

# China Legal Briefing\*284

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## **1. The Special Administrative Measures (Negative List) for the Access of Foreign Investment (2021) and Special Administrative Measures (Negative List) for the Access of Foreign Investment in Pilot Free Trade Zones (2021)**

On December 27, 2021, the *Special Administrative Measures (Negative List) for the Access of Foreign Investment (2021)* (the “**2021 Negative List**”) and *Special Administrative Measures (Negative List) for the Access of Foreign Investment in Pilot Free Trade Zones (2021)* (the “**2021 FTZ Negative List**”) were issued by the State Development & Reform Commission and the Ministry of Commerce. Both lists have become effective on January 1, 2022.

The Negative Lists contain the industries in which China does not allow foreign investments. The Negative Lists have two categories: prohibited and restricted market areas (industries). As the name says, foreign investors cannot invest in prohibited market areas, while they may be able to do so in the restricted market areas after filing an application which has been approved by the competent government authority.

The general principle for all the other market areas, which are not on the Negative Lists, is that these foreign investments are treated equally to domestic investments. Thus, in non-listed categories, there should be no difference between foreign and domestic investments. Accordingly, foreign invested entities are even eligible to benefit from preferential policies offered by the government in the industries in which investments are encouraged by the Chinese government.

### - The 2021 Negative List

Generally speaking, compared with the old list, the 2021 Negative List only slightly relaxes market controls in China. The number of market areas on the newly launched 2021 Negative List has been reduced from 33 items to 31. These relaxations on the market restrictions mainly concern the automobile manufacture industry and the manufacturing of broadcasting and TV equipment. However, no changes are made in restrictions on access to information technology, human health, scientific research and technical services and other sectors, which continue to be exclusively only open to Chinese investors.

### - The 2021 FTZ Negative List

Three previously existing prohibitions or restrictions have been completely removed from the 2021 FTZ Negative List. This includes the restrictions on access to manufacturing of satellite television broadcast ground receiving facilities and all its components, which has been lifted. Additionally, market surveys can now be conducted by foreign invested companies whereas in the past, only joint ventures were allowed to do so, allowing foreign-invested companies to better understand the regional market. Lastly, pursuant to the 2020 FTZ Negative List, it was completely prohibited for

foreign investors to invest in social surveys. The 2021 FTZ Negative List now allows foreign investment in social surveys as long as the Chinese party has a stake of not less than 67% and as long as the legal representative is a Chinese citizen.

## **2. Seed Law of the PRC (2021 Amendment)**

In response to tremendous ongoing changes in the seed industry and technology, both in China and abroad, an amendment to the *Seed Law of the People's Republic of China (2021 Amendment)* ("**Amendment**") has been passed and came into effect on March 1, 2022. The Amendment, consisting of 10 chapters and 92 articles, wants to further encourage innovations in the seed industry all while cracking down on IPR infringements in a more efficient way.

### **2.1 Expansion of the scope of the protected new plant varieties**

*New plant variety rights* are the rights granted to the breeder of a new variety of a plant that give the breeder exclusive control over the propagating material (including seeds, cuttings, divisions, tissue cultures) and harvested materials (cut flowers, fruits, foliage) of a new variety for a number of years.

Most disputes about new plant varieties are about whether the new plant variety is actually "*new*" or whether it is based on another variety for which rights already exist. Prior to the Amendment, the Seed Law only allowed parties to produce evidence from propagation materials including seeds, cuttings, divisions and tissue cultures. Henceforth, evidence may be directly taken from the harvested product. This will provide a much more accurate way of determining the relationship between the existing plant rights and the new variety of plant, better protecting the holder of previously existing new plant variety rights.

Another important change that the Amendment brought about is the expansion of the scope of what is protected: While prior to the Amendment, it was only prohibited to produce and propagate a new plant variety without the permission of the holder of the rights, it is now also prohibited to a third party to sell, import, export or store propagating materials of a new variety without holding the rights or having been given permission by the holder of the rights.

### **2.2 Increase of the amount of punitive damages and fines**

According to the general principle, the amount of damage that has to be paid to the holder of the new plant variety rights by someone who violated the rights is determined based on the actual loss that the right holder suffered. However, it is often difficult to calculate such amount. Therefore, the Seed Law provides other ways to determine an amount, namely by the benefits that the infringer was able to make or by reference to a given multiple of the royalties for the rights.

