US-China Business Council Comments on
The Draft Foreign Investment Law of the People’s Republic of China

February 17, 2015

The US-China Business Council (USCBC) has supported the expansion of mutually-beneficial US-China commercial relations for over 40 years. With more than 210 American companies as members, USCBC welcomes China’s current reform initiative to allow the market to play a decisive role in its economy.

Within that context, USCBC is pleased that the Ministry of Commerce (MOFCOM) 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 attracting more foreign investment to support China’s economic goals.

We are pleased to have the opportunity to offer comments on the draft Foreign Investment Law, which replaces three current foreign investment laws: the Wholly Foreign-Owned Enterprise Law (“WFOE Law”), the Sino-Foreign Equity Joint Venture Enterprise Law (“EJV Law”), and the Sino-Foreign Contractual Joint Venture Enterprise Law (“CJV Law”).

This draft law has many positive elements, such as removing articles in the current foreign investment laws on governance and registered capital and allowing the Company Law to govern these aspects of foreign investment. The draft law also appears to streamline the approval process for a significant portion of foreign investment. Finally, the draft law integrates important principles established during negotiations for the bilateral investment treaty (BIT) with the United States, including pre-establishment national treatment and a negative list (the “Catalogue of Special Management Measures”). A high-standard BIT will benefit the American and Chinese economies and is a top priority for USCBC.

On the other hand, the draft law continues to maintain a distinct class of enterprise in China—the foreign-invested enterprise (FIE)—with requirements and limitations for foreign investors and FIEs that do not apply to their domestic counterparts. USCBC greatly appreciated Premier Li Keqiang’s January 2015 statement at the World Economic Forum in Davos, Switzerland that “Chinese and foreign companies will be treated as equals.” We believe that a distinct class of enterprise for foreign investment invites continued differential and discriminatory treatment, and contradicts the spirit of national treatment. We encourage China’s policymakers to do away with the “FIE” classification and govern all legally-established companies in China under the same laws and regulations that apply to domestic enterprises, such as the Company Law.
With this in mind, USCBC proposes the following general principles for the draft law on foreign investment:

**Eliminate provisions that discriminate between foreign and domestic investment**

USCBC recommends revisions that would make foreign-invested companies subject to the same legal and reporting requirements as domestic companies. This would be in line with some of the most positive developments in the current draft to remove requirements for corporate governance and registered capital and instead refer companies to the Company Law. Such revisions would also be in line with the spirit of national treatment and support China’s ongoing negotiations with the US for a Bilateral Investment Treaty (BIT). To achieve this goal, regulators should consider making changes to the draft law such as eliminating extensive reporting requirements and additional supervision and inspection requirements that apply to foreign-invested but not domestic companies.

**Clarify the scope, form, and revision process for the negative list**

While USCBC appreciates the shift to a negative list approach, we remain concerned that dividing the negative list into “prohibited” and “restricted” categories will encourage the inclusion of more—not fewer—restrictions, resulting in a list that is not in line with the spirit of a negative list approach. Designing a negative list in this way would hinder progress on China’s BIT negotiations, limit the ability of the Chinese economy to benefit from competition with world-class companies in key sectors, and ultimately slow progress on China’s own domestic reform campaign. Additionally, this model contradicts the current approach being used in the Shanghai Free Trade Zone, undermining the central government’s stated goal of allowing the Shanghai model to spread nationally. We recommend that MOFCOM reconsider using a streamlined, unified negative list with a very specific and limited listing of industries in which investment is prohibited, clarifying its relationship to the existing Catalogue Guiding Foreign Investment.

Furthermore, USCBC requests that MOFCOM indicate how frequently the negative list may be revised and the process for doing so, as well as ensure that the drafting and subsequent revisions to the negative list are carried out in a transparent manner, with inputs from all stakeholders, including foreign business.

**Increase transparency in all review procedures**

Language in the current draft permits MOFCOM to collect input from other ministries and stakeholders, including Chinese companies, during market entry review and national security review processes. While we recognize potential value in gathering input from a variety of sources, we are concerned that this process creates an opening for protectionism, as it would allow input from parties who could potentially hold conflicting interests with foreign investors. Article 38, in soliciting public opinions on foreign investor applications, and Article 55, in allowing third parties to raise suggestions to the Joint Conference reviewing national security, create opportunities for discrimination against foreign investors by allowing stakeholders with conflicts of interest—including industry competitors—to participate and influence the process. We recommend structuring all review mechanisms in a transparent and efficient manner that limits third-party influence, increases administrative efficiency by reducing industrial licensing requirements,
and narrows the scope of national security review criteria to consider the positive effects of open trade and foreign investment while also considering national security concerns.

