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VIA ELECTRONIC MAIL

Working Party on State Ownership and Privatisation Practices
Organisation for Economic Co-operation and Development
2, rue André Pascal
75016 Paris
FRANCE
CorporateGovernance&CorporateFinance@oecd.org

**Re: Public Consultation on Draft Revisions to the OECD Guidelines on
Corporate Governance of State-Owned Enterprises**

Dear Working Party:

On behalf of United States Steel Corporation (“U. S. Steel”),¹ we submit the enclosed comments in response to the OECD’s request for public consultation on its Draft Revisions to the OECD Guidelines on Corporate Governance of State-Owned Enterprises (“Revised SOE Governance Guidelines”).² U. S. Steel appreciates the OECD’s willingness to solicit public input on this important update to its SOE Governance Guidelines, and commends the Working Party for proposing revisions that appear aimed at strengthening governance standards and limiting the extent to which SOEs distort the competitive marketplace. Although U. S. Steel is generally supportive of the draft revisions, it urges the Working Party to consider further strengthening the Revised SOE Governance Guidelines by explicitly recognizing the nonmarket advantages often enjoyed by SOEs, presuming that government control implies government authority, and encouraging further transparency in SOEs operations that would facilitate meaningful public oversight. Thus, U. S. Steel respectfully proposes the final SOE definition to the below (edits in redline), for the reasons explained thereafter:

Defining an SOE. Countries differ with respect to the range of institutions that they consider as state-owned enterprises. For the purpose of the Guidelines, any corporate entity recognized by a nation’s national law as an enterprise, and in which a state exercises ownership or control, should be considered as an SOE. This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover, statutory corporations, with their legal personality established

¹ U. S. Steel is a leading integrated producer of iron, semi-finished steel, flat-rolled steel, and steel tubular products in the United States and Europe.

² “Public Consultation on Draft Revisions to the OECD Guidelines on Corporate Governance of State-Owned Enterprises,” OECD, *available at* www.oecd.org/corporate/review-oecd-guidelines-corporate-governance-of-state-owned-enterprises.htm.

through specific legislation, should be considered as SOEs if their purpose and activities, or parts of their activities, are of an economic nature. Entities satisfying this definition are presumed to be state authorities.

I. The Revised SOE Governance Guidelines Should Encompass Third Country SOEs and Acknowledge SOEs' Negative Influence on Markets

As state authorities, SOEs generally benefit from state policies and programs not available or less open to non-state competitors. SOEs often enjoy nonmarket advantages, distribute subsidies, and act outside the bounds of laws that govern economic actors unaligned with the state.³ This imbalance between SOEs and non-state competitors often distorts the marketplace to the detriment of the non-state competitors and consumers. Especially in a global economy, the OECD's Revised SOE Governance Guidelines provide necessary instruction on how to mitigate the negative externalities associated with SOEs. Such guidance benefits all parties with an interest in sound SOE governance—not only the SOEs themselves, but also citizens, auditors, non-state competitors, and other governments. To be an effective resource, the Revised SOE Governance Guidelines must inform these interested parties of the risks inherent in SOE arrangements, as well as states' use of varying mechanisms to control enterprises.

The Revised SOE Governance Guidelines make substantial progress in the latter area, providing an enhanced definition of an SOE as:

Defining an SOE. Countries differ with respect to the range of institutions that they consider as stateowned enterprises. For the purpose of the Guidelines, any corporate entity recognised by national law as an enterprise, and in which the state exercises ownership or control, should be considered as an SOE. This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover, statutory corporations, with their legal personality established through specific legislation, should be considered as SOEs if their purpose and activities, or parts of their activities, are of an economic nature.⁴

³ See, e.g., A. Baum, *et al.*, “Managing Financial Risks from State-Owned Enterprises,” *IMF Working Paper EP/20/213* (2020) at 7-9; T. Chiang, “Note: Chinese State-Owned Enterprises and WTO’s Anti-Subsidy Regime,” 49 *Georgetown J. Int’l L.* 845-86 (2018) at 851-53; P. Kowalski, *et al.*, “State-Owned Enterprises: Trade Effects and Policy Implications,” *OECD Trade Policy Papers No. 147* (2013) at 4, 9-10, 16-17; U.S.-China Economic and Security Review Commission, *2022 Report to Congress* (Nov. 2022) at 57-58, 137, 179; I. Willemyns, “Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?” 19 *J. Int’l Econ. L.* 657-80 (2016) at 659, 661-62.

⁴ Revised SOE Governance Guidelines at 7.

U. S. Steel supports this updated definition, insofar as it:

- Explicitly recognizes that government ownership or control may be indirect;⁵ and
- Expressly acknowledges the wide variety of ways in which state authorities exercise leverage over incorporated entities and the breadth of arrangements that can confer control upon state authorities practically equivalent to formal ownership.⁶

The draft revised definition appropriately captures the practical reality of the marketplace and will help ensure that market actors subject to state control are not able to subvert standards of responsible governance and transparency by adopting indirect control schemes.

