Northwestern Journal of International Law & Business

Volume 38
Issue 2 *Winter*

Winter 2018

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Meichen Liu

Recommended Citation
Meichen Liu, *The New Chinese Foreign Investment Law and Its Implication on Foreign Investors*, 38 Nw. J. Int'l L. & Bus. (2018).
https://scholarlycommons.law.northwestern.edu/njilb/vol38/iss2/3

The New Chinese Foreign Investment Law and Its Implication on Foreign Investors

Meichen Liu[*]

Abstract: A major change in the regulation of foreign investment in China is underway. In 2015, the Ministry of Commerce issued the Draft Foreign Investment Law for public comment. If adopted, the new foreign investment law will replace the regulatory structure that has guided foreign investment in China for decades. The new law aims to further open the Chinese market and simplify the regulatory approval procedures for foreign investors. However, it will also limit foreign investment in restricted industries, which are still accessible to foreign investors through Varity Interest Entities under the current regulations. This note intends to examine the Draft Foreign Investment Law and analyze its impact on foreign investment in China.

[*] The author would like to thank the Northwestern Journal of International Law and Business editorial staff for their help in refining this note.

In early 2015, the Ministry of Commerce ("MOFCOM") released a draft of the new Foreign Investment Law (the "Draft Law") for public comment.[1] The Standing Committee has already adopted part of the Draft Law and implemented its "Negative List" system in October 2016.[2] When fully adopted, the new Foreign Investment Law will replace the current regulatory regime. Foreign investors will enjoy "national treatment," and will no longer be subject to a different regulatory regime from domestic Chinese investors, except in certain industrial sectors that are specified on a Negative List Catalogue, a list of industries that prohibit foreigners from investing or holding significant shares.[3] The new Foreign Investment Law will also expand the scope of national security review of foreign investments and replace the current requirements for foreign investors and enterprises to obtain licenses, permits and approvals prior to establishment and significant transactions, such as shareholding changes, with a comprehensive "after the fact" reporting system.[4]

China's new Foreign Investment Law intends to facilitate foreign investments by creating a stable, transparent, and predictable investment environment, but the Negative List approach and the national security review process will subject foreign investors to a more restrictive regulatory system. It will essentially eliminate Varity Interest Entity ("VIE"), foreign investors' current access to restricted investment industries. However, the lack of a clear legal definition and the regulatory overlay in the national security review process may undermine the legislative purpose of restraining access for foreign business interested in investing industries not open to foreign investment.

I. THE CURRENT LEGAL REGIME AND THE USE OF VARITY INTEREST ENTITY

The Current Catalogue Approach to Restrict Foreign Investment in Certain Industries

China's current foreign investment regulations subject foreign investors to a different regulatory regime than domestic Chinese investors.[5] For-

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[1] *Draft Foreign Investment Law Open for Comment Until February 17*, PRAC. L. CHINA (Jan. 19, 2015), https://1.next.westlaw.com/Document/Ied185d55a08c11e498db8b 09b4f043e0/View/FullText.html?transitionType=MyResearchHistoryItem&contextData=(oc.Search).

[2] Paul D. McKenzie, Xiaohu Ma, & Wei Zhang, *China's Draft Foreign Investment Law Still under Review, but "Negative List" System Comes into Effect Nationwide October 1*, Morrison Foerster (Sept. 15, 2016), https://media2.mofo.com/documents/160915-china-foreign-investment-law.pdf.

[3] *Draft Foreign Investment Law Open for Comment Until February 17*, *supra* note 1.

[4] *Id.*

[5] Foreign investments into China are governed concurrently by Zhonghua Renmin

eigners, including citizens of Hong Kong, Macau, and Taiwan, must invest and operate in China through special investment vehicles referred to as Foreign-Invested Enterprises ("FIEs").[6] There are restrictions on the business scope of FIEs, and they may only carry out activities that are permitted within their business scope, which is set out on their business license.[7] A FIE's business license is subject to approval when the company is established and will face further approval if the FIE changes its business purpose.[8] FIEs' business scope is regulated by the Catalogue for the Industrial Guidance of Foreign Investments, issued jointly by the National Development and Reform Commission ("NDRC") and MOFCOM.[9]

The Catalogue for the Industrial Guidance of Foreign Investments divides all industries into four categories: encouraged, permitted, restricted, and prohibited.[10] China encourages foreign investments in industries like manufactures and certain agricultural sectors,[11] because they provide the country with technological inventions and capitals, and rewards such investors with certain government subsidies, tax incentives, and waivers.[12] The

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Gongheguo Waizi Qiye Fa (中华人民共和国外资企业法) [the Wholly Foreign-owned Enterprise Law of the People's Republic of China] (promulgated by the Congress of the People's Republic of China, effective Apr. 12, 1968) THE NAT'L PEOPLE'S CONGR. OF CHINA (last visited Feb. 4, 2017) http://www.npc.gov.cn/wxzl/gongbao/2000-12/06/ontent _5004468.htm; Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa (中华人民共和国中外合资经营企业法) [the Sino-Foreign Equity Joint Venture Enterprise Law of the People's Republic of China] (promulgated by the 5th Nat'l People's Cong., effective July 1, 1979, amended Mar. 15, 2001) MINISTRY OF COMMERCE (Jan. 14, 2003) http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200301/20030100062855.shtml; Zhonghua Renmin Gongheguo Zhongwai Hezuo Jingying Qiye Fa (中华人民共和国中外合作经营企业法), Congress of the People's Republic of China (全国人民代表大会) [the Sino-Foreign Cooperative Joint Venture Enterprise Law of the People's Republic of China] (promulgated by the 7th Nat'l People's Cong., effective Apr. 13, 1988, am'd Oct. 31, 2000) THE NAT'L PEOPLE'S CONGR. OF CHINA (last visited Feb. 4, 2017) http://www.npc.gov.cn/wxzl/gongbao/2000-10/31/content_1481412.htm.

6 Edward Zezhou Xu, Yuan Gao & Ki Dat Cheng, *Chinese Foreign Direct Investment Law: Overview*, PRAC. L. CHINA, (Last visited Feb. 4, 2017).

7 *Id*.

8 *Id*.

