The American Chamber of Commerce in China, BSA | The Software Alliance, the US-China Business Council, the U.S. Chamber of Commerce and the United States Information Technology Office
Joint Comments to the Ministry of Industry and Information Technology on the draft Notice on Regulating Business Behaviors in the Cloud Service Market

General Comments:

The American Chamber of Commerce in China (AmCham China), BSA | The Software Alliance (BSA), the US-China Business Council, the U.S. Chamber of Commerce (the Chamber), and the United States Information and Technology Office appreciate the opportunity to submit comments to the Ministry of Industry and Information Technology (MIIT) on the draft *Notice on Regulating Business Behaviors in the Cloud Service Market* (the draft Notice). We recognize and support the government's interest in clarifying the rules for cloud service operators, and appreciate the opportunity to provide comments.

Our member companies represent a wide range of industries, including companies that develop, provide, and use cloud computing products and services. These companies enjoy deep investment ties with China, and contribute significantly to its economic growth, development of human capital, and innovative advancement.

After reviewing the draft Notice, our organizations want to express our deep level of concern. The draft Notice increases government interference into the operations of cloud services operators without explaining why these restrictions are necessary. In combination with the 2015 Telecom Services Catalogue, the draft Notice reinforces and expands restrictions on foreign cloud service operators, adversely impacting their ability not only to compete on equal terms with Chinese companies in the China market, but also to partner on reasonable terms with Chinese companies. Moreover, none, or at least very few, of these restrictions apply to Chinese cloud service operators as they invest abroad, including in the United States or other major western markets. For instance, Chinese firms are currently allowed to establish commercial operations in the United States without the need of either a license or foreign partner. Ultimately, these restrictions will inhibit the development of China's cloud market and conflict with China's own economic reform goals—including greater reform and opening—expressed at the Third Plenum.

The draft Notice will severely impact foreign-invested enterprises' current operations in the China cloud market. Because foreign cloud service operators are prohibited from operating as wholly foreign-owned enterprises in China, companies have operated legally through partnerships. The

draft Notice aims to restrict several basic business matters, including the use of trademarks and brands, signing of contracts, and sharing of data, within these partnerships. The draft Notice does not provide any justification for why this interference in the commercial market is necessary. With market access already so limited, these added restrictions are extremely concerning. Partnerships between Chinese and foreign companies are a primary vehicle for technological adaptation and advancement. If the draft Notice is adopted, these partnerships may become unworkable. Consequently, investment and information sharing will decline, thereby inhibiting innovation and growth for Chinese businesses that rely on cloud computing services.

Moreover, the draft Notice contains unclear terminology and has a vague scope of application. For instance, the definition of "cloud service operators" is unclear, raising concern that the proposed draft Notice may extend beyond commercial cloud service operators to impact the many organizations in China that employ their own internal cloud services (i.e. private or enterprise cloud). We request that private cloud computing networks and the provision of cloud services by a group company member to other members of the same group be expressly excluded from the requirements of the draft Notice. The draft Notice also does not explicitly distinguish between various cloud computing platforms, including infrastructure as a service (IaaS), platform as a service (PaaS), and software as a service (SaaS). Because the 2015 Telecommunications Services Catalogue does not explicitly state that an Internet Resource Collaboration Service (IRCS) license or any other licenses are necessary for SaaS, our organizations respectfully request that MIIT clarify that SaaS is not governed by this draft Notice, in order to ensure uniform regulatory treatment.

Our organizations have reviewed all the provisions of the draft Notice and provide some specific recommendations below.

Specific Comments:

Market Access Concerns for Cloud Service Operators

Article 1 defines cloud computing as governed by an IDC - IRCS license under the 2015 Telecommunication Services Catalogue. We recommend that MIIT re-evaluate China's regulatory approach to cloud computing with reference to how these services are treated in international markets, which generally categorize cloud computing as a computer service rather than a telecommunications service.

Under China's World Trade Organization (WTO) services commitments, China must permit foreign suppliers of relevant computer services (e.g., data processing services) to supply such services both through wholly foreign-owned entities within China and on a cross-border basis, without imposing capital restrictions or joint venture (JV) or partnership requirements.[1] In addition, China may not impose licensing procedures and conditions that act as barriers to market access or are more trade restrictive than necessary.[2] Categorizing cloud computing as a computer service would help ensure

[1] The People's Republic of China, Schedule of Specific Commitments, GATS/SC/135, at 9-10 (14 February 2002) (Schedule).