**Clarify the relationship between this law and other relevant laws and regulations**

We note and appreciate reference to the Company Law to guide company governance after a three-year transition period (Article 157). However, it remains unclear how the draft law, once enacted, will affect other existing regulations related to foreign investment. For instance, it is unclear whether the numerous foreign investment regulations ancillary to these three foreign investment laws will continue to be binding. Those regulations include the Provisions on the Takeover of Domestic Enterprises by Foreign Investors, the Guidelines on Market Access Administration for Foreign Investment, additional corresponding implementation regulations, and other regulations on foreign exchange. In addition, it remains to be seen what, if any, regulatory overhaul will occur, and whether there are any legislative plans to follow up on those regulations. We suggest providing additional clarity on these matters.

In addition to the above general principles, USCBC respectfully submits the following specific changes for consideration during the revision process of the draft law.

**Chapter 2: Foreign Investors and Foreign Investment**

USCBC remains concerned about vague and potentially discriminatory definitions contained in this chapter and asks for clarification concerning the scope of the following items.

- **Articles 14 and 15**—These articles seek to define what is considered a foreign-invested entity. They seem to suggest that no matter the percentage, any company with foreign investment shall be considered an FIE. This is different from the regime established by the EJV Law, under which any enterprise with a foreign investment of less than 25 percent is not considered a foreign-invested company. In reality, these companies are essentially already able to operate as domestic entities, as such low levels of investment do not afford meaningful operational control. In addition, we note that this article—when coupled with Article 13—creates confusion about the delineation between a FIE and a domestic enterprise, as all of the FIEs defined under Article 14 could also fall under the definition of domestic enterprises in Article 13. This confusion could lead to different interpretations by officials and agencies at different levels. To ensure equal treatment for all companies, China should move away from such designations entirely. If such a change is not possible, we suggest adding language to explicitly state that FIEs should be considered domestic enterprises in matters of Chinese regulation outside of the scope of restrictions listed in this law or its implementing regulations.

Additionally, we note that Article 15 would appear to halt the use of variable-interest entities (VIEs) as an investment model. Despite concerns about the nature of VIEs in China and the desire to better regulate them, VIEs have brought benefits to both foreign and domestic companies, including providing Chinese entrepreneurs access to international financial markets. We encourage Chinese regulators to consider a streamlined process to “grandfather”
existing VIEs and ensure that provisions related to VIEs – and their implementation – treat foreign-invested and domestic-invested VIEs equally.

- **Article 16** – This article suggests that a national security review is mandatory for a foreign-invested company that has property rights in China, including property ownership or land usage rights. It is not clear whether these provisions apply to all foreign-invested enterprises, or just FIEs in certain sectors, such as real estate. Such provisions, if applied to all companies using Chinese land, would require a significant number of companies to undergo national security reviews, straining capacity and significantly slowing MOFCOM’s ability to approve new foreign investment. We recommend clarifying this article to limit the scope of national security reviews.

- **Article 18** – This article lists several ways to determine if a party has control over an enterprise, but it does not sufficiently define many of the terms used for such an assessment. For example, the term “material impact” in Article 18.2.3 and the term “decisive influence” in Article 18.3 are difficult to define. In practice, even minority shareholders lacking meaningful operational control could still be interpreted as exerting a “material impact” on decision making, depending on how that impact is defined. Additionally, this provision does not provide sufficient guidance for cases in which the shareholding structure is complex. For example, it is not clear how the draft law would deal with a dispersed shareholding structure, multiple levels of investment, or fund-controlled companies whose actual capital contributors are limited partners or a managing general partner. Lack of clarity in these areas could cause officials to interpret the provision in very different ways, leading to uneven implementation and feeding further doubts about the value of this concept. We suggest eliminating this provision or providing greater clarity as to how control of an enterprise will be determined.

