Cooley

China’s Government Issues New Negative List for Foreign Investment

September 12, 2018

On 28 June, 2018, the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) of the People’s Republic of China (PRC) jointly issued the **Special Administrative Measures on Access to Foreign Investment** (the “Negative List”) (2018 Version). Effective on July 28, 2018, the Negative List supersedes the Foreign Investment Industry Guidance Catalogue (2017 Version) (the “2017 Catalogue”).

Background

The first Foreign Investment Industry Guidance Catalogue (the “Catalogue”) was promulgated by the NDRC and the MOFCOM on June 20, 1995. Since its first promulgation, the Catalogue has gone through eight revisions. Under the 2017 Catalogue, industrial sectors are divided into three categories: “Encouraged”, “Restricted” and “Prohibited”. Foreign investors are incentivized to invest in the Encouraged sectors and are banned from investing in the Prohibited sectors. Foreign investors are allowed to invest in the Restricted sectors, subject to certain restrictions (such as foreign ownership percentage limits and special regulatory approval requirements). Sectors that are not listed in the Catalogue are deemed as “Permitted”, where foreign investment is allowed, but without preferential treatments (such as tax breaks or other forms of government subsidies).

The Negative List is a list of industry sectors in which foreign investment is either restricted or prohibited. The relevant restrictive measures include shareholding limitations and requirements regarding the component of high-ranking executives. Compared with the 2017 Catalogue, the total number of Restricted and Prohibited items in the Negative List is reduced from 63 to 48 (relating to 22 different industry sectors). With respect to industries that are not explicitly listed in the Negative List, foreign investors are in principle treated the same as domestic investors, save for certain record-filing requirements.

Summary of major changes under the 2018 Negative List

1. **Standalone Negative List.** The 2017 Catalogue consists of both a list of Encouraged sectors and the Negative List, under which industry sectors are categorized as “Restricted” or “Prohibited”. Unlike last year’s practice, the Negative List is now a standalone document, under which there is no longer the two-fold (“Restricted”/“Prohibited”) categorization. Instead, the industry sectors listed are categorized according to the Industrial Classification for National Economic Activities (GB/T4754-2017), a national standard of industrial classification. According to the NDRC and the MOFCOM’s order, the list of designated Encouraged sectors in the 2017 Catalogue shall remain in full force and effect.
2. **New market access opportunities.** The Negative List loosens or cancels certain restrictions on foreign investment in a number of sectors, including, for example, (i) agriculture (removing equity requirements on selection of new crop varieties and production of seeds (except wheat and maize)), (ii) mining (removing restrictions on the exploitation and exploration of graphite and special or rare coal), (iii) shipping vessels (removing restrictions on the design, manufacture and repair of ships), aviation and weapons manufacturing, (iv) infrastructure (removing restrictions on electricity grid construction and operations), (v) transportation (removing restrictions on the foreign investment-to-equity ratio of passenger vehicles), and (vi) technological

services (relaxing restrictions on foreign-invested companies providing internet access to the general public).

3. **Opportunities subject to rolling reform.** In addition to the above immediate measures, we expect to see a rolling reform in certain industry sectors. For example, in the financial sector, the Negative List cancels the shareholding limitation for foreign investors in the banking industry, and lifts the foreign investment percentage ceiling for securities companies, fund management companies, futures companies and life insurance companies to 51%. The Negative List further indicates that such restrictions on foreign ownership will be rescinded altogether in 2021. In the automotive manufacturing sector, the Negative List removes the shareholding limitation for foreign investors in the special vehicle/new energy vehicle manufacturing industry and will remove the restriction on foreign ownership with respect to the commercial vehicle manufacturing industry in 2020. The government will further remove (i) the restriction on foreign ownership with respect to the passenger vehicle manufacturing industry, and (ii) the rules prohibiting a foreign investor from setting up more than 2 joint ventures in China manufacturing the same kind of vehicles, both in 2022. With these reform timetables, the opening-up measures in these industry sectors become more transparent to foreign investors.
4. **New market access prohibitions.** The Negative List also adds certain items that are now subject to the new special administrative measures. For example: (i) foreign investors cannot be partners at domestic law firms, (ii) foreign investors are prohibited from importing movies to China, and (iii) foreign investors are prohibited from investing in domestic organizations of performing arts.
5. **Restrictions not specified in the Negative List.** It should be noted that, although certain Restricted or Prohibited items with respect to industry sectors have been removed from the Negative List, it does not necessarily mean that those sectors are now open to foreign investment without restrictions. Foreign investors still need to comply with the applicable, industry-specific laws and regulations, including administrative approvals, qualification requirements and national security measures, even though those restrictions are not explicitly included in the Negative List itself. For example, the prohibition on foreign investment in film production has been removed from the 2018 Negative List, but there are certain governing, industry-specific regulations that remain in place (e.g., Regulations on the Administration of Movies and The Provisions on the Administration of Chinese-Foreign Cooperative Production of Films, specifying that foreign organizations or individuals are not allowed to produce films by themselves in China. If the foreign investors intend to co-produce films with certain domestic companies, an approval from the corresponding authority under the State Council is required.

Conclusion

The 2018 Negative List was released when it comes to the 40th anniversary of China's economic reform and liberalization, and is generally understood as demonstrating China's continued willingness to gradually open up its market to foreign investors.

Notwithstanding the PRC government's intention to open up more areas of investment for foreign investors, we would like to note that certain areas, which are of interest to Cooley's clients, stay in the 2018 Negative List. A non-exclusive list of such areas include: (i) technology relating to human stem cells and genetic diagnosis and therapy, (ii) online news and information services, online publishing services, online audiovisual program services, online operational cultural products and activities (other than music), and online information dissemination services (only permitted to the extent promulgated under China's WTO commitments), and (iii) value-added telecommunication business, except for e-commerce (subject to foreign shareholding limitations). We will continue to monitor any further developments in this regard and provide updates as appropriate.

legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our **legal notices**.

Key Contacts

Joyce Wang Hong Kong	xwang@cooley.com +852 3758 1285

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.