[2] Report of the Working Party on the Accession of China, WT/ACC/CHN/49 (1 October 2001) at para. 308. In addition, Article VI.5 of the GATS contains a similar requirement with respect to specific commitments under the GATS. This Article states that with respect to such commitments, WTO Members must not use licensing procedures that nullify or impair those commitments in a manner that (i) would themselves constitute a restriction on the supply of the relevant services; and (ii) could not have reasonably been expected at the time the commitments were made.

that foreign companies are treated fairly by eliminating licensing requirements which otherwise would risk creating inconsistencies with these WTO rules.

However, particularly if China continues to define cloud computing services as a value-added telecommunication service (VATS), our organizations respectfully request Chinese regulators to ensure non-discriminatory treatment of foreign and domestic companies. While Article 3 sets licensing requirements for foreign cloud service operators, it is unclear how readily the licenses that Article 3 requires will be issued to foreign-invested JVs or partnerships. We respectfully request China to adhere to its commitments under the WTO [3] and ensure that its licensing requirements are administered in a reasonable, objective and impartial manner. We also request that licensing approvals do not constitute a restriction on the supply of services.[4]

While Article 4 requires Chinese local suppliers to hold the requisite telecommunications operating licenses, our organizations respectfully request confirmation that the foreign investor in a JV/partnership cloud services agreement may retain ownership of software and other proprietary technology licensed to the JV or partner.

Article 4 also prohibits companies that enter into technical partnerships with cloud service operators from directly signing contracts with end-users or solely using their own trademarks or brands in supplying services to users. However, in a market-oriented economy, each party enters into a partnership based on commercial considerations. These commercial decisions include leveraging the technology, trademarks, and branding offered by both partners. Our organizations are concerned that the restrictions under Article 4 of this draft Notice limit partnerships to "technical cooperation," without allowing for flexibility regarding contracts, trademarks, or services, thereby impairing commercial decision-making. With restraints on how partnerships are structured, we are concerned that this provision will restrict the introduction of innovative global cloud services to the Chinese market, limit Chinese consumer choices, and ultimately constrain the development of China's digital economy.

Article 4 also requires Chinese cloud service operators to report their partnerships with foreign investors to MIIT (or the local counterpart). We request MIIT to provide a rationale for the notification requirement and further clarification on the level of detail to be included in these written reports or notifications. Our organizations also respectfully request that these requirements not include the disclosure or otherwise weaken the protection of proprietary technology from each party involved in the partnership.

Article 10.3 of the draft Notice requires cloud service operators to create duplicate copies of all key equipment, business systems, and data. Given that data are dynamically generated, managed, and removed, such a requirement will result in prohibitively expensive business operating costs, making cloud service businesses operationally impractical in China.

Impact on Cloud Users

Both Chinese and foreign companies that use international cloud services have reasonable expectations for global deployment of these services, both within China and in other markets.

[3] The People's Republic of China, Schedule of Specific Commitments, GATS/SC/135, at 9-10 (14 February 2002) (Schedule).
[4] WTO General Agreement on Trade in Services (GATS), Art. VI.

Cloud-based software enables the use of client relationship management (CRM) tools, data hosting, platforms for research and development (R&D), and the sharing of business documents internally and with external clients across borders in a unified manner. Such unified cloud systems allow for efficient communication and utilization of the technology between China-based and international teams, which in turn helps to improve innovation in China.

The licensing and partnership restrictions in Articles 3 and 4 create challenges to the use of global cloud solutions in China. These restrictions may force cloud users to create and utilize different cloud models for their global and their China based teams. By creating parallel cloud structures for China and the rest of the world, multinational (including Chinese) companies would face difficulties in applying innovative global cloud-based products to the China market. R&D centers for foreign companies are likely to move elsewhere if they cannot access the tools that power these centers. Chinese companies wanting to innovate will also not have access to the best software tools on the market. Our organizations are concerned that these challenges will severely impact innovation for both foreign and Chinese companies.

