Assessing “National Treatment” as a Basis for Securing Market Access Under a Comprehensive Agreement on Investment with the PRC

Prepared for the European Commission Directorate-General for Trade

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<table>
<thead>
<tr>
<th>#</th>
<th>Acronym</th>
<th>Government Agencies</th>
<th>Chinese Names</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>CAAC</td>
<td>Civil Aviation Administration of China</td>
<td>中国民用航空局</td>
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<td>2</td>
<td>CAEA</td>
<td>China Atomic Energy Authority</td>
<td>国家原子能机构</td>
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<td>3</td>
<td>CBRC</td>
<td>China Banking Regulatory Commission</td>
<td>中国银保监会</td>
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<tr>
<td>4</td>
<td>CCCPC</td>
<td>Central Committee of the Communist Party of China</td>
<td>中国共产党中央委员会</td>
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<td>CFDA</td>
<td>China Food and Drug Administration(^a)</td>
<td>国家食品药品监督管理总局</td>
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<td>CIRC</td>
<td>China Insurance Regulatory Commission</td>
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<td>CNCA</td>
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<td>国家认证认可监督管理委员会</td>
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<td>8</td>
<td>CPC</td>
<td>Communist Party of China</td>
<td>中国共产党</td>
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<td>9</td>
<td>CSRC</td>
<td>China Securities Regulatory Commission</td>
<td>中国证监会</td>
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<td>10</td>
<td>GAC</td>
<td>General Administration of Customs</td>
<td>海关总署</td>
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<td>11</td>
<td>GAQSIQ</td>
<td>General Administration of Quality Supervision, Inspection and Quarantine</td>
<td>国家质量监督检验检疫总局</td>
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<td>MEP</td>
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<td>环境保护部</td>
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<td>Ministry of Industry and Information Technology(^c)</td>
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<td>Ministry of Commerce(^e)</td>
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<td>人力资源和社会保障部</td>
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<td>Ministry of Justice</td>
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<td>Ministry of Science and Technology</td>
<td>科学技术部</td>
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<td>Ministry of Transport</td>
<td>交通运输部</td>
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<td>MPS</td>
<td>Ministry of Public Security</td>
<td>公安部</td>
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<tr>
<td>25</td>
<td>MWR</td>
<td>Ministry of Water Resources</td>
<td>水利部</td>
</tr>
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<td>26</td>
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<td>National Development and Reform Commission</td>
<td>国家发展和改革委员会</td>
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<td>27</td>
<td>NEA</td>
<td>National Energy Administration</td>
<td>国家能源局</td>
</tr>
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<td>NEC</td>
<td>National Energy Commission</td>
<td>国家能源委员会</td>
</tr>
<tr>
<td>29</td>
<td>NHFPC</td>
<td>National Health and Family Planning Commission</td>
<td>国家卫生和计划生育委员会</td>
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<td>NNSA</td>
<td>National Nuclear Safety Administration</td>
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<td>NPC</td>
<td>National People's Congress</td>
<td>全国人民代表大会</td>
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<td>32</td>
<td>PBOC</td>
<td>People's Bank of China</td>
<td>中国人民银行</td>
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<td>33</td>
<td>SAFE</td>
<td>State Administration of Foreign Exchange</td>
<td>国家外汇管理局</td>
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<td>SAIC</td>
<td>State Administration for Industry and Commerce</td>
<td>国家工商行政管理总局</td>
</tr>
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<td>35</td>
<td>SAPRFT</td>
<td>State Administration of Press, Publication, Radio, Film and Television</td>
<td>国家新闻出版广电总局</td>
</tr>
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<td>36</td>
<td>SARA</td>
<td>State Administration for Religious Affairs</td>
<td>国家宗教事务局</td>
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<td>37</td>
<td>SASAC</td>
<td>State-Owned Assets Supervision and Administration Commission</td>
<td>国有资产监督管理委员会</td>
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<td>#</td>
<td>Acronym</td>
<td>Government Agencies</td>
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<td>---------</td>
<td>----------------------------------------------------------</td>
<td>-------------------------------</td>
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<td>38</td>
<td>SASTIND</td>
<td>State Administration of Science, Technology and Industry for National Defense</td>
<td>国家国防科技工业局</td>
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<td>39</td>
<td>SAT</td>
<td>State Administration of Taxation</td>
<td>国家税务总局</td>
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<td>40</td>
<td>SAWS</td>
<td>State Administration of Work Safety</td>
<td>国家安全生产监督管理总局</td>
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<tr>
<td>41</td>
<td>SC</td>
<td>State Council</td>
<td>国务院</td>
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<td>42</td>
<td>SCNPC</td>
<td>Standing Committee of the National People's Congress</td>
<td>全国人民代表大会常务委员会</td>
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<td>43</td>
<td>STMB</td>
<td>State Tobacco Monopoly Bureau</td>
<td>国家烟草专卖局</td>
</tr>
</tbody>
</table>

Notes:

a  "CFDA" includes the former State Food and Drug Administration.

b  "MEP" includes the former State Environmental Protection Administration.

c  "MIIT" includes the former Ministry of Information Industry.

d  "MLR" includes the former Ministry of Geology and Mineral Resources, and the State Bureau of Surveying and Mapping.

e  "MOFCOM" includes the former Ministry of Foreign Trade and Economic Co-operation, the former State Economic and Trade Commission, and the General Office of MOFCOM.

f  "MOHRSS" includes the former Ministry of Labor and Social Security and the former Ministry of Personnel.

g  "MOHURD" includes the former Ministry of Construction.

h  "NDRC" includes the former State Development Planning Commission and the former State Planning Commission.

i  "NEA" includes the former State Electricity Regulatory Commission.

j  "NHFPC" includes the former Ministry of Health.

k  "SAPPRFT" includes the former General Administration of Press and Publication and the former State Administration of Radio, Film, and Television.
Section 1. Executive Summary and Conclusions

1.1 Purpose and Scope

As the European Commission negotiates a Comprehensive Agreement on Investment ("CAI") with China, a careful evaluation of China’s rules and practices governing domestic investment is warranted, because these rules and practices, with certain exceptions, would also apply to European investment in China if such investment were granted “national treatment” under the CAI. In particular, foreign companies would like to know: if they are granted national treatment in China under a bilateral investment agreement, will they gain market access in sectors where foreign investment is currently prohibited or restricted?

This report seeks to answer this question by:

a) describing the government approval processes at the central and local government levels for domestic investments (Section 2.1) and comparing them to the approval processes applicable for inbound foreign investment (Section 2.2);

b) reviewing fundamental policies guiding China’s investment screening processes, especially industrial policies and policies supporting the state sector (Section 3);

c) providing additional analysis of the interplay of these processes and policies for ten illustrative industry sectors (Section 4);

d) considering input received from fourteen working groups of the European Chamber of Commerce in China ("EUCCC") (Section 5); and

e) drawing conclusions regarding the practical value of enjoying “national treatment” in China, based on a discussion of the following two underlying questions (Section 1):

i. Domestic Restrictions: To what extent are Chinese investors themselves subject to market access restrictions, so that enjoying national treatment would not assure market access?

ii. Enforceability: To what extent would a Chinese violation of a national treatment obligation be provable and hence enforceable?

1.2 Regulatory Framework for Domestic Investors (Section 2)

As summarized in Table A below, investments by domestic investors are potentially subject to a six-step approval process, with three of the steps potentially involving a high level of administrative discretion on the part of the government approval authorities.
Table A - Domestic Investment Approval Steps

<table>
<thead>
<tr>
<th>Step</th>
<th>Administrative Discretion</th>
<th>Approval Type</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>High</td>
<td>Anti-Monopoly Law Review</td>
<td>Necessary for mergers and acquisitions meeting certain thresholds</td>
</tr>
<tr>
<td>2</td>
<td>Low</td>
<td>Name Registration by Administration for Industry &amp; Commerce (“AIC”)</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Medium</td>
<td>Project-Related Approvals from Various Authorities</td>
<td>If applicable (e.g., for land use, zoning, construction, environmental impact)</td>
</tr>
<tr>
<td>4a</td>
<td>High</td>
<td>Project Approval by National Development &amp; Reform Commission (“NDRC”) or Local Counterpart (“DRC”);</td>
<td>Required if project type is listed in the Catalogue of Investment Projects Subject to Government Verification and Approval (“Project Approval Catalogue”)</td>
</tr>
<tr>
<td>4b</td>
<td>Low</td>
<td>Project Filing with DRC</td>
<td>Generally required for fixed-asset investments not listed in Project Approval Catalogue</td>
</tr>
<tr>
<td>5</td>
<td>High</td>
<td>Licensing from Industry Regulator</td>
<td>If required per measures promulgated by relevant industry regulator</td>
</tr>
<tr>
<td>6</td>
<td>Low</td>
<td>Enterprise Registration with AIC</td>
<td></td>
</tr>
</tbody>
</table>

For domestic investment projects subject to Steps 1, 4a, and/or 5, approval generally depends on whether applicants meet all relevant approval criteria set forth in published laws and regulations (if any), and often on whether the relevant approval authorities determine that the project in question is aligned with national and local economic development plans and industrial policies. For Step 1, thresholds triggering approval requirements and criteria used by MOFCOM to evaluate applications are described in further detail in Section 2.1.2. With respect to Step 4a, the 2014 Project Approval Catalogue lists twelve investment categories and 42 specific project types within them that require project approval by the NDRC or local DRC (see Annex 1). For Step 5, the Consolidated List of Administrative Approval Items by Departments under the State Council (“Consolidated List”) includes 1,578 licensing requirements imposed by central government agencies, including 718 directly related to market access. Additional approval requirements are also sometimes issued by local governments to reflect local economic goals and conditions. Thus, investment approval for domestic investors in many cases is certainly not assured.

Nevertheless, in comparison, the approval process for inbound foreign investment is more onerous in several respects. First, in addition to the six approval steps potentially applicable to domestic investments, inbound foreign investments are generally subject to foreign investment enterprise approval by the Ministry of Commerce or its local counterparts, and also may be subject to a national security review by an inter-ministerial panel. Both of these approval processes entail a high level of administrative discretion on the part of the approval authorities. Second, compared with the relatively small number of project
types where project approval by NDRC or a local DRC is required for domestic investors, many more project types require project approval when inbound foreign investment is involved, including those listed as “restricted,” and also those listed as “encouraged” but requiring Chinese party control, under the Catalogue of Industries for Guiding Foreign Investment (“Foreign Investment Catalogue”). Under the Catalogue, foreign investments in 36 types of projects are expressly “prohibited,” in 38 types of projects they are expressly “restricted,” and in 12 types of “encouraged” projects Chinese control is required. Third, more restrictive conditions for industry licensing are often applied to foreign invested enterprises, both as a matter of law and as a matter of administrative practice.

1.3 Fundamental Policies Guiding Investment Screening Processes (Section 3)

China’s regulators are explicitly mandated to exercise their administrative discretion in accordance with the country’s economic goals and priorities, which appear in many forms -- ranging from general, high-level policy guidelines to specific, even legally binding goals, targets, and restrictions. In recent years, policy documents issued by the central government have focused on promoting “indigenous innovation,” rationalizing and moving key industries up the value chain, and growing domestic “champion” companies capable of competing globally. Local authorities also issue economic plans and industrial policies highlighting their own goals and priorities.

The principal economic policy document currently in effect is the Outline of the Twelfth Five-Year Plan for National Economic and Social Development (“12th FYP”), which covers the period from 2011-2015. However, this document is supplemented by at least 31 other “12th Five-Year Plans” issued by the State Council for specific industries or priority initiatives, e.g., the 12th Five-Year Plan for Building Indigenous Innovation Capabilities, the 12th Five-Year Plan for Energy Development, and the 12th Five-Year Plan for Development of the Services Industry.

These five-year plans are buttressed by a number of “medium-and long-term strategic plans” (“MLPs”), which look beyond the five-year window and include as a notable example the Outline of the National Medium-and Long-Term Plan for Science and Technology Development (2006-2020). In addition, a significant number of industry-specific policies establish directions, goals, and priorities for specific industry sectors. For example, for the ten illustrative industry sectors discussed in Section 4, we identified eleven currently effective industrial policies issued by the State Council or agency directly under the State Council charged with regulating the given sector (see Table 5).

The Chinese government also issues catalogues from time-to-time that list industry sectors that should receive specified types of treatment. Examples include the Project Approval Catalogue and Foreign Investment Catalogue referred to above, as well as the Catalogue for Guiding Industrial Restructuring. We have identified thirteen currently effective catalogues issued by central-level government agencies. Some of these policy documents state that approval authorities should “control overall production capacity,” select “industrial and environmental thresholds for access,” cultivate a batch of integrated manufacturing enterprises that possess indigenous intellectual property, “develop a batch of state-owned or state-controlled leading backbone enterprises,” encourage the introduction, digestion, absorption, and re-innovation of [technology], and “promote localization of the manufacture of
major technical equipment." These policies are in principle applicable to both domestic and inbound foreign investments.

Worthy of special note are policies intended to support the state sector, which under the Xi Administration will continue to play a “dominant” role in China’s “socialist market economy.” According to reports from the Ministry of Finance and Xinhua news service, as of 2013 there were approximately 155,000 non-financial SOEs in China, holding assets of about RMB 104.1 trillion and reporting net profits of about RMB 1.9 trillion. SOEs are commonly divided into two categories based on the level of government responsible for their management -- centrally-owned SOEs and local SOEs. Centrally-owned SOEs include:

- 121 SOEs that are managed by the State-Owned Assets Supervision and Administration Commission (“SASAC”);
- financial SOEs managed by China’s three financial regulatory commissions; and
- SOEs managed by other central government ministries and agencies, such as the State Tobacco Monopoly Administration.

For our previous report prepared for DG Trade on Measures and Practices Restraining Foreign Investment in China (the “China Investment Restraints Report”), we used 21 search strings to scan over 250,000 central and local government laws and regulations, and we manually reviewed nearly 30,000 “hits,” in order to identify legal measures that provide preferential treatment for state-owned or controlled enterprises. Considering the dominant role played in the Chinese economy by the state sector, the number of identified measures was relatively small -- only 15 that prohibited private investment in specific sectors, 24 that restricted private investment in specific sectors, and nine that provided special preferences to SOEs (see Table 9).

However, a number of policy documents and statements by senior officials have listed industries where the government “should” maintain “absolute control” or a “leading role.” The still effective 1999 Decision of the Central Committee of the Communist Party of China on Major Issues Concerning the Reform and Development of State-Owned Enterprises, for example, provides that state-owned capital must play a “leading role” in “industries related to national security, natural monopoly industries (自然垄断的行业), industries involving major infrastructure or important mineral resources, industries that provide vital products and services to the public, and pillar industries and backbone enterprises in high and new technology sectors. Considered together, Chinese measures and policies have been implemented by regulators in ways that have substantially benefitted SOEs and significantly impacted the competitive environment in China, as evidenced by the leading role SOEs play in a number of the sectors we studied (see Section 4).
1.4 Practical Applications for Ten Illustrative Industry Sectors (Section 4)

Given the investment approval processes and policy environment for investment in China described in
this report, market access for a domestic investor in a specific type of project depends largely upon the
answers to the following questions:

1. Approval Items

   1.1. Is AML clearance required?

   1.2. What project-related approvals from local authorities will be required, if any (e.g., land use,
        zoning, construction, environmental)?

   1.3. Is project approval required (i.e., is the project type listed in the Project Approval Catalogue)?

   1.4. What licenses are required, if any, in accordance with the Consolidated List?

   1.5. What other licenses and other approvals are required, if any, under industry-specific measures
        promulgated by central and local government agencies?

2. Approval Criteria and Related Factors

   2.1. What qualifications and conditions for granting the required approvals identified above are
        prescribed in relevant laws and regulations?

   2.2. What guidance for approval authorities is contained in relevant central- and local-level economic
        plans and industrial policies?

   2.3. What role do SOEs play in the specific industry sector?

To paint a clearer picture of the types of approval items currently in effect in China, we have sought to
identify published approval items corresponding to questions 1.3-1.5 above for ten illustrative industries
imposed at the central level and by five illustrative provincial-level governments (i.e., Beijing, Chongqing,
Guangdong, Shanghai, and Tianjin). The breakdown of the central and local approval requirements for
these ten industry sectors is provided in Table B below.
Table B - Project Approval and Licensing Requirements in the Ten Illustrative Sectors

<table>
<thead>
<tr>
<th>#</th>
<th>Sector</th>
<th>Project Approval</th>
<th>Type of Licensing Requirement</th>
<th>Sub-total</th>
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<td></td>
<td>Non-Project Approval</td>
<td>Market Entry</td>
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<tr>
<td>1</td>
<td>Automobile manufacturing</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>Chemical manufacturing</td>
<td>6</td>
<td>16</td>
<td>9</td>
</tr>
<tr>
<td>3</td>
<td>Construction and infrastructure</td>
<td>46</td>
<td>39</td>
<td>0</td>
</tr>
<tr>
<td>4</td>
<td>Distribution</td>
<td>0</td>
<td>31</td>
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<td>5</td>
<td>Energy</td>
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<td>6</td>
<td>Financial services</td>
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<td>Healthcare</td>
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<td>Mining</td>
<td>8</td>
<td>46</td>
<td>2</td>
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<tr>
<td>9</td>
<td>Professional services</td>
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<td>10</td>
<td>Telecommunications</td>
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<td></td>
<td>Total</td>
<td>75</td>
<td>348</td>
<td>79</td>
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</table>

In addition, to illustrate more fully the impact of these approval requirements, we have selected a sample project in each of the ten illustrative industries and analyzed the licensing conditions and policy environment for each. These analyses, taken together, illustrate the varied and complex regulatory and policy environment for investment in China, as summarized in Table C.

Table C - Summary of Domestic Investment Market Access Analyses for Ten Illustrative Project Types

<table>
<thead>
<tr>
<th>#</th>
<th>Project Type</th>
<th>SOEs Hold Majority Market Share</th>
<th>Project Approval Requirement</th>
<th>Market Access Licensing Requirement “Yes” or “No”</th>
<th>License Conditions Include Industrial Policy Elements</th>
<th>Industrial Policies Exist for This Project Type</th>
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<td>1</td>
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<td>3</td>
<td>Construction Companies</td>
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<td>4</td>
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<td></td>
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<td>√</td>
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</table>

As shown in Table C, SOEs occupy a majority share of the market in eight out of ten of the sample project sectors studied. Table C also shows that project approvals — which are explicitly designed to screen projects on industrial policy grounds — are required for four of the ten sample project types, and market access-related license approvals are required for all ten project types. The conditions for obtaining these licenses, set forth in the relevant regulations, include industrial policy-related elements (as opposed to including only objective technical qualification requirements) for nine of the ten project types, and industrial policies have been identified for all ten project types. Thus, it is important to understand China's policies related to each project type in order to assess the market access prospects for potential investors.

1.5 Input from EUCCC (Section 5)

Input for this report received from 15 industry working groups within the European Chamber of Commerce in China (“EUCCC”) confirmed that Chinese regulators often exercise their discretion in ways that negatively impact the market access and business operations of foreign investors in China. As shown in Table D, these industry groups cited 28 issues involving administrative discretion and 14 related to the dominance of SOEs in their sectors. Of the 63 relevant issues raised overall, the only issues that would be directly addressed by a grant of national treatment (without the often onerous requirement to prove de facto discrimination) are the relatively few related to measures and policies promulgated at the central and provincial levels that plainly discriminate against foreign investors.
<table>
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<tr>
<th>Recurring Themes →</th>
<th>Legal &amp; Regulatory Restrictions on Domestic Companies</th>
<th>Enforcement &amp; Administrative Discretion</th>
<th>Restrictions Discriminating Against Foreign Investment</th>
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<tr>
<td>TOTAL</td>
<td>14</td>
<td>1</td>
<td>14</td>
</tr>
</tbody>
</table>
1.6 Conclusions

Will foreign investors gain market access in China -- in sectors where foreign investment is currently prohibited or restricted -- if they are granted national treatment under the CAI?

Assuming that the particular project type is not included on China’s negative list, and that the project is not blocked on “national security” grounds under an “essential security” exception included in the agreement, the answer depends upon:

a) the types of approvals required for the specific investment;

b) the approval criteria and other restrictions set forth in relevant laws, regulations, and policies;

and

c) whether administrative discretion is likely to be exercised in a non-discriminatory manner.

Of course, if market access is ultimately denied by Chinese approval authorities on grounds ostensibly applicable to both foreign and domestic investors, it is still possible that the denial could violate China’s national treatment obligation if the restrictions in effect have a de facto discriminatory impact on foreign investors.

Potential foreign investors will want to look carefully at approval requirements and underlying policies applicable to domestic investors in their specific industries to determine the extent to which national treatment alone would open new doors for them in China. As documented in this report, such approval requirements and policies may present formidable obstacles to investment in many sectors, and a traditional “negative list” focused on exceptions to national treatment may not capture all of the industries impacted by market access restrictions -- since such restrictions may be applicable to domestic as well as to foreign investors.

In addition, it is important that the transparency provisions included in the CAI are robust enough to ensure that administrative decisions are made in a non-discriminatory manner and are subject to effective administrative and judicial review. As noted in this report, Chinese regulators are often granted high levels of administrative discretion, and EUCCC input during the preparation of this report specifically highlights challenges associated with local favoritism and regulatory opacity.

Moreover, even if current laws and policies applicable to domestic investors in a particular sector would likely not serve to block investments by foreign investors enjoying national treatment, it will be important to ensure that the CAI would protect against adverse changes in such laws and policies.

These considerations suggest that if securing market access is a fundamental goal, then the EU may wish to include affirmative market access commitments in the CAI, similar to provisions included in the Canada-European Union Comprehensive Economic and Trade Agreement.
Section 2. Regulatory Framework for Domestic Investors

The treatment of domestic investment through law, policy, and administrative action in China will take on increasing importance for foreign businesses and governments as the country moves towards a national treatment regime for foreign investment -- both in its domestic laws and through bilateral investment agreements it is negotiating with the European Union and the United States. While China’s investment environment is far more open than it was in the early 1980s, when the state dominated nearly all economic sectors, China still maintains significant barriers for private investment, both domestic and foreign.

In Section 2.1, we walk step-by-step through the government approval processes applicable to domestic Chinese investors (and largely, by extension, to foreign investors if and when national treatment is applied). In doing so, we identify areas where broad administrative discretion may be deployed. Administrative discretion is widely used to: (1) evaluate investments based on published criteria; and (2) implement industrial policies (described in Section 3.1) and foster the development of state-owned enterprises (discussed in Section 3.2), including through the imposition of extra-legal restraints. We consider central government approval requirements in Section 2.1.2, and the role of provincial and other local governments in the approval processes for domestic investment in Section 2.1.3 (we use the term “local” to refer to both the provincial- and sub-provincial-levels).

In Section 2.2, we compare the approval requirements domestic investors face with those that foreign investors face. This comparison allows us to better understand the extent to which EU companies would benefit from national treatment.

2.1 Framework for Screening Domestic Investment

2.1.1 Background

The screening of domestic investment in the Chinese economy is generally carried out by government authorities from two perspectives, as applicable to a particular project. First, the National Development and Reform Commission (“NDRC”) and its local counterparts (“local DRCs,” which together with NDRC are sometimes referred to herein as “DRCs”) ensure that investments align with broader national economic priorities through project approvals (see Step 4 below). Second, agencies charged with regulating specific types of investments within certain industries engage their deeper technical expertise to apply industry-specific rules and policies through their licensing approvals (see Step 5 below). In recent years, the anti-monopoly review has become a third mechanism through which government officials implement industrial policies and priorities (see Step 1 below).

Below, we consider the processes underlying each of these types of approvals in the broader context of the overall government approval process for domestic investment.
The Decision of the State Council on Investment System Reform issued in 2004⁸ ("2004 Decision") set forth the foundations of the project approval requirement after China’s accession to the WTO. Compared with pre-WTO project approval requirements, the 2004 Decision significantly liberalized the project approval process for domestic investment, replacing extensive government approvals (by NDRC or its local counterparts) with a simpler record filing-based process for most domestic investments not requiring government financing.⁹ The 2004 Decision marked a shift of emphasis from requiring project approvals as a condition for investment to imposing licensing requirements and post-establishment oversight by regulating agencies. It is important to note that unlike foreign investors, domestic investors do not normally need to apply for investment approval from the Ministry of Commerce or its local counterparts.¹⁰

2.1.2 Domestic Investment Approval Process

The steps generally applicable for approving domestic investments are discussed in turn below. The applicability of these steps in particular cases may vary, and some of the steps can be handled in parallel, while others may only be handled in sequence. The level of administrative discretion associated with each step is indicated next to its title.

Step 1: Anti-Monopoly Law ("AML") Review -- if Necessary (HIGH ADMINISTRATIVE DISCRETION)

In recent years, China has been strengthening its competition law and enforcement regime. Businesses, governments, and other observers should pay close attention to the latest developments in this area.

Applicability. A domestic investment is subject to anti-monopoly review ("AML Review") by the Ministry of Commerce ("MOFCOM") if:

- the investment is made by way of concentration (i.e., merger, or acquisition of assets or equity conferring control -- including joint control -- over another entity¹¹), or by way of acquisition through contract or other means conferring control or "a decisive influence" over another entity,¹² and
- all entities participating in the concentration ("participating entities") (i) have a combined turnover¹³ of over RMB 10 billion¹⁴ worldwide or RMB 2 billion in China, and (ii) at least two participating entities each have turnover in excess of RMB 400 million in China.¹⁵

Exceptions to this review are made if either (i) the investment is made by establishing a greenfield solely-owned or solely-controlled enterprise,¹⁶ (ii) one party owns at least 50% voting equity or assets in each other party, or (iii) a third party not involved in the concentration owns at least 50% voting equity or assets in each involved party.¹⁷

Timing. In general, AML review can be handled in parallel with other steps, but is a condition precedent for the closing of a concentration (usually at Step 6 below). It does not necessarily have to be the first order of business.
**Evaluation Criteria.** If AML Review is required, MOFCOM will decide whether to allow the project to move forward by judging its potential impact on competition in the relevant market -- taking into account factors such as the market share of each of the participating entities; the degree of market concentration; and the impact of the concentration on technological advancement, consumer welfare, and national economic development. The specifics of how these criteria are to be applied and weighed are not clearly stated, leading to significant uncertainty and room for use of administrative discretion (e.g., to implement industrial policy priorities or extract extra-legal concessions).

**Process.** MOFCOM first conducts a preliminary review to be completed within 30 days of the complete filing of materials from the relevant parties. If it issues an affirmative decision granting its approval or does not issue any decision within the time limit, the concentration will be permitted to close. Further review, if deemed necessary by MOFCOM, must be completed within another 90 days (with an additional 60 days allowed in exceptional circumstances). The outcome of a further review may be one of the following:

- **Clearance.** MOFCOM may determine that the concentration presents no competition issues and clear the deal. If the time limit passes without a decision, the project is considered cleared.
- **Conditional Clearance.** MOFCOM may conclude that the concentration could restrict or eliminate competition but such negative impact can be mitigated or remedied by imposing structural or behavioral conditions.
- **Denial.** In rare situations, MOFCOM may decide the concentration could restrict or eliminate competition and block a transaction completely, especially if the parties fail to prove the merits of the concentration or come up with mitigation plans.

In 2014, MOFCOM provided for a simplified review process (with some broad exceptions) for concentrations with any one of the following characteristics:

- the parties are in the same relevant market with combined market share below 15%;
- the parties are in different upstream and downstream markets with market share in each below 25%;
- the concentration is accomplished through establishment of, or acquisition of equity or assets of, an offshore joint venture with no business activities in China; or
- the concentration results in reducing the number of controlling shareholders of a joint venture, provided that the final controlling party (or parties) is not a competitor of the joint venture in the same relevant market.

