22 February 2019

全国人大常委会法制工作委员会
西城区前门西大街1号
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Dear Sir/Madam,

## Subject: Response to 2018 Consultation Draft of the Foreign Investment Law

On behalf of its members, Asia Securities Industry & Financial Markets Association ("**ASIFMA**")[1] conveys its sincere appreciation of the *Consultation Draft of the Foreign Investment Law*, which was issued on 26 December 2018 by the National People's Congress ("**NPC**") with the approval of the State Council (the "**Draft Law**"). ASIFMA deeply appreciates the efforts made by the Draft Law to address investment promotion and protection whilst aiming to correct abuses through the forced transfer of intellectual property. ASIFMA strongly believes that the Draft Law will make significant progress in improving the investment environment for foreign investors in China.

With the goal of continuously improving China's business environment to strengthen her position as the world's premier inbound investment destination, ASIFMA hereby provides these comments on the Draft Law to support foreign investment in China. ASIFMA believes that the Draft Law should, in order to achieve its purpose, strive to create a level playing field among domestic and foreign investors and maximise certainty and stability for existing investors. ASIFMA notes that the Draft Law, with only 39 articles as compared to 170 articles in the 2015 draft, does not contain enough detail to enable investors to adequately plan for compliance with its provisions. Areas where detailed implementation rules are needed include, but are not limited to, public offering of shares in a foreign-invested entity (Art. 17), protection of intellectual property rights (Art. 22), mechanism for foreign investors and foreign invested enterprises to lodge complaints (Art. 25), and national security review system (Art. 33). If the new draft cannot be amended to include the necessary detail before it is finalised, we

[1] ASIFMA is an independent, regional trade association with over 110 member firms comprising a diverse range of leading financial institutions from both the buy and sell side, including banks, asset managers, law firms and market infrastructure service providers. Together, we harness the shared interests of the financial industry to promote the development of liquid, deep and broad capital markets in Asia. ASIFMA advocates stable, innovative, competitive and efficient Asian capital markets that are necessary to support the region's economic growth. We drive consensus, advocate solutions and effect change around key issues through the collective strength and clarity of one industry voice. Our many initiatives include consultations with regulators and exchanges, development of uniform industry standards, advocacy for enhanced markets through policy papers, and lowering the cost of doing business in the region. Through the GFMA alliance with SIFMA in the United States and AFME in Europe, ASIFMA also provides insights on global best practices and standards to benefit the region.



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suggest that a timetable for the release of these implementation rules is separately published after consultation with industry participants.

Set out below are detailed comments on specific articles of the Draft Law for the working group's reference:

**1** (Article 2) The reference to "indirect" investments in Article 2 makes it unclear how an investment activity with no direct link to a Chinese entity - for example, a merger between two multinational groups at the offshore level which either have Chinese subsidiaries or supply products to China - will be regulated under the foreign investment regime. We suggest that either the reference to "indirect" investment activities, or the reference to "direct or indirect" investment activities in the territory of China, be removed from Article 2.

**2** (Article 4) Article 4 ought to include an express commitment to narrow the negative list to the maximum extent possible, including conducting periodic reviews of the negative list on at least an annual basis.

**3** (Article 5) It is suggested that Article 5:

(i) provides a high level of protection to foreign investors, through the use of phrases such as "protect fully" or "protect on a national treatment basis taking into account the needs of foreign investors in China"; and

(ii) specifies that the investments, business activities, returns and other legitimate interests of foreign investors within the territory of China will enjoy protection to an extent at least equal to domestic investors.

**4** (Article 6) The phrases "threaten the national security" and "damage the social public interest" in Article 6 need to be more specifically defined through a detailed framework, in order to prevent breach of World Trade Organisation (WTO) or other international principles of mutual investment and trade.

**5** (Article 9) In addition to "policies that promote the development of enterprises" under Article 9, all laws, regulations and policies which impact foreign investment, including the Anti-Monopoly Law, government subsidies and other preferential treatment, ought to apply equally and to the same extent to foreign and domestic investors (except for special incentives adopted by the State under Article 14 to attract foreign investment in accordance with national economic needs and social development).

**6** (Article 10) We suggest expanding Article 10 so that all decisions of the foreign investment authorities and other regulatory authorities impacting foreign investment shall be promptly

published in accordance with law. It is often these decisions which have the greatest impact on and reference value for foreign investors.

**7** (Article 10) Other suggestions in relation to Article 10 are for all consultation drafts, documents and decisions covered by Article 10 to be published in English and Chinese, and (given the differences between the English and Chinese language versions) a longer lead time of three months or more for each consultation. This will enable foreign investors to understand the full impact of legislative changes, provide responses and structure their operations efficiently.

**8** (Article 13) The reference to experimental policies and measures in Article 13 ought to expressly include the possibility of further reducing the scope of the negative list in the free trade zones and other designated zones.

