

AIPLA

American Intellectual Property Law Association

November 29, 2019

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Via email wstzfsstl@chinalaw.gov.cn

Re: Comments regarding Draft Implementing Regulations for the Foreign Investment Law 《中华人民共和国外商投资法实施条例》

Dear Sir or Madam,

The American Intellectual Property Law Association (AIPLA) appreciates the opportunity to comment on the draft Implementing Regulations of the Foreign Investment Law, which will become effective January 1, 2020. The comment deadline is December 1, 2019. A chart listing AIPLA's detailed comments is attached. A partial summary of the comments is also provided below.

AIPLA is a national bar association of approximately 12,000 members engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

AIPLA commends the publication of the draft Implementing Regulations for the new Foreign Investment Law, which strives to protect the intellectual property rights of foreign investors and

enterprises, protect the lawful rights and interests of intellectual property right holders, and encourage technological cooperation based on the principle of voluntariness and business rules. AIPLA welcomes the ban on forced technology transfer.

Due to time constraints, AIPLA focused its comments on specific articles of the Draft Implementing Regulations identified below or in the attached comment table. The absence of comments on other articles does not necessarily reflect support or lack of support of these articles by AIPLA.

A number of the proposed regulations raise concerns regarding the criteria that will be applied, confidentiality, and use of the information requested. These concerns are substantial, particularly if the regulations are interpreted in a manner that deviates from international norms for foreign investment and protection of intellectual property rights. AIPLA requests clarification of these provisions.

AIPLA commends proposed Article 22, which would provide that the State will not expropriate the investment of foreign investors. AIPLA requests clarification of what circumstances would be “special circumstances” that would justify expropriation or requisition of foreign investors’ investment, and that expropriation or requisition be limited to “rare and extraordinary circumstances” to encourage investment in China. AIPLA further requests that “fair and reasonable compensation” should be clarified and standardized across different courts and jurisdictions.

AIPLA commends the proposed Article 23, proposed to support implementation of Article 21 of the Foreign Investment Law, and which would provide free transfer into or out of mainland China of capital contributions, profits, capital gains, income from asset disposal, intellectual property right royalties, compensation or indemnification obtained in accordance with law, liquidation income, and so forth. AIPLA respectfully requests clarification that license fees includes any and all intellectual property royalties or compensation including without limitation such royalties or compensation relating to the assignment of intellectual property. AIPLA further requests clarification that Article 23 of the Draft Implementing Regulations will extend to state owned banks, so that such free transfer is not restricted by such banks.

AIPLA commends proposed Article 24, which would establish measures to improve protection of intellectual property rights. AIPLA requests clarification and further details regarding IPR protection mechanisms provided by Article 24, and the conditions that would be required for the award of punitive damages. AIPLA respectfully requests that such improvements include improved measures to enforce trade secret protection including the establishment of a stand-alone trade secret law, and improvements to facilitate the introduction of evidence. AIPLA commends the express requirement of equal treatment of foreign investment and investors in the development of standards, and the protection of the intellectual property of foreign investors and foreign-invested enterprises.

AIPLA commends proposed Article 25, proposed to support implementation of Article 22 of the Foreign Investment Law, and which would forbid administrative organs and their staffs

from compelling or covertly compelling foreign investors and foreign-invested enterprises to transfer technology. AIPLA respectfully requests Article 25 to be clarified to the effect that Article 25 preempts any other law or regulation that would require technology transfer. AIPLA remains concerned that the progress in banning forced technology transfer in Article 22 of the Foreign Investment Law could be undermined by other laws, regulations, practices or informal means, and thus preemption of conflicting laws and regulations would facilitate the success of proposed Article 25 of the Implementing Regulation (and Article 22 of the Foreign Investment Law). AIPLA respectfully requests that a broad program be initiated to revise laws and regulations to prevent their being used to undermine the protection against forced tech transfer provided therein.

AIPLA commends proposed Article 26, which would restrict access of administrative agencies to commercial secrets to those required in the scope of the agency's performance of its duties, and to restrict staff access to those having a need to know in the performance of their duties. AIPLA further commends the proposed provisions in proposed Article 26 to improve protection of the commercial secrets including trade secrets of foreign investors and foreign-invested enterprises. AIPLA requests clarification whether and how government agencies or its employees would be liable or can be challenged when commercial secrets are lost or stolen when in the possession of the agencies. AIPLA respectfully request clarification of which "laws or regulations provide otherwise" than to protect leaks of commercial secrets, and respectfully suggest that the implementing regulations include a process and requirements that would protect commercial secrets within the context of the exception.

AIPLA commends proposed Articles 30-32, which would establish a Complaint Working Mechanism, potentially a useful mechanism to bring up issues or questions essential to the effectiveness and efficiency of the Foreign Investment Law. AIPLA respectfully suggests that the Implementing Regulation include more detailed rules for the Complaint Working Mechanism with timelines, and that NGO's such as AIPLA, Chambers of Commerce or other trade or professional organizations be allowed to initiate complaints or otherwise provide comments for resolution under the Complaint Working Mechanism. AIPLA further requests clarification regarding the nature of complaints that would be accepted under Articles 30-32, and whether there are any proposals for other complaint handling processes relating to the Foreign Investment Law.

AIPLA commends proposed Article 33, which would allow foreign-invested enterprises to make their own decisions regarding participating or leaving chambers of commerce, associations and other social organizations. AIPLA requests clarification regarding what laws or regulations would be an exception to the ability of foreign-invested enterprises to make their own decisions.

Proposed Article 34 provides that foreign investors must meet restrictive requirements, such as shareholder ratios and senior managers, provided in the Negative List. AIPLA commends recent revisions to the Negative list that reduce the number of restricted industries, and respectfully requests continued progress in reducing the size of the Negative List. AIPLA respectfully suggests that the Negative List can result in forcing tech transfer against the spirit of the prohibition against forced tech transfer in the Foreign Investment Law (see, e.g., Article

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22 of the Foreign Investment Law and Article 25 of this Draft Implementing Regulations). For example, restrictive requirements such as shareholder ratios and senior managers may require partnership with a local entity, which would then have access to such technology – thus forcing a foreign entity to transfer technology in order to participate in the Chinese economy. Thus the Negative List and proposed Article 34 would undermine the prohibition against forced technology transfer for all industries identified in the Negative List.

We appreciate the opportunity to provide these comments on Draft Implementing Regulations for the Foreign Investment Law, and we would be happy to answer any questions that our comments may raise.