9 *See* 2011 Waishang Touzi Chanye Zhidao Mulu (外商投资产业指导目录 2011 修订) [The Catalogue for the Industrial Guidance of Foreign Investments] (promulgated by People's Republic Of China Ministry of Commerce, amended 2011) MINISTRY OF COMMERCE (Feb. 21, 2012), http://english.mofcom.gov.cn/article/policyrelease/aaa/ 201203/20120308027837.shtml; *see also*, 2015 Waishang Touzi Chanye Zhidao Mulu (外商投资产业指导目录) [2015 update of The Catalogue for the Industrial Guidance of Foreign Investments] (promulgated by People's Republic Of China Ministry of Commerce, amended 2015) MINISTRY OF COMMERCE (last visited Feb. 4, 2017) http://www.sdpc.gov.cn/zcfb/zcfbl/201503/W020150402620481787669.pdf.

10 *Id*.

11 *Id*.

12 Gloria G. Liu, *Foreign Investments in China: Basics and New Developments*, CORP. L. CLIENT STRATEGIES IN ASIA: LEADING LAWYERS ON SUCCESSFULLY CONDUCTING BUSINESS

permitted category includes every industries not named in the Catalogue.[13] The restricted category allows foreign investment into certain industries with restrictions. For example, the Chinese partners are required to hold the majority of shares.[14] Finally, prohibited industries are not open to foreign investment.[15] Notable industries include national defense, medical and pharmaceutical products, entertainment, internet and media business.[16] For example, it is not possible for a foreign investor to directly investment in a Chinese e-commerce company such as Alibaba or JD.com, as they fall under the prohibited industries.[17]

Creation of Variety Interest Entities to Bypass Restrictions

The current restrictive foreign investment regulations have a repressive effect on industries that are listed on the prohibited category. Chinese companies in the prohibited industries have a hard time raising capital because they may be "unable to access capital from China's state-owned banking system or from its undersized bond market."[18] As a result, they have to rely on foreign investors to finance their business operations. However, the Chinese government restricts foreign investment in those sectors through foreign equity caps and complex licensing requirements, and requires most private Chinese companies to obtain permission to list overseas.[19] To bypass these restrictions, Chinese companies use VIE to gain access to foreign capital.

For foreign businesses that want to invest in industries that are in the prohibited categories, they can set up a FIE in an encouraged or permitted category and appoint Chinese passport holders to act as nominee shareholders.[20] Setting up a VIE can be very complicated and risky. VIEs normally are comprised of at least three entities: an offshore holding company that is listed on a foreign exchange market, a Wholly Foreign-Owned Entity ("WFOE") in China, and an operating business entity domiciled in People's

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IN ASIAN MARKETS AND LEARNING THE LAWS OF LOCAL JURISDICTIONS, 5 (2014).

[13] *The Catalogue for the Industrial Guidance of Foreign Investments*, *supra* note 9.

[14] Gloria G. Liu, *supra* note 12.

[15] The Catalogue for the Industrial Guidance of Foreign Investments, *supra* note 9.

[16] *Id*.

[17] Gloria G. Liu, *supra* note 12, at 6.

[18] Kevin Rosier, *The Risks of China's Internet Companies on U.S. Stock Exchanges*, U.S.-CHINA ECON. AND SECURITY REVIEW COMMISSION STAFF REP., 2 (Sept. 12, 2014), http://www.uscc.gov/Research/risks-china's-internet-companies-us-stock-exchanges-addendum-added-september-12-2014; Joy Shaw, *China VIE Structure May Hold Hidden Risks*, FIN. TIMES (Nov. 11, 2011), http://www.ft.com/cms/s/2/0a1e4d78-0bf6-11e1-9310-00144feabdc0.html?ft_site=falcon&desktop=true#axzz4QsGWAJno; Rachel Lu, *A Wrinkle to Those Hot Chinese Tech IPOs*, CHINAFILE (Mar. 22, 2014), http://www.chinafile.com/reporting-opinion/media/wrinkle-those-hot-chinese-tech-ipos.

[19] Kevin Rosier, *supra* note 18, at 2-3.

[20] Gloria G. Liu, *supra* note 12, at 5-6.

Republic of China.[21] Foreign investors can then purchase shares of the offshore holding company, which is usually based in an offshore tax haven such as the Cayman Islands.[22] The offshore holding company can wholly own the PRC-domiciled WFOE.[23] The Chinese shareholders can then establish a domestic company in the prohibited category, known as the VIE.[24] The VIE, as controlled by Chinese nationals, are legally permitted to invest in any prohibited industries.[25] The VIE will then enter into various control contracts with its affiliated companies, which give all or part of its profits to the foreign invested company in the form of management or consulting fees.[26] The foreign invested company can exercise control over the VIE "through voting proxy, equity pledge, and various other arrangements with the nominee shareholders."[27] The contractual agreements allow foreign investors to exert influence over the operation the VIE, but do not give foreign investors and their offshore companies actual equity ownership in the VIE.[28] The operating control remains within the PRC-domiciled company, the WFOE, which complies with Chinese laws, while foreign investors derive economic benefits solely from the contractual agreements.[29]

Through the VIE structure, Chinese e-commerce companies are able to raise capital overseas. When the Chinese companies and their foreign investors want to list the companies on an international stock exchange, they can consolidate the financial statements of the VIE into the offshore group, which has control over the VIE, and list the foreign holding company on an international stock exchange.[30] The most prominent examples are Chinese internet and media companies that successfully launched initial public offerings (IPOs) on U.S. exchanges.[31] For example, Alibaba, China's leading e-commerce website, filed for an IPO in May 2015, which was one of the largest in U.S history.[32] One of the largest Chinese retailing websites,

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[21] Kaitlyn Johnson, *Variable Interest Entities: Alibaba's Regulatory Work-Around to China's Foreign Investment Restrictions*, 12 LOY. U. CHI. INT'L L. REV. 249, 253 (2015).

[22] *Id.*

[23] *Id.*

[24] Gloria G. Liu, *supra* note 12, at 5.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 5-6.

[28] *See* Kaitlyn Johnson, *supra* note 21, at 254-56 (Alibaba's example of how a VIE can list in U.S.).

[29] Dan Harris, *VIEs in China. The End Of A Flawed Strategy.*, CHINA L. BLOG (Oct. 10, 2011), http://www.chinalawblog.com/2011/10/vies_in_china_the_end_of_a_flawed_strategy.html.

[30] Kaitlyn Johnson, *supra* note 21, at 253, 249-50.

[31] *See* Rosier, *supra* note 18, at 2; *see also,* Richard Pearson, *Looking at Chinese VIE's*, FORBES (Oct. 18, 2012, 1:39 AM), http://www.forbes.com/sites/richardpearson/2012/10/18/looking-at-chinese-vies/.