The simplified process introduces some standard forms and involves a public comment period. After the application is accepted as complete, MOFCOM will determine whether the concentration qualifies for simplified review, and the deal-specific information will then be published on the agency’s website.
for ten days, during which any third party may submit its opinion on whether the simplified review process is appropriate. The lack of a timeline for posting a proposal online, the public nature of the exercise, and the possibility that the review could subsequently be rerouted to the standard process inject uncertainty regarding the practical benefits that will be derived from the simplified process.

**Consequences of Non-Compliance.** Serious consequences may follow non-compliance with these requirements. A failure to file and seek approval could lead to a fine of up to RMB 500,000 as well as remedial measures to restore the pre-concentration status quo within a designated time period -- e.g., ceasing implementation of the concentration, disposing of equity or assets, or transferring business operations. If the parties fail to comply with added conditions, they will be given an opportunity to rectify the situation within a designated time period. If they fail again, the same penalties would apply. Fraudulent or misleading filing information may result in fines of up to RMB 1 million and possibly criminal liability.

* * *

It is unclear to what degree MOFCOM has the authority to review the mergers of state-owned enterprises (“SOEs”) under the AML, or whether the central role of SOEs in national economic development plans would, in practice, exempt some SOEs transactions from AML review. The AML explicitly states that for industries important to China’s economy and national security and industries where exclusive production and sales rights are granted by law, the State shall protect the “legitimate business activities of state-owned enterprises and statutory monopolies.”

**Step 2: Name Registration by Relevant AIC (LOW ADMINISTRATIVE DISCRETION)**

This is more of a procedural step than an administrative approval. In order to set up a new enterprise or to change the name of an existing enterprise, an applicant must register the name of the enterprise with the State Administration of Industry and Commerce (“SAIC”) or with the local Administration of Industry and Commerce in charge (collectively, “AICs”). The name registration certificate, issued during this step, must later be submitted to the relevant AIC when applying for a business license (Step 6).

A company is not allowed to use a name identical or similar to that of an existing company within the jurisdiction of the AIC considering the application. Certain words may not be used in a company name, including those that may have a negative impact on the public interest or mislead the public, and names of foreign countries, international organizations, and political parties. Only (i) companies that have business operations nationwide, (ii) large-scale import and export enterprises approved by the State Council, (iii) large-sized enterprise groups approved by the State Council, and (iv) other enterprises approved by SAIC may use the words “China” (i.e., 中国 中华) or “International” (i.e., 国际) in their company names, provided that their registered capital is no less than RMB 50 million.

Assuming that the name is not already taken, name registration can be completed within ten days after the application is submitted.
Step 3: Specific Project-Related Approvals From Various Authorities -- if Relevant (MEDIUM ADMINISTRATIVE DISCRETION)

Investors may need to obtain approvals from various government authorities overseeing land use, zoning, construction, and environmental protection on a case-by-case basis. Some of these approvals may be a condition precedent to project approval (Step 4), while others may be obtained only after project approval is granted. Most of these approvals can be issued by local governments. Different local governments may have different agencies handling each type of approval (for example, the zoning authority and the land authority in Beijing are two separate agencies, but they are combined in Shanghai), and they may set forth different time sequences and require different application documents for such approvals. As a general matter, local authorities do not typically differentiate between foreign and domestic investors in making these approval decisions, though there is some room for discretion that can be utilized to promote local interests.

Zoning Department. A zoning approval is often needed if some construction is involved. Local zoning authorities in Beijing, for example, are also responsible for granting approvals for such things as construction site selection, land zoning, and building zoning.43 The purpose of a zoning approval is to confirm that the project location, construction, and function conform with the requirements of local city planning. The timing required for completion of this step may vary according to local rules; for example, Beijing’s zoning commission usually issues a decision within 20 business days after accepting an application.44

Land and Resources Department. Unless carrying out a pure reconstruction or expansion project utilizing previously approved land, investors must usually obtain an “opinion on pre-approval for the project” (项目用地预审意见书) from the local land and resources authority in order to obtain project approval in Step 4.45 In addition, some other land-related matters may also require government approval -- e.g., converting land collectively-owned by farmers into state-owned land,46 or exploitation or extraction of oil, coal, or other mineral resources.47

Environmental Protection Department. Chinese authorities and the general public are increasingly focused on the environmental impact of economic activity, making the environmental impact assessment process very important. Investors must prepare and submit to the relevant environmental protection authority for its review an assessment report, assessment form, or registration form (collectively, “assessment document”) -- depending on the anticipated impact of the project on the environment.48 Such review must be completed within 60 days after the authority receives an assessment report, within 30 days for an assessment form, and within 15 days for a registration form.49 If, after review, the authority agrees with the assessment of environmental impact and any contemplated mitigating measures laid out in the assessment document, it will issue a consenting opinion.

An investor must procure a consenting opinion from the relevant environmental authority before the start of project construction. Non-compliance may result in serious administrative or even criminal liabilities.
**Development and Reform Commission.** For proposed projects consuming energy above a certain level, investors must prepare an energy conservation assessment report and submit it to the appropriate DRC level for its examination and written opinion. Investors in proposed projects consuming energy below these levels only need to file with the DRC in charge and receive a confirmation of filing — commonly referred to as a “filing opinion.” The prescribed timeline for DRCs to complete their examination and issue an opinion regarding an energy conservation assessment report is 10 to 15 business days. Filing opinions must be provided within 5 business days.

**Step 4: Project Approval (HIGH ADMINISTRATIVE DISCRETION) or Project Filing (MEDIUM ADMINISTRATIVE DISCRETION) -- if Applicable**

The *Catalogue of Investment Projects Subject to Approval of the Government* ("Project Approval Catalogue"), which was promulgated together with the 2004 Decision referred to above, lists the types of investment projects that require project approval before they may be implemented. In general, listed projects involve investment in fixed assets, including for example manufacturing facilities, energy, and transportation infrastructure (such as highways, railroads, and airports). The box at the end of this step provides more background on the Project Approval Catalogue, and the items included in its latest version are listed in Annex 1.

**Applicability.** The 2004 Decision eliminated the requirement of project approval for most domestic investment, but retained the requirement for the large fixed-asset investment projects listed in the 2004 Project Approval Catalogue. The original Project Approval Catalogue has since been updated a couple of times, with the most recent version promulgated by the State Council on October 31, 2014, as described in more detail in the box below.

The 2004 Decision essentially groups investments into three categories:

**Category 1 (Fixed Asset Investments included in the Project Approval Catalogue).** Fixed asset investments listed in the Project Approval Catalogue generally require project approval from the NDRC or industry regulators under the State Council, or from their respective counterparts at the provincial or local government levels, with the appropriate level to be determined as discussed below. The Project Approval Catalogue in few cases specifies that only project filing is required for certain listed investment types. For certain other projects, the Catalogue defers to provincial or local governments to determine whether project approval or filing is required.

**Category 2 (Investments not included in the Project Approval Catalogue).** Category 2 investments do not require DRC or industry regulator project approval. Technically, project filing with local DRCs is still required for such investments, but in practice, given that NDRC tends to exercise its jurisdiction over the “industrial” rather than the services sectors in the economy, domestic investors generally only file for investments not listed in the Project Approval Catalogue if their investments involve construction, manufacturing, or other fixed assets. Most non-fixed asset investments not listed in the Project Approval Catalogue are not filed for the record with the DRCs.
Substantive reviews of Category 2 investments, if required by law, are primarily conducted by the agencies responsible for regulating the particular industries involved, as per Step 5.

**Category 3 (Domestic Investments with Government Funding).** The approval process may differ for these investments. Government-funded projects may entail a greater role for government authorities in project selection, approvals, and financial management. We set Category 3 investments aside for the purposes of this report.

Generally, an applicant must submit the project approval application to the local DRC. The local DRC then determines whether the application must be forwarded to NDRC (at the central level) for approval or whether the approval can be granted locally — depending on how the industry is designated in the Project Approval Catalogue, the planned amount of total investment, and other factors prescribed by laws and regulations applicable to the specific proposed investment. Certain investments may require State Council review. Local DRCs may consult with industry regulators and qualified external experts or consultants as part of their review.

**Evaluation Criteria.** Duly authorized NDRC or industry regulators at the central level, or their local counterparts, are to examine an investment for project approval based on the following factors:

1. compliance with laws and regulations and macro-control policies;
2. compliance with the development planning, industrial policies, technical policies, and market access standards;
3. rational development and efficient utilization of resources;
4. potential effect on China’s national security, economic security, and ecological security; and
5. potential for adverse effects on the public interest, especially the interests of the public in the location where the project is to be constructed.

No published criteria for project filing exist, but it is possible that DRC officials maintain their own internal guidance on how to evaluate project filing applications.

**Process for Category 1 Investments.** The process for project approval varies depending on the type and level of authority charged with granting approval. Here we consider the process when a project is reviewed by (1) the State Council; (2) NDRC or its local counterparts, (3) a central-level industry regulator under the State Council or its local counterparts, and (4) provincial or local government authorities. If a project is not approved, an applicant is entitled to apply for administrative review (行政复议) or initiate an administrative lawsuit against the government agency in a Chinese court, though such action is rarely taken.

1. **Verification and Approval by the State Council**

For projects subject to State Council approval, the approval procedure is the same as for the NDRC approval process except that there is a final step in the decision making process — i.e., submission by
NDRC to the State Council. We note that the final approval document is actually issued by NDRC. For projects subject to the approval of the State Council, comments must be obtained from the industry regulating agency under the State Council in advance.

(2) Verification and Approval by NDRC

First, application documents should be submitted to the provincial DRC for preliminary review, unless the provincial government specifically requires such preliminary review to be done by the provincial industry regulator. After the preliminary review has been completed, the application materials should be passed on by the provincial DRC, or if the preliminary review was conducted by the provincial industry regulator, then jointly by the provincial DRC and the regulator, to the NDRC for its final review.

If NDRC approval is required and the materials have been submitted for its review, NDRC must notify the applicant if any supplemental documents are required within five working days after the application materials are received. If necessary, NDRC will engage a project advisory body to evaluate the proposed project within four working days after application materials are received. For a project within the area of expertise of an industry regulator, NDRC may request that the regulator provide a written opinion within seven working days. If there is no response from the industry regulator within those seven working days, NDRC will consider the silence to be a positive opinion. NDRC may also seek public or expert opinions if deemed relevant and helpful.

NDRC will issue its decision on whether to approve the proposed project within 20 working days from the date it officially accepts the application materials. If it is unable to make a decision within 20 working days, the period may be extended by another 10 working days. To the extent NDRC needs to authorize a third-party assessment or expert review, the time required for such assessment or review shall not be counted against these time limits.

For projects subject to approval by the NDRC, comments must be obtained from the industry regulating agency under State Council in advance.

If the project is not approved, NDRC should issue a written decision to the applicant specifying the reasons for rejection.

(3) Verification and Approval by Industry Regulator Under State Council

For projects where the Project Approval Catalogue requires approval by the industry regulator under the State Council, the applicant should first submit its application to the provincial industry regulator. For example, for a project to be approved by the Ministry of Industry and Information Technology (“MIIT”), the application materials should first be submitted to the provincial Industry and Information Technology Department for preliminary review. Following preliminary review, the provincial Industry and Information Technology Department will submit the application to MIIT. After it accepts the application materials, MIIT may consult with an industry consultation institution, request opinions from
other departments, solicit public opinions, or arrange experts to review. Time requirements for this type of approval are the same as for NDRC approval.

(4) Verification and Approval by Local (Sub-Central) Government Authorities

For projects subject to verification and approval at the local level, the specific level of project approval authority may generally be determined by the provincial government (i.e., the provincial government may decide whether or not to delegate approval authority downward). However, for projects listed in the Project Approval Catalogue where verification and approval by provincial governments is expressly required, such approval authority may not be delegated.

Project Approval Catalogue

Background

Since China’s process of reform and opening first began in 1978, the Chinese government has launched a series of reforms intended to liberalize the highly centralized investment management system associated with China’s former planned economy, in order to establish a more market-oriented investment regime. Most recently, four important documents have been issued that have progressively carried this reform process to its current stage. They are: the Decision of the State Council on Investment System Reform (“2004 Decision”), the Catalogue of Investment Projects Subject to Government Verification and Approval 2004 (“2004 Project Approval Catalogue”), the Catalogue of Investment Projects Subject to Government Verification and Approval 2013 (“2013 Project Approval Catalogue”), and the Catalogue of Investment Projects Subject to Government Verification and Approval 2014 (“2014 Project Approval Catalogue”). The current version of this catalogue is referred to throughout this report as the “Project Approval Catalogue” unless otherwise specified or made clear in context.

The 2004 Decision reflected a determination by the State Council at that time to deepen reform of the country’s investment management system. Prior to the issuance of the 2004 Decision, project approval requirements were scattered in several regulations, and which investment projects were subject to approval was less clear. Immediately after the Administrative Licensing Law took effect on July 1, 2004, the Chinese government issued the 2004 Decision clarifying that only projects listed in the Project Approval Catalogue would be subject to project approval by the government.

The various versions of the Project Approval Catalogue provide a picture of how governmental control over investments has changed over time. The State Council reserves the authority to adjust the Project Approval Catalogue where necessary, and without State Council approval, no region or department may alter the approval requirements stipulated in the Catalogue.

The 2004 Project Approval Catalogue
As an annex to the 2004 Decision, the 2004 Project Approval Catalogue listed industry sectors and types of investments within them that required project approval, grouped into 13 categories and various sub-categories. Investment projects excluded from the Catalogue and not utilizing government funds were simply subject to record-filing, unless investments were specially prohibited by other laws and regulations.

The 2013 Project Approval Catalogue

In 2013, with a view toward further deepening the reforms in both the investment system and the administrative approval system, the State Council issued the 2013 Project Approval Catalogue. This version of the Catalogue retained the 13 investment categories, but removed and simplified the approval requirements for many investment projects within the sub-categories. More specifically, it removed project approval requirements for 19 types of projects (so that only record-filing was needed thereafter), and simplified the approval processes for 30 types of projects (lowering the level of approval authority required). After the revision, approximately 60% of the projects in the 2004 Catalogue were no longer subject to the central government’s approval. In the category of light industry, for example, pulp, polyester, salt, and sugar projects were no longer subject to project approval requirements under the 2013 Catalogue.

The 2014 Project Approval Catalogue

The State Council issued the 2014 Project Approval Catalogue in order to further streamline administration, delegate power, and transform the government’s investment management function to let the market play a “decisive role” in resource allocation. This version of the Catalogue, which came into effect on October 31, 2014, covers 12 investment categories, including: (1) agriculture and water conservancy; (2) energy; (3) transportation; (4) information industry; (5) raw materials; (6) machinery manufacturing; (7) light industry; (8) new and high-end technologies; (9) urban construction; (10) social undertakings; (11) foreign investment; and (12) outbound investment.

Under the 2014 Catalogue, the project approval requirement is replaced by a record-filing requirement for 15 types of investments, while the requirement to obtain central government approval for 23 other types of investments has been modified so that approval can now be obtained from governments at the provincial or local level. In addition, outbound investments are now no longer subject to project approval, unless the project involves sensitive countries, regions or industries. While the overall trend of reducing approval requirements is notable, removal from the list of any single type of investment may not necessarily represent an opening. For example, “iron and steel” and “cement” were removed from the 2014 Catalogue, suggesting that they would henceforth only be subject to project filing requirements. However, separate language in the Catalogue also indicates that investment in these industries is now forbidden.

Overall, 40% of the projects that required project approval from central-level authorities under the 2013 Catalogue no longer required central-level approval under the 2014 Catalogue.
compared to the 2004 Catalogue, the 2014 Catalogue represents a 76% reduction in items subject to central-level project approval.\textsuperscript{100}

The full listing of items from the latest Project Approval Catalogue, which contains twelve broad types of investments and 42 specific project types within them, can be found in Annex 1.

\textbf{Step 5: Licensing from Industry Regulator -- if Applicable (HIGH ADMINISTRATIVE DISCRETION)}

China imposes licensing requirements for entry into certain industries, issued and implemented by the agencies regulating the relevant industry. For example, a GMP (“Good Manufacturing Practices”) license and a Drug Manufacturing License issued by the China Food and Drug Administration (“CFDA”) or its local counterpart would be required for a company to manufacture drugs.\textsuperscript{101} An investment in certain entertainment business activities (such as discos and dancing clubs) requires licensing from culture authorities\textsuperscript{102} and filing with public security authorities.\textsuperscript{103} MIIT and the Ministry of Culture (or their local counterparts) would need to approve and provide permits for the establishment of a for-profit company engaging in internet entertainment and culture-related businesses such as producing, importing, publishing, disseminating, or otherwise engaging in activities related to online gaming, shows, music, or other online culture-related products.\textsuperscript{104} These licensing requirements are normally instituted through various types of central and local laws and regulations.\textsuperscript{105}

While there is no uniform terminology used under Chinese law for such licenses, permits, and other approvals issued by industry regulators, for the purposes of this report we refer to all such approvals as “licenses.”

Licensing requirements are of critical importance for understanding the process and restrictions on investment in China. For example, both domestic and foreign investors may invest in value-added telecommunications services (“VATS”) under the applicable laws and regulations, with certain equity restrictions on foreign investors (namely, the requirement that a foreign-invested enterprise (“FIE”) may only hold up to 50% equity in a VATS-licensed entity other than an e-commerce business\textsuperscript{106}). However, MIIT exercises its administrative discretion in granting VATS licenses in a much more restrictive way, making it nearly impossible for foreign-invested enterprises to be licensed, with rare exceptions.

\textbf{Input from EUCC Members}

Licensing requirements were a key topic noted by EUCC working groups. For example, EUCC members raised concerns that SOEs and private domestic insurance companies (which together are the dominant forces in the industry) are granted licenses more quickly than foreign companies and commonly allowed to follow more favorable laws than foreign companies. All of this has limited foreign companies from attaining significant market share, resulting in a life insurance market that is 95% controlled by Chinese companies.
In the past, investors needed to obtain necessary industry licenses before they could obtain a business license with the corresponding business scope (see Step 6 below for more information on AIC registration). The Chinese government has started to change this to streamline investment processes and shift from an “industry license first, business license to follow” regime to a post-license monitoring and inspection regime. For licenses and permits not required for AIC enterprise registration, investors must be sure to apply to the relevant industry regulator after AIC registration. Failure to do so may result in administrative penalties on the investors or their enterprises.

Consolidated Licensing & Approval List

In 2004, as the government sought to streamline its project approval processes for domestic investment (see discussion above regarding China’s Project Approval Catalogue), it recognized the need to streamline other administrative approval requirements as well. To that end, it issued the Decision of the State Council on Establishing Administrative Licenses for Administrative Examination and Approval Items that Must Be Retained, listing 500 administrative approval requirements, including a large number related to market entry – e.g., qualifications for insurance brokerage practitioners, authorization for coal export businesses, approvals for construction projects for the production of chromium compounds. Since then, a range of laws and regulations have been issued setting out new approval requirements or adjusting the allocation of approval authority, rendering the 2004 list out of date.

At the present time, the government maintains a large online list of central-level licensing and project approval requirements – the Consolidated List of Administrative Approval Items by Departments Under the State Council (“Consolidated List”). We view this list primarily as a resource for understanding Step 5 licensing requirements (as well as other licensing requirements not related to investment approval), because the Project Approval Catalogue is a more reliable and easily accessible source for identifying Step 4 project approval requirements. We have analyzed the contents of the Consolidated List and categorized them by industry (according to the UN’s ISIC classification system), type of investment, and applicability to foreign investors or investors from Hong Kong and Macao.

The Consolidated List originally contained a total of 1,623 administrative approval items (including 1,578 licensing requirements and 45 project approval requirements), administered by 60 central-level government agencies. As of May 7, 2015, six of these items have been cancelled and 59 of them have been delegated to local authorities through a series of three notices issued by the State Council (“Three Notices”) as part of the central leadership’s efforts to pare back central-level approval requirements. Further reductions and downward delegations are expected in the coming months and years.
The pie chart below presents the breakdown of Consolidated List items by type. According to our analysis, 44% of the items included in the Consolidated List are market entry-related licensing requirements. 39% of the items are non-market entry operations-related items (e.g., approval for change of articles of association by a stock exchange, approval for transfer of mining rights by a mining company). Note that the line between market entry and non-market entry items is not always clear and may vary depending on context, so the categorizations here reflect our best judgment.

*Figure 1 - Consolidated List Items by Type*

![Pie chart showing the breakdown of Consolidated List items by type.]

In Table 1 below, we breakdown the 1,623 approval items on the Consolidated List by industry and type.

*Table 1 - Consolidated List Items By ISIC Industry Category & Type*

<table>
<thead>
<tr>
<th>Industry</th>
<th>Project Approval</th>
<th>Type of Licensing Requirement</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>113</td>
<td>Non-Project Approval</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Market Entry</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Product</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Personnel</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Other Operations</td>
<td></td>
</tr>
<tr>
<td>Agriculture, forestry and fishing</td>
<td>0</td>
<td>21</td>
<td>46</td>
</tr>
<tr>
<td></td>
<td>7</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td></td>
<td>17</td>
<td>46</td>
<td></td>
</tr>
<tr>
<td>Mining and quarrying</td>
<td>3</td>
<td>19</td>
<td>37</td>
</tr>
<tr>
<td></td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td></td>
<td>15</td>
<td>37</td>
<td></td>
</tr>
</tbody>
</table>

*Note that the full list of categorized items is not included in the public version of this report.*
<table>
<thead>
<tr>
<th>Sector</th>
<th>Count 1</th>
<th>Count 2</th>
<th>Count 3</th>
<th>Count 4</th>
<th>Count 5</th>
<th>Count 6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manufacturing</td>
<td>9</td>
<td>36</td>
<td>78</td>
<td>2</td>
<td>21</td>
<td>146</td>
</tr>
<tr>
<td>Electricity, gas, steam and air conditioning supply</td>
<td>9</td>
<td>9</td>
<td>0</td>
<td>4</td>
<td>4</td>
<td>26</td>
</tr>
<tr>
<td>Water supply; sewerage, waste management and remediation activities</td>
<td>1</td>
<td>7</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>Construction</td>
<td>13</td>
<td>34</td>
<td>0</td>
<td>1</td>
<td>13</td>
<td>61</td>
</tr>
<tr>
<td>Wholesale and retail trade; repair of motor vehicles and motorcycles</td>
<td>0</td>
<td>126</td>
<td>11</td>
<td>3</td>
<td>19</td>
<td>159</td>
</tr>
<tr>
<td>Transportation and storage</td>
<td>2</td>
<td>52</td>
<td>3</td>
<td>25</td>
<td>40</td>
<td>122</td>
</tr>
<tr>
<td>Information and communication</td>
<td>2</td>
<td>72</td>
<td>3</td>
<td>3</td>
<td>21</td>
<td>101</td>
</tr>
<tr>
<td>Financial and insurance activities</td>
<td>0</td>
<td>58</td>
<td>0</td>
<td>17</td>
<td>70</td>
<td>145</td>
</tr>
<tr>
<td>Real estate activities</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Professional, scientific and technical activities</td>
<td>0</td>
<td>103</td>
<td>3</td>
<td>25</td>
<td>8</td>
<td>139</td>
</tr>
<tr>
<td>Administrative and support service activities</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Public administration and defense; compulsory social security</td>
<td>0</td>
<td>114</td>
<td>5</td>
<td>27</td>
<td>349</td>
<td>495</td>
</tr>
<tr>
<td>Education</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Human health and social work activities</td>
<td>0</td>
<td>12</td>
<td>3</td>
<td>1</td>
<td>4</td>
<td>20</td>
</tr>
<tr>
<td>Arts, entertainment and recreation</td>
<td>2</td>
<td>12</td>
<td>1</td>
<td>1</td>
<td>13</td>
<td>29</td>
</tr>
<tr>
<td>Other service activities</td>
<td>0</td>
<td>15</td>
<td>0</td>
<td>1</td>
<td>21</td>
<td>37</td>
</tr>
<tr>
<td>Activities of extraterritorial organizations and bodies</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Cross-Industry Items</td>
<td>4</td>
<td>19</td>
<td>2</td>
<td>0</td>
<td>14</td>
<td>39</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>45</strong></td>
<td><strong>718</strong></td>
<td><strong>116</strong></td>
<td><strong>113</strong></td>
<td><strong>631</strong></td>
<td><strong>1623</strong></td>
</tr>
</tbody>
</table>

The Consolidated List is a very useful reference tool, but it cannot be relied on by investors as a substitute for a more comprehensive review of relevant laws, regulations, and policies that may prescribe additional approval requirements for a specific sector. Notably, the Consolidated List does not contain approval.
requirements administered by sub-central government agencies unless they require approval by agencies at both central and provincial levels.

**Step 6: Enterprise Registration with Relevant AIC (LOW ADMINISTRATIVE DISCRETION)**

Finally, if a new enterprise is set up as a result of an investment, the investors must apply for “enterprise establishment registration” (企业设立登记) with the relevant “AIC.”\(^\text{114}\) If there is a change to an existing enterprise’s registered information, the enterprise must update its registration information with the AIC.\(^\text{115}\) This is a relatively transparent process, requiring the submission of certain documents\(^\text{116}\) and the payment of registration fees.\(^\text{117}\)

Once the AIC accepts the application as complete (usually confirmed immediately on site if submitted in person), the AIC may make a decision to approve. Usually, the business license is issued (or the updated registration is completed) within 2-3 weeks.\(^\text{118}\)

### 2.1.3 Role of Provincial/Local Governments in the Domestic Investment Approval Process

In Section 2.1.2, we describe the steps that domestic investors must take to obtain government approval for their investment projects. Local governments, defined throughout this report to include provincial and other sub-provincial governments, play an important role in the approval process.

The dynamic between the central government and local governments reflects a broader balance between competing goals. On one hand, delegating authority to local governments allows the system to: address wide disparities between different Chinese localities, provinces, and regions; incentivize local capacity building; foster the competitive spirits of local government officials; and free up central-level officials to handle more complicated, national-level issues. On the other hand, the central government finds it necessary to: set the overall direction for the country’s economy; ensure coordination and cooperation between localities, provinces, and regions in a way that supports its national economic priorities and goals; and reign in corruption and other abuses of power by local government officials.

In recent years, China has been shifting investment approval authority towards local governments. With the exception of Step 1 (AML Review), which is primarily a central government-level procedure, the other steps are derived from central-level requirements but in most cases have their implementation, at least in part, handled at the local level. Furthermore, local governments may also impose their own requirements and restraints on investors\(^\text{119}\).

Even where local governments administer approval requirements -- whether they originate from laws, regulations, and policies at the central level or directly from local government policies or measures -- the amount of discretion they exercise may vary:

- Central-government requirements administered by local governments may inherently involve little administrative discretion -- e.g., name registration (Step 2) and enterprise registration (Step 6).
• Central-government requirements administered at the local level, such as certain industry regulator licensing requirements (Step 5), depending on the specific agency and requirement, that involve high administrative discretion overall may leave little of that discretion to local officials. For example, local governments may be tasked with handling more technical matters while discretion is wielded by central-level authorities, or local-level discretion may be tightly controlled through strict internal rules, policies, and guidance.

• Other central-government requirements administered at the local level that involve medium to high levels of administrative discretion may in fact leave much of the discretion to be exercised by local officials. For example, authority for many project-related approvals (Step 3) and project approval (Step 4) requirements may be delegated to local levels as they may require a close understanding and consideration of local conditions.

Approval requirements may also be directly imposed by provincial and sub-provincial governments if permitted under central-level laws and regulations or regulations issued by local governments.\(^{120}\)

In the discussion that follows, we focus our attention on those steps listed in Section 2.1.2 that involve higher levels of administrative discretion for local government officials.

**Step 3: Specific Project-Related Approvals From Various Authorities**

Domestic investors are required to obtain approvals from various government authorities for inclusion in the project approval application. Such approvals are issued by the local counterparts of the relevant central-level government agencies -- for example, zoning approvals must be provided by local zoning departments. Similarly, environmental impact assessments are generally issued by the local branches of environmental protection agencies before a project approval can be issued.

