

## CORRESPONDING TO THE RECORD-FILING REFORM: THE SEVENTH REVISION OF THE CATALOGUE FOR THE GUIDANCE OF FOREIGN INVESTMENT INDUSTRIES

On December 7<sup>th</sup>, 2016, the National Development and Reform Commission (“NDRC”) and the Ministry of Commerce (“MOFCOM”) jointly issued the *Revised Draft of the Catalogue for the Guidance of Foreign Investment Industries* (in Chinese: “外商投资产业指导目录 (修订稿)”) (“Draft Catalogue”), seeking for public comments. It is the seventh revision of the *Catalogue for the Guidance of Foreign Investment Industries* (“Catalogue”) from its initial promulgation in 1995.

The Catalogue is a fundamental legal document guiding the entry of foreign investment into China. This revision actually was issued following the recent reform of foreign investment approval system. The Draft Catalogue also shows the opening of significant number of markets that are currently subject to restrictions of entry. Following lists the main highlights of the Draft Catalogue.

### 1. Structural change to the Catalogue

The Draft Catalogue has changed the structure adopted in all previous versions. It has consolidated the restricted industries, prohibited industries, and industries listed in the encouraged category with equity requirements or senior manager requirements into one sector, the special administrative measures of admission of foreign investment (“Negative List”). Therefore, in the Draft Catalogue, industries have been grouped into two main categories: (i) encouraged category and (ii) the Negative List.

Such structural change actually is a reaction to the recent reform on foreign investment in China (Record-filing Reform). From October 1st, 2016, foreign invested enterprises (“FIEs”) that are not subject to special administrative measures of admission shall adopt record-filing administration for its incorporation and changes, no prior approvals from MOFCOM will be required<sup>1</sup>. To implement such reform, NDRC and MOFCOM jointly issued the Announcement No.22 of 2016 (“Announcement No.22”) specifying that the scope of special administrative measures of admission should refer to the restricted category, prohibited category, and industries in the encouraged category with equity requirements or senior manager requirements as set forth in the *Catalogue for the Guidance of Foreign Investment Industries (Revised in 2015)* (“2015 Catalogue”).

To in line with the mode as set out in the Announcement No.22, the Draft Catalogue has combined those restrictive measures for admission of foreign investment into the Negative List. As a result, foreign investors can directly refer to the Negative List section to see if the envisaged investment subject to prior approval of MOFCOM. Obviously, such reorganization will provide more convenience and easier reference to foreign investors.

Due to such structural change in the Draft Catalogue, industries listed in the encouraged category with equity requirements or senior manager requirements will appear in both the encouraged category sector and the Negative List. According to the Draft Catalogue, for those overlapping industries, the investors shall be entitled to preferential policies as well as abide by relevant rules of admission.

<sup>1</sup> Decision on Revising Four Laws Including the Law of the People's Republic of China on Wholly Foreign-owned Enterprises (in Chinese: “关于修改《中华人民共和国外资企业法》等四部法律的决定”), issued by the National People's Congress Standing Committee of the People's Republic of China on September 3rd, 2016 and came into force on October 1st, 2016.

However, we would like to draw your attention that the negative list applicable in the Free Trade Zones<sup>2</sup> ("FTZs") is still valid, and it is slightly different from the Negative List as defined in the Draft Catalogue. Therefore, when handling incorporation and changes of the FIEs in the FTZs, the negative list of the FTZs shall be applied.

## 2. Less restriction on foreign investment

Compared to the 2015 Catalogue, the Draft Catalogue has reduced the total number of restrictive measures from 93 to 62. For example, the restrictions of entry on the following industries have been removed:

- Service Industries
  - High way passenger transport service;
  - Credit investigation and grading service;
  - Tally for foreign vessels
- Mining Industries
  - Exploring and mining of precious metals (gold, silver, platinum families);
  - Exploring and cradling of lithium
- Manufacturing Industries
  - Processing of edible oil and fat, with shareholding restriction also removed;
  - Processing of rice, flour and raw sugar and deep processing of corn;
  - Manufacturing of biology liquid fuel;
  - Manufacturing of motorcycles, with shareholding restriction also removed;
  - Manufacturing of new energy vehicle battery

Subject to the Draft Catalogue, the above mentioned industries shall be included in the permitted category. As a result, in these industries, establishment and changes of FIEs are no longer subject to MOFCOM approval.

## 3. Removal of restrictions apply to both foreign and domestic investment

As addressed in the Draft Catalogue, the Negative List specifically regulates the admission of foreign investment in China. In this regard, 11 restrictions have been removed from the Draft Catalogue due to the consideration that domestic investments are also subject to the said restrictions. The removed items include, for instance, construction and operation of large-scale theme park that was originally listed the restricted category, construction of golf course and villa, gambling, and lottery that were originally listed in the prohibited category.

<sup>2</sup> Free Trade Zones in China include the China (Shanghai) Pilot Free Trade Zone, the China (Guangdong) Pilot Free Trade Zone, the China (Tianjin) Pilot Free Trade Zone, the China (Fujian) Pilot Free Trade Zone and the Expanded Area of China (Shanghai) Pilot Free Trade Zone. The negative list of the FTZs is stipulated by the *Notice of the General Office of the State Council on Issuing the Special Management Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones* (in Chinese: "国务院办公厅关于印发自由贸易试验区外商投资准入特别管理措施(负面清单)的通知") which came into force on May 8, 2015.

## 4. Other issues

It is worth noting that one of the illustrations in the Negative List states that merger and acquisition of affiliated non-foreign invested Chinese enterprises (Domestic Enterprises) by overseas enterprises that established or controlled by Domestic Enterprise shall remain governed by existing laws and regulations. However, according to the Announcement No.22, all foreign investments in relation to merger and acquisition of Domestic Enterprises shall continuously subject to the existing requirements and require approval from MOFCOM. It seems the Draft Catalogue intends to narrow down the scope of MOFCOM's approval on merger and acquisition of Domestic Enterprises by foreign investors. We hope relevant authorities will further clarify and illustrate such intention in the future.

## 5. Conclusions

The issuance of the Draft Catalogue is in line with the Record-filing Reform. Although the structural change introduced by the Draft Catalogue is more like a form change than a substantial revision, it does provide easier reference to foreign investors. In addition, with the lifting of restrictions on certain industries, foreign investors can expect to enjoy new market entry opportunities in the near future. According to previous practice, it is expected that the final version of the Draft Catalogue might be released around July, 2017. In that case, for the moment, foreign investors can refer to the Draft Catalogue to assess the potential impact on their proposed investment in China. And Garrigues will keep close eyes on the final version of the Draft Catalogue and keep you posted.

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3205 West Gate Mall 38 Nanjing Xi Lu - 200041 Shanghai  
T +86 21 5228 1122 - F +86 21 6272 6125

China World Trade Center 1 Jian Guo Men Wai Avenue (Tower 1 - Office 1815) - Beijing 100004  
T +86 10 85720000 - F +86 10 85720020