[32] Ryan Mac & Brian Solomon, *Chinese E-commerce Giant Alibaba Files for IPO*,

JD.com, launched its IPO in 2014 with an expected valuation of $20 billion.[33] In the same year, the Chinese "Twitter," with over 140 million users, launched its IPO on the NASDAQ.[34]

Legal Risk of VIE for Foreign Investors

The VIE structure is not without risk. Chinese law has been silent about the legality of VIEs since their creation.[35] Chinese courts recognize that VIEs are an attempt to circumvent foreign investment regulations.[36] Like U.S. courts, Chinese courts are unlikely to enforce contracts that clearly attempt to violate law and undermine public policy.[37] In 2009, the General Administration of Press and Publication (now part of the State Administration of Press, Publication, Radio, Television, and Film) published a notice that specifically prohibited VIE structures in the online game sector.[38] In 2013, the Supreme People's Court of China ruled that contractual VIE agreements between a Hong Kong-based entity and mainland Chinese entity were intended to circumvent Chinese regulations and to use a lawful method to conceal illegal intentions.[39] The Ministry of Commerce and the China Securities Regulatory Commission have also especially discouraged VIEs in the internet sector.[40] Therefore, the effectiveness and enforceability of the VIE structure depends upon the good faith of the nominee shareholders from China. When the nominee shareholders decide not to honor their obligations under the contractual agreements, the whole VIE structure collapses because there would be no legal remedy available to enforce these control contracts.[41] One prominent case that illustrates the risk of the VIE structure is the dispute between Alibaba and Yahoo. Alibaba's founder, act-

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FORBES (May 6, 2014, 4:50 PM), http://www.forbes.com/sites/ryanmac/2014/05/06/chinese-e-commerce-giant-alibaba-files-for-1-billion-ipo/.

[33] Jonathan Browning & Leslie Picker, *JD.com Said to Plan IPO by July with Over $20 Billion Valuation*, BLOOMBERG (Mar. 11, 2014), https://www.businessoffashion.com/articles/news-analysis/jd-com-said-plan-ipo-july-20-billion-valuation.

[34] Rosier, *supra* note 18, at 2.

[35] David Schindelheim, *Variable Interest Entity Structures in The People's Republic of China: Is Uncertainty for Foreign Investors Part of China's Economic Development Plan?*, 21 CARDOZO J. INTL & COMP. L. 195, 209 (2012).

[36] *Id.* at 217-18.

[37] Samuel Farrell Ziegler, *China's Variable Interest Entity Problem: How Americans Have Illegally Invested Billions in China and How to Fix It*, 84 GEO. WASH. L. REV. 539, 548-49 (2016).

[38] Paul Gillis, *Variable Interest Entities in China*, ACCT. MATTERS (Sept. 18, 2012), http://www.chinaaccountingblog.com/vie-2012septaccountingmatte.pdf.

[39] Neil Gough, *In China, Concern About a Chill on Foreign Investments*, N.Y. TIMES, (Jun. 2, 2013), http://dealbook.nytimes.com/2013/06/02/in-china-concern-of-a-chill-on-foreign-investments/?_r=0.

[40] *Id.*

[41] Liu, *supra* note 12, at 12.

ing as the nominee shareholders of Alibaba's VIE Alipay, transferred 70% of Alipay's interest to himself without notifying Yahoo!.[42] Yahoo! eventually settled the disagreement with Alibaba.[43]

The current foreign investment law restricts foreign investors' access to some profitable Chinese industries. Foreign investors can circumvent the restrictions by employing VIE structures to invest in those industries. However, they face the risk of losing control when the enforceability of the VIE agreements is called into questions.

II. THE NEW DRAFT LAW: KEY PROVISIONS INFLUENCING FOREIGN INVESTMENT

Draft Law Provisions that Expand Restriction over VIE-Like Investment Model

Like its predecessor, the new Foreign Investment Law limits foreign investors' ability to invest or operate business in sensitive industries. The Draft Law, however, when fully implemented, will explicitly eliminate the VIE structure. The Draft Law defines foreign investors to include non-citizen individuals, any enterprise incorporated under foreign laws, any organ of a foreign government, international institutions, and any domestic entity which is controlled by any of these.[44] An additional standard for iden-

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[42] Kaitlyn Johnson, *supra* note 21, at 255.

[43] *Id.* at 256. The decision to settle the case may be the result of previous unfavorable rulings in Chinese courts. Shanghai's arbitration board has invalidated two VIEs, *id.* at 262. *See also,* Gordon G. Chang, *China Can Expropriate Alibaba's Business—And It Just Might*, FORBES (May 11, 2014, 6:24 PM), http://www.forbes.com/sites/gordonchang/2014/05/11/china-can-expropriate-alibabas-business-and-it-just-might/ (mentioning a 2013 case where the Supreme People's Court ruled that contractual agreements under consideration in the Chinachem case, similar in effect to VIE structures, were illegal).

[44] Department of Treaty and Law, Zhonghua Renmin Gongheguo Waiguo Touzifa Zaoan Zhengqiu Yijian Gao (中华人民共和国外国投资法草案征求意见稿) [Foreign Investment Law of the People's Republic of China, draft version to solicit opinions] (promulgated by the Ministry of Commerce), MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA (Jan 1, 2015), http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml (Art. 11:

> Foreign investor under this law means any of the following parties investing in China:
>
> (1) A natural person who is not a Chinese citizen;
>
> (2) An enterprise established in accordance with the law of any other country or territory; (3) The government of any other country or territory, or any department or organization under such government; or (4) An international organization. A domestic enterprise under the control of any of the foregoing parties is also regarded as a foreign investor.).

tifying foreign investors is added to regulate indirectly foreign controlled business. The definition of control now includes: 1) directly or indirectly holding more than 50% of the shares, voting rights or similar equity interests of another entity, 2) directly or indirectly holding the power to appoint or nominate more than half of the members of the board of directors or other corporate governance body of another entity, or 3) directly or indirectly holding a voting right which can direct the decisions of the corporate governance body of another entity.[45]

This means that any domestic entity controlled by a foreign entity or individual—such as nominally independent domestic companies that are controlled contractually through VIE structure—will be classified as controlled by a foreign investor and its investment will be subject to the foreign investment restrictions. This presents a material impediment for both foreign investors and Chinese businesses in the prohibited category. Industries appearing on the Negative List will be prohibited outright or subject to specified restrictions.