In Section 2.1.2, we characterize this step as one that involves medium administrative discretion because authorities are required to follow regulations that outline some evaluation criteria. Nonetheless, local zoning, land and resources, and environmental protection authorities usually have some leeway in applying such criteria as they are expected to incorporate their understanding of local conditions.

For example, a 2015 notice of the Ministry of Environmental Protection (“MEP”) delegates environmental approval authority for certain kinds of projects -- e.g., the construction of theme parks and thermal power plants -- to provincial environmental protection authorities.\(^{121}\) Local environmental protection bureaus are required to follow the Ministry’s technical guidance with respect to the criteria they use to evaluate the impact of such projects on the local environment. However, local bureaus generally maintain the power to reject a project if they determine that it will have a sufficiently negative impact on the local environment.\(^{122}\)

**Step 4: Project Approval or Filing**

In Section 2.1.2, we describe how Category 1 investments are subject to project approval requirements in accordance with the Project Approval Catalogue. Authority for implementing these approval requirements may be delegated to local authorities depending on factors such as the nature and
magnitude of the investment project. The central-level Catalogue is sometimes supplemented by project approval catalogues issued by provincial-level governments.\textsuperscript{123} Provincial-level governments can, when allowed under the central-level Catalogue, issue their own detailed catalogues of projects requiring local government approval.\textsuperscript{124} Locally-established requirements fall under the purview of the provincial governments and often reflect the economic development priorities of such governments. Sub-provincial governments such as city and county governments occasionally issue their own project approval catalogues (to the extent permitted by the central-level Catalogue), but this is not generally the case.\textsuperscript{125}

Local project approval catalogues serve several functions. One of them is to allocate authority for issuing project approvals. We can see some examples of how project approval authority is divided between various levels of government by looking at China’s Guangdong Province, a relatively developed province in the southeast of the country:

According to Guangdong’s project approval catalogue, construction projects in that province involving public transportation may in some cases be approved by DRCs at the county or city levels.\textsuperscript{126} Meanwhile, the Guangdong catalogue confirms that urban fast-track rail projects must be approved by provincial-level DRCs based on construction plans approved by the State Council (at the central level).\textsuperscript{127}

Guangdong delegates project approval responsibility for different types of highway projects to different levels of government.\textsuperscript{128} Projects connected with specially designated national highway networks must be approved by the State Council.\textsuperscript{129} Other toll roads, other national highways, and highways connecting cities within the province must be approved at the provincial level.\textsuperscript{130} Highway construction projects that do not fall into these categories are to be approved by DRCs at the county level.\textsuperscript{131}

Provincial project approval catalogues can also supplement the evaluation criteria provided by the central-level Project Approval Catalogue, emphasizing the relevant local governments’ own development plans.\textsuperscript{132} With this power in hand, local governments can prioritize projects that are important to the development of their local economies (such as those that contribute to economic restructuring) and reject undesirable projects for industrial planning reasons.

The verification and approval process at the local level largely follows the process laid out in Section 2.1.2 with respect to NDRC approval.

\textbf{Step 5: Licensing From Industry Regulator}

The vast majority of licensing requirements discussed in Section 2.1.2 are instituted through central-level laws and regulations. Local agencies are often delegated the authority to implement measures promulgated by central government authorities, but may be left with little discretion in terms of licensing approval.

For example, the central-level \textit{Measures for the Administration of Payment Services of Non-Financial Institutions} provide that if a domestic investor is applying to become a “payment institution” to engage in the provision of online and mobile payment services, issuance and acceptance of prepaid cards, and acceptance of bank cards, the investor should submit application materials to local branches of the
People’s Bank of China ("PBOC") for preliminary review.\textsuperscript{133} If the application materials are complete, the local branch will forward the package to the central-level PBOC for review.\textsuperscript{134} The final decision will be made at the central level, not the local level.\textsuperscript{135} Thus, when the local branches of PBOC are implementing this licensing requirement, they have little local discretion apart from determining whether the application package is complete.

Local governments generally have full discretion when implementing licensing requirements instituted by local regulations and rules.

\textbf{2.2 Comparing Approval Processes for Domestic Investments vs. Inbound Foreign Investments}

In order to evaluate the value of national treatment in the context of the investment approval process, we compare here the process that applies to domestic investment (presented in Section 2.1 above) to the process that applies to inbound foreign investment.\textsuperscript{136}

\textbf{2.2.1 Overview}

Foreign investment in different Chinese industries is divided into four categories -- "encouraged," "permitted," "restricted," and "prohibited" -- under the famous \textit{Catalogue of Industries for Guiding Foreign Investment} ("Foreign Investment Catalogue").\textsuperscript{137} The Foreign Investment Catalogue reflects how the Chinese government, based on economic and political considerations, promotes foreign investment in certain industries while limiting or even prohibiting it in others. Aside from investments labeled as prohibited by the Catalogue, foreign investment will follow an approval process that parallels and sometimes overlaps with the steps outlined for domestic investment above. In investment approvals and post-establishment treatment at the hands of various government agencies, encouraged investments receive special benefits\textsuperscript{138} (e.g., streamlined approvals, beneficial tariff treatment\textsuperscript{139}) while restricted investments face added hurdles (e.g., stricter scrutiny, additional approval conditions, and longer approval timelines).

Table 2 below lays out the approval processes for foreign investors and domestic investors side-by-side, with the level of administrative discretion applicable at each step noted in parentheses. Note that for both domestic and foreign investments, these steps are not necessarily linear -- some steps can be followed concurrently.

\textbf{Table 2 - Comparison of Inbound Foreign Investment and Domestic Investment Approval Steps}

<table>
<thead>
<tr>
<th>Inbound Foreign Investment</th>
<th>Domestic Investment</th>
</tr>
</thead>
<tbody>
<tr>
<td>\textbf{Step 1A: AML Review -- if Necessary}</td>
<td>\textbf{Step 1: AML Review -- if Necessary}</td>
</tr>
<tr>
<td>\textit{(High Administrative Discretion)}</td>
<td>\textit{(High Administrative Discretion)}</td>
</tr>
<tr>
<td>\textbf{Step 1B: National Security Review if Necessary}</td>
<td>\textit{N/A}</td>
</tr>
<tr>
<td>\textit{(High Administrative Discretion)}</td>
<td></td>
</tr>
<tr>
<td>Step 2: Name Registration by Relevant AIC</td>
<td>Step 2: Name Registration by Relevant AIC</td>
</tr>
<tr>
<td>------------------------------------------</td>
<td>------------------------------------------</td>
</tr>
<tr>
<td>(LOW ADMINISTRATIVE DISCRETION)</td>
<td>(LOW ADMINISTRATIVE DISCRETION)</td>
</tr>
<tr>
<td>Step 3: Specific Project-Related Approvals From Various Authorities -- if Relevant</td>
<td>Step 3: Specific Project-Related Approvals From Various Authorities -- if Relevant</td>
</tr>
<tr>
<td>(MEDIUM ADMINISTRATIVE DISCRETION)</td>
<td>(MEDIUM ADMINISTRATIVE DISCRETION)</td>
</tr>
<tr>
<td>Step 4: Project Approval</td>
<td>Step 4: Project Approval</td>
</tr>
<tr>
<td>(HIGH ADMINISTRATIVE DISCRETION)</td>
<td>(HIGH ADMINISTRATIVE DISCRETION)</td>
</tr>
<tr>
<td>or</td>
<td>or</td>
</tr>
<tr>
<td>Project Filing -- if Applicable</td>
<td>Project Filing -- if Applicable</td>
</tr>
<tr>
<td>(MEDIUM ADMINISTRATIVE DISCRETION)</td>
<td>(MEDIUM ADMINISTRATIVE DISCRETION)</td>
</tr>
<tr>
<td>Step 5: Licensing from Industry Regulator -- if Applicable</td>
<td>Step 5: Licensing from Industry Regulator -- if Applicable</td>
</tr>
<tr>
<td>(HIGH ADMINISTRATIVE DISCRETION)</td>
<td>(HIGH ADMINISTRATIVE DISCRETION)</td>
</tr>
<tr>
<td>Step 6: Enterprise Approval by Commerce Authority</td>
<td>N/A</td>
</tr>
<tr>
<td>(HIGH ADMINISTRATIVE DISCRETION)</td>
<td></td>
</tr>
<tr>
<td>Step 7: Enterprise Registration with Relevant AIC</td>
<td>Step 6: Enterprise Registration with Relevant AIC</td>
</tr>
<tr>
<td>(LOW ADMINISTRATIVE DISCRETION)</td>
<td>(LOW ADMINISTRATIVE DISCRETION)</td>
</tr>
</tbody>
</table>

On the surface, it appears that foreign investors face a process similar to that encountered by their domestic counterparts. However, the two additional steps faced by foreign investors -- national security review (if applicable) and enterprise approval -- are often complicated and time consuming, with the capacity to doom some investments. Also, importantly, project approval requirements apply to a far wider range of inbound foreign investments than of domestic investments.

Chinese government officials may also apply different procedures and approval criteria to foreign versus domestic investors, or apply the same rules in different ways. Some government agencies (such as DRCs and AICs) have separate divisions responsible for ensuring the implementation of foreign investment-specific rules and criteria. In addition to published rules that differentiate (and sometimes discriminate against) foreign investors, which potentially could be disciplined under national treatment obligations in a bilateral investment agreement, Chinese authorities often apply non-public internal rules and guidance which, it is widely believed, can encourage stricter treatment of foreign investors. According to a recent business survey conducted by AmCham China of its members, a majority of respondents identified “administrative authorities and judicial organs [relying] on non-public internal guidance” as one of their major concerns with China’s investment environment. Furthermore, industrial policies and plans that may not be legally binding documents often encourage the development of domestic
industries and enterprises and have a significant influence on the exercise of administrative discretion (see Section 3.1 for further discussion regarding this topic).

Below, we compare the treatment of foreign and domestic investors in more detail on a step-by-step basis.

2.2.2. Comparing Approval Requirements Step-by-Step

Step 1A: Anti-Monopoly Law Review -- if Necessary (HIGH ADMINISTRATIVE DISCRETION)

The text of the AML and its relevant rules and regulations do not themselves treat inbound foreign investment differently from domestic investment. In fact, MOFCOM, as the responsible authority for regulating business concentration, has reiterated that it has no bias towards filings made by foreign investors.142

Nonetheless, based on the cases published by MOFCOM on its website, it appears that MOFCOM’s AML pre-closing review is more focused on foreign investment deals and foreign undertakings than on cases only involving domestic entities.143 All cases published on the MOFCOM website where a transaction was blocked or subjected to additional conditions by MOFCOM through AML review involve foreign investment.144 According to AmCham China’s 2015 White Paper, “Concerns persist regarding the potential for selective use of the AML as a tool of protectionism and promotion of national Chinese industrial interests.” In addition, the recent clearance of a significant merger between two state-owned railway giants -- i.e., CSR Corporation Limited (中国南车股份有限公司) and China CNR Corporation Limited (中国北车股份有限公司)146 -- has further raised concerns of bias in AML reviews, particularly when it comes to state-owned enterprises.147

The disproportionate number of foreign investment-related projects negatively impacted by AML review may be attributable to two other factors besides possible bias against foreign investment. First, multinational companies may have greater capabilities and thus be more likely to engage in large investments that trigger AML reviews,148 although, the deal values of investments by Chinese SOEs or publicly traded companies are often quite large as well. Second, though companies are required to self-report for AML review, they may not always do so even if they cross the thresholds triggering review requirements, especially when it is a close call. Foreign companies have less room for discretion because of the added scrutiny applied during the enterprise approval process overseen by MOFCOM or its local counterparts (Step 6 for foreign investors in the table above). While the recent conversation about the treatment of foreign investors has been decidedly negative, there have been some positive signs. The 2015 AmCham White Paper notes:

MOFCOM has taken an important step by beginning to publicize penalty decisions on undertakings which fail to file for review when required. On December 8, 2014, the Department of Treaty and Law of MOFCOM imposed a fine of approximately US $48,272 (RMB 300,000) on Unigroup for failure to notify its acquisition of RDA Microelectronics. This decision is particularly to be commended given not only that Unigroup is a state-owned enterprise (“SOE”) under Tsinghua Holdings, but also because the transaction took place in the semiconductor industry
which is a major focus of China’s industrial policy. MOFCOM’s public censure of an SOE for failure to notify helps to dispel the impression that domestic companies, particularly SOEs, sometimes consider themselves to be exempted from the requirement to notify.  

**Step 1B: National Security Review -- if Necessary (High Administrative Discretion)**

The national security review process does not, at present, apply to domestic investment projects; it only applies to inbound foreign investment projects that meet certain criteria. Investments that trigger national security review requirements must be filed with MOFCOM and are reviewed for national security concerns by an inter-ministerial panel (“Panel”).

The national security review mechanism is mainly governed by the *Notice of the General Office of the State Council on Launching the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* and MOFCOM implementing rules, i.e., the *Provisions of the Ministry of Commerce on the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors*. In addition, on April 8, 2015, the State Council issued the *Notice of the General Office of the State Council on Distributing Pilot Rules for the National Security Review of Foreign Investment in Free Trade Zones*, which, as discussed in further detail below, applies not just to M&A deals, but also to greenfield investments in free trade zones.

**Applicability.** M&A transactions in which the target company is a domestic enterprise will trigger national security review if:

- the target company is a military or military-supporting enterprise, is located in the vicinity of key or sensitive military facilities, or is otherwise associated with national security or defense; or
- (i) the target company is engaged in a sector related to national security, including sectors involving key technologies, major equipment manufacturing industries, important agricultural produces, energy and natural resources, infrastructure, and transportation services; and (ii) foreign investors would obtain “actual control” over this (domestic) target company as a result of the transaction.

**Evaluation Criteria.** During national security review, a proposed M&A transaction is to be assessed on the basis of its impact on:

- national defense and security, including its impact on domestic production capacity, service capacity, and equipment and facilities associated with national defense;
- the operational stability of the national economy;
- social order; and
- R&D capacity for key technologies related to national security.

**Process.** A foreign investor may voluntarily submit its application for national security review to MOFCOM or be requested to do so by MOFCOM or its local counterparts during the enterprise approval...
step (Step 6 in this section).\textsuperscript{157} Certain other industry-related parties may also flag cases for MOFCOM’s attention -- these parties include industry regulators, national industry associations, enterprises in the same industry, or upstream or downstream enterprises.\textsuperscript{158}

If MOFCOM believes that a transaction is subject to national security review, it should, within five working days, call for the inter-ministerial panel to review the filing.\textsuperscript{159} After it is called, the Panel has five working days to request written opinions from relevant government agencies, who must then provide their opinions within another 20 working days.\textsuperscript{160} Depending on whether or not any of the opinng government agencies believe the transaction may have an impact on national security, the Panel has five more working days to follow one of the following two paths:

1. If none of the agencies believes that the transaction raises potential national security concerns, the Panel will make a review decision and inform MOFCOM in writing of such decision.\textsuperscript{161}

2. If any of the agencies does believe that the transaction raises national security concerns, the Panel may initiate a special review of the transaction.\textsuperscript{162} The Panel must reach a final decision through its special review within 60 working days. However, if the Panel is not able to reach a consensus within such time limit, the transaction is to be submitted to the State Council for a final decision, and the whole review period will be prolonged accordingly.\textsuperscript{163} There is no fixed timeline for a State Council’s decision at that point.

* * *

In addition to the State Council notice and the MOFCOM implementing rules, further grounds for national security review are provided by the 2006 \textit{Provisions on the Acquisition of Domestic Enterprises by Foreign Investors} ("M&A Rules") and the 2007 \textit{Anti-Monopoly Law}.\textsuperscript{165} However, these laws and regulations contain little in the way of detailed procedures or guidance regarding national security reviews. Furthermore, details on past review cases have not been made public. This lack of transparency into the operation of the national security mechanism makes definitive statements as to its nature, functions, and oversight difficult.

While the national security review is portrayed as a separate and independent review mechanism, it is generally believed that it is sometimes intermingled with MOFCOM’s AML review and enterprise approval functions. If a transaction is seen as falling into a “sensitive” industrial sector, for example, a lack of transparency allows MOFCOM to reject the transaction on some other basis such as supposed AML concerns.\textsuperscript{166} From our observations, dual-use technologies (those having both civil and military applications) and target entities directly or indirectly held by or involved in military-related functions tend to raise the most national security concerns. However, this may not always be the case. A proposed merger between Coca-Cola and Huiyuan Juice was rejected by MOFCOM on anti-monopoly grounds.\textsuperscript{167} Some legal practitioners and scholars have suggested that MOFCOM may also have had national economic security concerns in mind when making that decision.\textsuperscript{168} While the two additional regulations mentioned in the previous paragraph contain little guidance, the M&A Rules do interestingly contain language stating that any M&A transaction that may affect national economic security or would cause
the transfer of the actual control over a domestic enterprise that owns any well-known trademark or “time-honored Chinese brand” must be declared to MOFCOM.\footnote{169}

On April 8, 2015, China announced that a national security review system with a wider scope than had previously been applied would be implemented as of May 8, 2015 in four pilot free trade zones (the existing Shanghai Pilot FTZ and newly established pilot FTZs in Tianjin, Guangdong Province, and Fujian Province).\footnote{170} This expanded national security review will apply not just to mergers and acquisitions by foreign investors but also to greenfield investments by such investors, and the review will consider a wider range of factors, adding impact on cultural security, public morality, and network security.\footnote{171} Such expanded national security scrutiny has also been proposed under the recently issued draft Foreign Investment Law,\footnote{172} a law that will fundamentally revamp China’s system for managing foreign investment if and when it goes into effect. As with other economic reforms, it is possible that a successful trial of the national security review mechanism in the FTZ zones could eventually lead to nationwide implementation.

**STEP 2: Name Registration by Relevant AIC (Low Administrative Discretion)**

This step involves low administrative discretion, and the procedure for foreign invested enterprises is the same as that for domestic companies.

**STEP 3: Specific Project-Related Approvals from Various Authorities -- if Relevant (Medium Administrative Discretion)**

As with domestic investment, foreign investments in China may also require approvals from Zoning Departments (for zoning of land and building), Land and Resources Departments (for pre-approvals of land-use rights), Environmental Protection Departments (for environmental impact assessments and opinions), and DRCs (in the case of an energy-related projects).\footnote{173} Additionally, approval from the relevant state asset administrative authority or the parent state-owned enterprise is also required if state-owned assets are involved (e.g. if a Chinese state-owned enterprise contribute non-cash assets to its Sino-foreign joint venture).\footnote{174} Laws governing these requirements do not typically distinguish between domestic investors and foreign investors. In practice, some foreign investors have indicated that local authorities exhibit protectionist tendencies when making these assessments,\footnote{175} while others have noted that in some circumstances, foreign investors may find investment-hungry local authorities to be very welcoming.

**STEP 4: Project Approval (High Administrative Discretion) or Project Filing (Medium Administrative Discretion) -- if Applicable**

Project approval or filing requirements for foreign-invested projects are regulated by separate rules not applicable to domestic investors. Nonetheless, the procedures for foreign and domestic investors are essentially the same (at least as presented in published regulations) and there is significant overlap in criteria. The most significant legal difference between treatment of foreign and domestic investors with respect to this step comes in terms of applicability. While only a small set of domestic investments are subject to project approval requirements, a much larger set of inbound foreign investments require project approval, as described below.
**Applicability.** Foreign-invested projects are subject to both the Project Approval Catalogue ("PAC") and the Foreign Investment Catalogue ("FIC"). These two catalogues jointly determine the applicability of project approval or filing requirements and the specific government agency and level responsible for carrying them out, based on whether the project type is designated in the FIC as “encouraged,” “permitted,” or “restricted,” as shown in Figure 2.
Figure 2 - Determining Level of Project Approval or Filing Authority for Inbound Foreign Investments

Encouraged Category (per FIC)

- Chinese Control Requirement (per FIC)
  - ≥ US$1 billion
    - Approval: Central Level (NDRC) per PAC
  - < US$1 billion
    - Approval: Provisonal Level or Below per PAC
- No Chinese Control Requirement (per FIC)
  - Included in PAC
    - Approval: Agency Designated in PAC
  - Not Included in PAC
    - Filing: Provisonal Level or Below

Permitted Category (per FIC)

- Included in PAC
  - Approval: Agency Designated in PAC
- Not included in PAC
  - Filing: Provisonal Level or Below

Restricted Category (per FIC)

- ≥ US$100 million
  - Approval: Central Level (NDRC) per PAC
- < US$100 million
  - Approval: Provisonal Level per PAC
A wider range of foreign investment is subject to project approval requirements as compared with domestic investment. All projects that would require project approval if carried out by domestic investors require project approval when carried out by foreign investors. Additionally, all foreign investments listed in the Foreign Investment Catalogue as “restricted,” as well as those in the “encouraged” category that carry a requirement of absolute or relative control by Chinese parties, must also obtain project approval. The most recent (2015) Foreign Investment Catalogue lists 349 industries or types of investments as “encouraged,” with 12 of them having Chinese control requirements; 38 are listed as “restricted,” and 36 are listed as prohibited. Only a small portion of these items are included amongst the 41 items listed in the Project Approval Catalogue, which are organized in that document into twelve broad categories.

**Evaluation criteria.** The evaluation criteria for project approval and filing are different. Project approval evaluation criteria for inbound foreign investments are similar, though not exactly the same, as those used for evaluating domestic investments:

1. Compliance with relevant laws and regulations, the Foreign Investment Catalogue, and the Catalogue of Priority Industries for Foreign Investment in Central and Western China;
2. Compliance with development planning, industry policies, and industry entry standards;
3. Rational development and effective utilization of resources;
4. Potential effect on China’s national security and ecological security;
5. Potential material adverse impact on the public interest; and
6. Compliance with relevant laws and regulations on capital account management and external debt management.

For project filings, evaluation criteria mainly focus on items (1) and (2) above.

**Timeline.** Investment projects subject only to a project filing requirement may proceed immediately to subsequent steps without having to wait for confirmation from the project filing authorities; they may be contacted later if a problem arises in the project filing evaluation process. Investment projects subject to project approval, on the other hand, must wait for a final project approval decision before moving on to subsequent steps.

**Step 5: Licensing from Industry Regulator -- if Applicable (High Administrative Discretion)**

Certain industry regulator-issued licenses are required for both foreign and domestic investments in certain industries either (i) as a prerequisite for enterprise approval by MOFCOM (for foreign investment) or enterprise registration by the relevant AIC (for domestic investment); or (ii) post-establishment as a prerequisite for engaging in the licensed activity.

Industry-specific licenses are based on a wide variety of laws and regulations governing various industries. For some licenses, foreign and domestic investors are not distinguished, as for the GMP.
License and Drug Manufacturing License described above that are required for manufacturing drugs.\textsuperscript{185} For other licenses, such as the license for telecom services, foreign investors are treated differently, by law, from their Chinese competitors.\textsuperscript{186} Occasionally, additional licensing requirements may be imposed on foreign investors that are not required for their domestic counterparts. For example, the Regulation on the Administration of Commercial Performances requires foreign investors seeking to operate theaters or other performance arts venues to obtain a license from the Ministry of Culture through its provincial counterparts.\textsuperscript{187} Domestic investors in the same line of business need only make a filing for the record.\textsuperscript{188}

Whether or not published requirements for a particular license are the same for foreign and domestic investors, in practice, the scope for administrative discretion can be very broad (this varies significantly depending on the type of license, its legal basis, and the inclination of the implementing government agency), allowing industry regulators to impose stricter requirements on foreign investors. There are situations where industry regulators do not accept or approve license applications made by foreign investors even when they fulfill the criteria prescribed in written laws. For instance, under the applicable regulations, foreign-invested enterprises meeting certain criteria are permitted to apply for and obtain value-added telecommunications services (VATS) licenses,\textsuperscript{189} which according to the Classified Catalogue of Telecommunications Business,\textsuperscript{190} include internet data center licenses. However, the China Communication Consulting Center, an agency under MIIT responsible for the preliminary approval of VATS licenses, expressly states on its website that only domestic investors and investors from Hong Kong and Macao can receive such a license from the agency.\textsuperscript{191}

In other sectors, particularly for certain newly emerging industries, Chinese law sometimes provides that foreign investment will be regulated under separate rules yet to be issued. As long as the issuance of such foreign investment-specific rules is delayed -- which can be for an indefinite period of time -- market entry by foreign investors in that sector becomes \textit{de facto} impossible. An example of this is a rule published by the People’s Bank of China (“PBOC”) in 2010 regarding third-party payment services.\textsuperscript{192} The rule provides that licenses for foreign-invested payment institutions are to be governed by a separate rule to be formulated by the People’s Bank of China and approved by the State Council.\textsuperscript{193} By late 2011 the foreign investor-specific rules had still not been issued. Alibaba, to work around this gap and obtain the third-party payment services license, divested and converted its subsidiary Alipay into a pure domestic-invested entity.\textsuperscript{194} This resulted in a public controversy between Alibaba and its foreign shareholders, Yahoo and Softbank.\textsuperscript{195} In fact, the rules have still not been issued, and no licenses have
been granted to foreign-invested entities for online payment services, though some ad hoc licenses have been issued to foreign-invested entities related to the less-closely watched pre-paid card business.\textsuperscript{196}

**STEP 6: Enterprise Approval by Commerce Authorities (High Administrative Discretion)**

Enterprise approval by MOFCOM (or a local counterpart) is a requirement that only applies to foreign investors. It is a prerequisite for enterprise registration (with the relevant AIC) as well as a precondition for the effectiveness of certain corporate agreements (e.g., the Sino-foreign joint venture agreement or share purchase agreement) and certain corporate constitutional documents (e.g., the articles of association).\textsuperscript{197}

**Applicability.** Enterprise approval is required for all types of foreign investment except:

- (1) foreign investment in certain service industries such as securities,\textsuperscript{196} banking,\textsuperscript{199} insurance,\textsuperscript{200} and education,\textsuperscript{201} where industry-specific laws and regulations provide that licenses from relevant industry regulators are sufficient for the establishment and enterprise registration of the foreign-invested enterprise; and

- (2) foreign investment within FTZs in industries not contained in the given FTZ’s “negative list” of exceptions from national treatment, for which record-filing is substituted for the enterprise approval requirement.\textsuperscript{202}

**Evaluation criteria.** Under laws and regulations governing the enterprise approval requirement, commerce authorities (MOFCOM and its local counterparts) are not to approve the establishment of an FIE if the investment:

- (1) harms China’s sovereignty or social and public interests;

- (2) jeopardizes China’s national security;

- (3) violates Chinese laws, regulations, or industrial policies;

- (4) is not consistent with the direction of China’s national economy’s development;

- (5) causes environmental pollution; or

- (6) where the FIE is an equity joint venture company, involves obvious unfairness in the investment agreements, contracts, or articles of association to the detriment of the rights and interests of a joint venture party.\textsuperscript{203}

These criteria are plainly broad and create room for administrative discretion. In general, MOFCOM and its local counterparts exercise less scrutiny when it comes to foreign investment in the encouraged or permitted categories than for investments in the restricted category. In practice, MOFCOM has often required enterprise approval applicants to revise their transaction agreements in ways that favor local joint venture partners or otherwise meet MOFCOM’s preferences. When they believe the proposed investment exceeds their approval authority, local commerce departments officials may recommend or request substantive or formal changes to transaction documents in order to ensure that the enterprise
approval can be granted locally. It is also common for local governments to require foreign investment documents to be prepared in accordance with local administrative preferences and practices. Such administrative practices may be fairly simple formalistic ones (such as requiring signatures in black ink), or they may impose added burdens on foreign investors (such as requiring that documents be only written in Chinese).