**9** (Article 14) The Draft Law ought to clarify the types of preferential policies included within the scope of Article 14.

**10** (Article 15) Mandatory standards imposed by the State, as referred to in Article 15, should not impose excessive burdens on foreign investors that do not have to be borne by domestic investors. Whilst ASIFMA is fully supportive of equal treatment between domestic and international investors, equal should not mean identical and sufficient flexibility needs to be given to foreign investors to comply with the standards mentioned in Article 15. One example of a possible concern is where certain documents required for processing applications or complying with standards are not available abroad or not in the same format as in China.

**11** (Articles 16 and 22) Article 16 ought to extend to procurement activities by state owned enterprises and include an express prohibition against linking procurement decisions to the voluntary supply of technology or intellectual property rights or the supply of indigenous products and services. The same comment applies to the prohibition against forced transfer of technology in Article 22.

**12** (Article 17) ASIFMA welcomes the opening up of more channels for foreign invested enterprises to raise financing from the domestic capital markets in Article 17 but is concerned that Article 17 is not detailed enough to evaluate how these mechanisms will work in practice. It is suggested that a timetable for the release of the required implementation rules is separately published and consultation on the rules with domestic and foreign industry participants be undertaken.

**13** (Article 18) ASIFMA hopes that Article 18 can further define the types of measures the Draft Law will permit local governments to use to promote foreign investment.

**14** (Article 19) The services and guidelines referred to in Article 19 to be provided to foreign investors should, in the interests of efficiency and completeness of understanding, be provided in English and Chinese.

**15** (Article 20) In addition to requiring any expropriation to comply with legal procedures, Article 20 ought to specify that nationalisation or expropriation of foreign investments should apply in the same way to domestic investments, and compensation paid to foreign investors should not be inferior to that paid to domestic investors. Detailed guidance on the circumstances in which, and how, foreign-invested assets may be expropriated should be published.

**16** (Article 21) Building on the purpose of Article 21, we suggest that all restrictions and quotas on cross-border capital account transactions by foreign investors and foreign invested enterprises (other than those imposed by financial market rules and contained in published regulations) be removed, to enable China's capital flows to move in step with advanced economies. Repatriation of funds should be permitted with no delays imposed by administrative processes.

**17** (Article 22) It ought to be clarified in Article 22 that the protection of intellectual property rights of foreign investors (both scope of rights and intensity of enforcement) will not be weaker than the equivalent protection available to domestic investors. In order to further strengthen the principle of protection we suggest deleting the phrase "encourages technical cooperation based on voluntariness and business rules". Another comment on Article 22 can be seen at paragraph 11 above, in our comments on Article 16.

**18** (Article 24) Article 24, second paragraph ought to specify that if undertakings or contracts entered into by local governments and relevant government departments need to be amended, any amendments made and compensation for loss given are to be applied equally to foreign and domestic investors.

**19** (Article 25) Article 25, second paragraph ought to specify that in addition to a complaints procedure for foreign investors, any foreign invested enterprise whose rights are infringed by government authorities or functionaries should be entitled to the same protections as domestic investors and domestically invested enterprises under the laws and regulations of China.

**20** (Article 27) We suggest the following changes to the negative list management concept in Article 27:

(i) specify which negative list applies to foreign investment in China's free trade zones. The current negative lists that have been formulated for the free trade zones are different in scope to the national negative list;

(ii) a timetable for eliminating all remaining barriers to market entry imposed by the negative list. The prohibited and restricted categories of the existing negative list still pose extensive restrictions on the activities of foreign investors in China; and

(iii) express prohibition on government authorities imposing further restrictions (such as the Shanghai Free Trade Zone's *Implementing Rules for a Cross-Border Service Provision Management Model* issued in September 2018) on the cross-border or other activities of foreign investors in the PRC.

**21** (Article 29) ASIFMA welcomes that applications by foreign investors for licences should be reviewed using the same conditions and procedures as those applied to domestically invested enterprises. To maximise transparency and address the difficulties faced by foreign investors in complying with the relevant regulatory requirements, ASIFMA suggests:

(i) requiring all conditions and procedures for licence applications to be set out in published rules and regulations;

(ii) requiring the regulators to apply the relevant procedures in a manner which maximises efficiency and speed (for example, acceptance of electronic signatures and documents signed in counterpart);

(iii) extending the scope of Article 29 to all permits, qualifications, filings and registrations; and

(iv) a general principle that the capability and effort required to comply with criteria for obtaining licences and qualifications in China should be the same for foreign and domestic investors and their investment vehicles in China. It needs to be emphasised that the same capability and effort does not necessarily mean that requirements for foreign and domestic investors should be identical. For example, overseas working experience comparable to Chinese experience in a particular sector should be deemed to satisfy the relevant criteria.