The Draft Law also for the first time specifies the legal consequence of future VIEs, including: terminating business, mandatory disposal of shares or assets, confiscation of illegal gains, a fine of up to approximately USD 140,000 or 10% of the investment amount, and imprisonment or criminal detention.[46]

Effect of the Draft Law Over Foreign Investment

The Draft Law may have a devastating effect on companies that rely on VIE structures. Foreign investors are likely to suffer economic loss be-

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[45] *Id*. at art. 18 (directing that:

> Control under this law means, in regards to an enterprise, a situation that conforms to one of the following conditions:
>
> (1) Directly or indirectly holding 50 percent or more of the shares, equity interests, property shares, voting rights or other similar rights and interests in that enterprise; (2) Directly or indirectly holding less than 50 percent of the shares, equity interests, property shares, voting rights or other similar rights and interests in such enterprise but fulfilling one of the following criteria: 1. Having the right to directly or indirectly appoint one half or more of the members of the board of directors or similar decision making organ of that enterprise; 2. Having the ability to ensure that the personnel nominated by it will obtain one-half or more of the seats on the board of directors or similar decision making organ of such enterprise; or 3. Possessing the voting rights to exert a substantial influence on the resolutions made by the shareholders meeting, shareholders assembly, board of directors or similar decision making organ; or Having the ability to exert a decisive influence over the operations, finance, human resources or technology, etc. of that enterprise by contract, trust arrangement or other means.).

[46] *Id.* at art. 144-45.

cause they may have to sell their shares in the WFOE. However, the only buyers that can continue to operate the VIE structure are Chinese nationals due to the expanded definition of foreign ownership in the Draft Law. In addition, once their control is diluted, foreign investors will lose control over the WFOE, and by extension its interest in VIE, essentially eliminating the need for such structure. On the other hand, the living space for smaller Chinese companies in prohibited industries may be reduced as a result of the change in policy because they can no longer gain access to foreign investment. In the past, smaller companies that failed in the domestic market had the option to sell to multinational corporations that were listed on an international stock exchange.[47] For example, Eachnet.com was sold to eBay, JOYO.com was sold to Amazon, and eLong was sold to Expedia.[48] Once the draft law is adopted, foreign companies will have no incentive to enter into the Chinese market by setting up a VIE structure and operating through indirect control.

The current VIE structures in the prohibited categories have two options to preserve their interests. The first option is to rely on the declaration system and to seek grandfather protection.[49] If a foreign-invested enterprise controlled under an agreement applies to the foreign investment department of the State Council with information demonstrating its actual control of the Chinese investors, the agreement control structure may be retained and the relevant entities may continue to carry out business activities.[50] Another option is to go through the declaration and accreditation system.[51] The foreign

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[47] You Yunting, *Will China New Foreign Investment Law Wipe Out VIE Structure?*, BRIDGE IP LAW COMMENTARY (Jan. 22, 2015), http://www.chinaiplawyer.com/will-china-new-foreign-investment-law-wipe-vie-structure/.

[48] *Id.*; *see* Trefis Team, *Expedia Sells Its Majority Stake in eLong and Enters Into An Alliance With Ctrip*, FORBES (May 27, 2015), http://www.forbes.com/sites/greatspeculations/2015/05/27/expedia-sells-its-majority-stake-in-elong-and-enters-into-an-alliance-with-ctrip/#6ad346a57b5c.

[49] Practical Law China, *supra* note 1.

[50] *Id.*; *see also*, Department of Treaty and Law, *supra* note 44 at art. 153

> (Enterprises Existing Prior to Effectiveness allows a foreign invested enterprise that lawfully exists before this law becomes effective shall be governed by the provisions of this law, except where otherwise provided in this Chapter. In addition, Art. 155 allows a foreign invested enterprise that lawfully exists before this law becomes effective may continue to operate within such business scope and operating term and under such other conditions as originally approved. However, because Article 153 only applies to business that "lawfully" exist, and VIE structure's legality has been ambiguous, it is uncertain as whether VIEs can invoke the grandfather clause.).

[51] *Id.* art. 51 requires foreign investors to submit application and updates regarding the operational scope of the business, such as organization form, governance structure, and whether the application involves the establishment of or change to the foreign invested en-

investment enterprise controlled under the agreement shall apply to the competent foreign investment department under the State Council for confirmation that it is under the effective control of a Chinese investor.[52] After the foreign investment department of the State Council determines that it is under the actual control of a Chinese investor, the agreement control structure may be retained and continue operating.[53] As a result, foreign investors can proceed to the declaration stage after transferring a sufficient interest to their Chinese partners for effective control.[54]

However, the reporting system implemented by the draft foreign investment law poses questions as to whether the grandfather protection is a viable option for existing VIEs in the long term. Article 92 requires foreign investors involved in the establishment of or change to a foreign invested enterprise to provide annual content report.[55] The annual information report must contain information on the foreign investor such as name, domicile, jurisdiction of establishment, actual controller, organizational form, main business, contact person, and contact method of the business.[56] Information on the investment such as investment amount, place of origin of investment, investment sector, investment region, investment time, investment methods, capital contribution ratio and methods, and information on whether relevant administrative license are also required are in the annual report.[57] The annual reporting system thus discourages change of ownership over short periods of time in order to collect profit as frequent change may trigger further review. Moreover, the reporting system further strengthens the supervision by requiring an annual report of portfolio investment, which mandates similar annual reporting for foreign investors who purchase less than ten percent of the shares in a publicly listed company in China, even if such a purchase does not result in a change of control of the publicly listed company.[58] Last but not least, a quarterly reporting system is in place for foreign investment in a "key enterprise."[59] When a foreign invested enterprise controlled by a foreign investor has total assets, turnover or business revenue exceeding $15 million, or has more than 10 subsidiaries, the enterprise needs to report information on its business situation and its financial and accounting infor-

terprise. It also requires statement and declarations of the foreign investor and its actual controller and their undertakings as to authenticity and completeness of the application materials.

52 *Id*.

53 *Id*. at art. 154-55.

54 *Id*. at art. 153-55.

55 *Id*. at art. 92.

56 *Id*.

57 *Id*.

58 *Id*. at art. 93.

59 *Id*. at art. 94.

mation within 30 days of the end of every quarter.[60] The combination of the reporting system and the prohibited list will become major impediments for the VIE structures and Chinese companies' ability to seek foreign investment in sensitive industries such as the Internet, media, and energy.