**Process.** The level of government at which commerce authorities conduct enterprise approval review generally depends on (i) the designation of the relevant industry in the Foreign Investment Catalogue, and (ii) the total investment amount (in greenfield projects) or deal value (in M&A deals):

1. Central-level MOFCOM must approve (i) FIEs in encouraged and permitted industries when the total investment equals or exceeds US$300 million; for FIEs in restricted industries, the threshold is US$50 million; (ii) M&A deals when the deal value equals or exceeds US$300 million, or the payment consideration is shares of a foreign company; and (iii) foreign-invested holding companies or foreign-invested venture capital companies whose registered capital equals or exceeds US$300 million.204

2. FIEs with a total investment amount below the above-mentioned thresholds may be approved by local (provincial and sub-provincial) commerce departments, unless otherwise specified by law (for example, exceptions are made for foreign investments in the direct sales business and foreign strategic investments in companies publicly traded on a Chinese stock exchange). Unless otherwise required by the State Council or MOFCOM, provincial-level commerce departments may set up additional thresholds to divide authority within their purview between their commerce departments and those of city- or county-level governments.205

Commerce authorities are given 90 days to process an enterprise approval for a wholly foreign-owned enterprise (“WFOE”)206 or a Sino-foreign equity joint venture,207 and 45 days in the case of a Sino-foreign cooperative joint venture.208 In practice, the review period for the commerce authorities is usually much shorter (closer to 20 business days209) for all three types of enterprises. That said, the actual wait may be longer if the commerce authorities decide that an opinion is required from another government agency. Time for obtaining such an external opinion is not counted into the mandatory time limit.210

**STEP 7: Enterprise Registration with Relevant AIC (Low Administrative Discretion)**

Foreign investors must register their FIEs with the relevant AIC within 30 days of receiving enterprise approval (not applicable to domestic investors) from MOFCOM or its local counterpart.211 Failure to do so will automatically invalidate the enterprise approval, requiring the investor to go through additional procedures to renew the enterprise approval and then apply to the relevant AIC.

AICs traditionally have not exercised significant discretion when reviewing enterprise registration applications. However, more recently, AICs have sometimes requested certain changes to joint venture agreements or articles of association.
Section 3. Fundamental Policies Guiding Investment Screening Processes

Administrative discretion in China’s investment approval processes is a channel for government officials to implement priorities and restraints on both foreign and domestic investors that may not be explicitly written into published laws and regulations. Often, such goals are espoused in unwritten and/or unpublished rules used internally by government and Party officials. While accessing such unpublished internal guidance is difficult, China broadcasts many of its economic goals and priorities through its industrial policies. We delve into the background and present state of industrial policy in China in Section 3.1.

A central aspect of Chinese industrial policy is managing the country’s large and strategically important state-owned sector, which will continue to play a “dominant” role in the Chinese economy pursuant to policy objectives announced at the Third Plenum of the 18th Central Committee of the Communist Party of China (“CPC”) in November of 2013.212 In Section 3.2, we consider the history of the state-owned sector and its evolution since the founding of the PRC, discuss the legal framework governing the state-owned sector, and examine how SOEs receive preferential treatment under current laws and regulations.

3.1 Industrial Policy in China

Industrial policies in China appear in many forms, ranging from general, high-level policy guidelines to specific, and even legally binding, goals, targets, and restrictions. In fact, the distinction between law and policy gets blurred in China, making precise definitions for terms like “industrial policy” difficult to come by. In this section, we review the history of industrial policy in China, explore some key types of government-issued documents that tend to be high in industrial policy content, and discuss the current impact of industrial policies on economic governance.

3.1.1 Historical Background

Industrial policy has a long, storied history in China. As the new Communist-led government sought its economic bearings in the first decade of the People’s Republic, it naturally looked to the Soviet Union as a model.213 The result was an economy entirely dominated by state-owned enterprises, governed by the state and Party through specific production targets spelled out in industrial planning documents.214

The Third Plenum of the 11th Central Committee of the CPC in December 1978 was a watershed moment in the history of China’s economic governance, as China’s leadership under Deng Xiaoping announced that the country would begin a long, challenging process of “opening up and reform” (Third Plenums since 1978 have historically been opportunities for Chinese leaders to announce ambitious economic agendas).215 Liberalizing economic governance led to a changing role for industrial planning and policy.216 Instead of laying out explicit production targets, industrial policies laid out national economic goals and priorities with the aim of galvanizing government agencies, officials, and state-
owned enterprises to pursue them in a coordinated manner. As the country’s economy began to grow more rapidly through the 1980s, an important goal of industrial policy was to encourage and channel foreign investment through various forms of protection, support, and preferential treatment, though it took some time for the new focus of industrial policymaking to take hold.

In recent years, the focus has shifted from securing capital to (i) promoting “indigenous innovation,” (ii) helping China move up the value chain, and (iii) building domestic “champion” companies capable of establishing themselves as global players. Over time, China has thus moved from a production target-based industrial policy regime inspired by the Soviet Union to one drawing inspiration from the Japanese model, where industrial policy plays a key role in guiding the government’s coordination of economic activity through regulation that guides and incentivizes market actors to engage in preferred activities. We expect this trend to continue unabated as Xi Jinping’s administration implements the significant economic reforms announced at the Third Plenum of the 18th Central Committee of the CPC in 2013.

3.1.2 Present Day Industrial Policy

The administration of Hu Jintao and Wen Jiabao marked the beginning of a golden age for market incentive-oriented industrial policy in China. By the early 2000s, individuals inspired by the Japanese model of industrial planning had ascended to key positions in the country’s top policymaking bodies, and the result has been a flourishing of industrial policies and programs, especially after the start of the global financial crisis in 2008.

Today, industrial policies take a number of shapes and forms, and can range from the general and exhortatory to the specific and binding. Foreign businesses and policymakers may take note of the following common types of industrial planning and policy documents:

**Five-Year Plans (“FYPs”).** Chairman Mao oversaw the development of China’s first five-year plan, which covered the years 1953-1957. While that first plan was inspired by Soviet economic planning, an influence reflected clearly in the extensive use of explicit production targets, the five-year plans have survived China’s transition into a “socialist market economy.” These plans are the most classic and core examples of China’s industrial policies and planning on a broad level. In modern times, the five-year plans serve as important tools for macroeconomic planning, coordination, and control. They set five-year objectives and goals for the national economy in general, as well as for key economic sectors, and highlight critical government priorities for social and economic development during the prescribed period.

The most recent five-year plan is presented in the *Outline of the Twelfth Five-year Plan for National Economic and Social Development* (“12th Five-Year Plan”), approved by the National People’s Congress (“NPC”) on March 14, 2011. The 12th Five-Year Plan sets out key policy directions for the 2011-2015 period that touch on better macroeconomic and investment management, a shift to domestic consumption, upgrading Chinese industry through innovation, better public services, sustainable development, and social control. The prescriptions in the Plan range from the vague to the specific. Among other things, the 12th Five-Year Plan includes important language providing direction for the
development of the agricultural, industrial, and service sectors. For instance, under the manufacturing category of “non-ferrous metals,” the Plan calls for a focus on (i) developing key materials required for the advancement of the aerospace and electronic information industries; (ii) supporting the promotion and application of cutting-edge smelting technologies and energy-saving and emission-reduction technologies; and (iii) encouraging renewable resource recycling and the comprehensive utilization of tailings and waste residue.\textsuperscript{228}

The Plan becomes quite specific in identifying new key construction projects in the area of new energy, calling for (i) 120 million kWh of hydropower production capacity through large stations on the Jinsha River, Yalong River, and Dadu River; (ii) six onshore and two offshore wind farms with a total capacity of no less than 70 million kWh; and (iii) solar power stations in Tibet, Inner Mongolia, Gansu, Ningxia, Qinghai, Xinjiang, and Yunnan Provinces with a total capacity of no less than 5 million kWh.\textsuperscript{229} The Plan also includes certain numerical forecasts and binding commitments. The binding commitments cover items such as (i) the total amount of farmland reserves (to be unchanged at 1.818 billion mu), (ii) growth in non-fossil fuel usage in primary energy consumption (3.1%), (iii) decrease in energy consumption per unit of GDP (16%), (iv) decrease in CO2 emissions per unit of GDP (17%), and (iv) increase in forest coverage (1.3%).\textsuperscript{230}

As discussed later in this section, the promulgation of the broad national 12th Five-Year Plan was, as with past plans, followed by a number of more detailed five-year plans for specific social and economic sectors, promulgated by the State Council and other central government agencies, as well as by provincial and sub-provincial local authorities. Follow-on five-year plans at the central level were issued in areas such as environmental protection, indigenous innovation, energy, services, healthcare, the marine economy, and strategic emerging industries. Note that these follow-on five-year plans are often industry-specific and therefore should also be considered together with the industry-specific policies discussed below.

Table 3 below lists the 31 currently effective documents issued by the State Council containing the terms “12\textsuperscript{th}” or “12\textsuperscript{th} Five-Year” (“十二五” or “十二五”) and the word “plan” (“规划/计划/方案”) in their titles in the databases we used (“PKU Law Database”).\textsuperscript{231}

**Table 3 - List of the Five-Year Plans Issued by the State Council**

<table>
<thead>
<tr>
<th>Five-Year Plans</th>
<th>Issuing Agency</th>
<th>Effective Date</th>
</tr>
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<tbody>
<tr>
<td>Notice of the State Council on Issuing the National 12th Five-Year Plan for Building Indigenous Innovation Capabilities</td>
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<td>Notice of the State Council on Issuing the 12th Five-Year Plan for Energy Development</td>
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<tr>
<td>Notice of the State Council on Issuing the 12th Five-Year Plan for the Development of the Services Industry</td>
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<td>Notice of the State Council on Issuing the 12th Five-Year Plan for the Development of the National Ocean Economy</td>
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<td>Notice of the State Council on Issuing the 12th Five-Year Plan for Energy Saving and Emissions Reduction</td>
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<td>Notice of the State Council on Approving and Forwarding the Outline of the 12th Five-Year Plan for Social Security</td>
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<td>Notice of the State Council on Issuing the Planning on Deepening the Reform of the Medical and Health System During the 12th Five-Year Period and Its Implementation Plan</td>
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<td>Approval Reply of the State Council on the 12th Five-Year Plan for the Revitalization of Northeast China</td>
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</tr>
<tr>
<td>Approval Reply of the State Council on the 12th Five-Year Plan for the Development of the Western Regions</td>
<td>State Council</td>
<td>13/02/2012</td>
</tr>
<tr>
<td>Notice of the State Council on Issuing the National 12th Five-Year Plan for Drug Safety</td>
<td>State Council</td>
<td>20/01/2012</td>
</tr>
<tr>
<td>Notice of the General Office of the State Council on Forwarding the National 12th Five-Year Plan of the Ministry of Health and Other Departments for Endemic Disease Prevention and Treatment</td>
<td>General Office of the State Council</td>
<td>12/01/2012</td>
</tr>
<tr>
<td>Notice of the State Council on Issuing the National 12th Five-Year Plan for Environmental Protection</td>
<td>State Council</td>
<td>15/12/2011</td>
</tr>
</tbody>
</table>

Medium- and Long-Term Strategic Plans (“MLPs”). The Chinese government often looks beyond the five-year window in its industrial planning. The State Council and other central government agencies sometimes issue MLPs for the development of certain social or economic sectors or industries. Our review identified MLPs in a number of areas including, for example, the development of science and technology, education, the logistics industry, and the satellite navigation industry.

One of the most well-known industrial policies in this category is described in the Outline of the National Medium- and Long-Term Plan for Science and Technology Development (2006-2020) (“S&T MLP”), issued by the State Council at the end of 2005. The S&T MLP sets out guiding principles for China’s science and technology development over a 15-year period, promotes a number of select cutting-edge technologies and areas of research in the basic sciences, and proposes policies and measures to encourage “indigenous innovation” and technology transfer. In particular, it lists 10 “important fields,” and 62 “priority topics” within them, for science and technology development. By way of example, one of the important fields for development is the “information and modern service industry.” Under it, the S&T MLP lists seven priority topics: (1) highly-credible online software platforms and large application software, (2) major next-generation internet technologies and services, (3) dependable high-
performance computers, (4) sensor networks and intelligent information processing, (5) digital media content platforms, (6) high definition large flat-panel displays, and (7) core application-oriented information security. The S&T MLP’s attempt to promote indigenous innovation through the use of government procurement -- giving domestically produced high-tech equipment and products containing Chinese intellectual property priority in government procurement -- has led to complaints of “techno-nationalism.”

Table 4 below lists the seven currently effective documents issued by the State Council with titles containing “medium- and long-term” (“中长期”) and “plan” (“规划/计划/方案”) in the PKU Law Database.

**Table 4 - List of the Medium- and Long-Term Strategic Plans Issued by the State Council**

<table>
<thead>
<tr>
<th>Medium- and Long-Term Plans</th>
<th>Issuing Agency</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notice of the State Council on Issuing the National Medium- and Long-Term Plan for the Construction of Major Science and Technology Infrastructure (2012-2030)</td>
<td>State Council</td>
<td>23/02/2013</td>
</tr>
<tr>
<td>Notice of the State Council on Issuing the &quot;Outline of the National Medium- and Long-Term Plan for Science and Technology”</td>
<td>State Council</td>
<td>26/12/2005</td>
</tr>
</tbody>
</table>
Industry-Specific Policies & Plans. Industry-specific policies and plans establish directions, goals, and priorities for specific industry sectors. They are generally issued by the State Council or the agency or agencies charged with regulating the given sector -- e.g., the Ministry of Industry and Information Technology (“MIIT”) for the telecommunications industry,\(^241\) and the China Banking Regulatory Commission (“CBRC”) for the banking industry.\(^242\) Industry-specific plans tend to be much more specific than five-year plans.

For example, the industrial policy governing the automobile industry is one of the most well-known and most comprehensively implemented of China’s industry-specific industrial policies. The latest version of the Project Approval Catalogue, issued in October 2014,\(^243\) requires that projects in the automobile industry be governed by the *Policy on the Development of the Automotive Industry* (“Auto Industry Policy”),\(^244\) issued by NDRC in May 2004. The binding nature of this policy highlights how specific industrial policies can get, and the fact that they can range from loose guidelines to binding regulations, blurring the line between policy and law.

The all-important Auto Industry Policy addresses a number of aspects of the automobile industry in China including its industrial structure, technological development, sales, market access, investment management, and exports.\(^245\) In line with the government’s increasing emphasis on environmental protection, the Auto Industry Policy encourages the development of energy-saving, environmentally-friendly, low-emission automobiles as well as those utilizing new types of fuels.\(^246\) It also requires domestic and foreign automobile brands selling cars in China to set up sale and post-sale service systems.\(^247\)

The Auto Industry Policy’s prescriptions extend to and influence the government’s investment approval processes, which are described in more detail in the next section. This highlights the importance of carefully reviewing relevant industrial policies when analyzing the investment approval regime applicable to a particular investment. The Auto Industry Policy allows certain types of automobile investment projects to go through a simple record-filing procedure instead of having to undergo the scrutiny involved in obtaining a normal project approval from the NDRC (or other relevant project approval authorities).\(^248\) The Policy also stipulates minimum total investment requirements for newly established automobile and automobile engine manufacturers (RMB 2 billion and RMB 1.5 billion, respectively), and limits foreign investors to no more than 50% equity in joint ventures and to no more than two joint ventures involved in manufacturing a single category of automotive vehicles.\(^249\)
Table 5 below lists twelve currently effective documents that (i) were issued by the State Council or its subordinate ministries and administrative agencies, (ii) are categorized as “national industrial policy” by the PKU Law database, and (iii) regulate one or more of the 10 illustrative industry sectors examined in more detail in Section 4. These include: 1) automobile manufacturing; 2) chemical manufacturing; 3) construction and infrastructure (including water supply and sewage treatment); 4) distribution; 5) energy; 6) financial services (including banking, securities, and insurance); 7) healthcare (including pharmaceutical, medical device, and cosmetics manufacturing; and healthcare services); 8) mining; 9) professional services (including legal, accounting, consulting, and architecture); and 10) telecommunications.

Table 5 - List of Central-Level Industry-Specific Policies & Plans Falling within the Ten Illustrative Sectors

<table>
<thead>
<tr>
<th>Industry-Specific Policies &amp; Plans</th>
<th>Issuing Agency</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>国务院关于促进服务外包产业加快发展的意见&lt;br&gt;Opinions of the State Council on Promoting the Development of the Service Outsourcing Industry</td>
<td>State Council</td>
<td>24/12/2014</td>
</tr>
<tr>
<td>国务院关于促进光伏产业健康发展的若干意见&lt;br&gt;Several Opinions of the State Council on Promoting the Healthy Development of the Photovoltaic Industry</td>
<td>State Council</td>
<td>04/07/2013</td>
</tr>
<tr>
<td>国务院关于深化流通体制改革加快流通产业发展意见&lt;br&gt;Opinions of the State Council on Deepening the Circulation System Reform and Accelerating the Development of the Circulation Industry</td>
<td>State Council</td>
<td>03/08/2012</td>
</tr>
<tr>
<td>国务院办公厅关于进一步促进服务外包产业发展的复函&lt;br&gt;Replies of the General Office of the State Council on Further Promoting the Development of the Service Outsourcing Industry</td>
<td>General Office of the State Council</td>
<td>05/02/2013</td>
</tr>
<tr>
<td>国家能源局关于调控行业总量优化产业布局的指导意见&lt;br&gt;Guiding Opinions of the National Energy Administration on Controlling the Total Amount of Coal and Optimizing Industrial</td>
<td>NEA</td>
<td>12/10/2014</td>
</tr>
<tr>
<td>Layout</td>
<td>MOT, NDRC, MOE, MPS, MEP, MOHURD, MOFCOM, SAIC, GAQSIQ, &amp; CIRC</td>
<td>03/09/2014</td>
</tr>
<tr>
<td>-----------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Guiding Opinions of the Ministry of Transport, the National Development and Reform Commission, the Ministry of Education and Seven Other Departments on Promoting the Transformation and Upgrading of the Vehicle Maintenance Industry to Improve Service Quality</td>
<td>NDRC, &amp; MIIT</td>
<td>11/02/2014</td>
</tr>
<tr>
<td>Policies for the Coal Industry</td>
<td>MOFCOM</td>
<td>01/06/2004</td>
</tr>
<tr>
<td>Outline of the Reform and Development of the Circulation Industry</td>
<td>MOFCOM</td>
<td>01/06/2004</td>
</tr>
</tbody>
</table>

**Local Industrial Policies.** Taking their lead from their counterparts at the central level, provincial and sub-provincial governments and their constituent agencies often issue industrial policies highlighting their own economic goals and priorities. Given the significant influence that local officials have on the local business environment through the exercise of broad administrative discretion, successful investors work to build healthy relationships with local actors and to understand local industrial policies to ensure that their planned business activities fit local policy objectives.

Table 6 below lists twelve examples of currently effective documents that (i) are categorized as “national industrial policy” (国家产业政策) by the PKU Law Database, and (ii) were issued by one of the five illustrative provincial-level governments selected for this report -- i.e., Beijing, Chongqing, Guangdong, Shanghai, and Tianjin.
<table>
<thead>
<tr>
<th>Local Industrial Policies</th>
<th>Issuing Agency</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>中关村科技园区管理委员会关于印发《关于加快培育大数据产业集群推动产业转型升级的意见》的通知</td>
<td>Beijing Zhongguancun Science and Technology Park Management Committee</td>
<td>12/02/2014</td>
</tr>
<tr>
<td>Notice of the Beijing Zhongguancun Science and Technology Park Management Committee on Issuing “Opinions on Accelerating the Cultivation of the Big Data Industry to Promote Industrial Transformation and Upgrading”</td>
<td></td>
<td></td>
</tr>
<tr>
<td>北京市顺义区人民政府办公室转发区经济信息化委关于顺义区经济功能区(二三产业基地)建设项目控制指标和产业项目入驻标准实施细则的通知</td>
<td>Government of Beijing Shunyi District</td>
<td>29/12/2010</td>
</tr>
<tr>
<td>北京市海淀区人民政府关于印发海淀区促进重大产业发展实施办法的通知</td>
<td>Government of Beijing Haidian District</td>
<td>01/04/2009</td>
</tr>
<tr>
<td>Notice of the People’s Government of Beijing Haidian District on Issuing the Implementation Measures for Promoting the Development of Major Industries</td>
<td></td>
<td></td>
</tr>
<tr>
<td>北京市发展计划委员会关于在固定资产投资项目审批中严格掌握有关产业政策和行业管理标准的通知</td>
<td>Beijing Municipal Development and Planning Commission</td>
<td>27/04/2002</td>
</tr>
<tr>
<td>Notice of Beijing Municipal Development and Planning Commission on Strictly Implementing Relevant Industrial Policies and Administrative Standards in Approvals of Fixed-Asset Investment Projects</td>
<td></td>
<td></td>
</tr>
<tr>
<td>广东省人民政府关于促进我省产业结构调整的实施意见</td>
<td>Government of Guangdong Province</td>
<td>28/06/2007</td>
</tr>
<tr>
<td>Implementation Opinions of the People’s Government of Guangdong Province on Promoting the Industrial Restructuring</td>
<td></td>
<td></td>
</tr>
<tr>
<td>上海市杨浦区人民政府印发《杨浦区关于促进产业发展的若干政策意见》的通知</td>
<td>Government of Shanghai Yangpu</td>
<td>01/07/2014</td>
</tr>
</tbody>
</table>
Catalogues. The Chinese government periodically issues catalogues listing industry sectors that are eligible for certain treatment in administrative processes (such catalogues are issued from time-to-time by both central and sub-central government agencies). For example, the Project Approval Catalogue, referred to repeatedly in this report, lists the industries and sectors where project approval by the relevant DRC or other designated agency is required before the investment may proceed. The Foreign Investment Catalogue lists industries where foreign investment is “encouraged,” “restricted,” and “prohibited,” with non-listed industries considered “permitted.” Various laws and regulations mandate differential treatment for foreign investment projects depending on their categorization under this catalogue, and government officials take the categorization into account in exercising their discretion in the approval and post-establishment supervision of these projects.

Another catalogue, the Catalogue for Guiding Industrial Restructuring (“Restructuring Catalogue”) is currently in effect to help the government coordinate the upgrading of its industries and technology and phase out old, less desirable aspects of the economy. The Restructuring Catalogue divides industries into those that are to be “encouraged,” “permitted,” “restricted,” and “eliminated” based on how advanced the techniques, equipment, and products involved in the industry are, and whether they are conducive to broader goals such as economic development, energy conservation, and sustainable development. The Restructuring Catalogue is applicable to domestic investors only, with the exception of the list of items identified for “elimination,” which is applicable to both domestic and foreign investors. Investments in these different categories are treated very differently: investment in encouraged industries may enjoy certain financial and import preferential treatment.
By contrast, new investment is prohibited in all industries slated as restricted or for elimination. Furthermore, the government will take measures to force existing projects in industries slated for elimination to be shut down.

Table 7 below lists the thirteen currently effective catalogues issued by central-level government agencies that (i) are included in the PKU Law Database, and (ii) contain the terms “industry” (“产业”) and “catalogue” (“目录”) in their titles. Note that catalogues vary in importance.

**Table 7 - List of Industry Catalogues Issued by Central Government-Level Agencies**

<table>
<thead>
<tr>
<th>Catalogues</th>
<th>Issuing Agency</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>政府核准的投资项目目录(2014 年本)</td>
<td>State Council</td>
<td>31/10/2014</td>
</tr>
<tr>
<td>Catalogue of Investment Projects Subject to Government Verification and Approval (2014 Version)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>西部地区鼓励类产业目录</td>
<td>NDRC</td>
<td>01/10/2014</td>
</tr>
<tr>
<td>Catalogue of Industries Encouraged to Develop in the Western Region</td>
<td></td>
<td></td>
</tr>
<tr>
<td>中西部地区外商投资优势产业目录(2013 修订)</td>
<td>NDRC; MOFCOM</td>
<td>10/06/2013</td>
</tr>
<tr>
<td>Catalogue of Priority Industries for Foreign Investment in Central and Western China (2013 Revision)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>产业结构调整指导目录(2011 年本)(2013 修订)</td>
<td>NDRC</td>
<td>01/05/2013</td>
</tr>
<tr>
<td>战略性新兴产业重点产品和服务指导目录</td>
<td>NDRC</td>
<td>22/02/2013</td>
</tr>
<tr>
<td>Catalogue for Guiding the Development of Key Products and Services in Strategic Emerging Industries</td>
<td></td>
<td></td>
</tr>
<tr>
<td>产业转移指导目录</td>
<td>MIIT</td>
<td>26/07/2012</td>
</tr>
<tr>
<td>Catalogue for Guiding the Locality of Industries</td>
<td></td>
<td></td>
</tr>
<tr>
<td>外商投资产业指导目录 (2015 年修订)</td>
<td>NDRC; MOFCOM</td>
<td>10/04/2015</td>
</tr>
<tr>
<td>Catalogue of Industries for Guiding Foreign Investment (2015 Revision)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>部分工业行业淘汰落后生产工艺装备和产品指导目录(2010 年本)</td>
<td>MIIT</td>
<td>13/10/2010</td>
</tr>
<tr>
<td>当前国家鼓励发展的环保产业设备(产品)目录(2010 年版)</td>
<td>NDRC; MEP</td>
<td>16/04/2010</td>
</tr>
<tr>
<td>Catalogue of Equipment (Products) of Environmental Protection Industry Currently Encouraged by the State (2010 Version)</td>
<td></td>
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</tr>
</tbody>
</table>
3.1.3 Impact of Industrial Policy on Economic Governance

Industrial policies play an important role in coordinating government actors -- within legislative bodies, administrative agencies, judicial bodies, local governments, state-owned enterprises, and quasi-governmental industry associations -- to implement the leadership's priorities in their day-to-day decision-making. Therefore, they have a significant impact on the business environment in China for both domestic and foreign enterprises. We consider here their impact on legislative processes, government approval processes, and post-establishment and inspection processes.

