Article 44

Comments:

Investors from HK and Macao are treated differently from those from Taiwan, and seem to face more uncertainty compared with foreign investors from other places, including “Overseas Chinese”.

Suggestions:

We recommend deleting the phrase “or the State Council” in the first paragraph.

We further recommend providing clarification and explanation around the term “overseas Chinese” in order to avoid confusion.

Article 45

Comments:

There are still numerous rules and regulations that must be abolished or revised for FIE’s compliance with the FIL, for example, the M&A Regulations.

Suggestions:

We recommend establishing a plan and timetable for the legislature or rule-making authorities to conduct such review and revision.