**Chapter 3: Market Entry Management**

USCBC applauds the adoption of a negative-list approach in governing foreign investment in China as an important step in reforming China’s investment regime. However, we have concerns about provisions related to market entry review. Of particular concern is the involvement of parties with potentially conflicting interests—especially competitors, as this can create opportunities for protectionism and discrimination against foreign companies.

- **Article 21** – This article states that “competent foreign investment departments” will be responsible for managing the market entry review, but it does not clarify whether this means MOFCOM, provincial and local commercial agencies, other government stakeholders, or a combination of the above. We recommend that this language be clarified to ensure a streamlined and efficient administrative process that contains no unnecessary departmental overlap.

- **Article 22** – We applaud the adoption of a negative-list approach to governing foreign investment in China. We encourage regulators to take a pragmatic approach when determining the industries to be included, limiting them to what is truly key to protecting core national security, and excluding sectors in which open competition will promote government goals of innovation and industrial upgrading. We suggest that MOFCOM clarify
when the catalogue will be revised and ensure that its drafting and revision are carried out in a transparent manner. To do this, MOFCOM should consult actively with outside stakeholders, including foreign business. This will ensure that the catalogue is developed in tandem with principles China is using in its negotiations of the US-China bilateral investment treaty.

Additionally, we recommend that the provision clearly state that the Catalogue of Special Management Measures is a comprehensive list of all provisions governing foreign investment. It should be regarded as the only authority that exclusively applies to foreign investment. Invalidating all regulations not listed in the negative list will create a clear, streamlined foreign investment regime convenient for both regulators and foreign investors.

We also note language stating that this new catalogue will list all circumstances in which foreign investors are granted treatment less favorable than their domestic counterparts. As noted earlier, such differential treatment contradicts the spirit of Article 6 and statements by senior Chinese leaders that Chinese and foreign companies will be afforded equal treatment. We would encourage MOFCOM to work with other government agencies to reduce this list of exceptions to only those sectors that are concerned with core national security. In the past, investment ownership restrictions were not listed in one clear document; while most were included in the Catalogue Guiding Foreign Investment, some were included in ministry-specific regulations. This made it challenging for companies to clearly know what restrictions might be in place, and it also permitted ministries to restrict investment approval through guiding opinions and development plans. Current wording could duplicate this situation. Additionally, we suggest adding the following language: “This catalogue shall serve as the definitive list of all such differential treatment or restrictions; any sectors not listed shall be regulated under domestic laws and regulations and shall receive equal treatment with domestic companies.”

Finally, we recommend further written clarification that once enacted, this new negative list will supersede other legislation currently regulating foreign investment—namely, the Catalogue Guiding Foreign Investment and the National Development and Reform Commission Administrative Measures for the Approval and Filing of Foreign Investment Projects.

* Articles 24-26 – We recommend eliminating the two-part negative list in favor of a unified and simplified negative list. As noted previously, we remain concerned that dividing the negative list into “prohibited” and “restricted” categories will encourage the inclusion of more restrictions, not fewer, resulting in an extensive list that does little to address investment barriers. These articles raise a few additional questions:

  o Article 25, which details the types of domestic companies with foreign investment that are barred from investing in prohibited industries, is extremely broad. As written, this provision would treat any domestic company whose shares, equity, voting rights, property shares, or other rights and interests are held by a foreign investor as a foreign-invested company. For example, the terms “other rights or
interests” could be interpreted to mean that any domestic company with liability to foreign investors, such as a small bank loan, is a foreign company.

- Article 26 states that a monetary threshold will trigger a requirement for market entry review, but it does not specify the amount of that threshold. We recommend clearly specifying this amount.
- Additionally, it is not clear whether the difference between total investment and registered capital still exists under this new investment regime.

Based on these concerns, we suggest that Article 24 and the first paragraph of Article 25 be eliminated. The first paragraph of Article 26 should be rewritten to read: “The list of restricted investment shall include the following scenarios:

1. Investments exceeding the relevant monetary thresholds prescribed by the State Council; and
2. Industries listed in the Catalogue of Special Management Measures.”

Finally, we suggest that the State Council provide more information about the “monetary thresholds” listed in Article 26 to afford greater clarity to regulators and companies alike. This should be done in further consultation with international and domestic stakeholders to ensure a proper definition that takes into account pragmatic business realities.