Industrial policies can be harbingers of legislative developments to come. For example, China’s leaders, together with the Chinese public, have become increasingly aware of and anxious about the environmental costs of the country’s rapid development over the past few decades. The 12th Five-Year Plan, approved by the National People’s Congress in March 2011, bears out the government’s commitment to address this mounting concern.261 A quick glance through the document reveals repeated exhortations for the development of green technologies and principles of the “circular economy.”262 In this context, the Plan calls for promoting and accelerating the use of cleaner production techniques in “key sectors such as agriculture, industry, construction and commerce, and trade services.”263 Less than a year after the 12th Five-Year Plan was approved, the Standing Committee of the National People’s Congress (“SCNPC”) put forward amendments to the 2002 Law on the Promotion of Cleaner Production.264 Among other things, the amendments require the government to finance clean production activities in the “key fields, industries, and projects determined by the national plan,” and to set forth an agenda of “elimination within a time limit” for “outdated production technologies, techniques, equipment, and products which cause resource waste and serious environmental pollution.”265

The government approval processes for investment, domestic and foreign, are influenced by and used to implement the contents of industrial policies. The same administrative discretion that allows
government officials to discriminate against foreign investment\textsuperscript{266} is often used to implement industrial policies. The expectation that industrial policies should be used as benchmarks for the examination and approval of investment initiatives applies to a range of government and government-linked actors -- including project approval authorities and other relevant government agencies such as those in charge of land resources, environmental protection, urban planning, and financial institutions (see Section 2.1.2 for a more thorough treatment of these approval processes and the relevant government agencies).\textsuperscript{267} This expectation may be mandated by explicit legal measures. For example, NDRC, as discussed in Step 4 in Section 2.1.2, is explicitly expected to use compliance with industrial policies and development planning as a factor in evaluating investments projects when issuing project approvals.\textsuperscript{268} A separate MIIT regulation separately requires MIIT officials to apply the same criteria when conducting project approvals.\textsuperscript{269} Industrial policies carry more weight in some industries than in others. For example, as mentioned earlier, the latest version of the Project Approval Catalogue requires that projects in the automobile industry be governed by the industrial policy issued by the State Council specifically for that industry (see Section 4.3.1 for further discussion of how industrial policy affects the investment environment in the automobile manufacturing industry).\textsuperscript{270}

Industrial policy documents routinely contain language that discriminates against foreign investment, and often discriminate against private investment more generally. This could lead approval authorities to provide differential treatment of investors or impose performance requirements based on various factors relevant to industrial policies -- treatment that may not be readily apparent upon review of binding laws and regulations. Some such policy-based restraints are, in fact, visible in binding laws and regulations. Numerically speaking, the China Investment Restraints Report prepared for the EU identified over 300 examples of provisions containing policy guidance potentially restraining foreign investment in published legal measures.\textsuperscript{271}

One of many examples where industrial policies can lead to negative treatment of foreign investors (and private investors more broadly) can be found in the 2010 \textit{Several Opinions of the State Council on Promoting the Sustainable and Healthy Development of the Rare Earth Industry} makes clear the government’s intention to prohibit new entrants into and unsanctioned expansion of existing companies in the rare earth mining industry.\textsuperscript{272} Article 1(3) states that government’s goal of having “the rare earth industry led by large enterprises, and the industrial concentration of the top three enterprise groups in the ionic-type rare earth industry in south China...reach 80% or higher.”\textsuperscript{273} Given that the top six enterprise groups in the rare earth mining industry are state-owned or state-controlled\textsuperscript{274} the government’s consolidation plans harm both foreign investors and private domestic investors. One can see how approval authorities might take cues from language contained in industrial policies and consequently discriminate in favor of domestic industry when taking a look at China’s \textit{Medium- and Long-Term Development Planning for Nuclear Power (2005-2020)}.\textsuperscript{275} This industrial planning document calls for Chinese parties to play the dominant role in the nuclear power industry, cooperating with, and offering some market share to, foreign investors so as to import and absorb advanced technology.\textsuperscript{276}

The impact of industrial policies only begins with the approval process and continues after enterprise establishment through government monitoring and inspection processes. Chinese authorities, who exercise tremendous discretion in their enforcement of laws and regulations, are expected to employ
this discretion in line with the country’s industrial policies, going so far as to shutter projects “inconsistent with industrial policies and industry access criteria.”

3.2 Differentiated Treatment of State-Owned Enterprises (“SOEs”)

SOEs hold a large share of the Chinese market. According to an annual financial statement of SOEs issued by the Ministry of Finance (“MOF”) and a report from the state-owned Xinhua news service in 2013, there were approximately 155,000 non-financial SOEs in China, holding assets of about RMB 104.1 trillion, reporting net profits of about RMB 1.9 trillion, and employing nearly 37 million people.

The National Bureau of Statistics defines “state-owned enterprises” as: (1) enterprises, corporations, and joint ventures wholly owned by the State; (2) enterprises in which the State owns the majority of shares; or (3) enterprises where the State owns less than 50% of shares but still controls the enterprise in some way (such as owning a larger share of the company than any other shareholder), or has actual control through contracts.

SOEs are commonly divided into two categories based on the level of government responsible for their management -- centrally-owned SOEs and local SOEs.

Centrally-owned SOEs include:

- 121 SOEs managed by the State-Owned Assets Supervision and Administration Commission (“SASAC”);
- financial SOEs managed by the China Banking Regulatory Commission (“CBRC”), China Insurance Regulatory Commission (“CIRC”), and the China Securities Regulatory Commission (“CSRC”) -- e.g., the Bank of China and China Life Insurance (Group) Company; and
- SOEs managed by other central government ministries and agencies -- e.g., China National Tobacco Corporation (China Tobacco) managed by the State Tobacco Monopoly Administration.

In this section, we review the history of China’s SOEs and SOE reform during the past few decades, discuss the legal framework under which they operate today, and describe the protection and preferential treatment they receive.

3.2.1 Historical Background of SOEs in China

China’s reform of the SOE system began in the late 1970s as Deng Xiaoping came to power and the country embarked on fundamental economic reforms. The first stage of reforms focused on “decentralization and profit-sharing,” whereby the central government began giving enterprises and their employees greater autonomy in making operational decisions and enjoying the resulting profits. This was a critical first step in improving the performance of these enterprises. During the second stage of reforms (1987-92), reform efforts focused on separating SOE ownership from management, further increasing SOEs’ operational autonomy.

The third, and perhaps most ambitious, stage of reforms began in the early 1990s. The 1993 Third Plenum of the 14th Central Committee of the CPC announced the Party’s decision to transform SOEs,
restructuring them as modern corporate entities (e.g., joint stock companies). In 1995, the Party articulated a principle of “holding the large and releasing the small (抓大放小),” in other words focusing government control on large monopolies and strategic resource sectors while allowing liberalization in other sectors. And in 1998, Premier Zhu Rongji famously announced a goal of “resolving the deficit issue of most large- and medium-sized state-owned enterprises within three years and helping most key large- and medium-sized state-owned enterprises build … modern corporate structures.”

The modernization and corporatization of state-owned enterprises was not an easy task. As Chinese society was structured around the state-owned enterprise -- housing and social services were all tied to employment in SOEs, and employment was traditionally passed down through families -- it required the forceful personality and persistence of a strong leader like Premier Zhu to see these reforms through. During Zhu’s premiership alone (1998-2003), 40 million Chinese citizens working at state-owned enterprises lost their jobs.

Under the leadership of President Hu Jintao and Premier Wen Jiabao, emphasis shifted to the governance of SOEs. While the behavior and role of state-owned enterprises had shifted dramatically, the governance of the SOE sector had not yet caught up, leading to problems such as the misuse of state-owned assets. Consequently, in 2003, the State Council issued the Interim Regulation on the Supervision and Administration of State-Owned Assets of Enterprises, and that same year consolidated a number of industry-specific ministries into a powerful new agency under the State Council -- the State-Owned Assets Supervision and Administration Commission (“SASAC”). SASAC became the main authority overseeing the state-owned sector in China, operating at the central level and through local branches and local governments to supervise the use of state-owned assets (SASAC and its local branches are hereinafter collectively referred to as “SASACs”). In 2008, the Standing Committee of the National People’s Congress issued the Law of the People’s Republic of China on the State-Owned Assets of Enterprises, which serves as the key governing law regarding state-owned assets in effect today.

Amongst the sweeping economic reforms announced during the 2013 Third Plenum, China’s leaders announced a new wave of reforms for the SOE sector. According to Dan Rosen of the Rhodium Group, the goals of these reforms include “diluting state shareholding through the introduction of private shareholders; extracting more profit from SOEs to finance public expenditures; specifying which industries legitimately require state control; and making clear that when the state remains a non-controlling shareholder in a competitive industry, normal market competition should apply.” Initial signs suggest that the government is serious about implementing these reform plans, but that progress may be relatively slow, given the complexity of the issues involved and the apparent behind-the-scenes opposition of vested interests.

3.2.2 Legal Framework for SOEs

The first key law governing state-owned enterprises, the Law of the People’s Republic of China on Industrial Enterprises Owned by the Whole People (“Industrial Enterprises Law”), was issued in 1988. Most recently amended in 2009, the law codifies the legal status of state-owned enterprises in China.
and reflects the challenging process of separating ownership from management that began in the 1980s.297

**SOE Roles, Rights, and Responsibilities.** Article 2 of the Industrial Enterprises Law stipulates that “the property of the enterprises owned by the whole people shall be owned by the whole people, and shall be operated and managed by the enterprises with the authorization of the State in line with the principle of the separation of ownership and managerial authority. The enterprise shall enjoy the rights to possess, utilize and dispose of, according to law, the property which the state has authorized it to operate and manage.”298 The government must not interfere with enterprises’ operations aside from performing its investor duties.299

After some SOEs converted to joint stock corporations beginning in the early 1990s, three types of “state-invested enterprises” emerged (with the first two considered state ownership, and the third no longer considered state ownership): (1) corporations wholly owned by the State (国有独资公司), (2) corporations in which the State owns a controlling interest (国有控股公司), and (3) corporations in which the State owns a share (国有参股公司).300 For all three types of corporations in which the State invests, SASAC, its local branches, and local governments to the extent that no local SASAC exists (collectively, “Asset Supervision Entities”) are authorized to represent the State in enjoying investor rights and benefits and performing investor duties.301 For instance, Asset Supervision Entities may enjoy profits, participate in decision-making, and select the management of enterprises,302 as well as provide guidance on reforming their income distribution systems.303 At the same time, Asset Supervision Entities assume the responsibility of participating, as shareholders, in maintaining and increasing the value of state-owned assets.304

Asset Supervision Entities are given a particularly significant amount of control over enterprises wholly owned by the State. They have the right to (1) draft or approve corporations’ articles of association; (2) appoint and remove senior management personnel (e.g., board chairmen and vice-chairmen, general managers, and supervisors) and evaluate their performance; and (3) make decisions on important company matters including increases or decreases in the amount of registered capital, bond issuance, mergers and acquisitions, dissolution, bankruptcy, and liquidation.305

Important matters such as division, merger, dissolution, and bankruptcy for “key” wholly state-owned enterprises must first be approved by SASAC and then reported for approval to the corresponding level of government (i.e., national-level SASAC reports to the State Council; local-level SASACs report to the corresponding local People’s Government at the same level).306

**Supervision of State-Owned Assets.** Under Chinese law, “state-owned property rights (国有产权)” are defined as “the rights and interests generated from the State’s investments in SOEs in any form, generated from SOEs’ investments in any form, and other rights and interests that shall be enjoyed by the State as provided by laws and regulations.”307 Under the Rules on the Management of Property Rights Registration for State Assets of Enterprises, state-owned property rights must be registered with the SASACs.308 SASACs are also in charge of defining property rights (产权界定), supervising and
evaluating state-owned assets, performing verification of assets (清产核资), collecting asset-related statistics, and performing general evaluations.\textsuperscript{309}

**Transfer of State-Owned Property.** SASACs are responsible for supervising and managing the transfer of state-owned property.\textsuperscript{310} An SASAC and Ministry of Finance regulation states that “major” transfers (not defined) require the approval of the corresponding level of government.\textsuperscript{311} The *Law of the People’s Republic of China on the State-Owned Assets of Enterprises* similarly provides that approval by the corresponding level of government is required if a transfer involves all of the state-owned assets of an entity or if it will result in the State losing its controlling position over an entity -- both, presumably, would be considered major transfers.\textsuperscript{312}

Transfers of state-owned property must generally be made through a legally established property rights exchange market (产权交易场所).\textsuperscript{313} When transactions involve foreign investors, they are subject to additional requirements.\textsuperscript{314} If a foreign investor is to receive state-owned assets, the impact of the transfer on national security and the public interest will be considered before the transaction is approved.\textsuperscript{315}

**Board of Supervisors.** SOEs have boards of supervisors responsible for supervising financial and management activities and ensuring that state-owned assets and interests are not harmed.\textsuperscript{316} For key large SOEs, members of the board of supervisors are appointed by the State Council.\textsuperscript{317} For all other SOEs, supervisors are appointed by the level of government responsible for oversight.\textsuperscript{318}

### 3.2.3 Discriminatory Treatment Benefiting SOEs

State-owned enterprises and the sectors that they dominate continue to enjoy special treatment and protection by the government. While a great deal of preferential treatment is provided by officials and agencies through their exercise of discretion pursuant to industrial policy priorities that are favorable to the state sector, preferential treatment may also be provided for through laws and regulations.

In our previous China Investment Restraints Report, we used 21 search strings\textsuperscript{319} to search over 250,000 central and local government laws and regulations, and manually reviewed nearly 30,000 measures, in order to identify legal measures that provide preferential treatment for state-owned enterprises. In that report, measures providing favorable treatment for SOEs were categorized based on whether they impacted investors during the pre-establishment phase or post-establishment phase, and on the type of favorable treatment they bestowed.

The number of such measures identified was relatively small.\textsuperscript{320} Nevertheless, in combination with the preferences provided on a discretionary basis by government agencies, they have a significant effect on the competitive environment.

Our findings are summarized in Table 8 below, and additional analysis regarding the measures in question is provided in the narrative that follows:
Table 8 - Legal Measures Providing Discriminatory Treatment Favoring State-Owned Enterprises in China

<table>
<thead>
<tr>
<th>Sector</th>
<th>Local Partner/Equity</th>
<th>Market Entry</th>
<th>Approval Process</th>
<th>Technology Transfer</th>
<th>Targeted Enforcement</th>
<th>Government Financial Support</th>
<th>Government Procurement</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Central-Level Cross-Industry Measures</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cross-Industry</td>
<td>0</td>
<td>13</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td><strong>Central-Level Industry-Specific Measures for Ten Illustrative Sectors</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 Automobile Manufacturing</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0</td>
</tr>
<tr>
<td>2 Chemical Manufacturing</td>
<td></td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>3 Construction &amp; Infrastructure</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0</td>
</tr>
<tr>
<td>4 Distribution</td>
<td>1</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>5 Energy</td>
<td>1</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>6 Financial Services</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>7 Healthcare</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0</td>
</tr>
<tr>
<td>8 Mining</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>9 Professional Services</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0</td>
</tr>
<tr>
<td>10 Telecommunications</td>
<td>1</td>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>8</td>
</tr>
<tr>
<td><strong>Industry-Specific Total</strong></td>
<td>4</td>
<td>10</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td><strong>Provincial-Level Cross-Industry Measures</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Beijing</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Chongqing</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4</td>
</tr>
<tr>
<td>Guangdong</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>7</td>
</tr>
<tr>
<td>Shanghai</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>Tianjin</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>2</td>
<td>1</td>
<td>6</td>
<td>1</td>
<td>8</td>
<td></td>
<td></td>
<td>18</td>
</tr>
</tbody>
</table>

* There are only four provincial-level sector-specific measures in the ten illustrative industry sectors that provide discriminatory treatment favoring SOEs. They are all market-entry related measures, two in the distribution industry and one each in the energy and healthcare industries.
Pre-Establishment SOE-Supporting Measures

As Table 9 shows, the majority of SOE-supporting measures apply at the pre-establishment stage, with the most notable exception being government financial support provided below the central level.

While some discriminatory legal measures supporting state-owned enterprises are more nuanced, others explicitly prohibit private companies from entering certain sectors. Based on our previous study, the telecommunication industry contains the most legal measures favoring SOE companies, particularly when it comes to market entry. For example, the Measures on the Administration of International Communication Access provide that the “establishment of an International Communications Gateway Exchange” (“ICGE”) shall be applied for by a wholly state-owned telecommunications business operator, who shall undertake the operation and maintenance of the ICGE. Without approval of the Ministry of Information Industry, no entity or individual shall establish an ICGE in any form. Similarly, the Interim Measures on Installation of Ground Receiving Facilities (“GRF”) for Satellite Television list an enterprise’s status as a wholly state-owned enterprise or state-controlled enterprise with independent legal status as a mandatory qualification for it to be authorized as a GRF installation service provider. The same mandatory qualification applies when it comes to an enterprise wanting to provide services related to internet audio-video programs, engage in the disposal of low- and intermediate-level radioactive solid wastes, and enter the satellite network market.

In other industry areas considered by the government as vital to the Chinese economy, guidance documents issued by the Central Committee of the Communist Party of China (“CCP”) and the State Council stipulate that the state-owned economy must play a leading role. The still effective 1999 Decision of the Central Committee of the Communist Party of China on Major Issues Concerning the Reform and Development of State-Owned Enterprises (“1999 CCCPC Decision”) provides that state-owned capital must play a leading role in sectors including “industries related to national security, natural monopoly industries (自然垄断的行业), industries involving major infrastructure or important mineral resources, industries that provide vital products and services to the public, and pillar industries and backbone enterprises in high and new technology sectors.” This Decision reiterates the Chinese leadership’s principle of “holding the large and releasing the small,” in other words streamlining government involvement by focusing on larger, more important enterprises. Provincial and sub-provincial local governments also promulgate measures containing the same or similar restraints. For instance, the government of Guangdong province -- one of China’s most industrialized provinces -- has issued measures that echo such central-level decrees. Among other measures, the CPC Guangdong Provincial Committee’s Opinions on Implementing the “Decision of the Central Committee of the Communist Party of China on Major Issues Concerning the Reform and Development of State-Owned Enterprises” explicitly implement the 1999 CCCPC Decision (as is self-
evident in the title of the Opinions).\textsuperscript{331} For example, the CPC Guangdong Provincial Committee applies the principle of “holding the large and releasing the small” by identifying 50 leading companies in Guangdong for government attention.\textsuperscript{332}

In a widely publicized 2006 interview, then SASAC Chairman Li Rongrong declared that the Chinese government must have “absolute control” over seven industries: armaments, power generation and distribution, oil and petrochemicals, telecommunications, coal, aviation, and shipping.\textsuperscript{333} Li also stated the need for centrally-owned SOEs to play a key role in other sectors including machinery, automobiles, information technology, construction, iron and steel, and non-ferrous metals.\textsuperscript{334}

Li’s views are consistent with the contents of several laws and regulations. For example, the \textit{Outline of the Plan for Industrial Restructuring During the Tenth Five-Year Period}, issued by the State Economic and Trade Commission, explicitly states that state-owned capital must remain in “absolute control” of key sectors related to national defense and armaments and play a leading role in natural monopoly industries (e.g., rare earth metals) and industries providing vital products and services to the public (e.g., power and water supplies).\textsuperscript{335} Furthermore, the \textit{Outline} states that a few key “national pillar SOEs” must play a leading role in industries that “reflect overall national strength” such as automobiles, information, oil and petrochemicals, machinery and equipment, and hi-tech.\textsuperscript{336} A 2003 measure issued by the General Office of the State Council promotes a pilot program that supports the development and corporatization of cultural institutions and industry and requires that the State maintain a controlling interest in enterprises engaging in key news media and press industry sectors, including radio stations, TV stations, and Party newspapers and magazines.\textsuperscript{337} The \textit{2002 Interim measures for the Administration of the Import of Crude Oil, Oil Products, and Fertilizers through State Trading Enterprises}, issued by the Ministry of Foreign Trade & Economic Cooperation, requires that the import of crude oil, oil products, and fertilizers be placed under the control of State-operated trading enterprises.\textsuperscript{338}

Information regarding the industries in which SOEs are protected under specific legal measures identified in the China Investment Restraints Report, and the general types of preferential treatment such measures provide for SOEs vis-a-vis private entities in those industries, are presented in Table 9 below:
Table 9 - Industry-Based Summary of Number of Legal Measures Providing Discriminatory Treatment Favoring State-Owned Enterprises in China over Private Investors

<table>
<thead>
<tr>
<th>Industry</th>
<th>Prohibitions</th>
<th>Restrictions</th>
<th>Preferential Treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>CROSS-CUTTING</td>
<td>2</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>National Defense</td>
<td>2</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Energy Utilities (Supply of Electricity, Gas, and Water)</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Forestry</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Energy</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Mining</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Tobacco</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Automobile Manufacturing</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Information Technology and Telecommunications</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Universal Equipment Manufacturing</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Culture, Sports, Entertainment</td>
<td></td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Environment</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Distribution</td>
<td>4</td>
<td>4</td>
<td>0</td>
</tr>
</tbody>
</table>

Consistent with these policies to protect certain key sectors from private investment, SOEs also receive a measure of protection from anti-trust laws and enforcement. China’s Anti-Monopoly Law explicitly states that with respect to industries that are important to China’s economy and national security and industries in which exclusive production and sales rights are granted by law, the State shall protect the “legitimate business activities of state-owned enterprises and statutory monopolies.”

Post-Establishment SOE-Supporting Measures

Preferential Treatment for SOEs does not end with market entry. During their operations, SOEs receive special benefits and favorable treatment when it comes to land allocation, financing, government procurement, and direct government financial support.

Land Allocation (划拨土地). Under a regulation entitled Several Opinions of the Ministry of Land and Resources on Further Control over Land Assets and Promotion of the Reform and Development of State-Owned Enterprises, the State may allocate land to pillar SOEs in key industries (e.g., industries
that are important to China’s economy and national security) as State investment. \(^{341}\) This treatment is echoed in measures promulgated by local governments. \(^{342}\) The *Opinions on Further Deepening Shanghai SOE Reforms to Promote Enterprise Development* calls for “researching the use of allocated state-owned land as State investment in supporting enterprise development.” \(^{343}\)

**Financing.** China’s banking sector is dominated by state-owned financial institutions. Despite moves over the years to encourage independent business judgment on the part of bank managers, banks remain closely tied to the State and are often called upon to serve its policy interests. State-owned banks often provide preferential (below-market) loan rates and terms to their fellow SOEs in other industry sectors. \(^{344}\) For example, China Telecom Corporation Limited, a state-owned telecommunication company, reportedly obtained short-term loans from state-controlled banks in 2010 with borrowing rates ranging from “3.5 percent to 5.8 percent,” while “the average of monthly prime lending rates from December 2009 to December 2010 was 5.36 percent.” \(^{345}\) This kind of preferential lending behavior receives strong support from the Chinese government and the CPC. Financial institutions are often willing to offer such preferential terms because SOE debt is seen as implicitly backed by the government. Much of the support described here remains behind the scenes, but it is occasionally expressed explicitly in banking regulations. \(^{346}\)

**Government Procurement.** The government regularly uses its procurement processes to support state-owned enterprises and domestic industry. \(^{347}\) In 2005, the Chinese government published an influential industrial policy document called the *National Medium- and Long-Term Plan for the Development of Science and Technology* for the period 2006-2020 (“S&T MLP”). \(^{348}\) The S&T MLP serves as a roadmap for carrying out the Chinese leadership’s ambitions to move the country up the economic value chain through the encouragement of innovation in and implementation of science and technology. This roadmap imposes explicit requirements on the government to first purchase products and services innovated and produced by domestic companies. \(^{349}\) While state-owned enterprises are not explicitly mentioned in connection with government procurement, the connection is clear as the large size of some promoted government projects and the fact that many of them fall in industries where the government fosters state-owned enterprises makes the government’s support of state-owned enterprises through government procurement processes an inevitable conclusion. \(^{350}\)

**Direct Government Financial Support.** The Chinese government also provides direct financial
support to state-owned enterprises. Before 2007, Chinese SOEs that suffered losses could receive government subsidies. Between 1994 and 2004, subsidies provided to SOEs in order to cover the losses (用于国企亏损的补贴) amounted to around RMB 365 billion. Perhaps due to China’s obligations under the Agreement on Subsidies and Countervailing Measures, to end such subsidies after joining the WTO in December 2001, data published by the Chinese Statistics Bureau stopped including subsidies received by SOEs. However, this does not mean the government stopped providing such subsidies. For example, China National Petroleum Corporation (“CNPC”) and China Petrochemical Corporation Sinopec Group (“Sinopec”) reportedly obtained subsidies of around RMB 76 billion in 2007.

Local governments sometimes use “special funds” to support SOEs. For example, the Guangzhou People’s Government, in a notice, specifically permits SOEs in pillar industries to receive financial support through a special fund for technology reform (技术改造专项资金). Separately, the Shanghai SASAC also created a fund to support SOEs in the technology space, specifically identifying the goals of technology innovation and upgrading (国有企业主业核心关键技术创新和能级提升). Local governments may also make direct investments in SOEs.

Favorable tax treatment is another mechanism through which state-owned enterprises are subsidized in China. For instance, the Guangdong People’s Government promised to return a portion of taxes paid by SOEs carrying out key technology reform projects at the municipal level or higher.

Other Forms of Support. Beyond these categories of support, SOEs benefit from their close ties with the government and the Party in many, industry-specific ways. For example, an official directive issued by the State Council on the topic of sustainable development of the coal industry in a major coal-producing province states that, all else equal, key state-owned coal enterprises should enjoy preemptive rights to mining rights generated from state-funded exploration in existing coal mines near key state-owned coal enterprises.
Section 4. Practical Application for Ten Illustrative Industry Sectors

The previous sections describe the standard government approval processes for domestic investment in China and the impact of industrial policies and of other policies intended to support the state sector. In this section, we apply that framework to each of ten selected industry sectors, the same sectors studied in the China Investment Restraints Report:

1. Automobile manufacturing
2. Chemical manufacturing
3. Construction and infrastructure (including water supply and sewage treatment)
4. Distribution
5. Energy
6. Financial services (including banking, securities, and insurance)
7. Healthcare (including pharmaceuticals, medical devices, cosmetics manufacturing, and healthcare services)
8. Mining
9. Professional services (including legal, accounting, consulting, and architecture)
10. Telecommunications

In Section 4.1, we consolidate the framework presented in this report into a checklist of issues that investors should examine when trying to understand the key requirements and policy environment for specific types of domestic investment projects.

In Section 4.2, we provide a quantitative analysis of the types of project and licensing approval requirements that we have been able to identify for the ten illustrative sectors at the central level and for the five illustrative provincial governments.

In Section 4.3, we provide a regulatory and policy overview for each of the ten industry sectors.

In Section 4.4, to illustrate more fully the impact of the approval requirements described in Section 4.2 and the policies described in Section 4.3, we provide a brief, high-level summary of the licensing
conditions and policy environment that apply to one sample project in each of the ten illustrative industries.  

4.1 Checklist for Analyzing Key Requirements and Policy Environment for Proposed Domestic Investment Projects

The discussion above describes (i) the domestic investment approval process, (ii) industrial policies and priorities that are effected through the exercise of administrative discretion within that process, and (iii) policies and measures that support state-owned enterprises. Research and analysis on a case-by-case basis is required to evaluate their impact on any proposed investment by a domestic investor, as summarized in the checklist below.

<table>
<thead>
<tr>
<th>Checklist for Analyzing Key Requirements and Policy Environment for Domestic Investment Projects</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Background Research</td>
</tr>
<tr>
<td>☑ Identify Regulating Government Agencies</td>
</tr>
<tr>
<td>☑ Identify Key Laws, Regulations, and Policies</td>
</tr>
<tr>
<td>☑ Examine Role of State-Owned Enterprises</td>
</tr>
<tr>
<td>☑ Research on Approval Requirements &amp; Criteria</td>
</tr>
<tr>
<td>☑ Determine Project Approval Requirements &amp; Criteria</td>
</tr>
<tr>
<td>☑ Determine Industry-Specific Licensing Requirements &amp; Criteria</td>
</tr>
<tr>
<td>☑ Determine Applicability of Anti-Monopoly Review</td>
</tr>
<tr>
<td>☑ Review Industrial Policy Prescriptions</td>
</tr>
<tr>
<td>☑ Identify Other Legal Requirements/Restraints/Considerations</td>
</tr>
</tbody>
</table>

4.2 Quantitative Analysis of Required Approvals

To help potential investors better understand the nature and extent of administrative approval requirements in China, we have sought to identify, for projects in the selected industry sectors, the

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2 Full case studies for each of these ten sample projects are not included in the public version of this report.
types of project approvals and licensing approvals required under Steps 4 and 5 of the domestic investment approval process (as described in Section 2.1.2), as well as other approvals that might be required post-establishment in order to commence or expand operations. To identify such approval requirements, we consulted the Project Approval Catalogue, the Consolidated List, and materials published on the internet by the central-level government agencies responsible for regulating the relevant industries and by the five illustrative provincial-level governments.

Our search identified 695 approval items in total. These approval items were then reviewed and categorized one-by-one as pertaining to a (i) project approval, (ii) non-project approval market-entry license, (iii) product license, (iv) personnel license, or (v) other operational license. Some approval items included more than one approval requirement, so that a total of 745 approval requirements were identified. The breakdown of approval items by sector is displayed in Figure 3.

**Figure 3 - Number of Approval Items per Sector**

As shown in the above table, the healthcare sector has the greatest number of approval items (205), while the automobile manufacturing sector has the fewest (3). The financial services, construction and infrastructure, and mining sectors each have approximately 100 approval items, and professional services, distribution, energy, chemical manufacturing, and telecommunications each have close to or less than 40.