Despite the strengthened regulation and the clear ban on VIE under the Draft Foreign Investment Law, the Shanghai Free Trade Area may offer a last option for continuing the VIE arrangement. The Ministry of Industry circulated a document in 2015, stating that the Shanghai Free Trade Zone will allow foreign investors to hold up to a 100 percent equity ratio in online data processing and e-commerce businesses.[61] As the Shanghai Free Trade Zone has served as a testing ground for commercial and investment reform, there is reason to believe that if implemented successfully, a similar rule can be adopted by free trade zones in other parts of China. In turn, foreign investors can request their Chinese partners to change where the enterprises are located and avoid a complete transfer of their interest.

III. CHANGE FROM CATALOG APPROACH TO NEGATIVE LIST APPROACH

The Draft Law presented a new idea that foreign investment will receive national treatment regulated in the same way as domestic investment.[62] This means that foreign companies not on the prohibited list will be able to establish businesses by applying directly to the State Administration for Industry and Commerce. However, this change will be contingent on a "'negative list' of industrial sectors to which national treatment will not apply."[63] The Negative List approach will replace the existing catalogue system and only retain two categories of industries: (i) the "prohibited" category in which foreign investment is completely prohibited and (ii) the "restricted" category in which foreign investment will be subject to various restrictions.[64] In prohibited industries, no foreign investment in any form will be allowed, neither through any VIE structure nor through any intermediary domestic companies.[65]

Foreign investments in restricted industries will require the investor to obtain an entry license.[66] "The Negative List will specify the limitations and conditions that will apply to obtaining such a license for each industrial sec-

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[60] *Foreign Investment Law of the People's Republic of China, draft version to solicit opinions, supra* note 44.

[61] David Livdahl & Jenny Sheng, *China Opens Up to Wholly Foreign-Owned E-Commerce Cos,* LAW360 (Jul. 14, 2016) https://www.law360.com/articles/817517/china-opens-up-to-wholly-foreign-owned-e-commerce-cos.

[62] *Draft Foreign Investment Law Open for Comment Until February 17*, *supra* note 1.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

tor."[67] Approval of market access will be required for any foreign investment in a restricted sector.[68] Commentators also expect the Negative List to set out a monetary threshold over which investments would require market access approval, specific to industry sector.[69] Once the Negative List is put in place, it will lift regulatory hurdles for a number of foreign investment projects for which foreign investment approval would no longer be necessary.[70] The introduction of the Negative List regime came into effect on October 1, 2016.[71]

IV. NATIONAL SECURITY REVIEW PROCESS

The Draft Foreign Investment Law also places a national security review process over foreign investment in the restricted investment category.[72] China did not have a formal national security review regime until 2011.[73] Before 2011, there were certain scattered provisions in foreign investment-related regulations that would require security reviews.[74] However, despite the declaration that national security review should be conducted, no actual review process was conducted and no penalty was ever assessed.[75]

The Draft Foreign Investment Law establishes an inter-ministerial committee to conduct national security review.[76] The committee designates National Development and Reform Commission ("NDRC"), China's economic planning agency, and MOFCOM as standing lead agencies, with a number of other agencies acting as member agencies in the committee.[77]

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[67] *Id.*

[68] *Draft Foreign Investment Law Open for Comment Until February 17*, *supra* note 1.

[69] *Id.* "The Draft Law expressly prohibits foreign investors from splitting a large investment into smaller ones to circumvent the approval requirement." *Id.*

[70] *Id.*

[71] Paul D. McKenzie, Xiaohu Ma, & Wei Zhang, *supra* note 2([T]he Negative List will affect "core laws governing establishment of wholly foreign-owned enterprises and both Sino-foreign equity and Sino-foreign cooperative joint ventures.").

[72] *Foreign Investment Law of the People's Republic of China, draft version to solicit opinions, supra* note 44, art. 26-27.

[73] Xingxing Li, *National Security Review in Foreign Investments: A Comparative and Critical Assessment On China and U.S. Laws and Practices*, 13 BERK. BUS. L. J. 255, 265-66 (2016).

[74] *Id*. at 263-64 "For example, China's M&A Rules of 2006, as amended in 2009, state that parties should make a filing to MOFCOM where a foreign investor acquires a domestic Chinese company, obtains de facto controlling power, and the acquisition (i) concerns critical sectors or (ii) impacts, or has the possibility of impacting, China's national economic security." *Id*.

[75] *Id.*

[76] *Foreign Investment Law of the People's Republic of China, draft version to solicit opinions, supra* note 44, at art. 49.

[77] *Id*. The development and reform department and the department in charge of foreign investment, both under the State Council, shall act as co-conveners of the Joint Committee

The Draft Foreign Investment Law has not specified the identities of member agencies apart from the NDRC and MOFCOM.[78] In the security review process, China's pilot free trade zone's review process may become a reference for the membership of the committee. The security review committee in the Shanghai Free Trade Zone consists of as many as thirty agencies, including the Department of Justice, the Department of Finance, the Ministry of Industry and Information Technology that may participate in the review process.[79]

The Problem in The Formulation of National Security Review System Makes Enforcement Inconsistent.

National security review only applies to industries in restricted category and the factors in evaluation process are not clearly defined in the Draft Law. As a result, the enforcement of the system will likely be subject to discretion from the security review committee.

The policy rationale behind foreign investment is always a balance test between fending off foreign competition, to invoke it as a gatekeeper of foreign investments and to protect its national security.[80] Due to the need of foreign capital to finance China's growing market, China's security review scope has been narrowly tailored to allow foreign investment transaction to be immune from security review.[81]

Compared with its U.S. counterpart, the Committee on Foreign Investment in the United States, Chinese policymakers adopted a categorical list in an effort to narrow down the factors to be considered in a national security review.[82] In accordance with the categorical list, regulators may review inward foreign investment transactions—not restricted to mergers and acquisitions—relevant to national defense, critical technology, critical infrastructure, energy, and other resources.[83] The broad and ambiguous list is

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and conduct foreign investment national security review in conjunction with other departments related to foreign investment.

[78] *Id*. at art. 49 (charging the State Council to establish an inter-ministerial joint committee for foreign investment national security review to bear responsibility for the foreign investment national security review).