- **Article 30** – The negative-list approach for foreign investment has the potential to provide clearer guidance and greater convenience to foreign investors, but Article 30 requires licensing in unspecified industries with no similar catalogue of ministries that require industrial pre-approvals. This vague wording may cause confusion about which sectors need further licensing procedures, leading to investors inadvertently neglecting to apply for required licenses and increasing the time and cost for investors and the investment approval authority. We encourage Chinese authorities to eliminate unnecessary industry licenses to streamline investment approvals and reduce opportunities for protectionism. We also suggest that MOFCOM coordinate with the industrial regulators to compile a comprehensive list of industries that require pre-approval and required licenses. We encourage all industrial regulatory review processes to be conducted in an open and transparent manner that limits interference from third parties. These developments would demonstrate improvements to China’s reform efforts in streamlining administrative processes.

- **Article 32** – This article includes vague factors for consideration during the market entry review process, which could be interpreted to cover nearly any foreign investment. Such broad standards could permit opportunities for protectionism and discriminatory regulatory behavior. Specific areas of concern include clauses that discuss national security, industrial development, and technological innovation. Such broad standards could lead to a vast number of cases, causing excessive processing times for a significant portion of foreign investment transactions, straining regulator capacity, and dampening interest in foreign investment in China. We recommend defining the list of factors as narrowly as possible to avoid domestic protectionism and excluding sectors in which open competition will promote government goals of innovation and industrial upgrading.
**Article 33** – USCBC encourages communication among industry regulators involved in the market entry review mechanism to be conducted in an open and transparent manner, such that industrial ministries or other industry participants do not have undue influence in the market entry licensing process. Additionally, the relationship between market entry review and industry licensing has not been clearly defined—it is unclear how prior and non-prior industry licensing would be folded into the scope of market entry review. We recommend clarifying this relationship and taking steps to streamline these processes as much as possible.

**Article 35** – To best assure timely review of market entry licenses, limit the risk of regulator backlog, and better align with international best practices, USCBC recommends amending this article to grant automatic approval if no decision is issued within the review period. USCBC notes that similar automatic grant provisions are included in other regulatory areas where reviews are required, such as competition reviews under Article 25 of the Antimonopoly Law.

**Article 37** – This article discusses the range of conditions that investment authorities can apply to a potential investment based on its market entry review. While the previous article states that authorities shall provide reasons for their investment decisions—approval, rejection, or conditional approval—it does not clearly state that they must provide written rationales for their remedies. We recommend that regulators be required to provide these written rationales to all applicants.

**Article 38** – USCBC encourages communications between investment authorities and relevant departments to be conducted in an open and transparent manner to ensure that industrial ministries or other industry participants do not have undue influence in the market entry licensing process. Additionally, we note that this article allows for “other stakeholders” to participate in market entry review processes, allowing for potentially discriminatory input from industry participants or competitors with conflicting interests. We recommend revising this article to eliminate “and other stakeholders.”

**Article 39** – This article allows for public hearings and panel discussions on matters related to “public interests.” We appreciate the efforts of investment authorities to provide greater transparency, and we hope that this process will run efficiently and smoothly. To best ensure the success of these hearings, we recommend clarifying the scope of applicable topics that qualify as “public interests” to limit the risk of potential protectionism. We also recommend including provisions that ensure the protection of foreign investors’ commercial secrets during such public hearings and panel discussions.

**Article 40** – USCBC appreciates the opportunity for administrative self-defense as an important step in ensuring transparency and due process in these proceedings. We suggest providing more details to help make the process run smoothly for all parties. This should include information about when and how an investor will be notified about an intended conditional approval or denial, whether that notification will include the reasoning behind the review mechanism’s decision, how long the investor has to submit its response, what format discussions and arbitration will take, and whether a written decision will be issued at the conclusion of said deliberations.
• **Article 43** – This article also seeks to improve transparency in market review decisions, a step that can help all parties better understand and prepare for this review process. At the same time, protection of trade secrets and confidential business information is an important factor. To consider both of these factors, we recommend revising this article to read: “The competent foreign investment department shall make public its market entry licensing decisions on foreign investment in accordance with the law, with consideration to trade secrets and personal privacy as described in Article 84 of this law.”

• **Article 47** – We recommend amending this article to allow investors to inquire about the status of ongoing applications and to require foreign investment authorities to provide a timely response for such inquiries.