Importantly, multinational companies often use globally unified systems to hedge against security risks by monitoring local threats around the world from a central global location. Fractured networks reduce the response time by security teams when maintenance, technical, or criminal infiltration issues arise. Our organizations are concerned that this draft Notice would lead to network fracturing by forcing multinational cloud user companies to create independent local security monitoring teams that operate separately from their global (non-China) headquarters. This set up creates obstacles for deploying effective global security solutions, leading to China-specific networks that may not be as robust as their global counterparts.

An overly strict licensing environment could have unintended effects on cloud users across industries, affecting normal business operations and security protocols particularly among companies that currently use global cloud services in China. Our organizations respectfully request MIIT to consider the perspectives of cloud users when revising the licensing and partnership requirements for foreign cloud computing operators in the market.

Technology and Data Localization

Article 7 requires cloud suppliers to construct cloud service platforms physically within China. Our organizations believe that Article 7 would raise concerns under China's WTO service commitments not to discriminate against foreign suppliers of VATS or computer services.[5] Requirements to build cloud service equipment within China force foreign cloud service operators, including those operating through JVs or partnerships, to create redundant infrastructure within China. These redundancies would increase operating costs and eliminate the benefits of existing international infrastructure. Such requirements would negatively impact the competitiveness of foreign cloud service operators vis-à-vis local Chinese services or suppliers.

Article 9.4 also requires cloud service operators to ensure that network data and service facilities are located within China, and that data transmitted abroad complies with relevant rules and regulations. This requirement raises concerns for the same reasons discussed above with respect to Article 7 in terms of infrastructure redundancy and competition.

[5] *See* Schedule at 9-10, 17.

Data residency requirements increase operational costs and barriers for cloud users as well. Requirements for data localization and restrictions on cross-border data flows limit the types of cloud-based Internet of Things (IoT) and other smart solutions that foreign companies can introduce to the China market, and Chinese firms to global markets, because many of these products require interaction with global networks in order to function. Foreign companies are eager to bring new technology and solutions to the China market, but are hesitant to do so under a broad data regulatory regime that would negatively impact their deployment.

Notably, China's WTO commitments on computer services and VATS do not permit China to mandate the use of infrastructure located within China, or permit China to preclude the suppliers from using VPNs.[6] Our organizations respectfully request that China's regulatory approach to cloud services respect the principle of technology neutrality, as reflected by the service rules under the WTO.[7]

Finally, our organizations note that restrictions on cross-border data flows interrupt global monitoring and security systems that track information flows and respond to instances of criminal behavior or disruption. Multinational companies often operate globally-unified information security systems to monitor security threats affecting their international business units. This monitoring depends on the free flow of data and information communicated between global and local teams. Requirements that isolate data generated in China from global networks force cloud service operators and cloud users to create parallel systems in their China-based and global networks, which add challenges to deploying effective global security solutions.

Our companies note that the strongest global standards on data security are formulated by industry consensus and global best practices, which are determined based on advanced technology type, user expertise, robust infrastructure, and strong corporate institutions. The geographic location of data does little to determine security, as modern security threats are increasingly cross-border and operate remotely, including from outside of China's borders. Our organizations respectfully request MIIT to adopt requirements on the type of data that must be stored in China based on narrowly-defined national security concerns in alignment with the Cyber Security Law.

Internet Access and Monitoring

Article 7 also restricts cloud service operators from using dedicated lines, VPNs, or other channels that are not approved by MIIT to connect to overseas networks. While our organizations are sensitive to and respectful of China's desire to manage concerns related to national security, we respectfully urge MIIT to consider the business implications of such an approach to global communications. Multinational companies require smooth and unfettered access to the global Internet to function in China, which is essential for cross-border R&D activities, the sharing of business documents between China-based and non-China based stakeholders, and internal communication within companies with cross-border operations. Restricting access to the global

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[6] *See id.*

[7] *See, e.g.,* Panel Report, *United States – Measures Affecting The Cross-Border Supply Of Gambling And Betting Services*, WT/DS285/R, adopted 20 April 2005, para. 6.285 (stating that "a market access commitment for mode 1 implies the right for other Members' suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet etc., unless otherwise specified in a Member's Schedule. We note that this is in line with the principle of "technological neutrality", which seems to be largely shared among WTO Members.").