Sincerely,



Barbara A. Fiocco

President

American Intellectual Property Law Association

Attachment: Table of AIPLA Comments to the Draft Implementing Regulations for the Foreign Investment Law

Table of AIPLA Comments to the Draft Implementing Regulations for the Foreign Investment Law

Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
第一章 总 则	
Chapter I: General Provisions	
第一条 为了保障《中华人民共和国外商投资法》 (以下简称外商投资法) 有效实施, 制定本条例。	
Article 1: These Regulations are drafted so as to ensure the effective implementation of the "Foreign Investment Law of the P.R.C." (Hereinafter simply the Foreign Investment Law).	
第二条 国家完善相关政策措施, 持续加大对外开放力度, 优化外商投资环境, 鼓励和积极促进外国投资者依法在中国境内投资。	
Article 2: The state is to improve relevant policy measures, continuously strengthen the strength of opening to the world, optimize the environment for foreign investment, and encourage and actively promote foreign investors' lawful investment in China.	
第三条 外国投资者依法可以单独或者与包括中国的自然人在内的其他投资者共同在中国境内投资。	
Article 3: Foreign investors may invest in China either independently or jointly with other investors including natural persons from China.	

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<p>第四条 外商投资法第二条第二款第三项所称在中国境内投资新建项目，是指外国投资者在中国境内对特定项目建设进行投资，但不设立外商投资企业，不取得中国境内企业的股份、股权、财产份额或者其他类似权益。</p>	
<p>Article 4: "invest in new projects in mainland China" as used in Article 2, paragraph 2, item (3) of the Foreign Investment Law, refers to those types of investment in which foreign investors making investments in the establishment of specified projects in mainland China, but not setting up foreign-invested enterprises, and not obtaining shares, stock rights, property shares or other such types of benefits in mainland Chinese enterprises.</p>	<p>AIPLA notes that the implementing regulations permit foreign investors to invest in only certain types of projects and expressly preclude foreign investors from setting up foreign-invested enterprises, and not obtaining shares, stock rights, property shares or other such types of benefits in mainland Chinese enterprises. These restrictions are not consistent with international norms of foreign investment. AIPLA encourages China to work toward greater transparency and permitting foreign investment on terms providing at least national treatment (<i>i.e.</i> wherein a foreign entity or investor is treated the same as a domestic entity or investor) and, preferably, terms that are consistent with international norms.</p>
<p>第五条 外商投资企业的登记注册，由国务院市场监督管理部门或者其授权的地方人民政府市场监督管理部门负责办理。</p>	
<p>Article 5: The State Council Department for Market Oversight and Management, or other authorized local government departments for market oversight and management, are responsible for handling the registration of foreign-invested enterprises.</p>	<p>AIPLA recognizes that the State Council Department for Market Oversight and Management is being assigned primary jurisdiction over administering these regulations and encourages that all other administrative authorities should be consistent with these regulations.</p>

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>第六条 外商投资准入负面清单由国务院投资主管部门会同国务院商务主管部门等有关部门提出，报国务院发布或者批准发布。</p>	
<p>国家根据进一步扩大对外开放的需要，适时调整外商投资准入负面清单。调整外商投资准入负面清单的程序，适用前款规定。</p>	
<p>Article 6: The State Council departments in charge of investment, together with the State Council departments in charge of commerce and other relevant departments, are to report the negative list for foreign investment to be published by the State Council, or to be approved and published by the State Council.</p>	<p>AIPLA requests clarification regarding the criteria used to designate an entity on the negative list, and that procedures be put in place to review the relevant information, including appeal rights.</p>
<p>As needed for further expanding openness to the world, the state is to adjust the negative list for investment at appropriate times. The procedures for adjusting the negative list for foreign investment apply the provisions of the preceding paragraph.</p>	
<p>第七条 国家依照法律法规以及所缔结或者参加的国际条约、协定，保护外国投资者在中国境内的投资、收益和其他合法权益。</p>	
<p>Article 7: The state is to follow relevant laws and regulations as well as international treaties and agreements that it has concluded or participates in, to protect the investments, earnings, and lawful rights and interests of foreign investors in mainland China.</p>	

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<p>第八条 国务院商务主管部门、投资主管部门以及其他有关部门应当依照职责分工，密切配合、相互协作，共同做好外商投资促进、保护和管理工 作。</p>	
<p>县级以上地方人民政府应当加强对外商投资促进、保护和管理工作的组织领导，支持、督促有关部门依照法律法规和职责分工开展外商投资促进、保护和管理工 作，及时协调、解决外商投资促进、保护和管理工作中的重大问题。</p>	
<p>Article 8: The State Council departments in charge of commerce and investment, as well as other relevant departments, shall follow their duties and divide labor, cooperating closely and mutually collaborating to jointly complete efforts to promote, protect, and manage foreign investment.</p>	
<p>Local people's governments at the county level or above shall strengthen organization and leadership of efforts on the promotion, protection, and management of foreign investment; supporting and urging relevant departments to follow laws and regulations, and their duties and division of labor, to carry out efforts on the promotion, protection, and management of foreign investment, and promptly adjust and resolve major problems in the efforts to promote, protect, and manage foreign investment.</p>	
<p>第二章 投资促进</p>	
<p>Chapter II: Investment Promotion</p>	

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>第九条 政府及其有关部门制定或者实施政府资金安排、土地供应、税费减免、资质许可、项目申报、职称评定、人力资源等方面支持企业发展的政策措施，应当依法平等对待包括外商投资企业在内的各类企业，不得制定或者实施歧视性政策措施。</p>	
<p>支持企业发展的政策措施应当依法公开。政策措施实施中涉及需由企业申请办理事项的，政府及其有关部门应当公开申请办理的流程、条件等，并公平、公正予以审核。</p>	
<p>Article 9: Governments and their relevant departments that are formulating or implementing policy measures in support of enterprise development in areas such as funding arrangements, land supply, tax relief, qualifications and permits, project declarations, title evaluation, human resources, and so forth, shall treat all types of enterprises equally in accordance with law, including foreign-invested enterprises, and must not draft or implement discriminatory policy measures.</p>	
<p>Policy measures in support of enterprise development shall be publicly disclosed in accordance with law. Where the implementation of policy measures involves matters for which enterprises must apply for handling, governments and their relevant departments shall disclose the matters such as the process and requirements for applications, and shall fairly and justly review them.</p>	

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<p>第十条 政府及其有关部门起草与外商投资有关的法律、法规、规章、规范性文件，应当根据实际情况，采取书面征求意见、召开座谈会、论证会等方式，听取外商投资企业以及外国商会等方面的意见；对相对集中或者涉及外商投资企业重大权利义务问题的意见，应当通过适当方式将意见采纳情况予以反馈。</p>	
<p>与外商投资有关的规范性文件应当通过政府公报、政府网站等依法及时予以公布，未经公布的不得作为实施外商投资管理的依据。</p>	
<p>Article 10: Governments and their relevant departments that are drafting laws, regulations, rules, and normative documents related to foreign investment shall, based on the actual conditions, employ methods such as soliciting opinions, convening symposiums and hearings, to hear the comments of foreign-invested enterprises, foreign chambers of commerce, and other parties; and shall use appropriate methods to give feedback on the acceptance of comments that are more concentrated or involve issues of foreign-invested enterprises major interests.</p>	
<p>Normative documents related to foreign investment shall be promptly published in accordance with law through means such as government bulletin, government websites, and so forth; and where they have not been published, they must not be a basis for management of foreign investment.</p>	