**Chapter 4: National Security Review**

• **Article 49** – This article describes the body that will conduct the national security review. However, it does not clarify whether this review would take place at the central government level, or whether it could be delegated to lower-level government agencies. We recommend clarifying this point and designating the central government as the entity tasked with these reviews.

• **Article 50** – Foreign investors can apply for national security reviews with the foreign investment authorities if the investments in question might jeopardize or endanger national security. We recommend providing guidance to indicate the types of investment activities that could affect national security and instruction for foreign investors when conducting self-assessments. Such steps will ensure that foreign investors consider national security implications as they plan potential investments in China. They could also help cut down on the number of national security reviews that government agencies must conduct.

• **Article 53** – We appreciate that this article requires the foreign investment authority to notify an investor within 15 working days of its decision on whether a national security review is needed. To standardize this process and make it clear for all parties, we recommend that this article be amended to state that the authority shall “inform the applicant concerned in writing” whether a national security review is necessary.

• **Article 54** – This article states that foreign investors are not permitted to withdraw an application for a national security review without the consent of the relevant foreign investment department. Foreign investors may have a variety of legitimate reasons why they may wish to no longer proceed with a national security review that they have initiated, and they should have the ability to withdraw that application. We would note that such requests are often granted in other jurisdictions, including the United States. As such, we recommend that this provision be modified to state: “After submitting an application for national security review, a foreign investor may request to withdraw that application for any reason. Such requests will ordinarily be granted, unless otherwise determined by the Committee.”

• **Article 55** – This article states that various stakeholders—including industry associations, competitors, upstream and downstream enterprises, and other concerned parties—can raise
suggestions to competent investment authorities for investments that require a national security review. Such a process can create opportunities for discrimination against foreign investors by allowing input from parties who may hold conflicts of interest. We recommend that a mechanism be included to limit the role of competitors or other interested parties in the national security review process. This could include creating a transparent complaint application process, in which stakeholders that lodge complaints can be held accountable for their assertions.

When a suggestion is made by an outside party, we recommend that the government authority notify the applicant in writing and make a decision on whether to initiate a review within the same prescribed timeframe to avoid uncertainty and safeguard normal business operations.

Additionally, this article does not set any specific time period during which an *ex officio* review can be launched. To provide better clarity for all parties involved, we recommend that the law clearly states how long an investment may be subject to an *ex officio* review.

- **Article 57** – The factors to be considered during national security reviews, as currently stated, are vague and could be interpreted to cover nearly any investment. Such broad standards could lead to a large number of national security reviews for a significant portion of foreign investment transactions, straining regulator capacity while also dampening interest in foreign investment in China. These standards could also permit opportunities for protectionism and discriminatory regulatory behavior. We recommend narrowly defining the list of factors eligible for review to those that protect legitimate national security concerns without interfering in economic growth and development. We strongly recommend that the national security review consider both the positive and negative dimensions of increased investment. For example, foreign investment in agriculture could benefit China’s efforts to meet its long-term demand in grains, affecting Article 57 (clause 7).

- **Article 65** – This item provides the opportunity for applicants to propose conditions for an investment before a decision is issued. However, no mechanism exists for communication between the applicant and the authority during review. We recommend adding language to establish such a mechanism or to provide guidelines for investor-authority communication. This will allow investors to make proposals in a timely manner when the authority believes a need has arisen.

- **Article 70** – This article states that foreign investment authorities can impose “necessary provisional measures” to protect national security while a review is underway. However, there is no specific guidance on what types of interim measures are permitted, leaving potential investors with many questions. We suggest clarifying this term to specify which concrete measures may be taken and under what circumstances.

- **Article 73** – The draft law in its current form does not allow for administrative reconsiderations or administrative lawsuits to challenge national security decisions. The absence of a meaningful system of appeal contradicts efforts to promote more transparent administrative decision making and runs directly counter to goals laid out at the Fourth
Plenum of the 18th Chinese Communist Party Congress to promote rule of law in China. Recent experiences in the US system provide a good example of this, in particular Ralls Corporation’s successful CFIUS appeal. To promote these high-level reform goals, we recommend revising this article to state that parties may appeal national security review decisions through China’s court system. We also recommend revising this article to specify—either in this law or in follow-up implementing regulations—the specific mechanism and level of court that can hear these cases.