[79] *See* State Council, *Approval Reply of the State Council Pertaining to the Establishment of the Working-Level Inter-Ministerial Joint-Committee System in Free Trade Zones That Were Set Up by the State Council*
(国务院关于同意建立国务院自由贸易试验区工作部际联席会议制度的批复), STATE COUNCIL (Feb. 7, 2015), http://www.gov.cn/zhengce/content/2015-02/16/content_9486.htm.

[80] Xingxing Li, *supra* note 73, at 268-70.

[81] *Id*. at 283.

[82] *Id*.

[83] *Id*. *See also Foreign Investment Law of the People's Republic of China, draft version to solicit opinions*, *supra* note 44, at art. 57 (Factors to be Considered in connection with National Security Review of a foreign investment include):
(1) the influence on national defense security, including domestic product production capa-

equivalent to the U.S. approach of not furnishing a definition of national security.[84] While each categorical element is broad and ambiguous, the list is not a comprehensive one, missing the entire financial sector.[85] It unreasonably narrows the scope of the review and "mistakenly renders large subsets of transactions immune from national security scrutiny."[86]

The Chinese National Security Review System Has Under Inclusive Definitions of Key Provisions That Allow Foreign Investors to Bypass the Process.

Chinese policymakers have very limited experience with national security review and therefore directly borrow rules from more sophisticated jurisdictions like that of the Committee on Foreign Investment in the United States.[87] However, the many rules and structural arrangements transplanted from that of the Committee on Foreign Investment in the United States require cost-benefit analysis, data collections, and empirical study backup, which are traditions lacking in China's policymaking process.[88] China uses a top-down implementation of the intention of the leadership rule-making process, rather than empiricism derived from experience or cost-benefit analysis.[89]

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bilities, domestic service provision capabilities, and related equipment and facilities, in each case required for national defense, and the influence on the security of important or sensitive national defense facilities;

(2) the influence on the research and development capabilities for key technologies involving national security;

(3) the influence on the primacy of China's technologies in the national security sectors;

(4) the influence on the spread of dual use products and technologies that are subject to import or export control;

(5) the influence on China's key infrastructure and key technologies;

(6) the influence on China's information and internet security;

(7) the influence on China's long term demands for energy, grain and other key resources;

(8) whether the foreign investment is controlled by a foreign government;

(9) the influence on the stable operation of national economy;

(10) the influence on the public interest and public order; and

(11) other factors that the Joint Committee believes must be considered).

[84] *See* Xingxing Li, *supra* note 73, at 283.

[85] *Id*.

[86] *Id*.

[87] *Id*. at 285.

[88] *Id*.

[89] *See* Chinese Communist Party News (中国共产党新闻网), *The Current State of China's Legislation, the Problems, and the Reasons Analyzed* (我国立法的现状、问题与原因分析) 我国立法的现状 PEOPLE'S DAILY (Jul. 8, 2008), http://theory.people.com.cn/GB/68294/120979/124345/7481139.html (noting the lack of cost-benefit analysis in rule-makings, the absence of procedural due process, and the top-down rule-making process in which the drafters merely carry out the superior's will without scientific reasoning). *See also* Ta-kuang Chang, *The Making of the Chinese Bankruptcy Law:*

The lack of experience in national review is manifested in the arbitrary definition of "control" in the national security review system. The Committee on Foreign Investment in the United States ("CFIUS") has a broad definition of control, allowing the CFIUS to trigger the review process even when foreign investors only account for a small amount of shares, as no dollar threshold is set out for a covered transaction eligible for CFIUS.[90] As a result, an investor must file a notice with CFIUS when a control is found, and foreign ownership of less than 10 percent in a U.S. business may constitute foreign control unless it is solely for the purpose of passive investment with no elements of control.[91]

In comparison, the definition of "control" in Chinese context is much narrower. China adopts a cutoff of 50% equity interests as its national security review threshold: "control" is found where one or more foreign investors hold more than 50% interest in a target company.[92] The 50% ownership threshold is documented in the rules promulgated by China's State Council. However, the Catalogue system, which is primarily formulated by the NDRC, failed to reconcile the national security review threshold issued by the State Council.[93]

The Draft Foreign Investment Law is completely silent on the definition of control in its National Security Review process; rather it focuses entirely on the influence of foreign investment over restricted industries.[94] Therefore, one may need to fall back on the State Council National Security Review rule when looking for a definition of control.[95] The 50% ownership threshold is arbitrary even though additional catchall provisions were provided to find control, which includes "(i) where a foreign investor's equity interest is less than 50 percent, but equity interest voting rights exert substantial influences shareholders' meetings or the board of directors, and (ii)

A Study in the Chinese Legislative Process, 28 HARV. INT'L. L.J. 333, 336-54 (1987). *See also* Stanley Lubman, *Introduction: The Future of Chinese Law*, 141 CHINA Q, 1, 3-4 (1995).

[90] *See* Xingxing Li, *supra* note 73, at 290. CFIUS can review a "covered transaction", as defined in 31 C.F.R. § 800.207 (2015), where a transaction is defined as "by or which any foreign person, which could result in control of U.S. business by a foreign person." Control can be identified if a foreign investor (a) has the ability to determine or block important business matters, or (b) has representation on the board of directors. 50 U.S.C. app. § 2170(a) does not give a dollar threshold to define control, and CFIUS interprets "control" far more broadly than traditional corporate governance concepts.

[91] *Id.* at 290.

[92] State Council, *Circular of the General Office of the State Council on the Establishment of National Security Review Regime Pertaining to the Mergers and Acquisitions of Domestic Companies by Foreign Investors* (国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知), GEN. OFFICE OF STATE COUNCIL (Feb. 3, 2011), http://www.gov.cn/zwgk/2011-02/12/content_1802467.htm.

[93] *See* Xingxing Li, *supra* note 73, at 291.

[94] *See Foreign Investment Law of the People's Republic of China, draft version to solicit opinions*, *supra* note 44, at Art. 57.