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<p>第十一条 各级人民政府应当按照政府主导、多方参与的原则，建立健全外商投资服务体系，提升外商投资服务水平。</p>	
<p>政府及其有关部门应当通过全国一体化在线政务服务平台，集中公布有关外商投资的法律、法规、规章、规范性文件、政策措施和投资项目信息等，并通过多种途径和方式加强宣传、解读，为外国投资者和外商投资企业提供咨询、指导等服务。</p>	
<p>Article 11: All levels of people's government shall follow the principle of government direction with participation from many sides, to establish and complete a foreign investment service system, increasing the level of services for foreign investment.</p>	<p>AIPLA requests clarification regarding the criteria used to establish the foreign investment service system.</p>
<p>Governments and their relevant departments shall go through the uniform online government service platform to concentrate publication of laws, regulations, rules, and normative documents, policy measures, investment program information, and so forth related to foreign investment, and use multiple channels and methods to strengthen publicity and explanation, providing foreign-invested enterprises with information, guidance, and other such services.</p>	
<p>第十二条 外商投资法第十三条所称特殊经济区域，是指为促进外商投资、扩大对外开放，经国家批准设立，对外商投资实行更加开放政策措施的特定区域。</p>	

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<p>国家在部分地区实行的外商投资试验性政策措施，经试验证明成熟的，根据实际情况在其他地区或者全国范围内推广。</p>	
<p>Article 12: Special economic regions" as used in Foreign Investment Law article 13 refers to specified regions providing more open policy measures for foreign investment that are established by state approval to promote foreign investment and expand openness to the world.</p>	<p>AIPLA requests clarification regarding in what regions experimental policy measures will be implemented, the criteria for establishing these regions, criteria for expansion of these regions, and criteria for expansion nation-wide.</p>
<p>The state is to implement experimental policy measures for foreign investment in some regions, and where the experiments demonstrate readiness, expand the scope to other regions or to the entire nation, in light of actual conditions.</p>	
<p>第十三条 国家根据国民经济和社会发展的需要，制定鼓励外商投资产业目录，鼓励和引导外国投资者、外商投资企业在特定的行业、领域、地区投资。鼓励外商投资产业目录由国务院投资主管部门会同国务院商务主管部门等有关部门以及有关地方人民政府制定，报国务院批准后发布施行。</p>	
<p>外国投资者、外商投资企业在前款规定的特定行业、领域、地区投资的，可以依照法律、行政法规或者国务院的规定，享受财政、税收、金融、用地等方面的优惠待遇。</p>	

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<p>Article 13: Based on the State Council departments in charge of investment, together with the State Council departments in charge of commerce and other relevant departments, as well as relevant local people's governments, are to draft the catalog of industries in which foreign investment is encouraged, and implement it after sending it for approval and publication by the State Council.</p>	
<p>Foreign investors and foreign-invested enterprises investing in the specified industries, fields, and regions as provided for in the preceding paragraph, may enjoy preferential treatment in accordance with the provisions of laws, administrative regulations, or the State Council, in areas such as public finance, tax, finance, and land use.</p>	
<p>第十四条 外国投资者以其在中国境内的投资收益在中国境内扩大投资的，依法享受相应的优惠待遇。</p>	
<p>Article 14: Where foreign investors expand their investments in mainland China with the earnings from their investments in mainland China, they are to lawfully enjoy corresponding benefits.</p>	<p>AIPLA requests clarification regarding the criteria for expansion and the corresponding benefits.</p>
<p>第十五条 外商投资企业依法平等参与国家标准、行业标准、地方标准和团体标准的制定工作，任何单位和个人不得违法限制。</p>	
<p>外商投资企业可以向国务院标准化行政主管部门提出强制性国家标准的立项建议，在标准起草、技术审查以及标准实施等过程中提出意见和建议，并可以按照规定承担相关工作。</p>	

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外商投资企业可以参与国家标准的外文翻译工作。	
Article 15: Foreign invested-enterprises are to participate equally in efforts to draft national standards, industry standards, local standards, and group standards in accordance with law, and must not be illegally restricted by any units or individuals.	AIPLA commends China’s willingness to permit foreign investors to participate in standards-setting activities. AIPLA requests clarification regarding whether these are consensus standards or Government-mandated standards.
Foreign invested-enterprises may submit recommendations for opening projects on compulsory state standards to the State Council’s administrative departments for standardization, and may submit comments and recommendations in processes such as drafting standards, technology reviews, as well as implementation of standards, and may undertake relevant work in accordance with provisions.	
Foreign-invested enterprises may participate in efforts to translate national standards into foreign languages.	
第十六条 除外商投资企业公开标准的技术要求高于强制性标准的相关技术要求外，政府有关部门不得对外商投资企业适用高于强制性标准的技术要求，不得强制或者变相强制外商投资企业适用推荐性标准或者团体标准。	

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<p>Article 16: Unless the technical requirements of foreign-invested enterprises' published standards are higher than those in the compulsory standards, relevant government departments must not apply technical standards higher than those in the technical standards for foreign-invested enterprises, and must not compel or covertly compel foreign-invested enterprises to use recommended standards or group standards.</p>	<p>AIPLA commends China's willingness to not impose technical standards higher than the foreign investors' standards. AIPLA requests clarification regarding whether these are consensus standards or Government-mandated standards. AIPLA requests clarification that foreign-invested enterprises would be permitted to meet their higher published standards voluntarily; otherwise AIPLA suggests deleting "Unless the technical requirements of foreign-invested enterprises' public published standards are higher than those in the compulsory standards," for consistency with Article 15 of the Foreign Investment Law.</p>
<p>第十七条 任何单位和个人不得采用任何方式，阻挠、限制外商投资企业自由进入本地区和本行业的政府采购市场。</p>	
<p>政府采购监督管理部门、采购人或者采购代理机构应当依照政府采购有关法律、行政法规的规定，保障外商投资企业通过公平竞争参与政府采购活动，不得在政府采购信息的公布、供应商条件的确定和资格审查、评审标准等方面，通过限定供应商的所有制形式、组织形式、股权结构或者投资者国别等不合理的条件，对外商投资企业实行差别待遇或者歧视待遇。</p>	

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<p>Article 17: Foreign-invested enterprises' free entry into the government procurement market in corresponding areas and industries must not be restricted or frustrated through any means by any unit or individual.</p>	<p>AIPLA requests clarification regarding the degree to which and standards applicable to the government procurement market. Many countries regulate certain government procurement, such as defense, while permitting open competition in commercial areas. Will China under these regulations allow open participation by foreign investors in non-defense markets?</p>
<p>Departments for the oversight and management of government procurement, procurers, and procurement agencies shall follow the laws and administrative regulations related to government procurement to ensure foreign-invested enterprises' participation in government procurement through fair competition, and there must not be unreasonable requirements restricting suppliers' form of ownership, organizational form, stockholder structure, or investors' nationality in published information on government procurement, determination of supplier requirements and inspection of credentials, assessment standards, and other such areas, so as to implement differential or discriminatory treatment for foreign-invested enterprises.</p>	
<p>第十八条 政府采购监督管理部门应当平等为内资企业和外商投资企业参与政府采购提供指导和服务。</p>	
<p>Article 18: Departments for the oversight and management of government procurement shall provide guidance and services for government procurement equally to domestic enterprises and foreign-invested enterprises.</p>	