In addition, as indicated below in Figure 4, approvals for the distribution, construction and infrastructure, and energy sectors involve the greatest number of government authorities, partly because these three sectors are subject to oversight by multiple industrial regulators. By contrast, the regulatory regimes over the healthcare, telecommunications, and automobile manufacturing sectors are limited to two or three government authorities. The other four sectors, i.e., chemical manufacturing, mining, professional services, and financial services, involve a moderate number of regulatory authorities (5 or 6).
Table 10 below is a type-based breakdown of approval requirements identified during our research for the ten illustrative sectors. Among the five types of approval requirements, non-project approval market entry licensing items (348) are the most prevalent, followed by operation (180) licensing items, with substantially fewer requirements for product (79), project approval (75), and personnel (63).

**Table 10 - Project Approval and Licensing Requirements in the Ten Illustrative Sectors**

<table>
<thead>
<tr>
<th>#</th>
<th>Sector</th>
<th>Project Approval</th>
<th>Type of Licensing Requirement</th>
<th>Sub-total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Non-Project Approval Market Entry</td>
<td>Product</td>
</tr>
<tr>
<td>1</td>
<td>Automobile manufacturing</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>Chemical manufacturing</td>
<td>6</td>
<td>16</td>
<td>9</td>
</tr>
<tr>
<td>3</td>
<td>Construction and infrastructure</td>
<td>46</td>
<td>39</td>
<td>0</td>
</tr>
<tr>
<td>4</td>
<td>Distribution</td>
<td>0</td>
<td>31</td>
<td>5</td>
</tr>
<tr>
<td>5</td>
<td>Energy</td>
<td>9</td>
<td>12</td>
<td>1</td>
</tr>
<tr>
<td>6</td>
<td>Financial services</td>
<td>0</td>
<td>57</td>
<td>0</td>
</tr>
<tr>
<td>7</td>
<td>Healthcare</td>
<td>3</td>
<td>106</td>
<td>57</td>
</tr>
<tr>
<td>8</td>
<td>Mining</td>
<td>8</td>
<td>46</td>
<td>2</td>
</tr>
<tr>
<td>9</td>
<td>Professional services</td>
<td>0</td>
<td>20</td>
<td>0</td>
</tr>
<tr>
<td>10</td>
<td>Telecommunications</td>
<td>2</td>
<td>19</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>75</td>
<td>348</td>
<td>79</td>
</tr>
</tbody>
</table>
4.3 Applying Framework to the Ten Illustrative Sectors

4.3.1 Automobile Manufacturing

The automobile manufacturing industry is primarily regulated by NDRC and MIIT. The key document governing the industry is the Auto Industry Policy [361], which is supplemented by a series of market admission rules for different categories of manufactured automobiles. [362]

NDRC is responsible for administering the project approval and filing process. [363] The Auto Industry Policy prescribes project approval for certain automobile projects, including all projects that involve setting up a new enterprise to produce motor vehicles and, in most cases, projects by existing enterprises that seek to produce a new category of motor vehicles. [364] For other automobile projects, the policy provides for a less onerous project filing procedure. [365] Almost all projects subject to project approval must be handled by NDRC (at the central level), while the power to handle project filing is divided between NDRC and its provincial counterparts. [366]

MIIT is charged with administering the market admission process for motor vehicle manufacturers and products. [367] The Auto Industry Policy calls for a unified market admission control system under which new automobile enterprises and new or changed vehicle types from existing manufacturers are to be licensed and announced by MIIT. [368] The MIIT market admission control system is seen as less of a barrier to new investments than is the project approval process. MIIT is more focused on the day-to-day management of automobile enterprises and product types -- factoring into its decision-making more technical concerns. Investments approved by or filed with NDRC or its provincial counterparts are likely to eventually be approved by MIIT as well.

In addition to the aforementioned market admission of motor vehicle manufacturers and products, our analysis identified another licensing requirement, an export license issued by certain authorized local commerce departments for the export of motor vehicles and motorcycles. [369]

The automobile manufacturing industry is recognized as one of the most highly regulated industries in China. [370] The Auto Industry Policy sets as one of its objectives avoiding redundant development of new enterprises in a “scattered, disorderly, or low-level way.” [371] At the same time, it encourages increased scale amongst existing enterprises, the development of large automobile enterprise groups, and the formation of business alliances so as to “optimize and upgrade” the structure of the automotive industry. This policy and some other similar policy prescriptions may lead regulators to use their discretion to impose restrictions on existing small companies and new investors trying to enter this market. [372]

4.3.2 Chemical Manufacturing

Chemical manufacturing refers to the chemical transformation of organic and conventional raw materials into new products. The degree to which companies in this industry sector are regulated depends on the types of chemicals produced. The Chinese government imposes relatively few restrictions on the manufacturing of ordinary chemicals, but maintains tight control over petrochemicals and precursor chemicals.

The chemical manufacturing industry is primarily regulated by NDRC, the State Administration of Work Safety (“SAWS”), and MIIT, together with their local counterparts. NDRC [373] is in charge of
relevant project approvals while SAWs\textsuperscript{374} and MIIT\textsuperscript{375} are mainly responsible for supervising safety and issuing licenses. Our analysis identified 34 project approval and licensing requirements for this industry.

Project approvals are required from the NDRC for manufacturing certain chemicals, specifically: (1) coal-based methanol-to-olefin projects with an annual output of over 500,000 tons;\textsuperscript{376} (2) coal-based methanol projects with an annual output of over 1 million tons;\textsuperscript{377} and (3) new oil refining projects and expansions of refining projects for primary processing.\textsuperscript{378} New ethylene projects, new P-Xylene ("PX") projects, new methylene diphenyl diisocyanate ("MDI") projects, and other oil refinery expansion projects are to be approved by NDRC’s provincial counterparts.\textsuperscript{379}

In addition to project approval requirements, manufacturing licenses must be obtained before producing the following chemical products:

\begin{itemize}
  \item controlled chemicals that can be used as chemical weapons,\textsuperscript{380}
  \item controlled chemicals that can be used as precursors for the manufacture of chemical weapons;\textsuperscript{381}
  \item controlled chemicals that can be used as the main raw materials for manufacturing chemical weapons;\textsuperscript{382}
  \item civil explosives;\textsuperscript{383} and
  \item hazardous chemicals.\textsuperscript{384}
\end{itemize}

The \textit{Petrochemical Industry Planning and Layout Plan} drafted by NDRC and approved by the State Council in 2014 ("2014 Petrochemical Industry Plan") sets forth the overall plan for the refinery, ethylene, and aromatic hydrocarbon projects for the next 10 years. Although the 2014 Petrochemical Industry Plan is not publicly available,\textsuperscript{385} according to an official of the NDRC, the 2014 Petrochemical Industry Plan mainly includes the following points:

\begin{itemize}
  \item new refinery, ethylene, and aromatic hydrocarbon projects must be located in designated petrochemical industry zones;
  \item improvements are to be made to existing refinery projects;
  \item upgrades are to be made to the coal-chemical industry;
  \item the involvement of reputable downstream private domestic investors in industrial restructuring and the construction of industrial bases is to be encouraged; and
  \item the integration of refining and chemical manufacturing and the expansion of industry chains are encouraged.\textsuperscript{386}
\end{itemize}

What we know about the 2014 Petrochemical Industry Plan suggests that China plans to further open the downstream petrochemical industry to private domestic investors and develop petrochemical industry zones.
4.3.3 Construction & Infrastructure

The construction and infrastructure industry sector is a broad sector that reaches into a number of other industries that we analyze in this report. Here, we define it to include five sub-sectors: (i) investment in infrastructure projects such as airports, railways, highways, bridges, tunnels, ports, water projects, berths, and laying of submarine cables and pipelines, (ii) investment in housing and building projects, (iii) investment in water supply projects, (iv) investment in sewage treatment projects, and (v) investment in construction companies constructing the foregoing types of projects. To the extent that construction and infrastructure activity is linked to a type of project covered in another one of the illustrative industry sectors we examine, relevant licensing requirements are categorized under that other industry sector. For instance, although hydropower stations may be generally understood to be a kind of infrastructure project, the approval for the construction of a hydropower station is categorized under the energy industry sector.

This industry sector is primarily regulated by the Ministry of Housing and Urban-Rural Development ("MOHURD"), NDRC, the State Administration of Work Safety ("SAWS"), the Ministry of Transportation ("MOT"), the Ministry of Water Resources ("MWR"), and the local counterparts of these central-level agencies. Projects in special fields are regulated by additional government agencies. For example, the Civil Aviation Administration is responsible for the approval of the planning and construction of civil airports, and the National Railway Administration, a vice ministerial-level agency under MOT, is charged with quality supervision and administration of railway construction.

The vast majority of construction and infrastructure licensing and project approval requirements (99 of 108) must be obtained by the owner of a given project, as opposed to the company doing construction work for the project. Nine of the 108 approval requirements we have identified for this industry sector must be obtained by construction companies themselves, with six of them applying to relevant personnel.

4.3.4 Distribution

Products can be generally distributed freely in China without significant legal restrictions except for the following types of products and distribution models:

(1) products such as (i) energy products of strategic importance (e.g., oil, refined oil); (ii) state-monopoly products (e.g., salt, tobacco); (iii) politically sensitive products (e.g., the Bible); (iv) products involving security concerns (e.g., radiation equipment, commercial encryption products); and (v) other products deemed to be of great importance by the Chinese government (e.g., crop seeds).

(2) special distribution models such as direct selling, pawn shops, duty-free shops, franchises, and auctions.

Since different products are regulated by different government agencies, there are a large number of government agencies regulating the distribution industry sector in China. For example, the distribution of salt is regulated by MOFCOM's provincial counterparts, the distribution of crop seeds is regulated by the Ministry of Agriculture ("MOA"), the distribution of guns is regulated by...
the provincial counterparts of the Ministry of Public Security (“MPS”), and the distribution of tobacco is regulated by the State Tobacco Monopoly Bureau (“STMB”) and its local counterparts. Auctions, franchising, pawn shops, and direct selling are regulated by MOFCOM, while duty-free shops are regulated by the General Administration of Customs (“GAC”).

Licensing requirements vary between products. Tobacco is a highly regulated product monopolized by the government. Both wholesale and retail sales of tobacco must be licensed. An unusual feature of tobacco sales is that the government’s powerful control extends to key raw materials of tobacco products – e.g., the government sets the purchase price of tobacco leaves. Another highly regulated product is salt. Compared to tobacco, though, there are fewer restraints on salt, which only requires a wholesale license.

The most highly regulated distribution model is direct selling. The establishment of direct selling companies and of their branches must be approved by MOFCOM. In addition, a direct selling company’s service outlets must also be approved and inspected. By contrast, commercial franchising is only subject to record-filing with MOFCOM.

Generally speaking, restrictions on the distribution sector are gradually decreasing. For example, (i) it is reported that restrictions on salt distribution will be eliminated in 2016; (ii) some local governments are planning to loosen standards for tobacco retail licensing; and (iii) the new Foreign Investment Catalogue issued in 2015 no longer lists direct selling in the “restricted category.”

4.3.5 Energy

China is one of the largest global energy consumers and has increasing demand for energy resources. Although China still heavily relies on traditional energy sources like coal, oil, and gas, it is gradually shifting towards the renewable alternatives, including hydroelectricity, wind, solar, biomass power, and nuclear power. According to the relevant 12th five year plans, China aims to have non-fossil fuel constitute 11.4% of all consumption, to increase the consumption of natural gas to 7.5%, and to reduce the consumption of coal to 65%.

The National Energy Administration (“NEA”) under NDRC was established in 2008 as the key regulatory authority. NDRC oversees the energy sector through the NEA and is in charge of China’s macroeconomic planning. The National Nuclear Safety Administration under the Ministry of Environmental Protection (“MEP”) oversees the nuclear energy sector. The National Energy Commission (“NEC”), a cross-ministry government agency established in 2010, is responsible for making policies regarding energy strategies, ensuring energy security, reviewing key issues arising from energy development, and coordinating energy exploration and international cooperation.

The energy industry, especially for traditional energy resources, is relatively heavily regulated compared to other industries due to the important role played by energy in both national security and people’s daily lives. Our analysis identified 35 administrative approval requirements (project approvals and licensing requirements) in this sector, covering both traditional energy like liquid gas and clean energy such as hydroelectric power. Project approvals are granted at various levels. For instance, for nuclear power plants, the project approval agency is the State Council (together with
but for coal-fired power plants, the project approval agency is usually simply the DRC of the corresponding local government.\footnote{420}

The trend of this sector appears to be divided into two different directions.\footnote{422} For subsectors involving many actors, such as electricity generation and renewables, the trend appears to be deregulation and introduction of increased competition, which is leading towards a more open market;\footnote{429} on the other hand, for sectors where monopolies exist, such as for electricity transmission, there are more restrictions, leading towards a more closed market.\footnote{424}

\subsection*{4.3.6 Financial Services}

The financial services industry is highly regulated in China. As shown in the China Foreign Investment Restraints Report, it is one of the most restrictive industries for foreign investors.\footnote{425} As stated in that report, “agencies regulating the financial services sector are by far the most prolific issuers of restraining measures [for foreign investment].”\footnote{426} Our analysis reveals that it is also one of the most regulated and restrictive industry sectors for domestic investors.

The People’s Bank of China (“PBOC”),\footnote{427} the State Administration of Foreign Exchange (“SAFE”),\footnote{428} the China Securities Regulatory Commission (“CSRC”),\footnote{429} the China Banking Regulatory Commission (“CBRC”),\footnote{430} and the China Insurance Regulatory Commission (“CIRC”)\footnote{431} are the five government agencies in charge of regulating this industry sector. They all implement a “vertical administration” mode of regulation, where local regulating agencies are branches or dispatching agencies that directly report to their central counterparts rather than to their local governments.\footnote{432} As a result, the requirements set out by national rules apply to all geographic regions. Local agencies mostly comply with these national rules instead of drafting their own requirements.

Our analysis identified 110 administrative approval requirements in the financial services industry. Licensing requirements are used to regulate many aspects of the financial services industry sector, while project approval is generally not required, as fixed-asset investments in this sector are uncommon. Nearly half of the requirements fall during the pre-market entry stage, as a company engaging in financial services generally cannot start operations before obtaining relevant approvals, licenses, and certifications from regulating authorities.\footnote{433}

Due to recent financial reforms,\footnote{434} which have taken place nationally and locally, the licensing requirements have been reduced to allow market forces to play a greater role.\footnote{435} Many approvals have been delegated to lower-level authorities, are now required at a later stage, or have been changed to filing requirements.\footnote{436} Some have even been cancelled.\footnote{437}

\subsection*{4.3.7 Healthcare}

The healthcare sector is regulated by the China Food and Drug Administration (“CFDA”) and the China National Health and Family Planning Commission (“NHFPC”). NHFPC is charged with handling licensing for, among other things, disinfectant products,\footnote{438} drinking water safety products,\footnote{439} blood banks,\footnote{440} pathogenic microorganism laboratories,\footnote{441} and medical institutions.\footnote{442} CFDA is responsible for drug registration and recording,\footnote{443} and product licensing for medical devices,\footnote{444} cosmetics,\footnote{445} and health foods.\footnote{446} CFDA also regulates market entry for a number of types of entities, granting licenses, for example, for the establishment of drug manufacturing companies,\footnote{447} drug distribution
Our analysis identified 205 administrative approval requirements (project approvals and industry regulator licensing requirements) in the healthcare sub-sectors of drugs, medical devices, health foods, cosmetics, and medical institutions, many more approval requirements than were identified for any of the other nine industries. This supports the view that the healthcare sector is one of the most regulated industry sectors in China, as it often is in other countries.

Most investments in the health industry do not require project approvals. An exception is medical institution projects, which, among the five provincial-level governments examined for this report, require project approval under the government approval catalogues of Shanghai\(^\text{451}\) and Chongqing.\(^\text{452}\)

Given the complexity and importance of the healthcare sector, the government maintains a fairly extensive licensing regime as compared to many other industries. By way of example, a domestic investor seeking to set up a drug manufacturing company must obtain the following kinds of licensing approvals: domestic drug registration, drug manufacturing license, and Good Manufacturing Practices for Pharmaceutical Products (“GMP”) Certification.\(^\text{453}\) Setting up a drug distribution company usually requires, at minimum, a Drug Distribution License and a Good Supply Practices for Pharmaceutical Products (“GSP”) Certificate.\(^\text{454}\) These licensing requirements may be subdivided further. For instance, obtaining a Drug Distribution License involves two consecutive sub-approval steps: (i) an approval to engage in preparatory activities for the establishment of a drug company, and (ii) an approval for full operations after the company has been checked and accepted by the relevant government authority.\(^\text{455}\)

Licensing requirements are relatively strict and comprehensive for the healthcare industry as a whole, but the burden imposed by these requirements varies by sub-sector. Drug-related licensing requirements are particularly strict, and all drugs must be registered before they are marketed in China.\(^\text{456}\) Cosmetics and medical devices are treated differently. Medical devices are classified into three categories according to their risk levels, and Class-2 and Class-3 medical devices require product registration before they are marketed in China (the higher the class level, the greater the perceived risk), while Class-1 medical devices need only be filed for the record, a lesser burden.\(^\text{457}\) Cosmetics for “special use” -- i.e., cosmetics used for hair nourishment, hair perming, hair dying, hair removal, breast massage, deodorant, spot removal, and acting on sunburn -- require product registration.\(^\text{458}\) Cosmetics other than those designated for special use simply require record filing.\(^\text{459}\)

4.3.8 Mining

The mining sector is highly regulated in China. Foreign investors are prohibited or restricted from investing in a variety of specific mining activities.\(^\text{460}\) Moreover, our analysis reveals that it is also one of the most regulated and restrictive sectors for domestic investors.

Our analysis identified 86 licensing items and project approvals in the mining sector, involving six regulating agencies. Each of these six government agencies is involved in the sector in different, sometimes overlapping, ways:
(1) *The Ministry of Land and Resources ("MLR") (and provincial counterparts).* MLR is the government authority regulating the mining sector, and it is responsible for most of the issues involved in the sector. Its power and responsibilities include the issuance of licenses and approvals for the core activities involved with mining.

(2) *SAWS (and provincial counterparts).* SAWS regulates this sector mainly from a work safety perspective, requiring approval of such things as the design of safety facilities and issuance of work safety licenses.

(3) *NDRC.* NDRC's supervision over this sector is limited to project approval for certain fixed-asset projects.

(4) *MIIT.* MIIT mainly focuses on the mining of certain special minerals (such as gold and rare earths).

(5) *NEA.* NEA is mainly responsible for the approval of coal mining projects with annual production capacity of 1.2 million tons or more in mining areas under national planning.

(6) *MOA.* MOA is mainly responsible for mining projects involving the occupation and/or use of over 70 hectares of grassland.

Most of the administrative approval requirements identified are managed by MLR and SAWS or their respective provincial counterparts. All requirements set out by the other four government agencies are national rules that apply to all geographic regions.

The licensing requirements cover a great variety of mining-related issues, including mining rights, market entry and exit, personnel management, and various operational matters. Nearly half of the industry licensing requirements are non-project approval market entry requirements.

### 4.3.9 Professional Services

For purposes of this report, the professional services sector includes legal, accounting, consulting, and architecture services. These professional services do not require project approval, but they do require licensing by central- or provincial-level authorities.

Legal service providers include law firms, lawyers, notaries public, and arbitration commissions. The first comprehensive law governing the legal profession, the Lawyers Law of the People’s Republic of China, was issued in 1996 (amended most recently in 2012). While the industry has grown significantly since the first Lawyers Law came into effect in January 1997, the overall number of lawyers and total revenue for China’s legal services industry are far less than is found in other developed countries. Consequently, the government has treated the legal services industry as a development priority. Legal services in China are primarily regulated by the Ministry of Justice ("MOJ").

Accounting companies provide services such as auditing, bookkeeping, assessment and verification, payroll processing, and tax return preparation. Accounting services are primarily regulated by the Ministry of Finance ("MOF") and the China Securities Regulatory Commission ("CSRC").
The term “consulting company” is used in China very broadly to describe a wide range of companies and activities. For the purposes of this report, we focus our analysis on consulting services provided by asset appraisal institutions -- i.e., asset appraisal services, which include services for appraisal of a single asset item, an asset portfolio, the value of an enterprise, and other relevant consulting services provided by asset appraisal institutions. Consulting services of this type are primarily regulated by MOF and CSRC.

In this report, we define architecture-related services as encompassing services such as architectural design, supervision, surveying and quality inspection for construction projects, and examination of construction drawings for construction projects. Architecture services are mainly regulated by MOHURD and NDRC.

Our analysis identified 44 administrative approval requirements in total in the professional services industry as defined above.

4.3.10 Telecommunications

The telecommunications industry is highly regulated in China. As noted in the China Foreign Investment Restraints Report, telecommunications is “one of the most difficult industries for private actors (including FIEs) to enter.”

The major regulating agencies for the telecommunications industry are MIIT and NDRC. Our analysis identified 27 administrative approval requirements (project approvals and licensing requirements) in the telecommunications industry. Two of these are project approval requirements, covering (i) international communication infrastructure projects (which require NDRC project approval) and (ii) domestic backbone transmission networks (including radio and television networks) and other telecommunications infrastructure projects involving information security (which require MIIT project approval). The remaining 25 approval requirements are licensing requirements, which include a license for the operation of telecommunications services, a license for electronic verification services, and approvals for the establishment of internet domain name registration service providers, domestic entities renting foreign satellite resources, telecommunications equipment network access (including for trial use), radio frequency assignments, establishment and use of radio stations, and the establishment of satellite communications networks.

Telecommunications services in China are divided into basic telecommunications services (“BTS”) and value-added telecommunications services (“VATS”), both of which are subject to operation licenses issued by MIIT or its local counterparts. The licensing requirements for these two types of services are different. An updated catalogue for classifying basic telecommunications services and value-added telecommunications services was issued in 2003 (the “2003 Telecom Services Catalogue”). This Catalogue remains in use but is outdated in certain aspects as the telecommunications industry has evolved rapidly over the last decade. According to the 2003 Telecom Services Catalogue, basic telecommunications services are further divided into two major sub-groups: (1) Category I basic telecommunications services and (2) Category II basic telecommunications services. The Catalogue provides that some types of Category II basic telecommunications services are to be regulated under the VATS regulations, thus, these services, for licensing requirement classification purposes, are not included in the discussion of BTS below. The 2003 Telecom Services Catalogue also divides VATS into two major sub-groups: Category I
VATS and Category II VATS. New types of telecommunications services not included in the 2003 Telecom Services Catalogue are subject to record-filing and approval for trial operations.

BTS are more heavily regulated than VATS. For example, at least 51% of the equity in any company holding a BTS license must be state-owned. In practice, BTS has been generally closed to private investment, both domestic and foreign, although there is a trend to somewhat open BTS for private domestic investment. As for VATS, private domestic investors may own 100% equity interest and are subject to fewer restrictions. In fact, many private domestic investors have already obtained VATS licenses.

The Chinese government is also gradually opening the VATS sector to foreign investors. For example, China opened up some VATS to foreign investors in the Shanghai Free Trade Zone in 2014. Under the new 2015 Foreign Investment Catalogue, foreign investors may own 100% of e-commerce companies, while the foreign shareholding percentage is still capped at 50% for other kinds of VATS.

### 4.4 Approval Requirements and Policy Environment for Ten Sample Projects

For each of the ten illustrative industry sectors, we applied the framework described above to one specific type of investment activity in that sector. Specifically, we looked at:

1. Automobile manufacturing companies (automotive manufacturing)
2. Ethylene production projects (chemical manufacturing)
3. Construction companies (Construction and infrastructure)
4. Direct selling companies (distribution)
5. Nuclear power plants (energy)
6. Insurance companies (financial services)
7. Drug wholesale companies (healthcare)
8. Rare earth mining companies (mining)
9. Law firms (professional services)
10. Basic telecommunications service companies (telecommunications)

We examined the underlying laws, regulations, and industrial policies applicable to each of these ten types of projects, in order to understand specific approval requirements and other relevant considerations. The following table summarizes the results of our examination:
**Table 11 - Summary of Domestic Investment Market Access Analyses for Ten Illustrative Project Types**

<table>
<thead>
<tr>
<th>#</th>
<th>Project Type</th>
<th>SOEs Hold Majority Market Share</th>
<th>Project Approval Requirement</th>
<th>Market Access Licensing Requirement “Yes” or “No”</th>
<th>License Conditions Include Industrial Policy Elements</th>
<th>Industrial Policies Exist for This Project Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Automotive Manufacturing Companies</td>
<td>✓</td>
<td>✓</td>
<td>Yes</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>2</td>
<td>Ethylene Production</td>
<td>✓</td>
<td>✓</td>
<td>Yes</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>3</td>
<td>Construction Companies</td>
<td>✓</td>
<td></td>
<td>Yes</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>4</td>
<td>Direct Selling Companies</td>
<td></td>
<td></td>
<td>Yes</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>5</td>
<td>Nuclear Power Plants</td>
<td>✓</td>
<td>✓</td>
<td>Yes</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>6</td>
<td>Insurance Companies</td>
<td></td>
<td></td>
<td>Yes</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>7</td>
<td>Drug Wholesale Companies</td>
<td>✓</td>
<td>✓</td>
<td>Yes</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>8</td>
<td>Rare Earth Mining Companies</td>
<td>✓</td>
<td>✓</td>
<td>Yes</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>9</td>
<td>Law Firms</td>
<td></td>
<td></td>
<td>Yes</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>10</td>
<td>Basic Telecommunications Services</td>
<td>✓</td>
<td></td>
<td>Yes</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

This summary of findings provides some interesting insights — namely, regarding the pervasive impact of state-owned enterprises, government approval requirements, and industrial policy.

In Section 3.2, we discussed the important role of state-owned enterprises in China, and the evolution of their role since the founding of the PRC. Despite major reductions and transformations in the role of SOEs over the years, we see that eight of the ten illustrative investments involve markets in which SOEs are dominant.

Moreover, all ten of these project types involve market access licensing requirements, and four of them also require project approval. All of them are covered by industrial policies, and in at least nine of the ten project types, government officials are required to consider industrial policy elements in making approval decisions.

It is clear that an investment agreement that truly seeks to affect the investment climate for foreign investors engaging in these ten types of projects, as well as in many other types of investment activity across the Chinese economy, will need to address concerns related to approval requirements and how they can become channels for implementing the government’s industrial policy goals. Forward-looking foreign investors should conduct similar analyses for the types of business activities they hope to carry out in China to assess the degree to which approval requirements and underlying policies could limit the benefits of enjoying national treatment under the CAI.

We see these same themes surface in the on-the-ground feedback provided by EUCC member companies, discussed in the section that follows.
Section 5. Input from EUCCC

To assist with the preparation of this report, the European Chamber of Commerce in China convened sessions with its members to discuss the CAI and how it could address member concerns. In addition to general sessions, sixteen industry working groups provided specific input from the perspective of their industries.

Input from the EUCCC working groups appears alongside the main text throughout this report, highlighting EUCCC member views about how specific policies and practices impact investors operating on the ground in China. More broadly, Table 12 below presents a numerical summary of the types of concerns flagged by EUCCC members in each of six categories.\textsuperscript{492}
<table>
<thead>
<tr>
<th>Recurring Themes →</th>
<th>Legal &amp; Regulatory Restrictions on Domestic Companies</th>
<th>Enforcement &amp; Administrative Discretion</th>
<th>Restrictions Discriminating Against Foreign Investment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Dominance of SOEs</td>
<td>Certification, Accreditation &amp; Approval Difficulties</td>
<td>Informal Pressure &amp; Favoritism Toward Chinese Companies</td>
</tr>
<tr>
<td>Working Groups ↓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unidentified Group</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Automotive</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Auto Components</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Medical Devices</td>
<td></td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Banking &amp; Securities</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Carbon Market</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Consumer Finance</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Insurance</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Information &amp; Communication Technology</td>
<td>3</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Metals &amp; Mining</td>
<td>1</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Postal &amp; Courier Services</td>
<td>2</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Quality &amp; Safety Services</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Renewable Energy</td>
<td></td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Energy</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Information Security</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Construction</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>14</td>
<td>1</td>
<td>14</td>
</tr>
</tbody>
</table>
Member concerns seem to be concentrated in four sometimes interrelated categories.