[95] *See* Xingxing Li, *supra* note 73, at 291.

a *de facto* control transfer from the target company (i.e., management decisions, finance, personnel, or technology) to foreign investors."[96] Even though the catchall provision, together with the 50% threshold, seems to cover foreign holding below 50 percent, the catchall provision does not touch on the ownership threshold for "control."[97] It is highly likely that the committee in its enforcement activities will rely on the 50% ownership threshold as its benchmark for national security review.[98]

The security review system issued by State Council clearly aims to check against inward mergers and acquisitions activities.[99] Yet the 50% threshold in reality functions to automatically filter out a subset of critical sectors, "those sectors in which foreign ownership is restricted to minority interest such as financial service and telecommunication, granting them immunity from national security review."[100]

Since the National Security Review under the new foreign investment law will likely refer back to the 50% ownership threshold set up by State Council,[101] this potentially has a relaxing effect for foreign investment under the new foreign investment law. When considering both the Catalogue system and the national security review regime together, the over-50% equity threshold renders industries that the Catalogue system imposes a cap on foreign shareholding off the radar of scrutiny for national security threats.[102] In addition, because foreign investors concurrently abide several layers of regulations, they have to file against the Catalogue system to fall into the reviewable category (comply with the shareholding limitations) and file a national security notice for investment in restricted sector.[103] The collision between these two regimes leads to the ineffectiveness of a national security review in certain sectors, for example, "as long as a foreign investor complies with the shareholding restrictions, the regulators do not have to assess the national security consequences of their investment."[104]

Competition Between Department and Local Governments Incentivize a Lessened Standard of Review.

China's National Security Review process is carried out by an inter-ministerial joint committee chaired by both the NDRC and MOFCOM and

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[96] *Circular of the General Office of the State Council on the Establishment of National Security Review Regime Pertaining to the Mergers and Acquisitions of Domestic Companies by Foreign Investors*, *supra* note 92, at Art. 3(2), (3), and (4).

[97] Xingxing Li, *supra* note 73, at 291.

[98] *Id*.

[99] *Id*. at 292.

[100] *Id*. at 291.

[101] *Id*.

[102] *Id*. at 292.

[103] *Id*.

[104] *Id*.

includes other ministries in charge of the industries and sectors related to the proposed foreign acquisition, although the specific ministries involved are ambiguous.[105] The review process has two phases. The general review phase, analogous to the initial review phase in the CFIUS process, will be completed within thirty working days.[106] If there is no national security concern found, the transaction can go through, unless the committee detects concealed or false information during the report progress, thus reinitiating the investigation.[107] Otherwise, the review enters the second phase, where a special investigation phase, analogous to the special investigation phase in the CFIUS process, is to be completed within sixty business days.[108]

The Draft Law does not clarify the differences between the two phases. Factors to be considered in the national security review process, as listed in Article 57 of the draft law, seem to apply across the board for the entire review proceeding.[109] The language of Articles 51, 52 (general review phase) and Articles 61, 64 (special investigation phase) identify reviewers by phases. For the general review process, the "department in charge of foreign investment under the State Council" (usually local government) will determine whether the application enter the general phase, and submit the application material to the Joint Committee for review.[110] For the special investigation phase, the Joint Committee can make the decision to approve the transaction, or to submit the potential application to the State Council for final decision.[111] Conveniently, before the conclusion of the special investigation, a foreign investor may propose mitigation measures to avoid being attributed as posing national security risk.[112] The Joint Committee

[105] *Foreign Investment Law of the People's Republic of China, draft version to solicit opinions*, *supra* note 44, at art. 49. Joint Committee for National Security Review (The State Council shall establish an inter-ministerial joint committee for foreign investment national security review to bear responsibility for the foreign investment national security review. The development and reform department and the department in charge of foreign investment, both under the State Council, shall act as co-conveners of the Joint Committee and conduct foreign investment national security review in conjunction with other departments related to foreign investment).

[106] *Id*. art. 61. The general review process starts within 15 business days after receiving the application materials prescribed in art. 51 (Application Materials for National Security Review). Then, art. 57, Factors to be Considered in connection with National Security Review are evaluated to determine whether the second phase of review is required.

[107] *Id*. at art. 62. The joint committee reserve the right to revisit the review under art. 56 (Supplementary National Security Review).

[108] *Id*. at art. 62.

[109] *Id*. at art. 57 (listing the factors to be considered in connection with National Security Review). Because the use of phrase "National Security Review" correspond with general provisions National Security Review, it can be assumed that the factors are applied to both review processes.

[110] *Id*. at art. 52-54.

[111] *Id*. at art. 62-64.

[112] *Id*. at art. 65 ("[t]o avoid having a foreign investment cause possible harm to national

then may recommend the State Council to make the final decision, alongside the proposed mitigation measure, to either block the transaction or grant authorization.[113] The last process is analogous to the presidential review phase in the CFIUS process, and "[s]imilar to the black-box process of CFIUS, there is essentially no public information about the inner workings of the inter-ministerial committee."[114]

Most importantly, the multi-layer regulatory regime is susceptible to ministerial competition, due to ministries and local governments' interest to bring in more foreign investment to stimulate the economy within their own jurisdiction. On the very top of the legislative food-chain, the NDRC and MOFCOM are known to be in fierce jurisdictional competition for jurisdiction over foreign investment, dating back to before the national security review as a regulatory regime.[115] The two lead agencies system in the current security review regime may be a result of political bargaining and compromise.[116] Such competition of power is common in China's legislative history,[117] and the State Council has allowed the "self-interested behaviors of the NDRC and MOFCOM by authorizing both of them to be lead agencies in the Joint Committee."[118]

The inter-ministerial competition gives foreign investors a chance to file their applications and reports with agencies that have the most favorable policies. This is especially prominent for the general review phase of the new foreign investment law. The approval authority for a transaction and the power to conduct a national security review lie in different branches of MOFCOM: the former with local MOFCOM and the latter central MOFCOM.[119] Article 53 of the Draft Law gives local MOFCOMs the pow-

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security, the applicant may propose to the department in charge of foreign investment under the State Council additional restrictive conditions for the foreign investment before a review decision is issued. The Joint Committee shall carry out an appraisal of the effectiveness and feasibility of such proposal. To eliminate possible harm to national security, the Joint Committee may, in accordance with the results of the appraisal, agree with the relevant parties to additional restrictive conditions, including necessary adjustments to the foreign investment").

[113] *Id.*

[114] Xingxing Li, *supra* note 73, at 295-96.

[115] Xingxing Li, *An Economic Analysis of Regulatory Overlap and Regulatory Competition: The Experience of Interagency Regulatory Competition in China's Regulation of Inbound Foreign Investment*, 67 ADMIN. L. REV. 685, 700-08 (2015).

[116] *Id.* at 730-34. *See also* Xingxing Li, *supra* note 73, at 301-02 ("[t]he outcome is the inefficient stacking of agencies; instead of being alternatives to each other, the NDRC and MOFCOM became additives to one another, each with veto power in signing off a foreign investment project. For the regulated firms, it means onerous sequential approvals rather than an option to choose a preferred regulatory agency").