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<p>第十九条 外商投资企业可以依法在中国境内或者中国境外通过公开发行股票、公司债券，公开或者非公开发行其他融资工具，向金融机构贷款以及其他方式进行融资。</p>	
<p>对外商投资企业依照前款规定进行融资，有关主管部门、金融机构应当按照与内资一致的条件和程序为其办理相关手续。</p>	
<p>外商投资企业可以按照国家有关规定借用外债。</p>	
<p>Article 19: Foreign-invested enterprises may lawfully conduct financing using finance tools, such as stock issuances, corporate bonds, and public or non-public offerings either within mainland China or outside it, or by borrowing from financial institutions, and other means.</p>	<p>AIPLA commends China’s willingness to permit foreign investors to use finance tools. AIPLA requests clarification whether foreign investors will receive national treatment (<i>i.e.</i> wherein a foreign entity or investor is treated the same as a domestic entity or investor) or be accorded the same benefits as applicable under international norms of finance.</p>
<p>Relevant regulatory departments and financial institutions shall follow requirements and procedures consistent with those for domestic investment to handle relevant formalities for foreign-invested enterprises conducting financing in accordance with the preceding paragraph.</p>	<p>Will foreign investors be accorded national treatment (<i>i.e.</i> wherein a foreign entity or investor is treated the same as a domestic entity or investor)?</p>
<p>Foreign-invested enterprises may follow relevant state provisions to borrow from abroad.</p>	<p>Will the relevant state provisions be consistent with international norms of international finance?</p>
<p>第二十条 县级以上地方人民政府根据本地区实际情况和促进外商投资的需要，可以在法定权限内制定有针对性的外商投资促进和便利化政策措施。</p>	

Table of AIPLA Comments to the Draft Implementing Regulations for the Foreign Investment Law

Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>县级以上地方人民政府制定外商投资促进和便利化政策措施, 应当符合法律、行政法规、地方性法规的规定, 以推动高质量发展为导向, 坚持有利于提高经济效益、社会效益、生态效益的原则。</p>	
<p>Article 20: As necessary to promote foreign investment, and on the basis of actual conditions, local people's governments at the county level or above may draft policy measures within the scope of their legally-prescribed authority to promote and facilitate foreign investment.</p>	<p>AIPLA requests clarification what measures are being implemented to prevent, reduce, or resolve potential conflicts between national regulatory authorities and local people's governments.</p>
<p>Local people's governments at the county level or above that are drafting policy measures to promote and facilitate foreign investment shall comply with the provisions of laws, administrative regulations, and local regulations, being oriented towards high-quality development, and upholding the principles of being advantageous to increasing economic efficacy, social efficacy, and ecological efficacy.</p>	
<p>第二十一条 国务院商务主管部门、投资主管部门会同国务院其他有关部门编制综合性的外商投资指引。国务院有关行业主管部门根据实际需要, 可以编制本行业、领域的外商投资指引。县级以上地方人民政府有关部门根据实际需要和本级政府确定的职责分工, 编制相应的外商投资指引。</p>	
<p>外商投资指引应当包括有关外商投资的法律法规、政策措施、数据信息、办事指南以及投资环境分析等内容。</p>	

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
外商投资指引应当在政府部门网站公布，并及时更新。	
<p>Article 21: The competent departments for commerce and investment under the State Council, together with other relevant departments of the state council, are to compile comprehensive foreign investment guidelines. The competent departments under the state council related to industries, may compile foreign investment guidelines for that industry or field as necessary. The relevant departments of local people's governments at the county level or above are to compile foreign investment guidelines based on actual needs and the duties and division of labor determined by that level of government.</p>	<p>AIPLA requests clarification whether foreign investors will be accorded national treatment (<i>i.e.</i> wherein a foreign entity or investor is treated the same as a domestic entity or investor). What criteria will be used in the comprehensive foreign investment guidelines?</p>
Foreign investment guidelines shall include content related to foreign investment such as laws and regulations, policy measures, data, handbooks for handling matters, and analysis of the investment atmosphere.	
Foreign investment guidelines shall be published on government websites, and promptly updated.	
第三章 投资保护	
Chapter III: Investment Protection	

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>第二十二條 国家对外国投资者的投资不实行征收。在特殊情况下，为了公共利益的需要对外国投资者的投资实行征收或者征用的具体情形应当有法律的明确规定，不得根据法律以外的依据对外国投资者的投资实行征收或者征用。依照法律规定对外国投资者的投资实行征收或者征用的，应当及时给予公平、合理的补偿。</p>	
<p>Article 22: The State will not expropriate the investment of foreign investors. The special circumstances where it is necessary for the public interest to expropriate or requisition foreign investors' investments shall be clear provided for in law, and foreign investors' investments must not be expropriated or requisitioned based on other reasons other than laws. When the State expropriates or requisitions the investment of foreign investors in accordance with the provisions of law, fair and reasonable compensation shall be promptly given.</p>	<p>AIPLA requests clarification of what "special circumstances" would justify expropriation or requisition of foreign investors' investment. AIPLA also requests clarification regarding under what circumstances are expropriation or requisition limited to "rare and extraordinary circumstances." Under what circumstances would expropriation be considered appropriate? AIPLA further requests that "fair and reasonable compensation" be clarified and standardized across different courts and jurisdictions in China.</p>

Table of AIPLA Comments to the Draft Implementing Regulations for the Foreign Investment Law

Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>第二十三条 外国投资者在中国境内的出资、利润、资本收益、资产处置所得、知识产权许可使用费、依法获得的补偿或者赔偿、清算所得等, 可以依法以人民币或者外汇自由汇入、汇出, 任何单位和个人不得违法对币种、数额以及汇入、汇出的频次等进行限制。</p>	
<p>外商投资企业外籍职工的工资收入和其他合法收入, 依照中国税收法律、行政法规纳税后, 可以依法自由汇出。</p>	
<p>Article 23: Foreign investors' capital contributions, profits, capital gains, income from asset disposal, intellectual property right royalties, compensation or indemnification obtained in accordance with law, liquidation income, and so forth, that are made or obtained in mainland China, may be freely transferred into or out of mainland China in RMB or foreign exchange according to law; and the currency, amounts, and frequency of import or export, must not be restricted by any unit or individual.</p>	<p>AIPLA commends the proposal for free transfer into or out of mainland China of capital contributions, profits, capital gains, income from asset disposal, intellectual property right royalties, compensation or indemnification obtained in accordance with law, liquidation income, and so forth. The regulations, however, limit these transfers to being in accordance with law. AIPLA requests clarification whether certain provisions of Chinese law would prevent or impair these transfers. AIPLA respectfully requests clarification that license fees includes that any and all intellectual property royalties or compensation, including without limitation such royalties or compensation relating to the assignment of intellectual property, may be freely transferred.</p> <p>AIPLA further requests clarification that Article 23 of the Draft Implementing Regulations will extend to State-owned banks, so that such free transfer is not restricted by such banks.</p>