**22** (Article 30) On enforcement of business registration, tax, accounting, foreign exchange and other rules by the Chinese government authorities, Article 30 ought to contain a new principle that the violation of these rules by foreign and domestic investors and their investment vehicles in China will be monitored and punished to the same extent.

**23** (Article 31) Article 31 ought to contain a general principle that the nature and extent of information required to be submitted by foreign investors and foreign invested enterprises under the foreign investment reporting system (e.g. details of ultimate controllers) should not be more onerous than the equivalent information requirements which apply to domestic investors and domestically invested enterprises.

**24** (Article 33) Article 33, paragraph 2 ought to set out the factors to be taken into account and the process for conducting a national security review and affirm that all such decisions will be made public. Foreign investors should be able to bring appeals in respect of any issues related to the national security review process, and be given the opportunity to address, through mitigation measures, any national security concerns identified in the course of a review.

**25** (Article 35) Article 35 ought to be expanded to apply legal and regulatory sanctions to foreign and domestic investors to an equal extent (both scope and intensity of sanctions) for infringements of any applicable investment restrictions. A reasonable timeframe for cessation of operations under Article 35 should also be defined.

**26** (Article 36) The requirement for violations of laws and regulations to be investigated and recorded in the credit information system and subject to joint authority action in Article 36 ought to apply to domestic investors and domestically invested enterprises to an equal extent.

**27** (Article 37) Concerns were raised by many ASIFMA members that Article 37 may lead to unilateral action being taken against businesses in China from, or deemed to support, particular countries or regions. ASIFMA hopes to obtain the appropriate assurances from the Chinese government to address such concerns, and hopes that Article 37 will specify the following:

(i) before imposing corresponding measures, the Chinese state must make a finding that its local industry has been harmed by the discriminatory measures and must quantify the harm to its local industry;

(ii) any measures taken by the Chinese government in response to discriminatory measures adopted by other countries or regions must be proportionate to the quantified harm;

(iii) such measures should be taken only after consultation with the affected country or region and should be adopted in a fully transparent manner, with broad solicitation of opinions from stakeholders;

(iv) existing foreign investments in China impacted by the new measures be given the full range of protection under Chinese laws and regulations, including without limitation Chapter 3 of the Draft Law; and

(v) firms and investors that are impacted by any measures taken by China outlined in Article 37 should be notified before the measures are implemented and have the right to appeal.

**28** (Article 38) Whilst ASIFMA agrees that certain restrictions may continue to have specific application to foreign investors in the financial sectors, it is suggested that Article 38 be clarified as follows:

(i) Removing the first part of Article 38. There should be no need for any rules further restricting foreign investment in specific industry sectors, as the purpose of the negative list is to contain an exhaustive list of such restrictions. Alternatively, the first part of Article 38 should refer to a definite and not an open-ended list of sectors (including banking, securities and insurance) in which special provisions applying to foreign investors continue to apply. This would prevent the issue of further rules providing for restrictions on foreign investments in other sectors not covered by the negative list.

(ii) Foreign investment in the financial markets, such as A-share companies and onshore bonds, is becoming increasingly important to the Chinese economy. The second part of Article 38 thus ought to contain a general principle that all prohibitions on or criteria for participation in the securities, foreign exchange and other financial markets be applied equally to domestic and foreign investors and their respective investment vehicles. Any restrictions and quotas that are necessary to be applied only to foreign investors or foreign invested enterprises should be clearly specified in the published rules of the relevant financial market or exchange.

**29** (Article 39) ASIFMA appreciates the legislators' initiative to harmonise the different corporate structures within the framework of the *PRC Company Law* and hopes that it will result in minimum disruption and maximum certainty to the business activities of foreign companies in China. ASIFMA also appreciates that the transition period was extended to five years from the previous three years. To better achieve the legislative purpose, ASIFMA proposes the following changes to Article 39:

(i) all foreign invested enterprises established before the coming into effect of the Foreign Investment Law be given the option to continue with the pre-existing corporate structure for an indefinite period. This will minimise any disruption from renegotiation of existing Sino-foreign joint venture arrangements between Chinese and foreign investors. If conversion is needed, ASIFMA members ask that the conversion process be detailed and that the process minimises any possible disruption;

(ii) express provision be made allowing investors to elect that the constitutional documents of foreign invested enterprises be governed by foreign law; and

(iii) equity transfers, mergers, demergers and other corporate changes to foreign invested enterprises within the negative list should continue to be governed by the rules that apply to foreign invested enterprises after the repeal of the three foreign investment laws.

ASIFMA greatly appreciates the NPC and State Council's consideration of the points and questions raised in this paper and would be pleased to discuss them in greater detail as appropriate. If you have any questions, please contact me or Laurence Van der Loo (lvanderloo@asifma.org) in my office. This submission was prepared by global law firm Linklaters LLP, ASIFMA member, based on feedback from the wider ASIFMA membership.

Sincerely,

Mark Austen

CEO

Asia Securities Industry & Financial Markets Association