Chapter 5: Information Reporting

As stated in the General Principles above, USCBC believes that the information reporting mechanism as currently described conflicts with the principle of national treatment and is a step back in China’s efforts to streamline its administrative systems. Many of the provisions overlap with State Administration of Industry and Commerce (SAIC) requirements in the Annual Reporting and Publication System, as well as the Annual Joint Inspection System covered by the Ministry of Commerce, the National Statistics Bureau, the State Foreign Exchange Administration, the Ministry of Finance, and the State Taxation Administration.

Beyond overlapping with these two existing systems, the scope of information required is significant. Foreign companies that have shown the greatest commitment to investing in China may be impacted most, because of the amount of information required and the frequency with which they must provide it. We encourage MOFCOM to eliminate overly burdensome reporting requirements, particularly ongoing reporting requirements, and instead work with SAIC to ensure an information collection system that would cover both foreign and domestic companies. If there is a need to strengthen reporting requirements beyond those already required by SAIC for companies doing business in China, then changes should be made to relevant laws and regulations such as the Interim Measures for Examining and Approving Enterprises’ Investment Projects and the 2014 Provisional Rules on Enterprise Information Disclosure. Those changes should cover all enterprises operating legally in China.

If it is not possible to eliminate this process as an independent requirement for foreign investors, we submit the following suggestions for Chapter 5:

- **Article 75** – SAIC, via the State Council, has already enacted the Provisional Regulations on the Disclosure of Enterprise Information in 2014 that covers both domestic and foreign enterprises. This draft law would require additional information reporting obligations only for foreign-invested companies. Moreover, the two regulations require different information from investors. Thus, the information disclosure requirements laid out here create an extra burden for foreign companies, raising costs and taking time and resources away from efforts to grow in the Chinese economy. USCBC recommends that foreign investment authorities coordinate with SAIC to build a unified and integrated information reporting system, ensuring that MOFCOM has sufficient data about foreign investment while not placing extra reporting burdens on foreign companies.

- **Article 84** – This provision does not specify the definition or scope of commercial secrets and personal privacy. In practice, investment authorities may have differing interpretations of
what information should be kept secret. Information required in Article 92 (specifically clauses 4, 5, 6, and 7) could involve commercial secrets. USCBC recommends clarifying the definition and scope of commercial secrets under this article. Such changes could allow companies to identify trade secrets and other sensitive intellectual property in disclosures to authorities, with the assurance that regulators would take the proper steps to maintain confidentiality. Additionally, we recommend specifying the mechanism to be used in settling disputes or seeking consultancy when any conflict arises regarding the disclosure of confidential information.

- Article 92 – The scope of information required in clause 2 of this article, including the “source of investment,” is not clearly defined. The experience of US companies shows that defining sources of investment is much more complicated than this law indicates. We recommend further discussion with international and domestic stakeholders to ensure a clearer definition for “source of investment,” so as to avoid regulatory confusion and ensure that companies are able to fully comply with the law.

Additionally, clause 5 of Article 92 calls for the submission of financial accounting information from the previous year—a requirement that is generally only provided during tax audits or company restructuring. Because this provision is repetitive and will increase administrative costs for both government regulators and companies, we recommend its simplification or removal.

Finally, much of the information required comes from annual auditing reports, which are not usually available until May or June of each year. This, combined with the excessive requirements on companies that may have to coordinate reporting requirements among many corporate entities, leads us to recommend that the deadline to be postponed until June 30 each year.

- Article 94 – Quarterly reporting requirements are unnecessarily frequent, and will increase administrative costs for both foreign investors in China and government regulators. We recommend eliminating this requirement in favor of a single annual report. If that is not possible, we recommend streamlining the list of required information to balance regulatory needs and the administrative burden for companies. In addition to clarifying that all financial information should be kept confidential, the article should state that for a foreign-invested enterprise that has more than 10 subsidiaries, the parent company shall be responsible for reporting.

Chapter 7: Investment Protection

- Article 111: We recommend further clarifying key terms in this provision, including “public interest of society,” and setting standards for value determination, compensation timing, the currency of compensation in expropriation cases, and other related matters.

