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Implementation of the Catalogue of Industries for Guiding Foreign Investment (2017 Version)

I. Introduction and Background on the Foreign Investment Catalogue

The Catalogue of Industries for Guiding Foreign Investment (hereinafter the “New Catalogue”) has been released on 28 June, 2017 by the National Development and Reform Commission (NDRC) and the Ministry of Commerce of the People’s Republic of China (MOFCOM). The New Catalogue, which has come into effect on 28 July, 2017, introduces a negative list to guide foreign investment and cuts the number of special administrative measures restricting foreign investment from 93 to 63, compared to the previous version of 2015.

The first Catalogue for Guiding Foreign investment in China has been first released in 1995. The New Catalogue represents the seventh amendment. Each previous catalogue contained three categories of industries where foreign investments were restricted or supported in China: the encouraged, the restricted and the prohibited ones. In other words, industries not listed in the Catalogue were deemed as permitted. However, Industries fallen under the scope of encouraged, restricted, and permitted industries were all subject to governmental approval. Such examination procedure was held by the MOFCOM.

However, under the Decision of the Standing Committee of the National People’s Congress on Revision of Four Laws Including the Law of the People's Republic of China on Wholly Foreign-owned Enterprises that took effect last October 2016, a filing system for the establishment and administration of corporate changes of FIES in “industries that are not subject to special administration measures for entry” is now implemented in the PRC (*details refer to Wenfei China Legal Report released in January 2017*). Only industries regulated in the “Negative List” (*see below II. The New Catalogue*) shall apply for approval and examination to the competent department of the commerce. Such new filing system requires a negative list and the previous catalogue couldn’t meet such requirements. Therefore, the Chinese government intended to promulgate the New Catalogue in order to ease the implementation of the new laws by providing a negative list and to adapt to the latest foreign investment developments.

II. The New Catalogue

The New Catalogue is constituted of two parts: 1) the Category of the Encouraged Foreign Investment Industries and 2) the Special Management Measures for Foreign Investment Access (hereinafter the “Negative List”). The Negative List is further divided into two parts: the category of the restricted and the category of the prohibited. The Negative List will be used to determine

whether foreign investment in relevant industries will be subject to approval of MOFCOM or its local provincial branches. In other words, foreign investors can simply refer to the Negative List to see whether their investments are subject to MOFCOM approval or not.

The Category of the Encouraged Industries consists now of 348 subdivisions in 12 industries:

- Agriculture, forestry, animal husbandry and fishery;
- Mining;
- Manufacturing;
- Power, gas and water production and supplying industries;
- Transportation, warehousing and postal industries;
- Wholesale and retail;
- Leasing and commercial services;
- Scientific research and technical services;
- Water resources, environmental and public facilities management;
- Education;
- Health, social security and social welfare;
- Culture, sports and entertainment.

The Catalogue of Encouraged Industries offers benefits to the above-mentioned industries, such as reduction or even exemption of customs tariffs for imported equipment regulated by the General Administration of Customs. Besides, encouraged industries, which are subject to certain restrictions (mostly regarding shareholding ratio and form of foreign investment) are also listed in the category of the restricted industries in the Negative List (e.g. design, manufacturing and repair of airplane is encouraged, but also restricted to joint-ventures with a Chinese partner entity).

The Negative List specifies the industries in which foreign investment is restricted or prohibited. Those falling under the restricted category are subject to restrictions such as shareholding limits, and must receive prior approval from MOFCOM or its local provincial branches and then register at the local State Administration for Industry & Commerce of the People's Republic of China (SAIC). Industries in the prohibited category are closed completely to foreign investment. The concept of a Negative List to guide foreign investment was pilot in China's free trade zones (FTZs) (e.g. Shanghai Free Trade Zone).

For industries not listed in the Negative List, foreign investors are given equal treatment to domestic Chinese investors. It has to be noted that although foreign investors do not require prior approval from MOFCOM in industries outside the Negative List, they are still subject to record-filing requirements.

III. Modifications and Reasons

Compared to the current Catalogue, category of the restricted and the prohibited are directly listed and no longer classified via industries. Furthermore, an explanation is put ahead of the restrictive measures. The New Catalogue makes an exhaustive list of restrictive measures, and deleted the miscellaneous clauses. Here are some significant changes in the New Catalogue:

A. Further liberalizations for foreign M&A

According to the New Catalogue, if a domestic company, enterprise or natural person acquiring a domestic company associated with it with its company lawfully established or controlled outside China involves foreign investment items and the establishment and change of enterprises, it shall be then subject to the approval of MOFCOM. Foreign M&A outside of the mentioned definition are subject to the online filing system (i.e. submit application table for filing of the changes regarding foreign enterprise through an online system with materials required within 30 days after such change) after the investment has been made. Through this liberalization, foreign M&A are in principle not required for MOFCOM approval. However, if the M&A falls under the scope of the Negative List, it shall then be subject to the approval of MOFCOM.