Table of AIPLA Comments to the Draft Implementing Regulations for the Foreign Investment Law

Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
The salary and other lawful income of foreign national staff of foreign-invested enterprises may be freely remitted after taxes are paid in accordance with Chinese tax law and administrative regulations.	
<p>第二十四条 国家建立知识产权侵权惩罚性赔偿制度，推动建立知识产权快速协同保护机制，健全知识产权纠纷多元化解机制和知识产权维权援助机制，加大对外国投资者和外商投资企业知识产权的保护力度。</p>	
标准制定中应当依法平等保护外国投资者和外商投资企业的知识产权；涉及外国投资者和外商投资企业专利的，应当按照国家标准涉及专利的有关管理规定办理。	
<p>Article 24: The state is to establish a punitive compensation system for violations of intellectual property rights, promote the establishment of rapid collaborative protection mechanisms for intellectual property rights, complete diversified dispute resolution mechanisms for intellectual property rights disputes and mechanisms for assistance in protecting intellectual property rights, to increase the force of protections for foreign investors' and foreign-invested enterprises' intellectual property rights.</p>	<p>AIPLA commends the proposal to establish measures to improve protection of intellectual property rights. AIPLA requests that further consideration be given to improving compensatory remedies in favor of the rights holder, rather than relying exclusively on punitive measures. Improved compensatory remedies would bring Chinese law in closer conformity with international norms for intellectual property protection. AIPLA requests clarification and further details regarding IPR protection mechanisms provided by Article 24, and the conditions that would be required for the award of punitive damages. AIPLA respectfully requests that such improvements include improved measures to enforce trade secret protection including the establishment of a stand-alone trade secret law, and improvements to facilitate the introduction of evidence.</p>

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>The intellectual property rights of foreign investors and foreign-invested enterprises shall be equally protected in the drafting of standards in accordance with law, and where foreign investors' or foreign-invested enterprises' patents are involved, it shall be handled in accordance with the relevant management provisions of state standards involving patents.</p>	<p>AIPLA commends the express requirement of equal treatment of foreign investment and investors in the development of standards, and the protection of the intellectual property of foreign investors and foreign-invested enterprises. AIPLA requests clarification whether these provisions require extending national treatment to foreign investors (<i>i.e.</i> wherein a foreign entity or investor is treated the same as a domestic entity or investor) and, if not, to what extent do they extend to foreign investors. Similarly, AIPLA requests clarification whether equal treatment requires extending protections comparable to those provided by international norms of intellectual property protection, and if not to what extent do they extend to foreign investors.</p>
<p>第二十五条 行政机关及其工作人员不得利用办理登记注册、投资项目核准或者备案、行政许可以及实施监督检查、行政处罚、行政强制以及其他履行行政管理职责的行为，强制或者变相强制外国投资者、外商投资企业转让技术。</p>	
<p>Article 25: Administrative organs and their staffs must not use the performance of administrative management duties such as handling registration, approvals or filings for investment projects, and administrative permits, as well as implementing oversight inspections, administrative punishments, or administrative compulsion, to compel or covertly compel foreign investors or foreign-invested enterprises to transfer technology.</p>	<p>AIPLA commends the proposal to forbid administrative organs and their staffs from compelling or covertly compelling foreign investors and foreign-invested enterprises to transfer technology. AIPLA respectfully requests Article 25 to be clarified to the effect that Article 25 preempts any other law or regulation that would require technology transfer.</p>

Table of AIPLA Comments to the Draft Implementing Regulations for the Foreign Investment Law

Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>第二十六条 行政机关依法履行职责，确需外国投资者、外商投资企业提供涉及其商业秘密的材料、信息的，应当限定在履行职责所必需的范围内，并严格控制知悉范围，与履行职责无关的工作人员不得接触有关材料、信息。</p>	
<p>行政机关应当建立健全内部管理制度，采取有效措施保护履行职责过程中知悉的外国投资者、外商投资企业的商业秘密；依法需要公开履行职责信息的，不得含有商业秘密的内容；需要与其他行政机关共享信息的，除法律、行政法规另有规定外，应当对信息中含有的商业秘密进行相应处理，防止泄露。</p>	
<p>Article 26: Where administrative organs lawfully performing their duties truly need foreign investors or foreign-invested enterprises to provide materials or information related to their commercial secrets, it shall be restricted to the scope required for performance of the duties, and the scope of those informed is to be strictly controlled such that staff which is unrelated to performance of the duties must not have contact with the materials or information.</p>	<p>AIPLA commends the proposals to restrict access of administrative agencies to commercial secrets to those required in the scope of the agency ' s performance of its duties, and to restrict staff access to those having a need to know in the performance of their duties.</p>

Table of AIPLA Comments to the Draft Implementing Regulations for the Foreign Investment Law

Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>Administrative organs shall establish and complete internal management systems, employing effective measures to protect the commercial secrets of foreign investors and foreign-invested enterprises that are learned of during the lawful performance of duties; where the law requires disclosure of information from performance of duties, it must not contain commercial secrets; and where it is necessary to share information with other administrative organs, information relating to commercial secrets shall be processed to prevent leaks, except where laws or administrative regulations provide otherwise.</p>	<p>AIPLA commends proposals to improve protection of the commercial secrets including trade secrets of foreign investors and foreign-invested enterprises. AIPLA requests clarification whether and how government agencies or its employees would be liable or can be challenged when commercial secrets are lost or stolen when in the possession of the agencies.</p> <p>AIPLA respectfully request clarification of which “laws or regulations provide otherwise” than to protect leaks of commercial secrets, and respectfully suggest that the implementing regulations include a process and requirements that would protect commercial secrets within the context of the exception.</p>
<p>第二十七条 各级人民政府及其有关部门制定涉及外商投资的规范性文件，应当按照国务院的规定进行合法性审核和公平竞争审查。</p>	
<p>外国投资者、外商投资企业认为行政行为所依据的国务院部门和地方人民政府及其部门制定的规范性文件不合法，在依法对行政行为提起诉讼时，可以一并请求对该规范性文件进行审查。</p>	
<p>Article 27: All levels of people's government and their relevant departments drafting normative documents involving foreign investment shall conduct legality reviews and fair competition inspections in accordance with State Council provisions.</p>	

Table of AIPLA Comments to the Draft Implementing Regulations for the Foreign Investment Law

Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>Foreign investors and foreign-invested enterprises that feel that a normative document drafted by a state council department, local people's government, or its departments, and upon which an administrative act was based, is unlawful, they may request a review of the normative document when they raise a lawsuit over the administrative act.</p>	
<p>第二十八条 外商投资法第二十五条所称政策承诺，是指地方各级人民政府及其有关部门就外国投资者、外商投资企业在本地区投资可以享有的优惠措施、便利条件等作出的承诺。</p>	
<p>地方各级人民政府及其有关部门不得超出其法定权限向外国投资者、外商投资企业作出政策承诺。政策承诺应当采用书面形式，内容应当符合法律法规规定和国家有关政策。</p>	
<p>Article 28: "Policy commitments" as used in article 25 of the Foreign Investment Law refers to promises by all levels of local people's governments regarding the benefits, facilitation conditions, and so forth that foreign investors or foreign-invested enterprises may enjoy in those regions.</p>	
<p>Local people's governments of any level and their relevant departments must not exceed their legally-prescribed scope of authority to make policy commitments to foreign investors or foreign-invested enterprises. Policy commitments shall be made in writing, and the content shall comply with laws and regulations and relevant state policies.</p>	<p>AIPLA requests clarification regarding what mechanisms are being put in place to ensure that any local people's government regulations are consistent with the national regulations and laws.</p>

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>第二十九条 地方各级人民政府及其有关部门应当履行向外国投资者、外商投资企业依法作出的政策承诺以及依法订立的各类合同，非因国家利益、社会公共利益不得改变政策承诺、合同约定，不得以行政区划调整、政府换届、机构或者职能调整以及相关责任人更替等为由违约毁约。</p>	
<p>Article 29: Local people's governments at all levels and their relevant departments shall perform on policy commitments lawfully made to foreign investors and foreign-invested enterprises as well as on all kind of lawfully concluded contracts; policy commitments and contract agreements must not be modified, for reasons other than for the national interest or societal public interest, and agreements must not be breached or renounced for reasons such as adjustment of administrative regions, government transitions, adjustments to organizations, functions, or personnel responsibilities.</p>	<p>AIPLA requests clarification regarding what mechanisms are being put in place to ensure that any local people's government regulations are consistent with the national regulations and laws.</p>
<p>第三十条 国务院商务主管部门会同国务院有关部门建立外商投资企业投诉工作机制（以下称投诉工作机制），及时处理外商投资企业或者其投资者反映的在全国有重大影响的问题以及其他重大、复杂的问题，协调完善有关外商投资的政策措施，对全国的外商投资企业投诉工作进行指导和监督。</p>	

Table of AIPLA Comments to the Draft Implementing Regulations for the Foreign Investment Law

Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>县级以上地方人民政府根据实际需要，组织有关部门建立投诉工作机制，及时处理本地区外商投资企业或者其投资者反映的问题，协调完善本地区制定的有关外商投资的政策措施。县级以上地方人民政府应当确定投诉工作机制的牵头部门或者机构。</p>	
<p>国务院商务主管部门、地方人民政府确定的牵头部门或者机构承担投诉工作机制日常工作。</p>	

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>Article 30: The competent departments for commerce under the State Council, together with relevant State Council departments, are to establish mechanisms for work on complaints from foreign-invested enterprises (hereinafter simple 'complaint work mechanisms), promptly addressing issues with a major impact in the nation as well as other major and complicated issues on which feedback is given by foreign-invested enterprises or their investors, coordinate improvements of policy measures related to foreign investment, and conduct oversight of the entire nation's efforts on complaints form foreign-invested enterprises.</p>	<p>AIPLA commends the Chinese Ministry of Justice for establishing a Complaint Working Mechanism in the Implementing Regulations, which is hoped to be a useful mechanism to bring up issues or questions essential to the effectiveness and efficiency of the Foreign Investment Law. The proposed Articles 30-32 establishing the Complaint Working Mechanism do not provide detailed rules for how this Complaint Working Mechanism is intended to work, no timelines are provided, and no procedures are proposed for a challenge or appeal to a court. Foreign-invested companies may be reluctant or fear retribution. AIPLA respectfully suggests that the Implementing Regulation include more detailed rules for the Complaint Working Mechanism with timelines, and that Non-Government Organizations such as AIPLA, Chambers of Commerce or other trade or professional organizations be allowed to initiate complaints or otherwise provide comments for resolution under the Complaint Working Mechanism. AIPLA further requests clarification regarding the nature of complaints that would be accepted under Articles 30-32, and whether any there are proposals for other complaint handling processes relating to the Foreign Investment Law.</p>
<p>As needed based on actual conditions, local people's governments at the county level or above are to organize relevant departments to establish complaint work mechanisms, promptly addressing issues on which feedback is given by foreign-invested enterprises or their investors in that region, and coordinating improvement of policy measures on foreign investment drafted by that region. Local people's governments at the county level or above shall designate the department or body that is to take the lead in complaint work mechanisms.</p>	<p>AIPLA requests clarification regarding what mechanisms are being put in place to ensure that any local people's government regulations are consistent with the national regulations and laws.</p>

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>The departments taking the lead in complain work mechanisms, which are designated by the competent departments for commerce under the State Council and local people's governments, are to undertake routine work of complaints work mechanisms.</p>	
<p>第三十一条 投诉工作机制应当按照高效、便利、畅通的原则, 完善工作规则、投诉渠道, 并制定投诉指南。投诉工作机制的组成和牵头单位、主要职责、工作规则、投诉渠道和投诉指南, 应当向社会公布。</p>	
<p>投诉工作机制协调解决外商投资企业或者其投资者反映的行政机关及其工作人员的行政行为侵犯其合法权益的, 可以向有关行政机关及其工作人员了解情况, 有关行政机关及其工作人员应当予以配合。</p>	
<p>对外商投资企业或者其投资者通过投诉工作机制反映或者申请协调解决有关问题, 任何单位和个人不得压制或者打击报复。</p>	
<p>Article 31: Complaint work mechanisms shall follow the principles of high efficiency, convenience, and ease, improving work rules and complaint channels, and drafting guides for complaints. The component and leading units for complaint work mechanisms, their primary duties, work rules, channels for complaints, and complaint guides shall be made public.</p>	

Table of AIPLA Comments to the Draft Implementing Regulations for the Foreign Investment Law

Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>Where the complaint work mechanisms coordinate resolution of foreign-invested enterprises or their investors' reports of violations of their lawful rights and interests by the administrative actions of administrative organs or their staffs, they may learn about the situation from the administrative organs or their staffs and the relevant administrative organs and their staffs shall cooperate.</p>	
<p>Where foreign-invested enterprises or their investors report or relevant issues through the complaint work mechanisms or apply for coordination of a resolution, they must not be suppressed or retaliated against by any unit or individual.</p>	
<p>第三十二条 投诉工作机制应当分析、总结外商投资企业或者其投资者反映的具有典型性、普遍性的问题，及时向本级人民政府提出加强外商投资保护、改善外商投资环境的建议。</p>	
<p>Article 32: The complaint work mechanisms shall analyze and summarize issues reported by foreign-invested enterprises or their investors which are typical or common, and promptly submit suggestions to the local people's government at that level on strengthening protections for foreign investments and improving the atmosphere for foreign investment.</p>	<p>AIPLA respectfully requests that the Complaint Work Mechanism also analyze and summarize issues reported by Chambers of Commerce and other organizations, such as AIPLA.</p>
<p>第三十三条 除法律、法规另有规定外，外商投资企业有权自主决定参加或者退出商会、协会等社会组织，任何单位和个人不得干预。</p>	