5.1 Discriminatory Market Access Restrictions

The greatest number of concerns (20) centered on market access restrictions discriminating against foreign investors. In fact, most of the working groups mentioned a concern in this regard. In some cases, these concerns relate to published, central-level laws and regulations. For instance, the EUCCC working group on medical devices reports that foreign investment in healthcare providers such as hospitals continues to be restricted. This reflects a central-level restriction imposed by the Foreign Investment Catalogue. These types of discriminatory restrictions on foreign investment should be eliminated if national treatment is applied.

Other restrictions in this category may reflect the contents of industrial policies. For instance, the Automotive Industry Working Group mentioned that in addition to various other requirements such as capital requirements, the Auto Industry Policy limits foreign investors to two Chinese joint ventures for the manufacturing of commercial vehicles. Furthermore, foreign equity in commercial vehicle manufacturing companies is not to exceed 50%. These are very concrete restrictions included in a very important industrial policy. Other industrial policies may contain softer language that also discriminates against foreign investors.

Written legal restrictions may also be imposed by sub-central governments. The Quality & Safety Services Working Group reported that in many provinces, foreign-invested testing, inspection, and certification companies are not allowed to provide independent services as third parties, thereby limiting their activities to a very narrow segment of the market.

5.2 Dominance of State-Owned Enterprises

A large number of concerns raised by EUCCC working groups (14) related to the dominance of SOEs in their respective sectors. More than half of the working groups identified such concerns. As discussed in Section 3.2, SOEs in China are given significant benefits and protections in their sectors, while private investors (both domestic and foreign) are often subject to de jure or de facto restrictions.

The Information & Communication Technology Working Group identified a number of such concerns. The group noted that SOEs dominate the telecom sector (specifically, China Mobile, China Unicom, and China Telecom). SOEs in the sector are granted licenses for basic and value-added telecom services more easily than foreign companies, and they are permitted to build networks and base stations with government funds in remote areas of the countries. Furthermore, private investment in areas such as basic telecom services is significantly limited, with only companies that are at least 51% owned by SOEs allowed to operate in the country (see further discussion of approval requirements in the telecommunications industry in Section 4.3.10).
5.3 Informal Pressure/Favoritism Towards Chinese Companies & Transparency Challenges

Of the 63 specific concerns identified in the EUCCC input, 14 involved informal pressure on foreign investors or favoritism displayed towards Chinese companies, and another 11 identified transparency-related challenges. These two categories of concerns are closely related, as unwelcome pressure and favoritism are made possible, in part, by a lack of transparency in government decision-making and the granting of required approvals. A majority of working groups identified concerns in one or both of these categories.

With respect to favoritism towards Chinese companies, the Medical Devices Working Group, among other concerns, noted that the government prefers to oversee fewer companies, preferably large ones, and that this preference significantly impacts European manufacturers and trading companies, most of which are small- and medium-sized enterprises. The Insurance Working Group notes that SOEs and private domestic investors are granted licenses more quickly than foreign companies. The Metals & Mining Working Group presented a specific example of favoritism for domestic companies. The group noted that in one instance, two steel manufacturers (one a local mainland company, and the other a Taiwanese company) were given very different treatment by government authorities. The local company was permitted to build directly along a waterway, which is crucial for incoming and outgoing materials. The Taiwanese company (with exceptions, investors from Taiwan, Hong Kong, and Macao are generally treated the same as foreign investors) was instructed to build further away, being told that only domestic companies can attain the privilege of building on a waterway.

The Renewable Energy Working Group expressed the view that Chinese authorities often impose informal pressure to act in certain ways. That working group noted constant pressure from local officials, as well as private parties, to enter joint ventures and partner with local players well connected to the local authorities.

One group noted that even if a foreign-invested enterprise’s business scope is not subject to an approval requirement, in practice, authorities still have considerable discretion in deciding whether or not to include the specific business scope in the company’s business license. Specifically, the group describes a situation where a local Bureau of Commerce has approved the investment but the local AIC has refused to register the business license. While this report identifies AIC enterprise registration as a step where authorities have only low levels of discretion, EUCCC member companies encountering challenges even with this step illustrates the difficulties that can arise even during the innocuous stages of the investment approval process.

There is also sometimes a lack of transparency in the formulation of new laws, regulations, and policies. The Renewable Energy Working Group, for example, notes that local companies often receive advance warning of new policies while there is little transparency into the policy formulation process for foreign companies.
Annex 1: Industries and Investment Projects Listed in the October 2014 Project Approval Catalogue

<table>
<thead>
<tr>
<th>1. Agriculture and water conservancy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Agriculture</strong></td>
</tr>
<tr>
<td><strong>Reservoirs</strong></td>
</tr>
<tr>
<td><strong>Other projects involving water-related matters</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2. Energy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Hydropower stations</strong></td>
</tr>
<tr>
<td><strong>Pumped-storage hydropower stations</strong></td>
</tr>
</tbody>
</table>
| **Thermal power stations** | Projects in this category shall be subject to the verification and approval by provincial governments, of which the projects of building coal-fired thermal power stations shall be subject to the verification and approval within the construction planning formulated by the State based on total
<table>
<thead>
<tr>
<th>Category</th>
<th>Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thermal power stations supplying both heat and electricity</td>
<td>Coal-fired extraction thermoelectric projects shall be subject to the verification and approval by provincial governments within the construction planning formulated by the State based on total control.</td>
</tr>
<tr>
<td>Wind power plants</td>
<td>Projects in this category shall be subject to the verification and approval by local governments within the construction planning formulated by the State based on total control and the annual development guiding scale.</td>
</tr>
<tr>
<td>Nuclear power plants</td>
<td>Projects in this category shall be subject to the verification and approval by the State Council.</td>
</tr>
<tr>
<td>Power grid projects</td>
<td>Projects of ± DC 500KV or more that involve multiple countries or multiple provinces (autonomous regions and municipalities directly under the Central Government), and projects of AC 500KV, 750KV and 1000KV that involve multiple countries or multiple provinces (autonomous regions and municipalities directly under the Central Government), shall be subject to the verification and approval by the competent investment department of the State Council, of which the projects of ± DC 800KV or more and the projects of AC 1000KV shall be subject to record-filing with the State Council; the other projects in this category shall be subject to the verification and approval by local governments, of which the projects of ± DC 800KV or more and the projects of AC 1000KV shall be subject to verification and approval in accordance with the planning formulated by the State.</td>
</tr>
<tr>
<td>Coal mines</td>
<td>Coal development projects that will generate additional annual production capacity of 1.2 million tons or more in mining areas under national planning shall be subject to the verification and approval by relevant industry management departments of the State Council, of which the projects that will generate additional annual production capacity of 5 million tons or more shall be reported to the State Council for recording-filing and all remaining coal development projects in mining areas under national planning shall be subject to the verification and approval by provincial governments. All the other general coal development projects shall be subject to the verification and approval by local governments. It is not allowed to verify and approve coal and gas outburst projects, high-density gas projects, and small and medium-sized coal development projects for which new construction is prohibited by the State.</td>
</tr>
<tr>
<td>Coal-based fuel</td>
<td>Coal-based natural gas projects with an annual output of over 2 billion cubic meters, and coal liquefaction projects with an annual output of over 1 million tons shall be subject to the verification and approval by the competent investment department of the State Council.</td>
</tr>
<tr>
<td>Receiving and storage facilities for liquefied petroleum gas (excluding supporting)</td>
<td>Projects in this category shall be subject to the verification and approval by provincial governments.</td>
</tr>
<tr>
<td>Category</td>
<td>Description</td>
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<td>-------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>Receiving, storage and transportation facilities for imported liquefied</td>
<td>New projects (including project expansion in a different place) in this category shall be subject to the verification and approval by relevant industry management departments of the State Council, of which the projects with the receiving, storage and transportation capacity of 3 million tons or more shall be reported to the State Council for recording-filing. All other projects shall be subject to the verification and approval by provincial governments.</td>
</tr>
<tr>
<td>natural gas</td>
<td></td>
</tr>
<tr>
<td>Oil transmission pipeline networks (excluding gathering and transmission</td>
<td>Projects of cross-border trunk pipeline networks or trunk pipeline networks across multiple provinces (autonomous regions and municipalities directly under the Central Government) shall be subject to the verification and approval by the competent investment department of the State Council, of which the project of cross-border trunk pipeline networks shall be reported to the State Council for recording-filing; all the other projects in this category shall be subject to the verification and approval by provincial governments.</td>
</tr>
<tr>
<td>transmission pipeline networks for oil fields)</td>
<td></td>
</tr>
<tr>
<td>Gas transmission pipeline networks (excluding gathering and transmission</td>
<td>Projects of cross-border trunk pipeline networks or trunk pipeline networks across multiple provinces (autonomous regions and municipalities directly under the Central Government) shall be subject to the verification and approval by the competent investment department of the State Council, of which the project of cross-border trunk pipeline networks shall be reported to the State Council for recording-filing; all the other projects in this category shall be subject to the verification and approval by provincial governments.</td>
</tr>
<tr>
<td>transmission pipeline networks for oil and gas fields)</td>
<td></td>
</tr>
<tr>
<td>Oil refining</td>
<td>New oil refining projects and expansion of refining projects for primary processing shall be subject to the verification and approval by the competent investment department of the State Council, of which the expansion of projects listed in the national energy development plan or the petrochemical industry planning and layout plan approved by the State Council shall be subject to the verification and approval by provincial governments.</td>
</tr>
<tr>
<td>Denatured fuel ethanol</td>
<td>Projects in this category shall be subject to the verification and approval by provincial governments.</td>
</tr>
</tbody>
</table>

3. Transportation

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>New construction (including additional construction) of railways</td>
<td>Projects involving multiple provinces (autonomous regions and municipalities directly under the Central Government) and projects of trunk railway lines under the national railway network shall be subject to the verification and approval by the competent investment department of the State Council, while the remaining projects under the national railway network shall be independently determined by the China Railway Corporation and be reported to the competent investment department of the State Council for record-filing. All the other local railway projects shall be subject to the verification and approval by provincial</td>
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<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Highway</strong></td>
<td>Projects under the national highway network shall be subject to the verification and approval by the competent investment department of the State Council, and the general national road network projects shall be subject to the verification and approval by provincial governments. Local highway projects shall be subject to the verification and approval by provincial governments in accordance with planning; All the other projects in this category shall be subject to the verification and approval by local governments.</td>
</tr>
<tr>
<td><strong>Independent highway (railway) bridges and tunnels</strong></td>
<td>Cross-border projects, and projects across waterways or sea areas of 100,000 tons or more or cross great rivers (referring to those with or planned to be with navigable sections of class 1 or higher) in this category shall be subject to the verification and approval by the competent investment department of the State Council, of which the cross-border projects shall be reported to the State Council for recording-filing, while the remaining projects under the national railway network shall be independently determined by the China Railway Corporation and be reported to the competent investment department of the State Council for record-filing. All the other projects in this category shall be subject to the verification and approval by local governments.</td>
</tr>
<tr>
<td><strong>Special berths for coal, mineral ore, and oil and natural gas</strong></td>
<td>Projects to be newly constructed along coastal areas (including Nanjing and cities further down along the Yangtze River) with an annual handling capacity of 10 million tons and more shall be subject to the verification and approval by the competent investment department of the State Council, while all the other projects in this category shall be subject to the verification and approval by provincial governments.</td>
</tr>
<tr>
<td><strong>Special container terminals</strong></td>
<td>Projects of constructing special container terminals along coastal areas (including Nanjing and cities further down along the Yangtze River) with annual handling capacity of 10 million standard containers or more shall be subject to the verification and approval by the competent investment department of the State Council, while all the other projects in this category shall be subject to the verification and approval by provincial governments.</td>
</tr>
<tr>
<td><strong>Inland river transport</strong></td>
<td>Projects of navigation and hydropower junctions of one kiloton or higher involving high-class waterways of multiple provinces (autonomous regions and municipalities directly under the Central Government) shall be subject to the verification and approval by the competent investment department of the State Council, while all the other projects in this category shall be subject to the verification and approval by local governments.</td>
</tr>
<tr>
<td><strong>Civil aviation</strong></td>
<td>Projects of new transportation airport construction shall be subject to the verification and approval by the State Council, while the projects of new construction of airports with general use and the projects of expansion of airports with both military and civilian use shall be subject to the verification and approval by local governments.</td>
</tr>
</tbody>
</table>
4. Information Industry

**Telecommunications**  
International communications infrastructure projects shall be subject to the verification and approval by the competent investment department of the State Council, while projects of domestic trunk transmission networks (including radio and television networks) and other telecommunications infrastructure projects involving information security shall be subject to the verification and approval by relevant industry management departments of the State Council.

5. Raw materials

**Exploitation of rare earth, iron ore and non-ferrous metal mines**  
Exploitation projects of rare earth mines shall be subject to the verification and approval by relevant industry management departments of the State Council; and all the other projects in this category shall be subject to the verification and approval by provincial governments.

**Petrochemical**  
New ethylene projects shall be subject to the verification and approval by the provincial governments in accordance with the petrochemical industry planning and layout plan approved by the State Council.

**Chemical**  
Methanol to olefins projects with an annual output of over 500,000 tons and projects of coal-based methanol with an annual output of over 1 million tons shall be subject to the verification and approval by the competent investment department of the State Council; and new p-Xylene (PX) projects and new methylene diphenyl diisocyanate (MDI) projects shall be subject to the verification and approval by the provincial governments in accordance with the petrochemical industry planning and layout plan approved by the State Council.

**Rare earth**  
Rare earth smelting and separation projects shall be subject to the verification and approval by relevant industry management departments of the State Council, while rare earth deep processing projects shall be subject to the verification and approval by provincial governments.

**Gold**  
Ore mining and dressing projects shall be subject to the verification and approval by provincial governments.

6. Machinery manufacturing

**Automobiles**  
Projects in this category shall be governed by the Development Policies of the Automobile Industry approved by the State Council.

7. Light industry

**Tobacco**  
Projects of cigarettes, cellulose acetate for tobacco use and tongs shall be subject to the verification and approval by relevant industry management departments of the State Council.
<table>
<thead>
<tr>
<th>8. New and high-end technologies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil aviation and aerospace</td>
</tr>
<tr>
<td>Projects of manufacturing main and regional-route aircraft, general aircraft with 6 tonnes/9 seats or more and helicopter with 3 tonnes or more, civil satellite manufacturing, and construction of ground stations for civilian remote sensing satellites shall be subject to the verification and approval by the competent investment department of the State Council; the projects of manufacturing general aircraft with less than 6 tonnes/9 seats or and helicopter with less than 3 tonnes shall be subject to the verification and approval by the provincial governments.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>9. Urban construction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Urban rapid rail transport projects</td>
</tr>
<tr>
<td>Urban roads and bridges and tunnels</td>
</tr>
<tr>
<td>Other urban construction projects</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>10. Social undertakings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Theme parks</td>
</tr>
<tr>
<td>Especially large projects shall be subject to the verification and approval by the State Council, large projects to the verification and approval by the competent investment department of the State Council, and small and medium-sized projects to the verification and approval by provincial governments.</td>
</tr>
<tr>
<td>Tourism</td>
</tr>
<tr>
<td>Tourism development and resource protection projects with a total investment of RMB 50 million or more that are to be constructed within the areas of national scenic spots, national nature reserves and entities under national key cultural relics protection, and projects with a total investment of RMB 30 million or more that are to be constructed within world natural and cultural heritage sites shall be subject to the verification and approval by provincial governments.</td>
</tr>
<tr>
<td>Other projects of social undertakings</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>11. Foreign investment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreign investment</td>
</tr>
<tr>
<td>The following projects listed in the Catalogue for the Guidance of Foreign Investment Industries shall be subject to the verification and approval by the competent investment department of the State Council: encouraged</td>
</tr>
</tbody>
</table>
projects with a total investment (including additional investment) of USD 1 billion or more that are subject to requirements on control (including relative control) by Chinese shareholders, and restricted projects with a total investment (including additional investment) of USD 100 million or more (excluding real estate projects), of which the projects with a total investment (including additional investment) of USD 2 billion shall be reported to the State Council for record-filing. Real estate projects under restricted industries and other restricted projects with a total investment (including additional investment) of less than USD 100 million as listed in the Catalogue for the Guidance of Foreign Investment Industries shall be subject to the verification and approval by provincial governments.

Encouraged projects with a total investment (including additional investment) of less than USD 1 billion that are subject to requirements on control (including relative control) by Chinese shareholders and are listed in the Catalogue for the Guidance of Foreign Investment Industries shall be subject to the verification and approval by local governments.

Projects other than those listed in the preceding Paragraph that fall under Article 1 through to Article 10 herein shall be subject to verification and approval in accordance with Article 1 through to Article 10 herein.

<table>
<thead>
<tr>
<th>12. Outbound investment</th>
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</thead>
<tbody>
<tr>
<td><strong>Outbound Investment</strong></td>
</tr>
</tbody>
</table>
Notes

1. [Several Opinions of the State Council on Promoting the Healthy Development of the Photovoltaic Industry], Art. 2(2) (SC, effective Jul. 4, 2013).

2. [Several Opinions of the State Council on Promoting the Sustainable and Healthy Development of the Rare Earth Industry], Art. 2(4) (SC, effective May 10, 2011).


7. Our methodology for identifying approval requirements involved consulting the Project Approval Catalogue, the Consolidated List, and materials published on the internet by the central-level government agencies responsible for regulating the relevant industries and by the five illustrative provincial-level governments.


9. Id., Art. 2(1).

10. MOFCOM approval may still be necessary for domestic investors in sectors where MOFCOM acts as the industry regulator, such as direct sales, import of crude and refined oil, import and export of dual-use items and technology, anti-monopoly review, etc. [Circular of the Ministry of Commerce on the Directory of Publicly Available Administrative Examination and Approval Items] (MOFCOM, effective Feb. 17, 2014).
11 The AML uses the term “business operator” (经营者), which it defines as including “natural persons, legal persons, and other organizations that engage in manufacturing, or selling commodities or providing services.” 中华人民共和国反垄断法 [Anti-Monopoly Law of the People’s Republic of China] (“Anti-Monopoly Law”), Art. 12 (SCNPC, effective Aug. 01, 2008).

12 Id., Art. 20.

13 Turnover in China refers to revenue (excluding relevant tax) derived from sales of products and services provided by a business operator to customers located within the borders of China. Turnover figures are calculated as the sum of the turnover of (1) the individual business operator; (2) other business operators directly or indirectly controlled by the business operator referred to in Item 1; (3) other business operators who directly or indirectly control the business operator referred to in Item 1; (4) other business operators directly or indirectly controlled by the business operators referred to in Item 3; (5) other business operators jointly controlled by two or more business operators among those referred to in Items 1 through 4. If the transaction involves the sale of less than an operator’s entire business, the operator’s turnover includes only the portion that relates to the business that is being sold. 商务部反垄断局关于经营者集中申报的指导意见 (2014 修订) [Guiding Opinions of the Anti-Monopoly Bureau of the Ministry of Commerce on the Declaration of the Concentration of Business Operators (2014 Amendment)], Art. 6 (MOFCOM, effective Jun. 6, 2014).

14 The exchange rate used throughout this report is €1 = RMB 7.


16 Establishment of a joint venture will be considered as a concentration if the joint venture is jointly controlled by at least two parties. In other words, if there is only one party that exerts control over a joint venture, then no concentration is constituted. 商务部反垄断局关于经营者集中申报的指导意见 (2014 修订) [Guiding Opinions of the Anti-Monopoly Bureau of the Ministry of Commerce on the Declaration of the Concentration of Business Operators (2014 Amendment)], Art. 6 (MOFCOM, effective Jun. 6, 2014).

17 Anti-Monopoly Law, Art. 22.

18 Id., Art. 27.

19 Id., Art. 25. The 30-day period for the preliminary review shall only begin after MOFCOM deems the parties’ filing to be complete. In practice, with MOFCOM in control of the start of the review clock, parties often consult with the agency and provide their filings in draft form to ensure that their filings will include the information that the case team requires in order to accept the filing as
complete. As a result of such consultations, MOFCOM may not officially begin its review until one or more months after the parties submit their initial draft filing.

20 Id., Art. 25.


24 Id., Arts. 28, 29.

25 Id., Art. 28.

26 Among other things, a concentration would not qualify for the simplified process if the relevant market were difficult to define, or if it were to negatively impact market access, technological advancement, consumers, or other enterprises, or national economic development. 关于经营者集中简易案件适用标准的暂行规定 [Interim Provisions on Standards Applicable to Simple Cases of Concentration of Business Operators], Art. 3 (MOFCOM, effective Feb. 12, 2014).

27 Id., Art. 2.

28 关于经营者集中简易案件申报的指导意见(试行) [Guiding Opinions on Streamlined Declaration of Market Concentration Cases (for Trial Implementation)] (“Guiding Opinions on Streamlined Declaration”), Arts. 4, 8 (MOFCOM, effective Apr. 18, 2014).

29 The current rules fail to indicate the timeline for MOFCOM’s review under the simplified procedure.

30 Guiding Opinions on Streamlined Declaration, Arts. 8, 9.

31 Anti-Monopoly Law, Art. 48. See also 未依法申报经营者集中调查处理暂行办法 [Interim Measures for Investigating and Handling Failure to Legally Declare the Concentration of Business Operators], Art. 13 (MOFCOM, effective Feb. 1, 2012).

32 商务部关于经营者集中附加限制性条件的规定(试行) [Provisions of the Ministry of Commerce on Attaching Restrictive Conditions to Concentration of Business Operators (for Trial Implementation)], Art. 29 (MOFCOM, effective Jan. 5, 2015).

33 Anti-Monopoly Law, Art. 52.

35 Anti-Monopoly Law, Art. 7.


37 Id., Art. 20.

38 企业名称登记管理规定 (2012修订) [Provisions on Administration of Enterprise Name Registration (2012 Amendment)], Art. 6 (SC, effective Jan. 1, 2013).

39 Id., Art. 9.

40 Id., Art. 13.


44 Id.


The Ministry of Environmental Protection issued a catalogue providing guidance on which of the three types of assessment documents is appropriate for a project in a certain industry. For instance, an assessment report is required to open a school with more than 10,000 teachers and students; if there are going to be less than 10,000 people but more than 2,500 people, then an assessment form is needed; a registration form is only applicable for schools with less than 2,500 teachers and students. 建设项目环境影响评价分类管理名录 [Catalogue for the Classified Administration of Environmental Impact Assessments for Construction Projects] (MEP, effective Oct. 1, 2008).

中华人民共和国环境影响评价法 [Law of the People’s Republic of China on Assessment of Environment Impacts], Art. 22 (SCNPC, effective Sep. 1, 2003). Note that these time periods only refer to the time used by the authorities to conduct review. Document preparation may also take a significant amount of time.

This level of energy consumption refers to annual energy consumption of no less than (i) 1,000 tons of standard coal equivalent, (ii) 2 million KWH of electricity, (iii) 500 tons of petroleum, or (iv) 0.5 million cubic meters of natural gas. 固定资产投资项目节能评估和审查暂行办法 [Interim Measures for Energy Conservation Evaluation and Review of Projects Investing in Fixed Assets], Art. 5 (NDRC, effective Nov. 1, 2010).

Id.

Id.


Id.

Id.


2004 Decision, Art. 2(1).

We developed these categories and naming for the purposes of this report. They are not explicitly described as such in the Project Approval Catalogue.

2014 Project Approval Catalogue.

For example, crude oil and natural gas exploitation projects only require project filing with the relevant industry regulator. 国务院关于发布政府核准的投资项目目录(2014 年本)的通知 [Notice of the State Council on Issuing the Catalogue of Investment Projects Subject to Government

60 For example, for urban construction projects not specified in the Project Approval Catalogue, local governments may determine at their own discretion whether those projects are subject to the project approval or project filing. 2014 Project Approval Catalogue, Art. 9.


62 2004 Decision, Art. 3.

63 Standard applications must include the following documents:

- local authorities’ project-related opinions (see Step 3);
- applicant’s profile, including the applicant’s primary business, period of operation, assets and debts, shareholders, past major investment projects, and existing production abilities;
- project details, including construction background of the project, construction site, major construction content and scale, product and engineering technical process, key equipment and supporting project, and investment scale and financing scheme;
- construction, land, and related planning information;
- analysis of resource utilization, including resource exploration plan, resource utilization plan, and resource conservation plan;
- analysis of the impact on the local ecological environment, including (a) current environmental and ecological status, (b) analysis regarding impact on ecological environment, (c) protection measures for ecological environment, (d) analysis regarding impact on geological disasters, (e) impact on special environmental factors, such as historical sites; and
- analysis of the economic and social effects of the project as follows:
  - economic effects, including (a) analysis regarding benefit of economic expense, (b) analysis regarding impact on industry, and (c) analysis regarding impact on regional economy, (d) analysis regarding impact on macro-economy; and
  - social effects, including (a) the social impact and social benefit the proposed project may have on local society, (b) whether the proposed project can be accepted into the local social and cultural environment and an evaluation of the adaptation of the project to the local social environment; and (c) social risks and corresponding solutions.
For example, a nuclear power plant project. 2014 Project Approval Catalogue, Art 2.

A few other agencies may have project approval authorities, such as the management commissions of certain economic development zones in Shanghai. 上海市政府核准的投资项目目录细则(2014年本) [Shanghai Municipal Catalogue of Investment Projects Subject to Government Verification and Approval (2014 Version)] (“2014 Shanghai Project Approval Catalogue”) (Shanghai Municipal People’s Government, effective Dec. 31, 2014).

Domestic Project Approval Measures, Arts. 17, 18.

Domestic Project Approval Measures, Art. 23.

Id., Art. 22.


Id., Art. 20.

2014 Project Approval Catalogue Notice, Art. 5.


Id.

Id., Art. 15.

Id., Art. 16.

Id., Art. 17.

Id.

Id., Art. 18.

Id., Art. 19.

Id.

Id.

2014 Project Approval Catalogue Notice, Art. 5.

Domestic Project Approval Measures, Art. 20.

Implementing Measures for the Administration of Investment Projects Subject to Government Verification and Approval, Art. 11 (MIIT, effective Nov. 1, 2014).

Id.

Id., Arts. 13 to 15.

Id., Art. 16. See also, Domestic Project Approval Measures, Art. 19.

Domestic Project Approval Measures, Art. 2.

2014 Project Approval Catalogue Notice, Art. 5.

2004 Decision.

Id.

Note that the last 2 categories are foreign investment and outbound investment, which are different from other 11 categories in nature.

2004 Decision, Art. 2(3).


2014 Project Approval Catalogue Notice.

Note that the category of Finance (projects of printing paper money, coinage and banknote paper) was completely removed, comparing to the 2013 Catalogue.


Id.

Id. Note that such statistics are not entirely reliable because categories and project types may be redefined with, for example, some items being consolidated. Nonetheless, the trend of significant reductions described here is without dispute.

102 娱乐场所管理条例 [Regulation on the Administration of Entertainment Venues], Art. 9 (SC, effective Mar. 1, 2006).


104 互联网文化管理暂行规定(2011 修订) [Interim Provisions on the Administration of Internet Culture (2011 Amendment)], Arts. 9, 11 (Ministry of Culture, effective Apr. 1, 2011).


107 E.g., as of April 24, 2015, drug manufacturing companies and distribution companies no longer need to submit their respective industry licenses (i.e., Drug Manufacturing Licenses and Drug Distribution Licenses) for enterprise registration with AICs. 全国人大常委会关于修改《中华人民共和国药品管理法》的决定 [Decision of the Standing Committee of the National People’s Congress on Amending the “Drug Administration Law of the People’s Republic of China”], Arts. 1, 2 (SCNPC, effective Apr. 24, 2015).