There are, however, several additional changes to the SOE definition that could be made to further clarify that the Revised SOE Governance Guidelines encompass third-country SOEs. As noted above, the current draft SOE rules refer to “any corporate entity recognized by national law as an enterprise, and in which the state exercises ownership or control...”. Some might misunderstand the reference to both “national law” and “the state” in this passage as limiting the definition to SOEs whose legal personality is established in the same state that is exercising control over the SOE. Put differently, it could be misconstrued as omitting SOEs that are owned by State A but given legal personality in State B. The definition should be clarified, because SOEs and their subsidiaries are equally capable of engaging in distortive behavior when incorporated in a third-party state. To effectuate this recommendation, the passage quoted above should be revised to “any corporate entity recognized by a nation’s law as an enterprise, and in which a state exercises ownership or control...”

In addition, the Revised SOE Governance Guidelines should explicitly acknowledge that state ownership of economic actors presents risks. Such risks stem from the commingling of political and economic power and the elevation of political expediency above ordinary rules-based competition in the market. This would clarify the need for devising this specifically tailored set of guidelines and would ensure users’ awareness of the breadth of concerns surrounding SOEs’ role in the marketplace. One way of implementing this suggestion would be to include the following language in Chapter I, the Rationales for State Ownership: “Unique risks are presented by the commingling of political and economic aims in the legal person of an SOE. Consequently, SOEs should, to the maximum extent possible, be subject to the same or higher standards of good governance and transparency as private enterprises.”

⁵ See Revised SOE Governance Guidelines at 7-8.

⁶ See *id.*

II. The Revised SOE Governance Guidelines Recognize the Importance of Government Ownership and Should Also Recognize that Government Ownership Implies Government Authority

As noted above, the Revised SOE Governance Guidelines feature stronger language which better informs interested parties of the variety of ways in which state authorities exercise control over enterprises. The Revised SOE Governance Guidelines further acknowledge SOEs' engagement in "Economic Activities" and "Public Policy Objectives."⁷ In expecting SOEs to direct their Economic Activities so as to advance state-defined Public Policy Objectives, the Revised SOE Governance Guidelines appropriately demonstrate that SOEs are—first and foremost—political entities.

It is important that the Revised SOE Governance Guidelines explicitly push back on the fiction that SOEs are essentially economic entities acting the market. Rather than framing SOEs as simply another species of business, SOEs must be characterized as a species of state authority. SOEs' operations begin at the strategic (*i.e.*, leadership) level with the setting of objectives for the organization. As an enterprise controlled by the state, SOEs' leaders' objectives are necessarily state-approved objectives. That an SOE may carry out those objectives though primarily economic means does not diminish its fundamental position as a state authority that carries out state objectives. As drafted, the Revised SOE Governance Guidelines imply this reality, but U. S. Steel proposes making it explicitly by adding the following language to the end of the proposed SOE definition: "Entities satisfying this definition are presumed to be state authorities."

SOEs are state-controlled entities, often wielding an immense and/or legally protected concentration of economic power. As recently summarized by the IMF:

SOEs are among the largest corporations in some advanced economies (France, Italy, Norway) and comprise one-third or more of the largest firms in several emerging markets (China, India, Indonesia, Malaysia, Russia, Saudi Arabia, United Arab Emirates)

[. . .]

In Africa and Asia, SOEs dominate power generation. SOEs accounted for more than half of all infrastructure project commitments in emerging market economies and low-income developing countries in 2017. Moreover, banking sector SOEs account for 40 percent or more of banking system assets in the BRIC economies (Brazil, Russia, India, China) and some low-income developing countries, and one-third or more in Germany and Portugal among advanced economies.⁸

⁷ Revised SOE Governance Guidelines at 8-9; *see also id.* at 14 (discussing SOEs' "engage{ment} in economic activities and fulfill{ment} of public policy objectives").

⁸ "Chapter 3: State-Owned Enterprises: The Other Government," *IMF Fiscal Monitor* (Apr. 2020) at 48 (internal citations omitted).

When a state-controlled entity exercises that power in service of ends defined by the state, the entity should presumptively be regarded as a government authority. To characterize an SOE based on the veil of incorporation would be to mischaracterize its fundamental nature.

III. The Revised SOE Governance Guidelines Improve Transparency Standards, but the Rules Should Be Further Strengthened

High transparency standards are necessary to ensure the effective implementation of the Revised SOE Governance Guidelines. Proposed revisions enhance transparency standards in several respects that should be carried forward in the final version. For example, the revised guidelines instruct SOEs to communicate through “appropriate frameworks” for state-SOE communication; extend the obligation to maintain appropriate, continuous communication with external auditors to all SOEs, regardless of legal system;⁹ oblige the state to ensure regulatory neutrality for economically engaged SOEs, presumably including transparency and reporting regulations;¹⁰ encourage transparency in public procurement involving SOEs;¹¹ and provide several revisions to the chapter on Disclosure, Transparency, and Accountability.¹²

In general, these revisions bring the guidelines closer to meeting an important standard—holding SOEs to transparency and compliance standards at least equivalent to those applicable to private enterprises. The concentration of state and economic power inherent in an SOE, however, should require *more* stringent transparency expectations. Thus, while the Revised SOE Governance Guidelines certainly improve upon the present guidelines, further modifications are needed to better effectuate meaningful public oversight.