In addition to this, punitive damages could be awarded by a court as extra compensation if the infringement was intentional and serious. These punitive damages were limited to three times the amount of the actual damages that were calculated based on the above stated methods. The Amendment now lifts this threshold and gives the court the option to grant punitive damages of five times the calculated damage, or lacking a calculation, a maximum of RMB 5 mio, as opposed to RMB 3 mio.

The Amendment also increases the penalties for the production and business operations with fake and substandard seeds. For the production and business operation of counterfeit seeds, the penalties are increased to “20,000 RMB to 200,000 RMB” (previously “10,000 RMB to 100,000 RMB”). For the production and business operations of substandard seeds, the penalties are increased to “10,000 RMB to 100,000 RMB” (previously “5,000 RMB to 50,000 RMB”).

### **2.3 Licensing of new plant variety rights**

While new plant variety rights used to be licensed in the past, the Amendment now gives an explicit legal basis to such licensing contracts. The Amendment adds that the license royalty can either be agreed on in the form of a fixed price or it can be calculated as a percentage of the proceeds.

## **3. Regulation on the Administration of the Registration of Market Entities**

On March 1, 2022, *the Regulation on the Administration of the Registration of Market Entities* (“**Regulation**”) took effect, which for the first time, establishes unified rules concerning administrative procedures for all different types of market participants including companies, sole proprietorship enterprises, partnership enterprises and their branch offices and branch offices of foreign companies. At the same time, regulations like the *Administration of the Company*, *the Registration of Enterprise Legal Persons* and *Registration of Partnership Enterprises* etc. became obsolete and ceased to apply. Some preliminary comments regarding key issues addressed by the Regulation are provided in the following.

### **3.1 Circumstances that a person could not serve as the legal representative of a company**

The Regulation summarizes and unifies the previously reasons why someone would not be eligible to serve as the legal representative of a company, which previously were scattered in different laws, and which are the following:

- He or she has no civil conduct capacity or has a limited civil conduct capacity. This means that the person can’t or can’t fully recognize his or her own conduct due to a lack of mental capability or age.
- He or she was given a criminal punishment for corruption, bribery, encroachment upon property, embezzlement of property, or disturbance of the socialist market economic order,

and it has not been five years since the day when he or she finished serving the criminal sentence; or he or she was deprived of political rights in a sentence for a crime, and it has not been five years since the day when he or she finished serving the criminal sentence.

- He or she was the legal representative, director, factory head or manager of a company or non-corporate enterprise legal person which went bankrupt and was liquidated, and he or she was personally liable for the bankruptcy, and it has not been three years since the day of completion of bankruptcy liquidation.
- He or she was the legal representative of a company or non-corporate enterprise legal person which had its business license revoked or was ordered to close down for any violation of law, he or she was personally liable for the revocation or closedown, and it has not been three years since the day of revocation of the business license thereof.
- The person fails to repay a large amount of due debt.

### **3.2 Introduce Business Suspension System**

The Regulation states that a company may decide on its own to suspend its business within a certain period when there are difficulties in the business operation caused by natural disasters, accidents, public health incidents and social security incidents. The period of business suspension of a company must not exceed three years. If a company conducts business activities during the period of business suspension, it will be deemed to have resumed business operations, and it has to announce this fact to the public through the National Enterprise Credit Information Publicity System. With the business suspension system, companies can reduce costs in response to difficult situations without shutting down the company.

### **3.3 Summary Procedures for Deregistration**

Before the Regulation came into force, deregistering a company in China could be very time-consuming and difficult. A lot of documentation was needed, a lot of which had to be obtained by making applications to different governmental authorities. Also, different governmental administration authorities requested more materials in addition to what the law had stipulated. Thus, there has long been an urgent need of simplify the deregistration process.

Now, the Regulation introduces a summary deregistration procedure, which provides an easier way for companies to deregister. A company, which hasn't been ordered to close down or was not included in the list of market entities of abnormal operations, or the license of which hasn't been revoked, is eligible for summary deregistration procedure.

To apply for deregistration according to the summary procedure, all the investors of a company have to sign a letter and assume in writing all the legal liability for the veracity of the following situations:

The company has no pending debts, liquidation expenses, employees' wages, social insurance premiums, statutory compensation, or tax payable (late payment fee, fine).

After that, the letter and deregistration application will be published through the National Enterprise Credit Information Publicity System for a publicity period of 20 days. If no objections are raised during the publicity period, the company may apply to the registration authority for deregistration within another 20 days after the publicity period expires.

The summary procedure facilitates deregistration in undisputed cases and provide a time-saving method for companies to deregister. However, it is of course questionable how many investors will be willing to take on a personal liability only to facilitate the deregistration process.

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