B. Further opening to the foreign investments in service, mining and manufacturing industries.

Industry	Category in the Catalogue 2015	Catalogue 2015	The New Catalogue (2017)
Service Industry	Encouraged (with senior executive restrictions)	Accounting and auditing (managing partner must be a Chinese national)	Removed
	Restricted	Creditworthiness investigation and rating services	Removed
Mining Industry	Restricted	Exploration and extraction of precious metal (gold, silver, platinum group)	Removed
	Encouraged (Shareholding ratio condition)	Exploration and development of oil and natural gas and utilization of gas well (only in the form of joint venture or cooperative joint venture)	Exploration and development of oil and natural gas (only in the form of joint venture or cooperative joint venture)

Industry	Category in the Catalogue 2015	Catalogue 2015	The New Catalogue (2017)
	Restricted	Mining and beneficiation of lithium ore	Removed
Manufacturing Industry	Restricted	Soybean oil, rapeseed oil, peanut oil, cottonseed oil, tea seed oil, sunflower oil, palm oil and other edible oil processing (PRC parties control), rice, flour, raw sugar processing, deep corn processing	Removed
		Non-ferrous metal refining of tungsten, molybdenum, stannum (except tin compounds), antimony (including antimony oxide and antimony sulfide)	Only reserves the smelting of tungsten.
		Production of bio-liquid fuels (fuel ethanol, biodiesel) (PRC parties control)	Removed
		Manufacturing of automotive vehicles, special purpose vehicles and motorcycles : Chinese equity ratio shall not be less than 50% one foreign investor may establish no more than two equity joint venture enterprises in China to manufacture the same type of automotive products (passengers vehicles, commercial vehicles, motorcycles); the aforesaid restriction does not apply where the foreign investor and the Chinese equity joint venture partner jointly carry out a merger and acquisition of another car manufacturing enterprise in China.	Manufacturing of automotive vehicles, special purpose vehicles (motorcycle was removed) Chinese equity ratio shall not be less than 50% one foreign investor may establish no more than two equity joint venture enterprises in China to manufacture the same type of automotive products (passengers vehicles, commercial vehicles, motorcycles); the aforesaid restriction does not apply where the foreign investor and the Chinese equity joint venture partner jointly carry out a merger and acquisition of another car manufacturing enterprise as well as the establishment of equity joint venture enterprises manufacturing electric automotive vehicles in China.
	Encouraged (Shareholding ratio condition)	Production as well as research and development of automobile electronic devices: engine and under-chassis control system as well as key spare parts,.., automobile electronic network technology	Remove the requirement for an equity ratio in this item.

		(restricted to equity joint ventures), EPS electronic controller (restricted to equity joint ventures)	
		Manufacturing of key parts and components for new energy vehicles: energy power battery (energy density of 110Wh/kg or above, cycle life of 2,000 or more times, and foreign investment ration shall not exceed 50%),	Remove the requirement for an equity ratio in this item.
		Rail transit and communication facilities	Removed
		Manufacture and repair of marine engineering equipment (including modules) (PRC parties control)	Removed
		Manufacture of low and medium speed diesel engines and crankshafts for ships (PRC parties control)	Removed
		Design and manufacture of civil satellite; manufacture of civil satellite payload (PRC parties control)	Remove the requirement for an equity ratio in this item.
Industry	Category in the Catalogue 2015	Catalogue 2015	The New Catalogue (2017)
Wholesale and Retail	Restricted	Grain purchasing, grains, cotton wholesale, construction and operation of big agricultural products wholesale market	Removed the original clause and changed into "Purchase and wholesale of rice, wheat and corn".
		Cargo Handling (restricted equity/cooperative joint ventures)	Removed

C. All industries with additional conditions are listed in the category of the Restricted Industries.

In the previous catalogues, both categories of encouraged and restricted industries had additional conditions such as limitation of foreign shareholding ratio in the investment, designated forms of foreign investment (e.g. in joint venture only), specifications of certain products/skills, etc. The encouraged category of industries with additional conditions was criticized by the public during its implementation. As a result, the New Catalogue put all items with additional conditions into the category of the Restricted Foreign Investment Industries.

D. Deleted Items in the Negative List

11 items in Industries prohibited and 1 item in restricted listed in the Catalogue 2015 are deleted in the New Catalogue. Since the domestic investment regarding the 12 items are also prohibited or restricted respectively, the New Catalogue deleted them based on the consistency treatment for domestic and foreign investments. In a word, foreign investment under the following items are still prohibited/restricted.

Industry	Category in the Catalogue 2015	Catalogue 2015	The New Catalogue (2017)
Power, heat, gas and water production and supplying industries	Restricted	Construction and operation of, within small power grids, single capacity of 300,000 kilowatts and below coal-fired condensing steam power stations, single capacity of 100,000 kilowatts and below coal-fired condensing or extracting steam dual-purpose unit cogeneration power plants	Removed to be administered according to the principle of consistent treatment for domestic and foreign investments
	Prohibited	Construction and operation of, within big power grids, single capacity of 300,000 kilowatts and below coal-fired condensing steam power stations, single capacity of 200,000 kilowatts and below coal-fired condensing or extracting steam dual-purpose unit cogeneration power plants	See above
Culture, sports and entertainment	Prohibited	Large-scale theme park construction, management	See above
		Construction of golf course and villa	See above
pharmaceutical industry	Prohibited	Processing of Chinese herbal medicines included in the Wild Medicinal Resources Protection and Management Regulations and the Rare and Endangered Plants of China Catalogue	See above
Other Manufacturing Industry	Prohibited	Ivory carving	See above
		Tiger bone processing	See above
Other Industries	Prohibited	Projects that harm the security and efficiency of military installations	See above
		Gambling and lottery industry (including racetrack gambling)	See above

		Pornography	See above
Industry	Category in the Catalogue 2015	Catalogue 2015	The New Catalogue (2017)
Education	Prohibited	Military, police, political and party schools and other special educational institutions	Compulsory education institutions remain prohibited; other prohibitions are removed
Water conservancy environment and public facilities management	Prohibited	Construction and operation of comprehensive water hubs (controlling stake to be held by Chinese party)	Removed to be administered according to the principle of consistent treatment for domestic and foreign investments

IV. Conclusion

As a result, the Negative List will serve as reference for foreign investors to determine if they are subject to the approval of MOFCOM under the new FIE filing system. The New Catalogue makes another step towards further opening up of certain sectors of the Chinese economy. The exhaustive list in the New Catalogue provides a more predictable environment for foreign investment. However, the New Catalogue is not as ambitious as expected.

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