First, the draft revisions provide for annual external audits by a qualified, independent auditor subject to international standards. This is, of course, desirable, but the guidelines only provide for disclosure “to the board and shareholders,”¹³ all of which may themselves be state actors or designees of the state. To ensure that the audit facilitates meaningful oversight, the guidelines should provide for public disclosure of the auditor’s conclusions.

Second, several changes were made to the list of reporting disclosures encouraged by the guidelines. The list of disclosures, however, is preceded by a proviso that such disclosures are not mandatory (“should include”) and are constrained by “due regard to enterprise capacity and size.”¹⁴ This ambiguous framing undercuts the utility of the list itself. Recognizing that not all items in the list are necessarily relevant to all SOEs, the Working Party should reformulate the

⁹ Revised SOE Governance Guidelines at 12 (¶C, ¶F.6).

¹⁰ *See id.* at 14 (¶D).

¹¹ *Id.* at 15 (¶F).

¹² *See id.* at 17-18 (Chapter V).

¹³ *See id.* at 18 (¶B).

¹⁴ *See id.* at 17 (¶A).

proviso as follows: “To illustrate, an SOE is expected to disclose all of the following information that is applicable to the SOE:”

Finally, the Revised SOE Governance Guidelines replace the directive for public disclosure of “public policy objectives” with a directive to disclose “public service obligations.”¹⁵ Both are relevant to public oversight and should be included, rather than replacing one with the other.

U. S. Steel respectfully submits that the reformulations proposed herein would materially advance the transparency objectives of the Revised SOE Governance Guidelines.

IV. Other Targeted Edits Could Strengthen the Revised SOE Governance Guidelines

As a final note, the draft text could be further refined to improve coverage:

- Whereas the draft provides the example of “powers to appoint the CEO” in defining ownership and control,¹⁶ removal power provides similar leverage to constrain CEO activity. Thus, the passage should be expanded to encompass “powers to appoint and/or remove the CEO.”
- The description of “Ownership entity” appears intended to be inclusive, referring broadly to “a single state ownership agency, a co-ordinating agency, or a government ministry or another public body responsible for exercising state ownership.”¹⁷ An express proviso encompassing subnational government ownership should be added, *e.g.*, “This may be a national, subnational, or local government entity.”
- The guidelines prescribe that the state’s role as owner includes the responsibility to ensure the SOE’s adherence to “applicable corporate governance standards,”¹⁸ but it would also be relevant and worthwhile to specify that the state must ensure adherence to “financial accounting standards like those applicable to similar non-state-owned entities.”
- Guidelines regarding SOE boards provide for incentivizing board members to act consistent with the long-term interest of the enterprise “and its shareholders.” However, insofar as SOEs are often majority-owned by state authorities, one could conceivably conclude that acting in the interest of the state is the same as acting in the interest of an SOE’s shareholders. To clarify the guidelines’ intent, the phrase should be adjusted to include “its shareholders, including non-state shareholders.”

¹⁵ *See id.* at 18 (¶A.2).

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 12.

V. Conclusion

U. S. Steel appreciates the Working Party’s substantial efforts to update and modernize the OECD’s SOE Governance Guidelines. In general, the edits set forth in the Revised SOE Governance Guidelines evidence the Working Party’s overarching desire to strengthen the rules and close loopholes to good governance and responsible participation in the competitive marketplace. The issues posed by SOEs, however, are immense and growing—with the share of SOE assets among the world’s 2,000 largest firms having doubled over the past decade, equaling 50 percent of global GDP.¹⁹ Accordingly, in these comments, U. S. Steel has proposed targeted modifications and additions that would further improve the guidelines and better inform interested parties of SOEs’ outsized role in the global marketplace.

Most fundamentally, further incremental adjustments to the revised definition of an SOE are needed. As proposed herein, the revised definition of an SOE would read as follows in its entirety (see page 1 herein for redline edits):

Defining an SOE. Countries differ with respect to the range of institutions that they consider as state-owned enterprises. For the purpose of the Guidelines, any corporate entity recognized by a nation’s law as an enterprise, and in which a state exercises ownership or control, should be considered as an SOE. This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover, statutory corporations, with their legal personality established through specific legislation, should be considered as SOEs if their purpose and activities, or parts of their activities, are of an economic nature. Entities satisfying this definition are presumed to be state authorities.

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If we can provide additional information, please do not hesitate to contact the undersigned.

Respectfully submitted,

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¹⁹ “Chapter 3: State-Owned Enterprises: The Other Government,” *IMF Fiscal Monitor* (Apr. 2020) at 49.