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>商会、协会依照法律法规和章程的规定，加强行业自律，及时反映行业诉求，为会员提供信息咨询、宣传培训、市场拓展、经贸交流、权益保护、纠纷处理等方面的服务。</p>	
<p>国家保障商会、协会依照法律法规和章程的规定开展相关活动。</p>	
<p>Article 33: Except as otherwise provided by laws or regulations, foreign-invested enterprises have the right to make their own decisions on participating in or leaving chambers of commerce, associations, and other social organizations, and there must be no interference by any units or individuals.</p>	<p>AIPLA commends the proposal to allow foreign-invested enterprises to make their own decisions regarding participating or leaving chambers of commerce, associations and other social organizations. AIPLA requests clarification regarding what laws or regulations would be an exception to the ability of foreign-invested enterprises to make their own decisions.</p>
<p>In accordance with laws, regulations, and their charters, chambers of commerce and associations are to strengthen industry self-discipline, promptly giving feedback on industry demands, and providing members with information services, publicity and training, market expansion, exchanges on economics and trade, rights protection, dispute resolution, and other services.</p>	
<p>The state is to safeguard chambers of commerce and associations' carrying out of relevant activities in accordance with the provisions of laws, regulations, and charters.</p>	
<p>第四章 投资管理 Chapter IV: Investment Management</p>	

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>第三十四条 外商投资准入负面清单规定限制投资的领域，外国投资者进行投资应当符合负面清单规定的股比、高管人员等方面的限制性要求。</p>	
<p>外商投资准入负面清单对相关领域外国投资者的持股比例作出限制性规定，外国投资者以设立合伙企业方式在该领域进行投资的，合伙协议约定的外国投资者的表决权比例应当符合负面清单关于持股比例的限制性规定。</p>	
<p>Article 34: For fields in which the negative list for foreign investment provides that investment is restricted, foreign investors making investments shall meet the restrictive requirements, such as for shareholder ratios and senior managers, that are provided for in the negative list.</p>	<p>AIPLA commends recent revisions to the Negative list that reduce the number of restricted industries, and respectfully requests continue progress in reducing the size of the Negative List. AIPLA respectfully suggests that the Negative List can result in forcing tech transfer against the spirit of the prohibition against forced tech transfer in the Foreign Investment Law (see, e.g., Article 22 of the Foreign Investment Law and Article 25 of this Draft Implementing Regulations). For example, restrictive requirements such as shareholder ratios and senior managers may require partnership with a local entity, which would then have access to such technology.</p>
<p>Where the foreign investment negative list makes restrictive provisions on stock ownership by foreign investors in field, and the foreign investors make investments in that field by establishing a partnership, the ration of foreign investors' voting rights in the partnership agreement should comply with the restrictive provisions of the negative list on the ration of shareholders.</p>	<p>AIPLA requests clarification what criteria or standard will be used to list a foreign investor on the negative list and what restrictions negative listing will entail, as well as whether there is any process to appeal from such listing or treatment.</p>

Table of AIPLA Comments to the Draft Implementing Regulations for the Foreign Investment Law

Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>第三十五条 中国的自然人、法人或者其他组织在中国境外设立的全资企业在中国境内投资的，经国务院有关主管部门审核并报国务院批准，可以不受外商投资准入负面清单规定的有关准入特别管理措施的限制。</p>	
<p>前款所称法人或者其他组织，不包括外商投资企业。</p>	
<p>Article 35: Where wholly owned enterprises established outside of mainland China by Chinese natural persons, legal persons, or other organizations make investments inside mainland China, upon review by the competent departments under the State Council and approval by the State Council, they may be excused from the restrictions of the special management measures of the foreign investment negative list.</p>	
<p>"Legal persons or other organizations" as used in the preceding paragraph, does not include foreign-invested enterprises.</p>	
<p>第三十六条 外商投资需要办理投资项目核准、备案的，按照国务院以及国务院投资主管部门的有关规定执行。</p>	
<p>Article 36: Where the approval or recording of investment projects need to be processed for foreign investment, it is to be implemented in accordance with the relevant provisions of the State Council and the departments in charge of investment under the State Council.</p>	<p>AIPLA requests clarification what criteria or standards will be used for the approval or recording of investment projects.</p>

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>第三十七条 外国投资者在依法需要取得许可的行业、领域进行投资的,除法律、行政法规另有规定外,负责实施许可的有关主管部门应当按照与内资一致的条件和程序审核外国投资者的许可申请,不得对外国投资者增加许可条件或者适用更严格的许可条件,不得增加审核环节、审核材料以及提出其他额外要求。</p>	
<p>有关主管部门应当通过多种方式,优化审批服务,提高审批效率。对符合相关条件和要求的许可事项,可以按照有关规定采取告知承诺的方式办理。</p>	
<p>Article 37: Where foreign investors invest in industries or fields that require permits in accordance with law, except where laws or administrative regulations otherwise provide, the regulatory departments responsible for carrying out permitting shall review foreign investors' applications for permits according to the same requirements and procedures as for domestic capital, must not add permit conditions or apply stricter permit requirements for foreign investors, and must not add additional steps in review, materials for review, or require other extra requirements.</p>	
<p>Relevant regulatory departments shall use diverse methods to optimize approval services and increase the efficiency of approvals. Permit matters that meet all conditions and requirements may be handled through means such as information pledges in accordance with relevant provisions.</p>	

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>第三十八条 市场监督管理部门在依法办理外商投资企业登记注册时，审核其是否符合外商投资准入负面清单规定的股比、高管人员等方面的限制性要求；有关主管部门依法办理相关手续时已经审核的，市场监督管理部门不再重复审核。</p>	
<p>Article 38: When departments for market oversight and management handle registration of foreign-invested enterprises in accordance with law, they are to review whether they comply with the foreign investment negative list's restrictive requirements for stock ratios, senior management and so forth; but where other relevant regulatory departments have already reviewed them while handling relevant formalities, the market oversight and management departments do are not to repeat review.</p>	<p>AIPLA requests clarification what criteria or standards will be used to list a foreign investor on the negative list and what restrictions negative listing will entail, as well as whether there is any process to appeal from such listing or treatment.</p>
<p>第三十九条 外国投资者或者外商投资企业应当通过企业登记系统以及企业信用信息公示系统向商务主管部门报送投资信息。</p>	
<p>国务院商务主管部门应当与国务院市场监督管理部门做好相关业务系统的对接和工作衔接，明确外商投资信息报告的具体流程，加强对投资信息报送的指导。</p>	
<p>Article 39: Foreign investors or foreign-invested enterprises shall submit investment information to the competent departments for commerce through the enterprise registration system and the enterprise credit information disclosure system.</p>	<p>AIPLA requests clarification whether the regulations will include provisions protecting the confidentiality of information submitted by a foreign investor, specifically, to preserve the confidentiality of the information as well as to prevent it being used for other purposes.</p>