Chapter 8: Coordination and Handling of Complaints

- Article 123 – In order to ensure efficiency in handling complaints, we recommend that the Complaint Coordination and Handling Organizations only hear complaints against
government regulators at lower administrative levels. Under such an approach, provincial authorities would hear complaints against county-level authorities, and national authorities would handle complaints against provincial-level authorities. In this manner, investors can be confident that complaints will be handled fairly, and that they will not face barriers or interference from parties with conflicting interests.

Chapter 9: Supervision and Inspection

As stated in the General Principles above, USCBC believes that subjecting foreign investors to supervision and inspection procedures beyond those required by domestic companies is inherently discriminatory, and violates the principle of national treatment. We recommend eliminating any such provisions from this law and stating that foreign-invested enterprises are subject to equal supervision and inspection requirements to their domestic counterparts under other laws and regulations. If it is not possible to eliminate these processes as unique requirements for foreign investors, we submit the following comments:

- **Article 126** – The inclusion of “etc.” in appears to provide an unlimited number of government departments the right to conduct inspections of foreign companies. Any necessary inspection authority of various government departments should be specified other laws and regulations, apply equally to all companies, and refrain from allowing unlimited inspections. We recommend removing this clause.

- **Article 131** – Criteria laid out in this article as possible triggers for foreign company inspections are extremely broad. In particular, criteria number seven states that an inspection can be triggered if “a foreign investor has committed any acts detrimental to national security and public interests.” These terms are undefined, and no standards are provided as to the legal basis or process that can justifiably trigger an inspection. We recommend either the removal of this statement or the inclusion of specific, limited criteria as to what national security suspicions are sufficient to launch an inspection.

- **Article 133** – We recommend that the inspectors conducting field verifications present not only certificates to prove their identities, but also documents issued by the competent government authorities granting them the ability to conduct on-site inspections. Additionally, we recommend that this law make clear that legal counsel has the right to be present for all on-site inspections.

- **Article 135** – The scope of materials eligible for examination as detailed in this provision is vague and potentially unlimited. We recommend providing clear guidelines for information that is allowed to be kept confidential by investors, especially with regard to provisions detailed in Article 141, which establishes a foreign investment integrity file system and potentially makes this information public.

- **Article 138** – In order to ensure uniform enforcement and orderly administrative implementation of the supervision and inspection function, we recommend that only provincial-level administrations or above be responsible for inspecting foreign investors, if such a function continues to exist in future versions of this law.
• **Article 141** – We recommend clarifying the scope of this mechanism, including information to be collected and made public and methods of ensuring that confidential information will not be made public. In the interest of adhering to fair and equal treatment for all companies operating in China, we recommend clarifying whether this mechanism will apply to domestic companies as well.

• **Article 143** – This provision details how to correct wrong information in the credibility archive system. In order to prevent damage to company reputation for any incorrect information made public, we recommend amending this article to include “if a company’s credibility information has been inaccurately published, only to be corrected later, the foreign investment authority shall immediately make a public announcement of such corrections on its official website.”

**Chapter 10: Legal Liabilities**

• **Article 147** – As this provision concerns serious legal and criminal consequences, we recommend clarifying this article to differentiate between key terms and the severity of various violations. This includes how “failing to report on time” will be different from “providing false or misleading information during information reporting,” and what exactly constitutes “grave circumstances.”

**Chapter 11: Supplementary Provisions**

• **Article 157** – This article states that a foreign-invested enterprise shall have three years to revise its organizational structure to comply with the Company Law and other relevant regulations. While we appreciate the need to ensure compliance, such language could require both foreign and domestic companies to renegotiate key aspects of their existing joint ventures. Such renegotiation could cause significant disruption to business for key companies across a range of sectors, and harm both domestic and foreign companies. As such, we recommend adding new language to state: “The competent foreign investment authority shall deem provisions in existing joint venture contracts that apply to the powers of the board of directors to be applicable to the powers of the shareholders’ meeting.” In addition, we recommend that the time period for this transition be extended from three to five years.

• **Article 165** – This “countermeasures” clause is unnecessary and we recommend removing this provision.

**Conclusion**

USCBC would like to thank MOFCOM again for this opportunity to submit comments on the draft law on foreign investment. USCBC hopes these comments will prove constructive in facilitating investment by foreign companies in China, and in contributing to the continued development and advancement of the Chinese economy. We welcome any feedback that MOFCOM may have on these comments, and we would be pleased to further discuss the content and various provisions at MOFCOM’s request.