[117] Xingxing Li, *supra* note 73, at 302.

[118] *Id.*

[119] *Foreign Investment Law of the People's Republic of China, draft version to solicit opinions*, *supra* note 44, at art. 53.

er to make judgments as to whether or not transactions are "covered transactions" during their pre-approval screenings.[120] As a result, the dominant strategy of foreign investors would attempt to file to local MOFCOMS according to their decisions in the screening process, much like the forum shopping in the United States. This is because if the pre-approval power lies with local MOFCOM, a foreign investor would not be required to make a separate national security review filing with the central MOFCOM.[121] Foreign investors have an incentive to claim that they have received endorsement from the authorities and therefore avoid self-reporting to the central MOFCOM.[122] When local MOFCOM approves a foreign investment transaction, it does not trigger any national security concern.[123] Since local MOFCOMs are making decisions for transacting parties as to whether a national security filing needs to be made, investors can rely on the decision and avoid voluntary fillings until local MOFCOM requires so.[124]

The division of authorities may lie in the recognition of divergent interests of local and central MOFCOMs: an incentive to encourage foreign investment during the early stage of China's economic development. National security can be put in lower priority compared with the need of economic development. Local MOFCOMs align more with local governments, who have more interest to attract foreign investment into the locality.[125] Local governments and MOFCOMs are more "inclined to excessively focus on trivial details in a transaction so as to assert their authority and seek rents from the foreign investors."[126] It is also not in their interest to "turn down an incoming foreign investment project on the ground of a national security concern, as that implies steering foreign investment away from their locality."[127] As a result, Articles 52 and 53 provide foreign investors a *de facto* safe harbor by granting local MOFCOMs the authority to determine whether the application should even proceed to be review by the Joint Committee.[128] Therefore, central MOFCOM has largely delegated its power of judgment to local MOFCOMs.[129]

Last but not least, even if local MOFCOMs are able to take a neutral

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[120] *Id.* at art. 53.

[121] Xingxing Li, *supra* note 73, at 306-07.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Foreign Investment Law of the People's Republic of China, draft version to solicit opinions*, *supra* note 44, at Art. 52, 53. Article 52 specifically allows investors to submit a request for appointment to confer about related procedural issues and have advance communications on the relevant circumstances before applying for national security review.

[129] Xingxing Li, *supra* note 73, at 306-07.

stand on whether an individual transaction should be submitted to national security review, they may not have the capacity or information advantage to do so.[130] Nor do local MOFCOM branches have the information advantage in making the decision for the transacting parties: "the local MOFCOM branches would make the judgment call as to whether the parties should make a filing *prior to* the revelation by the investors of comprehensive information about its national security implications."[131] The Draft Law has attempted to force more disclosure from the foreign investors regarding their financial and investment information, evidence in the quarterly and annual reporting requirement discussed before. The Draft Law also imposes more severe punishment for failure to disclose information during the registration and review process. In addition to the fine and confiscation of profit, it also (for the first time) imposes criminal liability for violating the foreign investment law.[132] However, because foreign investors do not have to disclose their proprietary information about the possible national security impacts of their transaction until they are about to enter the general review phase of security review, the punishment is unlikely to have a deterrence effect over investors' filing practices.

Overall, the processing of filing is convoluted due to the ministerial competition within the Chinese government and the divergent interests from different decision makers with regard to the initiation of the security review process. In addition, the capabilities of MOFCOM branches vary in China, and the review proceedings mitigate the effectiveness of the penalty set up in the Draft Law. As a result, one would expect great disparity in the decision-making process, a result that is open to forum shopping by foreign investors.

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[130] *Id.*

[131] *Id.*

[132] *Foreign Investment Law of the People's Republic of China, draft version to solicit opinions*, *supra* note 44, at Draft Foreign Investment Law. For example, Article 144 poses a fine between RMB 100,000 and RMB 1 million (inclusive) or 10% of the illegal investment for a foreign investor who invests in a sector listed in the catalogue of prohibited investment. Article 145 imposes a fine between RMB 100,000 and RMB 1,000,000 (inclusive) or 10% of the illegal investment for investing in a sector listed in the catalogue of restricted investment without approval. Article 146 impose a fine of between RMB 100,000 and RMB 1,000,000 (inclusive) or 10% of the investment, and a new national security review may be carried out in accordance with the provisions of Article 56 (Repeated National Security Review) of this law, when: (1) The foreign investor concealed the related circumstances, provided false materials or made false representations during the national security review; or (2) The foreign investor violated the additional restrictive condition(s) set out in a national security review decision. Article 148 imposes fix-term imprisonment of no more than one year or criminal detention for evading performance of its information reporting obligations, or by concealing the truth or by providing misleading or false information while carrying out information reporting. Article 151 threatens to revoke a business permit and impose criminal liability for violation of the foreign investment law.

V. CONCLUSION

On 17 January 2017, the State Council released the Circular on Several Measures on Expanding the Opening to and Active Use of Foreign Investment Guidelines, which sets out the blueprint for China's policies on attracting foreign investment in the upcoming years.[133] Although the Draft Law has yet to be officially approved by the central government, the Guideline document reiterates the plan to gradually implement the Draft Law in 2017 as an effort to attract more foreign investment.[134] China's new foreign investment law intends to facilitate investments with a view to creating a stable, transparent and predictable investment environment, but negative list approach as well as the national security review process will subject foreign investors to a more restricted regulatory system. Under this new regulatory regime, the VIE structure used to gain access to the prohibited industries are likely to be entirely eliminated by the new foreign investment law and its reporting system, unless a special free-trade zone can be exempted from the foreign investment law. On the other hand, foreign investors in restricted categories are likely untouched by the adoption of the new law, due to the under-inclusive scope of the national security review process as well as the ministerial overlay of the reviewing system. Because of the current defect in the enforcement of the national security review, foreign investors in restricted industries arguably benefit more from the strengthened regulatory regime as they are unlikely to be subject to national security review, and therefore will enjoy national treatment like domestic companies once they avoid security review.

[133] *Circular on Several Measures on Expanding the Opening to and Active Use of Foreign Investment Guidelines* (国务院关于扩大对外开放积极利用外资若干措施的通知), State Council, http://www.gov.cn/zhengce/content/2017-01/17/content_5160624.htm (Jan. 17, 2017).

[134] *Id.*