111 The three notices of the State Council (“Three Notices”) refer to here are:

   (i) 国务院关于取消和调整一批行政审批项目等事项的决定(国发[2014]27 号) [Decision of the State Council on Canceling or Adjusting a Group of Administrative Approval Items and Other Matters (Guo Fa [2014] No. 27)] (SC, effective Jul. 22, 2014).
(ii) [Decision of the State Council on Canceling or Adjusting a Group of Administrative Approval Items and Other Matters (Guo Fa [2014] No. 50)] (SC, effective Oct. 23, 2014).

(iii) [Decision of the State Council on Canceling or Adjusting a Group of Administrative Approval Items and Other Matters (Guo Fa [2015] No. 11)] (SC, effective Feb. 24, 2015).

112 For example, on May 14, 2015, after the completion of research for this report, the State Council further cancelled 49 “non-administrative licensing approval items” and changed the remaining 84 “non-administrative licensing approval items” to “internal approval items of government agencies,” and thus completely eliminated “non-administrative licensing approval items.” [Decision of the State Council on Cancelling Non-Administrative Licensing Approvals Items] (SC, effective May 14, 2015).

113 Note that these numbers differ from the number of types of projects listed in the Project Approval Catalogue as project approval requirements may be categorized and defined differently in the Consolidated List.


116 Id., Art. 20. These documents include: (i) written application form; (ii) appointment letter/power of attorney signed by all shareholders; (iii) articles of association; (iv) capital verification certificate; (v) where the shareholders’ initial capital contribution is made in the form of in-kind contribution, transfer certification document for transferring shareholders’ property rights; (vi) qualification certificates of investors; (vii) contact information and certification of company directors, supervisors, and managers; (viii) legal representative appointment document and identity certificate; (ix) written notice of name registration; (x) certificate of domicile for the company; and (xi) other documents as required.

117 Id., Art. 55.

118 Id., Arts. 51, 53, 54.

119 See, e.g., [Notice of People’s Government of Guangdong Province on Issuing Opinions on Inventory]
Management of Investment Projects of Enterprises in Guangdong Province (for Trial Implementation) ([People’s Government of Guangdong Province, effective Mar. 1, 2015]).

Administrative License Law, Arts. 15, 16.


See also, 环保信息简报第五期(总第19期) [Environmental Newsletter No. 5 (Total No. 19)], Ordos Environmental Protection Bureau (Sep. 10, 2014), http://www.ordoshb.gov.cn/ywgl/xcjy/xjhd/201409/t20140910_1458743.html (last visited May 14, 2015).


Id.


See, e.g., 2014 Guangdong Project Approval Catalogue.

Section 2.2 does not include discussion of domestic investments made by foreign-invested enterprises. In general, the same approval steps apply to investments by FIEs as to investments by purely domestic companies, except that (i) an investment by an FIE made into a restricted industry requires MOFCOM enterprise approval as per Step 6 in this section, and (ii) an FIE cannot invest into a prohibited industry.

The Foreign investment Catalogue lists industries that fall into the encouraged, restricted, or prohibited categories, while unlisted industries are deemed to be in the permitted category. Encouraged foreign investment projects may enjoy tariff exemptions for equipment imported for their own use. About the part of the preferential import tax policies for corresponding adjustment of the customs and other tax policies [Circular of Adjusting Certain Preferential Import Tax Policies], Art. 1(1) (GAC, effective Jan. 1, 2009).

The enterprise approval alone can easily add one extra month to the approval timeline.


145 AmCham China, supra, at p. 36.


148 See Section 2.1.2 (Step 1) for further discussion of thresholds triggering AML review.

149 AmCham China, supra, at p. 38.

150 As this report was being finalized in July 2015, the Chinese government issued a new National Security Law that contains broad language that could apply national security review requirements to domestic investors. Specifically, Article 59 of this new Law contains an explicit reference to national security reviews. It mandates not only the national security review of “foreign investment that infringes upon, or may infringe upon, national security,” which is consistent with the mandates of previous laws and regulations, but also security reviews of “key materials and technologies,”
“internet or information technology products and services,” “construction projects that implicate national security,” and “other major projects or events.” The new language could, in theory, apply to both domestic and foreign investors. We must wait for implementing rules to be issued by relevant government agencies before we can assess the nature, reach, and impact of the new National Security Law.

151 The inter-ministerial panel is a temporary organization under the State Council headed by NDRC and MOFCOM, which are to coordinate national security review with other government agencies relevant to a given transaction. 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 [Notice of the General Office of the State Council on Launching the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (“Security Review Notice”), Art. 3 (General Office of the State Council, effective Mar. 5, 2011).

152 Id.


156 Id., Art. 2.


158 Id., Art. 3.

159 Security Review Notice, Art. 4(1).

160 Id., Art. 4(3).

161 Id.

162 Id.

163 Id.

165 Art. 31 of the Anti-Monopoly Law mentions that a national security review must be carried out in addition to AML review for foreign-invested AML cases that raise national security concerns. Anti-Monopoly Law, Art. 31.


169 M&A Rules, Art. 12.


171 Id., Arts. 1, 2.

172 中华人民共和国外国投资法(草案征求意见稿) [The Foreign Investment Law of the People’s Republic of China (Draft for Consultation)], Ch. 4 (MOFCOM, Jan. 19, 2015).


174 Id.

175 Covington and Burling LLP, China’s Approval Process for Inbound Foreign Direct Investment: Impact on Market Access, National Treatment, and Transparency, U. S. Chamber of Commerce

176 FIE Project Approval Measures, Art. 4. See also, 2014 Project Approval Catalogue, Art. 11.

177 Id.

178 2015 Foreign Investment Catalogue.

179 2014 Project Approval Catalogue.


181 FIE Project Approval Measures, Art. 16.

182 Id., Art. 19.

183 The FIE Project Approval Measures provide that a DRC will only issue a written opinion when it rejects a filing, and such written rejection will be issued within seven working days after the filing is submitted. Id., Art. 20.

184 Id., Art. 25.


186 Foreign investors are required to have experience and good track records in providing telecom services. These requirements are not explicitly applied to domestic investors. 外商投资电信企业规定(2008 修订) [Provisions on the Administration of Foreign-funded Telecommunications Enterprises (2008 Amendment)], Arts. 8, 9 (SC, effective Sep. 10, 2008).


188 Id., Art. 8.


非金融机构支付服务管理办法 [Administrative Measures for the Payment Services Provided by Non-financial Institutions](PBOC, effective Sep. 1, 2010).

Id., Art. 9.


Id.


全国人大常委会关于授权国务院在中国(广东)自由贸易试验区、中国(天津)自由贸易试验区、中国(福建)自由贸易试验区以及中国(上海)自由贸易试验区扩展区域暂时调整有关法律规定的行政审批的决定 [Decision of the Standing Committee of the National People’s Congress on Authorizing the State Council to Temporarily Adjust the Relevant Administrative Approval Items Prescribed by Law in the China (Guangdong) Pilot Free Trade Zone, the China (Tianjin) Pilot Free Trade Zone, the China (Fujian) Pilot Free Trade Zone, and the Expanded Zone of the China (Shanghai) Pilot Free Trade Zone] (SCNPC, effective Mar. 1, 2015).


See also, EJV Law, Art. 3.


商务部关于下放外商投资审批权限有关问题的通知 [Notice of the Ministry of Commerce on Decentralizing the Examination and Approval Power for Foreign Investment], Art. 1 (MOFCOM, effective Jun. 10, 2010).

For instance, commerce bureaus of the districts/counties of Beijing are authorized to approval FIEs in the encouraged and permitted industries with a total investment amount at or below US$ 100 million, but they do not have the authority to approve the establishment of FIEs in the restricted industries regardless of the total investment amount. 北京市商务委员会关于进一步做好本市外商投资企业合同章程及其变更事项审批工作的通知 [Notice of Beijing Municipal Commission of Commerce on Further Improving Approval Work of Contract and Articles of Association and Other Related Changes of the Foreign-invested Enterprise], Art. 1 (Beijing Municipal Commission of Commerce, effective Nov. 11, 2010).


EJV Law, Art. 3.

CJV Law, Art. 5.

Id.

WFOE Law, Art. 7. See also, EJV Implementation Regulation, Art. 9. See also CJV Law, Art. 6.

中共中央关于全面深化改革若干重大问题的决定 [Decision of the Central Committee of the Communist Party of China on Several Major Issues Concerning Comprehensively Deepening the Reform], Art. 2 (CCCPC, effective Nov. 12, 2013).


Id., p. 38.


Id.

Dorn & Cloutier, supra, at p. 40.

Dorn & Cloutier, supra, at pp. 42-50.

Heilmann & Shih, supra, at p. 2.

Heilmann & Shih, supra, at p. 12.

Heilmann & Shih, supra, at p. 18.


225 Dorn & Cloutier, supra, at pp. 38-40.


227 Id., Ch. 4.

228 Id., Ch. 9, Sec. 5.

229 Id., Ch. 11, Sec. 3.

230 Id., Ch. 1.

231 The principal database we relied on in preparing this Report is Peking University’s Chinalawinfo.com (en.pkulaw.com), used together with its Chinese sister site (www.pkulaw.com). Chinalawinfo hosts the most complete collection of Chinese legal texts available on the internet. There are instances where the database incorrectly categorizes a law, regulation, or policy or includes one that is no longer effective. In instances where such a situation has come to our attention, we have made corresponding adjustments. We also referred to Westlaw’s Chinese legal database (www.westlawchina.com) to locate English translations and to confirm whether older measures remained in effect. (We hereinafter refer to the databases we used as “PKU Law Database”).


233 Id., Art. 2.

234 Id., Arts. 5, 6.

235 Id., Art. 8.

236 Id., Art. 3.

237 Id., Art. 3(7).

238 Id.
239 Id., Art. 8(3).


245 Id.

246 Id., Art. 8.

247 Id., Art. 34.

248 Id., Arts. 41, 42.

249 Id., Art. 47.

250 We did not closely review the contents of all of the policies identified that met criteria (i) and (ii). Determinations for the purposes of preparing this table were made by reviewing the titles and issuing agencies of the search hits.

251 All dates in the tables in this report are represented in the DD/MM/YYYY format.


253 Foreign Investment Catalogue.

As with the Foreign Investment Catalogue, investments that do not fall under any of the three categories, but meet the provisions of the applicable laws and policies, shall be considered to be “permitted.” There is no explicit “permitted” category of items listed in the Catalogue.


Id., Art. 12.

Id., Art. 17.

Id., Art. 18.

Id., Art. 19.

Id., Art. 12.

Id., Art. 17.

Id., Art. 18.

Id., Art. 19.

Master 12th Five-Year Plan.

Id., Ch. 23.

Id., Ch. 23, Sec. 1.


Id., Arts. 9, 12.


2014 Project Approval Catalogue Notice, Art. 2.

Domestic Project Approval Measures, Art. 23.

政府核准投资项目管理办法 [Implementing Measures for the Administration of Investment Projects Subject to Government Verification and Approval], Art. 19 (MIIT, effective Nov. 1, 2014).


China Investment Restraints Report, pp. 48 to 55.
The six enterprise groups are China Minmetals Corporation (中国五矿集团公司), Aluminum Corporation of China (中国铝业公司), China Northern Rare Earth Group High Tech Co., Ltd. (中国北方稀土(集团)高科技股份有限公司), Xiamen Tungsten Co., Ltd. (厦门钨业股份有限公司), China Southern Rare Earth Group Co., Ltd. (中国南方稀土集团有限公司), and Guangdong Rare Earth Industry Group (广东稀土产业集团). These six groups have a combined quota for rare earth production that accounts for 94.69% of the total production volume planned by MIIT as of April 2015. 工业和信息化部下达 2015 年第一批稀土生产计划 [The First Direct Plan for Rare Earth Production for Year 2015 Issued by the Ministry of Industry and Information Technology] (MIIT, effective Apr. 10, 2015).


According to a report from the state-owned Xinhua news agency, in 2011, SOEs reportedly earned a total of revenue of RMB 39.25 trillion (€5.61 trillion), accounting for 35 percent of total industrial and business revenues; as well as a profit of RMB 2.58 trillion (€0.37 trillion), accounting for 43 percent of total profits.


The last two types of SOEs are sometimes referred to as state-controlled enterprises; the term state-owned enterprise (“SOE”) as referred to in this report includes all three types of entities.


282 *Id.*


284 *Id.*, at pp. 6-8.


286 Unirule Institute of Economics, *supra*, at pp. 10-12.


295 Id.


297 Id., Art. 2.

298 Id.

299 State-Owned Assets Interim Regulation, Arts. 7, 10.


300 State-Owned Assets Interim Regulation, Art. 2.


See also, Law on State-Owned Assets of Enterprises, Art. 4.

See also, State-Owned Assets Interim Regulation, Arts. 5, 6.


305 Company Law, Arts. 65, 66, 67, and 70.

See also, Law on State-Owned Assets of Enterprises, Arts. 22, 31.
See also, State-Owned Assets Interim Regulation, Arts. 13, 17, 20 and 34.

306 Law on State-Owned Assets of Enterprises, Art. 34.

See also, State-Owned Assets Interim Regulation, Art. 21.


308 企业国有资产产权登记管理办法 [Rules on the Management of Property Right Registration of the State Assets of Enterprises], Art. 7 (SC, effective Jan. 25, 1996).


310 Management Measures, Arts. 7, 8.

311 Id., Art. 8.

312 Law on State-Owned Assets of Enterprises, Art. 53.

See also, State-Owned Assets Interim Regulation, Art. 23.

See also, Management Measures, Art. 25.

313 Law on State-Owned Assets of Enterprises, Art. 54. See also, Management Measures, Art. 4.


316 国有企业监事会暂行条例 [Interim Regulation on the Boards of Supervisors in State-owned Enterprises], Arts. 2, 3 (SC, effective Mar. 15, 2000).

See also, 国有重点金融机构监事会暂行条例 [Interim Regulation on the Board of Supervisors of Important State-owned Financial Institutions], Arts. 2, 3, and 5 (SC, effective Mar. 15, 2000).

317 Id.

318 国有企业监事会暂行条例 [Interim Regulation on the Boards of Supervisors in State-owned Enterprises], Art. 27 (SC, effective Mar. 15, 2000).

319 The 21 search strings were:
<table>
<thead>
<tr>
<th>Key Search Terms (CH)</th>
<th>Key Search Terms (EN)</th>
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<tbody>
<tr>
<td>1 国有绝对控股</td>
<td>Absolute state-owned equity control</td>
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<tr>
<td>2 国有相对控股</td>
<td>Relative state-owned equity control</td>
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<tr>
<td>3 支柱产业</td>
<td>Pillar industries</td>
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<td>4 国有控股</td>
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<td>6 国营贸易</td>
<td>State trading</td>
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<td>7 国有法人</td>
<td>State-owned legal person</td>
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<tr>
<td>8 资源性垄断</td>
<td>Monopoly of natural resources</td>
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<td>9 自然垄断</td>
<td>Natural monopoly</td>
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<td>10 垄断行业</td>
<td>Monopolistic industries</td>
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<tr>
<td>11 国有资本 + 支配地位</td>
<td>State-owned capital + controlling position</td>
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<tr>
<td>12 国有资本 + 垄断地位</td>
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<td>13 国有资本 + 优势地位</td>
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<tr>
<td>21</td>
<td>国有企业 + 优先</td>
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</tbody>
</table>

320 Note: A small number of the measures identified in the China Foreign Investment Restraints Report were omitted from our analysis due to various factors.

321 China Investment Restraints Report, pp. 50, 51.

322 国际通信出入口局管理办法 [Measures for the Administration of International Communications Gateway Exchanges], Art. 5 (MIIT, effective Oct. 1, 2002).

323 卫星电视广播地面接收设施安装服务暂行办法 [Interim Measures on Installation of Ground Receiving Facilities (GRF) for Satellite Television], Art. 5 (SAPPRFT, effective Jan. 1, 2010).

324 互联网视听节目服务管理规定 [Provisions on Administration of Internet Audio-visual Program Service], Art. 8 (MIIT, SAPPRFT, effective Jan. 31, 2008).

325 放射性固体废物贮存和处置许可管理办法 [Administrative Measures for the License for Storage and Disposal of Radioactive Solid Waste], Art. 9 (MEP, effective Mar. 1, 2014).

326 设置卫星网络空间电台管理规定 [Regulation for the Administration of the Deployment of Satellite Network Space Radios], Art. 6 (MIIT, effective Sep. 13, 1999).

327 Note that CPC guidance can, in practice, be very influential and therefore should be considered alongside legal measures.

328 中共中央关于国有企业改革和发展若干重大问题的决定 [Decision of the Central Committee of the Communist Party of China on Major Issues Concerning the Reform and Development of State-Owned Enterprises], Art. 3 (CCCPC, effective Sep. 22, 1999).

关于推进国有资本调整和国有企业重组的指导意见 [Opinions of the SASAC about Promoting the Adjustment of State-owned Capital and the Reorganization of State-owned Enterprises], Arts. 1, 2 (SASAC, effective Dec. 5, 2006).


1999 CCCPC Decision Guangdong Implementing Opinions, Art. 2.

332 Id., Art. 2(2).


334 Id.

335 国家经济贸易委员会关于发布《“十五”工业结构调整规划纲要》的通知 [Notice of the State Economic and Trade Commission on the Publication of the “Outline of the Plan for Industrial Restructuring During the Tenth Five-Year Period”], Art. 3 (MOFCOM, effective Nov. 2, 2001).

336 Id.


338 原油、成品油、化肥国营贸易进口经营管理试行办法 [Interim Measures for the Administration of the Import of Crude Oil, Oil Products, and Fertilizers through State Trading Enterprises], Art. 2 (MOFCOM, effective Aug. 18, 2002). See also, China Foreign Investment Restraints Report, p. 30.

340 Anti-Monopoly Law, Art. 7.

341 国土资源部关于加强土地资产管理促进国有企业改革和发展的若干意见 [Several Opinions of the Ministry of Land and Resources on Further Control over Land Assets and Promotion of the Reform and Development of State-owned Enterprises], Art. 2 (MLR, effective Nov. 25, 1999).

342 See, e.g., 中共上海市委、上海市人民政府关于进一步深化上海国资改革促进企业发展 的意见 [Opinions on Further Deepening Shanghai SOE Reforms to Promote Enterprises Development], Art. 19 (CPC Shanghai Municipal Committee and Shanghai Municipal People’s Government, effective Dec. 18, 2013).

343 Id.

344 Szamosszegi & Kyle, supra, at p. 47.

345 Id.


347 China Investment Restraints Report, p. 34.

348 S&T MLP.

349 Id., Art. 8(3).

350 Szamosszegi & Kyle, supra, at pp. 56-57.

351 Unirule Institute of Economics, supra, at p. 30.

352 Id.


355 *Id.*


357 上海市国有资产监督管理委员会关于印发《市国资委关于企业技术创新和能级提升项目专项扶持办法(试行)》的通知 [The Notice of “Shanghai SASAC Measures to Support Enterprises Technical Innovation and Upgrade (for Trial Implementation)” Issued by Shanghai SASAC], Art. 3 (SASAC of Shanghai Municipality, *effective* Apr. 12, 2013).

358 For example, the CPC Guangdong Provincial Committee and the People’s Government of Guangdong Province together called for direct financial support to SOEs in their *Decision to Rely on S&T Advancement and Promoting the Upgrading and Perfecting Industrial Structure*. 中共广东省委、广东省人民政府关于依靠科技进步推动产业结构优化升级的决定 [Decision to Rely on S&T Advancement and Promoting the Upgrading and Perfecting Industrial Structure], Art. 28 (CPC Guangdong Provincial Committee & the People’s Government of Guangdong Province, *effective* Sep. 23, 1998).


363 Auto Industry Policy, Arts. 42, 44.

364 *Id.*, Art. 43.

365 *Id.*, Art. 41.

*Id.*, Art. 4.

*Id.*, Arts. 2, 5.

*Id.*, Arts. 2, 5.


*Id.*, Art. 4.


*Id.*, Art. 4.


*Id.*, Art. 4.


*Id.*, Art. 4.


*Id.*, Art. 4.


*Id.*, Art. 4.


*Id.*, Art. 4.
382 Id.
385 According to publicly available information, the 2014 Petrochemical Industry Plan has already been approved by the State Council. However, this document is classified as a “secret document” in China and is not publicly available.
388 See, e.g., 2014 Project Approval Catalogue, Art. 3.
389 Production Safety Law, Art. 9.
391 Id.
393 铁路建设工程质量监督管理规定 [Provisions on Quality Supervision and Administration of Railway Construction], Art. 5 (MOT, effective May. 1, 2015).
394 食盐专营办法 (2013 修订) [Measures on the Monopoly of Table Salt (2013 Amendment)] (“Table Salt Monopoly Measures”), Art. 11 (SC, effective Dec. 7, 2013).


商业特许经营管理条例 [Regulation on the Administration of Commercial Franchises], Art. 5 (SC, effective May 1, 2007).

典当管理办法 [Measures for the Administration of Pawning], Art. 4 (MOFCOM, effective Apr. 1, 2005).


Tobacco Monopoly Law, Art. 3. “Monopolized” here means the government has the exclusive power to sell these products or strictly controls selling licenses issued to private investors.

Tobacco Monopoly Law, Arts. 15, 16.


Table Salt Monopoly Measures, Art. 10.

Direct Selling Regulation, Art. 9.


商业特许经营管理条例 [Regulation on the Administration of Commercial Franchises], Art. 8 (SC, effective May 1, 2007).


2015 Foreign Investment Catalogue.


国务院关于印发能源发展“十二五”规划的通知 [Energy Strategy 12th Five-year Plans], Ch. 2, Sec. 3 (SC, effective Jan. 1, 2013).


Project Approval Catalogue, Art. 2.

Id.

Qiu & Li, supra, at p. 8.

Id.

Id.

China Foreign Investment Restraints Report, p. 52.

Id.


See, e.g., 国务院办公厅关于印发中国银行业监督管理委员会主要职责内设机构和人员编制规定的通知 [Regulation on the Main Functions, Interior Institutions and Staffing of the China Banking Regulatory Commission], Art. 5(2) (General Office of the State Council, effective Apr. 25, 2003).


Article 3 of the Decision of the CCCPC on Several Major Issues Concerning Comprehensively Deepening the Reform sets a goal of “establishing a unified open market with orderly competition” so as to “let the market play an decisive role in the allocation of resources,” and calls for a sound financial system and “further opening up of the financial industry to both domestic and foreign investors.” 中共中央关于全面深化改革若干重大问题的决定 [Decision of the CCCPC on Several Major Issues Concerning Comprehensively Deepening the Reform], Art. 3 (CCCPC, effective Nov. 12, 2013).


Id.

消毒管理办法 [Measures on the Disinfection Control], Art. 3 (NHFPC, effective Jul. 1, 2002).
439 生活饮用水卫生管理办法 (2010 年修订) [Measures on Supervision and Management of Drinking Water (2010 Amendment)], Art. 3 (MOHURD, NHFPC, effective Feb. 12, 2010).

440 血站管理办法 [Measures for the Administration of Blood Stations], Art. 6 (NHFPC, effective Mar. 1, 2006).

441 病原微生物实验室生物安全管理条例 [Regulation on Administration of Biosafety in Pathogenic Microorganism Laboratories], Art. 3 (SC, effective Nov. 12, 2004).

442 医疗机构管理条例 [Administrative Regulation on Medical Institutions], Art. 5 (SC, effective Sep. 1, 1994).


444 医疗器械监督管理条例 [Regulation on the Supervision and Administration of Medical Devices] (“Medical Devices Regulation”), Art. 3 (SC, effective Jun. 1, 2014).


446 保健食品注册管理办法 [Measures on Health Food Registration Management], Art. 5 (CFDA, effective Jul. 1, 2005).

447 Drug Administration Law, Art. 7.


449 Medical Devices Regulation, Art. 22.

450 Medical Devices Regulation, Art. 31.


452 2015 Chongqing Project Approval Catalogue, Art. 10.


454 Drug Administration Law, Arts. 14, 16.

456 Drug Administration Law, Art. 31.

457 Medical Devices Regulation, Art. 4.

458 化妆品卫生监督条例 [Regulation Concerning the Hygiene Supervision over Cosmetics], Art. 10 (NHFPC, effective Jan. 1, 1990).

459 化妆品卫生监督条例实施细则 (2005 修订) [Implementation Rules for the Regulation Concerning the Hygiene Supervision over Cosmetics (2005 Amendment)], Art. 19 (NHFPC, effective Jun. 1, 2005).

460 For example, exploration and mining of rare earths and radioactive minerals are categorized as prohibited for foreign investment in the 2015 Foreign Investment Catalogue. 2015 Foreign Investment Catalogue, Restricted Category, Art. 5. See also, European Chamber, European Business in China Position Paper 2014/2015, p. 220 (2015) (“Mining is closed to foreign investment in a bid to protect China’s national assets.”)

Note that investments in smelting and the separation of rare earth elements (稀土冶炼、分离) are categorized as “restricted” in the 2015 Foreign Investment Catalogue, and are subject to the requirement that foreign investors set up Chinese-foreign equity joint ventures or contractual joint ventures to carry out such investments. 2015 Foreign Investment Catalogue, Restricted Category, Art. 10.

461 Master 12th Five-Year Plan, Ch. 15, Sec. 4.


465 Lawyers Law, Art. 4.

Id. Art. 5.


资产评估机构审批和监督管理办法 [Measures for the Examination, Approval, Supervision and Administration of Asset Appraisal Institutions], Art. 5 (MOF, effective Oct. 1, 2011).

Id. Arts. 3, 4.


Construction Law, Arts. 12, 13.

Id. Art. 6.


China Foreign Investment Restraints Report, p. 52.


2014 Project Approval Catalogue, Art. 4.

Id.

Telecommunications Regulation, Arts. 7, 8.

信息产业部关于重新调整《电信业务分类目录》的通告 [The Notice of the Ministry of Industry and Information Technology on Readjusting the “Telecommunications Service Categorization Catalogue”] (MIIT, effective Apr. 1, 2003).

This sub-group includes: (1) fixed line communications services; (2) cellular mobile communications services; (3) Category I satellite communications services; and (4) Category I data communications services.

This sub-group includes: (1) trunking communications services; (2) wireless paging services; (3) Category II satellite communications services; (4) Category II data communications services; (5) network access services; (6) domestic communications facilities services; and (7) network hosting services.
BTS regulated under VATS regulations include: analog trunking communications services, wireless paging services, domestic very small aperture terminal earth station (“VSAT”) communications services, Category II data communications services (including fixed network domestic data transmission services and wireless data transmission services), customer premise network services, and network hosting services.

This sub-group includes: (1) online data processing and transaction processing services; (2) domestic multi-party communications services; (3) domestic internet protocol virtual private network services; and (4) internet data center services.

This sub-group includes: (1) storage and forwarding services; (2) call center services; (3) internet access services; and (4) information services.

Telecommunications Regulation, Art. 9.

Id., Art. 10.

For example, as of April 2015, 33 private domestic investors had received mobile virtual network operator licenses from MIIT to “resell” mobile services that were originally purchased from the three SOEs monopolizing the mobile services sub-sector. Sun Huifeng, 虚拟运营商的痛苦与挣扎 [Pain and Struggle of Mobile Virtual Network Operators], CCIDNET.com (Apr. 3, 2015, 08:39 AM), http://news.ccidnet.com/art/1032/20150403/5806483_1.html (last visited May 10, 2015).

Telecommunications Regulation, Art. 13.


2015 Foreign Investment Catalogue, Restricted Category, Art. 20.

Note that input provided by EUCCC members and working groups represents their perceived concerns, but has not been independently verified.