Internet will have a severe impact on foreign direct investment into the Chinese market, as multinational companies will be hesitant to invest or expand existing investments in China if they are unable to communicate with their international operations in a timely and secure manner. We are also concerned that restricting cloud service operators from choosing international network gateways may undermine the technological advantages of public cloud services. These restrictions may also unintentionally undermine the global business models of Chinese cloud service operators, particularly those who partner with foreign companies for technological assistance both within and outside of China. Our organizations respectfully request clarification whether VPNs, dedicated lines and other channels that build on MIIT-approved international network gateways are available for cloud service operators, in order to preserve cross-border commercial operations to continue without issue.

Article 8.4 requires cloud service operators to identify, terminate the transmission of, record, and immediately report any information posted or transmitted by access users that violates relevant Chinese laws and regulations. Monitoring information posted or transmitted by access users and assessing whether it is in accordance with Chinese laws is onerous and operationally impractical, as cloud service operators may not have the resources to actively parse through the large volumes of information generated by all of their China-based users. These requirements are also inherently inconsistent with Article 9's mandates on protecting personal information, particularly because content monitoring will inevitably lead to violations of personal information. Our organizations are concerned that some cloud service operators may lack the requisite infrastructure to undertake these activities, and that interfering with communications could constitute breaches in service contracts between the cloud service operator and the user. This broad and vague requirement raises concerns under China's WTO services commitments, which state that measures of general application affecting trade in covered services (including computer services and VATS) be administered in a reasonable, objective, and impartial manner. Our organizations respectfully suggest that these provisions be adjusted to clarify these requirements in a way that does not encumber cloud service operators with overly burdensome responsibilities.

In addition, Article 8.4 does not specify whether these requirements also apply to content generated by customers outside of China. Our organizations respectfully ask MIIT to clarify whether these requirements are specific only to China-based users and operators.

Article 8.5 prohibits cloud service operators from providing service to access users "violating relevant provisions." This article is unclear and imposes an unreasonable obligation on cloud service operators to evaluate the compliance of customers (including the clients of their customers) with a wide variety of unspecified requirements. We respectfully suggest that this provision be eliminated from the draft Notice, or at least should be adjusted to clarify the scope of this provisions in a narrow manner that would ensure that customers in China are not unduly deprived of the benefits of technology, and cloud service operators are not encumbered by an unreasonable and burdensome requirement.

Security Assessment

Article 8.6 requires cloud service operators to assist with security review work at the request of relevant departments. Our organizations are concerned that Article 8.6 does not provide further details on the scope of this review. We respectfully request MIIT to clarify the responsible agencies, the scope of reviews, and the criteria used within these reviews, so as to assist companies in security

compliance. We also ask that these security reviews be based on clear, detailed, requirements that are publicly available rather than broad requests of relevant departments, and that these security reviews be constructed in a transparent and open way with input from industry, so as to ensure a robust mechanism that can help China achieve its security goals.

Article 13 encourages third party evaluation, testing, and certification programs. Our organizations respectfully request these programs be non-duplicative, market-driven, reflective of industry needs, and streamlined to allow for maximum compliance without imposing undue burdens on companies.

Implementation Concerns

The draft Notice does not set forth a clear timeline for implementation. A short implementation timeframe would raise numerous technical and operational concerns for both cloud services operators and cloud service users, which may have the unintended effect of disrupting normal business operations across different industries.

We respectfully urge the MIIT to provide an implementation period of several years. Such timeframe is necessary to enable companies to make operational and technical adaptations to their businesses to ensure legal and regulatory compliance. Moreover, we hope to engage in further discussion and commenting on this draft Notice before it is implemented.

Our organizations thank MIIT for the time and attention for considering the opinions and recommendations of the foreign business community. We hope to remain constructive partners in China's development of an innovative and world class cloud computing industry.

Sincerely,

American Chamber of Commerce in China
Business Software Alliance (BSA)
The US-China Business Council (USCBC)
The U.S.-Chamber of Commerce (USCC)
United States Information Technology Office (USITO)