

China: Comparison Chart re JV Law and Foreign Investment Law (Draft for Comments)

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On January 19, 2015, MOFCOM released a draft for comment of PRC Foreign Investment Law (the “FIL”). The deadline for comments is February 17, 2015. The purpose of the FIL is to replace the present-day laws for foreign investment, i.e. PRC Sino-foreign Equity Joint Venture Law, PRC Sino-foreign Contractual Joint Venture Law and PRC Foreign Invested Enterprises Law (collectively, the “JV Law”). The major difference between the JV Law and FIL are as follows.

	JV Law	FIL
Foreign Investors & Foreign Investment	The JV Law classifies foreign invested companies in three categories based on their company forms, i.e. sino-foreign equity joint venture, sino-foreign contractual joint venture and wholly owned foreign enterprise, and regulates the foreign invested companies accordingly.	The FIL will manage and promote foreign investment based on the current status and investment behavior of the foreign investors. The FIE defines “Foreign Investors” in accordance with their registration places and “Substantial Control” standard. The domestic companies which are controlled by Chinese investors will be regarded as foreign investors. (See Art. 11) “Foreign Investment” will include green land investment, M&A, medium and long term financing, franchise to explore natural resources and operate infrastructures, real estate investment and holding domestic companies through contracts (the “VIE”) and trust. (See Art. 15)
Market Entrance	The NDRC and MOFCOM published the Catalogue of Industries for Guiding Foreign	The FIL will cancel the system to examine and approve foreign investment case by case. The

	Investment, which outlines the encouraged, restrictive and prohibited industries for foreign investment. Foreign investors are required to obtain government approvals to establish companies or invest in certain projects in China, even though the relevant industries are encouraged. (See Art. 3 in PRC Sino-foreign Equity Joint Venture Law, also see Art. 5 in PRC Sino-foreign Contractual Joint Venture Law and Art. 6 in PRC Foreign Invested Enterprises Law)	new market entrance system for foreign investment is “Pre-entrance National Treatment” and “Negative Foreign Investment Catalogue”. The State Council will publish a new catalogue which contains prohibited and restrictive industries for foreign investment (the “New Catalogue”). The foreign investment authorities will merely implement market entrance permission in the industries that are listed in the New Catalogue. The permission will be based on current status and investment behaviors of foreign investors, rather than investment contracts or articles of association. Most foreign investment will not need to obtain government approvals for market entrance. (See Chapter 3)
National Security Review	None.	The FIL includes a chapter about national security review. Such national security review can be applied by the foreign investors or commenced by the authority ex officio. (See Art. 50 and 55) The foreign investors shall not institute any administrative reconsideration or litigation based on the decision of such national security review. (See Art. 73)
Information Report	None.	Foreign investors shall submit information report to government authorities to disclose their investment and operation in China. The foreign investors shall submit information reports prior to the investment or within 30 days from the date of investment, no matter whether they need market entrance permission or not. (See Art. 85) There are three forms of such reports: foreign investment item report, foreign investment item modification report and foreign investment item periodic report.

VIE Structure	None.	The FIE confirms that VIE is one form of foreign investment. The government authorities are still discussing how to deal with the VIEs that exist before this FIL, and to which extent the business scope and operation of such VIEs shall be acknowledged. (See Art. 158)
Complaint Coordination Mechanism	None.	The peoples' governments above county level shall establish complaint coordination departments for foreign investors to handle their complaints against relevant administrative authorities. (See Art. 119 and 123) Such departments may provide suggestions to the involved administrative authorities, and the administrative authorities shall reply their solutions in time. (See Art. 120 and 122)
Credit Archive	None.	The competent department of foreign investment under State Council shall establish a credit archive system to disclose information related to registrations and business operation of foreign investors. The public may request credit information of foreign investors and foreign invested enterprises. (See Art. 141 and 142)

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National Law Review, Volume V, Number 42

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