

China advances foreign investment and negative list reform with seventh draft catalogue.

Overview

On 7 December 2016, China's National Development and Reform Commission and Ministry of Commerce published consultation draft revisions to the Foreign Investment Industrial Guidance Catalogue ("**Consultation Catalogue**") which, once finalised, will be the seventh version of the Catalogue since inception.

Significantly, the finalised Consultation Catalogue will be the first revision to be made to this document since October's reforms to the PRC foreign investment approval system (see our alerts on the **draft** and **final** rules).

The Consultation Catalogue differs from its predecessor rules in the following respects:

- As foreshadowed in the October reforms, the Consultation Catalogue explicitly provides for a "negative list" of industry sectors and sub-sectors defining the situations where the old approval requirements for foreign investment transactions still apply, with transactions not covered by this list now only requiring a filing rather than an approval.
- The stated purpose of the negative list is to function as a "one stop shop" of all shareholding, business and personnel restrictions that apply only to foreign investments (not including any restrictions generally applicable to both foreign and domestic investments) in the covered sectors. The new list consolidates the scattered restrictions previously found in the encouraged, restricted and prohibited categories within a single integrated section.
- Under this integrated section, the total number of foreign investment restrictions previously spread across the encouraged, restricted and prohibited categories has been reduced from 93 to 62.
- Restrictions are proposed to be lifted in road transport, ocean shipping, credit investigation and rating services, the manufacture of railway transportation equipment, automotive electronics and new energy automobile batteries, motor vehicles, edible oil and fat, corn deep processing, fuel ethanol, non-conventional oil and gas, precious metals, and lithium minerals. Nationality requirements on managing

Contents

Overview	1
Encouraging, but further clarity is needed	2

partners of accounting and auditing firms are also proposed to be removed.

- Restrictions will be deleted in sectors that also apply to domestic investors, such as pornography, theme parks, special training institutions, golf courses and villas and projects which endanger the security and efficiency of military facilities, emphasising the need for those restrictions of general application as well as foreign investment-specific restrictions to be considered for any potential foreign investment and paving the way for a parallel nationwide negative list to be introduced for all investors.
- The Consultation Catalogue also clarifies that if a sector in the encouraged category is eligible for incentives or other preferential treatment for investment, this eligibility is unaffected by any foreign investment restrictions on market access imposed by the draft negative list (such as construction and operation of nuclear power plants, which in the Consultation Catalogue is both an encouraged industry and listed in the draft negative list as restricted). Foreign investments in these industries enjoy preferential treatment, but have to comply with the market access restrictions.

Encouraging, but further clarity is needed

It is worth noting that the Consultation Catalogue appears to advance the October foreign investment reforms by stating that acquisitions of affiliated domestic companies made by PRC-established or PRC-controlled overseas companies remain covered by the pre-existing rules (which we understand to include foreign investment approval requirements). Contrast this with the October rules, which provided that all foreign investments in domestic companies (not just investments made by PRC-established or PRC-controlled overseas companies) are subject to the pre-existing requirements.

Unfortunately, the Consultation Catalogue lacks clarifying language so whether it is intended to supplement or replace the previous requirement is unclear. Given the significance of the October reforms, it is important to have clarification on how key foreign investment provisions (such as the above) will be interpreted under the new regime and we hope this will be addressed in a revised draft or final rules next year. The consultation period ends on 7 January 2017.

Reference: [Notice of the National Development and Reform Commission and Ministry of Commerce Seeking Public Comment on the Revised Draft Foreign Investment Industrial Guidance Catalogue](#) (国家发展改革委 商务部关于《外商投资产业指导目录》修订稿公开征求意见的公告), 7 December 2016

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