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>The State Council departments for commerce and market oversight and management are to complete connections and work linkages between related business systems, clarifying the specific processes for reporting foreign investment information, and strengthening guidance on the sending of foreign investment information.</p>	
<p>第四十条 外商投资信息报告的内容、范围以及报告的频次，由国务院商务主管部门会同国务院市场监督管理部门等有关部门按照确有必要、尽可能减轻外国投资者和外商投资企业负担的原则确定。确定外商投资信息报告的内容、范围以及报告的频次，应当充分听取外国投资者、外商投资企业以及其他有关方面的意见。</p>	
<p>除法律、行政法规另有规定外，有关部门在履行职责过程中获取的外商投资信息，应当及时与商务主管部门共享。</p>	
<p>Article 40: The content, scope and frequency of foreign investment information reports, is to be determined by the State Council departments of commerce together with the State Council departments for market oversight and management, and other relevant departments, in accordance with actual needs and the principle of reducing the burden on foreign investors and foreign-invested enterprises as much as possible. In determining the content, scope and frequency of foreign investment information reports, the opinions of foreign investors, foreign-invested enterprises, and other relevant parties shall be fully heard.</p>	<p>AIPLA requests clarification what types of information will be required of foreign investors for these reports, including whether the information submitted will be maintained in confidence and not be used for any other purpose.</p>

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
Except as otherwise provided by laws or administrative regulations, foreign investment information obtained by the relevant departments in the course of performing their duties shall be promptly shared with the departments for commerce.	
第四十一条 外国投资者或者外商投资企业报送的投资信息应当真实、准确、完整。	
商务主管部门应当建立健全外商投资信息的保存、管理制度。	
Article 41: Investment information sent by foreign investors and foreign-invested enterprises shall be truthful, accurate, and complete.	
The departments in charge of commerce shall establish and complete systems for the retention and management of foreign investment information.	
第五章 附 则	
Chapter V: Supplemental Provisions	
第四十二条 外商投资法施行前依照《中华人民共和国中外合资经营企业法》、《中华人民共和国外资企业法》、《中华人民共和国中外合作经营企业法》设立的外商投资企业（以下简称现有外商投资企业），其组织形式、组织机构等与《中华人民共和国公司法》、《中华人民共和国合伙企业法》等法律的强制性规定不一致的，国家鼓励其在外商投资法施行后 5 年内依法办理变更手续。	

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>属于前款规定情形的现有外商投资企业，在外商投资法施行后 5 年内未依法办理变更手续的，应当自 2025 年 1 月 1 日起 6 个月内依法办理变更手续；逾期未依法办理变更手续的，企业登记机关不予办理该企业的其他登记事项，并可以将相关情形在企业信息公示系统中公示。</p>	
<p>现有外商投资企业办理组织形式、组织机构等变更手续的具体办法，由国务院市场监督管理部门会同国务院有关部门制定。国务院市场监督管理部门应当编制并对外公布办事指南，明确办理变更手续的具体流程等。</p>	
<p>Article 42: For foreign-invested enterprises that were established in accordance with the "P.R.C. Chinese-Foreign Equity Joint Ventures Law," the "P.R.C. Wholly Foreign-Owned Enterprises Law," or the "P.R.C. Chinese-Foreign Contractual Joint Ventures Law" before Foreign Investment Law took effect (hereinafter simply 'pre-existing foreign-invested enterprises'), where their organization form or structure is inconsistent with those required in the "PR.C. Company Law" and the "P.R.C. Partnership Enterprise Law" the state encourages them to lawfully modify their organizational forms within five years following the implementation of the Foreign Investment Law.</p>	

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>Where pre-existing foreign-invested enterprises as provided for in the preceding paragraph, have not lawfully handled modification procedures within 5 years of the Foreign Investment Law being implemented, they shall handle modification formalities within 6 months of January 1, 2025; and where modification formalities are not completed within this time, the organs for enterprise registration are not to handle other registration matters for that enterprise and may announce the relevant circumstance on the enterprise information announcement system.</p>	
<p>Specific measures for pre-existing foreign-invested enterprises handling formalities for modification of organizational form and organizational bodies are to be drafted by the State Council departments for market oversight and management together with relevant State Council departments. The State Council department for market oversight and management shall compile and publish guidebooks for handling matters, clarifying the specific process for handling modification procedures and so forth.</p>	
<p>第四十三条 外商投资法施行后, 现有外商投资企业合营、合作各方在合同中约定的收益分配方法、剩余财产分配方法等, 在合营、合作期限内可以继续按照约定办理。</p>	
<p>Article 43: After the Foreign Investment Law takes effect, the joint operators and cooperators in pre-existing foreign-invested enterprises may continue to follow the agreed upon terms in their contract on methods for profit allocation, distribution of surplus property, etc., during the period of cooperation.</p>	

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>第四十四条 香港特别行政区、澳门特别行政区投资者在内地投资，参照外商投资法和本条例执行，法律、行政法规或者国务院另有规定的除外。</p>	
<p>台湾地区投资者在大陆投资，适用《中华人民共和国台湾同胞投资保护法》和《中华人民共和国台湾同胞投资保护法实施细则》（以下简称台湾同胞保护法及其实施细则）的规定；台湾同胞保护法及其实施细则未规定的事项，参照外商投资法和本条例执行。</p>	
<p>华侨在中国境内投资，参照外商投资法和本条例执行。</p>	
<p>Article 44: For investors from the Hong Kong and Macao Special Autonomous Region investing in the mainland, refer to the Foreign Investment Law and these Regulations, except where laws, administrative regulations, or the State Council provide otherwise.</p>	

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Implementation Regulations of the Foreign Investment Law (draft for public opinion)	AIPLA Comments
<p>For investors from the Taiwan region making investments in the mainland, apply the provisions of the "P.R.C. Law on the Protection of Investments by Taiwan Compatriots" and the "Implementation Regulations for the P.R.C. Law on the Protection of Investments by Taiwan Compatriots" (Hereinafter "P.R.C. Law on the Protection of Investments by Taiwan Compatriots and its implementation regulations"); and where the P.R.C. Law on the Protection of Investments by Taiwan Compatriots and its implementation regulations do not have provisions, implementation is to be with reference to the Foreign Investment Law and these Regulations.</p>	
<p>Investment by overseas Chinese in mainland China is implemented with reference to the Foreign Investment Law and these Regulations.</p>	
<p>第四十五条 本条例自 2020 年 1 月 1 日起施行。《中华人民共和国中外合资经营企业法实施条例》、《中外合资经营企业合营期限暂行规定》、《中华人民共和国外资企业法实施细则》、《中华人民共和国中外合作经营企业法实施细则》同时废止。</p>	
<p>Article 45: These Regulations are to take effect on January 1, 2020. The "Implementation Regulations for the P.R.C. Chinese-Foreign Equity Joint Ventures Law," the "Temporary Provisions Periods for Wholly Foreign-Owned Enterprises", the "Implementation Regulations for the P.R.C. Chinese-Foreign Contractual Joint Ventures Law" are revoked at the same time.</p>	