



## Foreign Direct Investment Law

### The Catalogue for the Guidance of Foreign Investment Industries under the Negative List Approach

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On December 7, 2016, the National Development and Reform Commission (“**NDRC**”) and the Ministry of Commerce (“**MOFCOM**”) jointly announced the issuance of a revised draft for public comment of the *Catalogue for the Guidance of Foreign Investment Industries (2015 Version)* (“**Revised Draft**”). As the usual practice has been to issue revisions every three to four years, the speed with which the Revised Draft has been worked on demonstrates the proactive attitude of policymakers towards the negative list regulatory approach for foreign investment.

Special access administrative measures (also known as a negative list), a key supporting document to the “pre-access national treatment plus negative list,” were not issued at the time the new regulatory regime was formally introduced in October 2016. The role of the negative list has instead been delegated to the *Catalogue for the Guidance of Foreign Investment Industries (2015 Version)* (“**2015 Catalogue**”). The 2015 Catalogue, in its layout of encouraged, restricted, and prohibited categories, lacks a clear description of special access administrative measures for foreign investment. The main purpose of the current revisions is to respond to the needs of the new regulatory regime by providing a unified list of restrictions as well as to improve the clarity of the foreign investment access regime.

#### Overview of the Revised Draft

The Revised Draft proposes to reform the organizational structure of the 2015 Catalogue by merging the encouraged, restricted, and prohibited categories into two broad categories, “encouraged” and “special foreign investment access administrative measures” (“**Negative List**”). The Negative List combines those entries in the encouraged category subject to shareholding requirements with the entries in the previous restricted and prohibited categories. The Negative List is further divided into two sub-categories: restricted and prohibited. The

Revised draft currently lists 344 encouraged entries and 62 Negative List entries (35 restricted entries and 27 prohibited entries).

Based on our preliminary review, the Revised Draft contains the following main adjustments to specific entries:

- a. The Revised Draft presents a unified Negative List by placing encouraged entries subject to special measures into the restricted category, which results in 11 entries presented as both encouraged and Negative Listed (restricted category) (see the table below).

#	Original Catalogue Entries	2015 Catalogue	Revised Draft
1	11.石油、天然气（含油页岩、油砂、页岩气、煤层气等非常规油气）的勘探、开发（限于合资、合作） Oil, natural gas (including oil shale, oil sands, shale gas, coal-bed methane and other unconventional oil and gas) exploration and development. (limited to equity/cooperative joint ventures)	Encouraged category Shareholding limit	Both encouraged /restricted category Only for oil, natural gas (including coal-bed methane, excluding oil shale, oil sands, shale gas, etc.), exploration and development. Shareholding limit remains
2	210. 民用飞机设计、制造与维修：干线、支线飞机（中方控股），通用飞机（限于合资、合作） Design, manufacture and maintenance of civil aircrafts: aircrafts for main and regional lines (PRC parties control) and general-purpose aircrafts (limited to equity/cooperative joint ventures)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains
3	212. 民用直升机设计与制造（3吨级及以上需中方控股） Design and manufacture of civil helicopters (3 tons and above require PRC parties control)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains
4	214. 地面、水面效应飞机制造及无人机、浮空器设计与制造（中方控股） Ground-effect, water-effect, surface aircraft manufacture, and design and manufacture of unmanned aerial vehicles, aerostat (PRC parties control)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains
5	293. 核电站的建设、经营（中方控股） Nuclear power plants construction, operation (PRC parties control)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains
6	295. 电网的建设、经营（中方控股） Power grid construction, operation (PRC parties control)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains
7	301. 铁路干线路网的建设、经营（中方控股） Main railway line construction, operation (PRC parties control)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains
8	307.民用机场的建设、经营（中方相对控股） Civil airport construction, operation (PRC	Encouraged category	Both encouraged /restricted category

	parties holding relative majority of equity interests)	Shareholding limit	Shareholding limit remains
9	308. 航空运输公司（中方控股，且一家外商及其关联企业投资比例不得超过25%） Air transport (PRC parties control, and the investment of a single foreign investor and its affiliated enterprises not exceeding 25%)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains Add nationality requirement for legal representative
10	309. 农、林、渔业通用航空公司（限于合资、合作） General aviation for agricultural, forestry and fishery (limited to equity/cooperative joint ventures)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains Add nationality requirement for legal representative
11	310. 定期、不定期国际海上运输业务（限于合资、合作） Scheduled or non-scheduled international marine transportation services (limited to equity/cooperative joint ventures)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains

- b. In accordance with the principle of consistent administration of domestic and foreign investment, the Revised Draft deletes 11 restricted entries applicable to both foreign and domestic investors, which are no longer regarded as foreign-specific access measures (see the table below).

#	Original Catalogue Entries	2015 Catalogue	Revised Draft
1	14.小电网范围内，单机容量 30 万千瓦及以下燃煤凝汽火电站、单机容量 10 万千瓦及以下燃煤凝汽抽汽两用机组热电联产电站的建设、经营 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	Restricted category	Delete
2	37.大型主题公园的建设、经营 Large-scale theme park construction, management	Restricted category	Delete
3	7.列入《野生药材资源保护管理条例》和《中国稀有濒危保护植物名录》的中药材加工 Processing of Chinese herbal medicines included in the <i>Wild Medicinal Resources Protection and Management Regulations</i> and the <i>Rare and Endangered Plants of China Catalogue</i>	Prohibited category	Delete
4	11. 象牙雕刻 Ivory carving	Prohibited category	Delete
5	12. 虎骨加工 Tiger bone processing	Prohibited category	Delete

6	14. 大电网范围内，单机容量 30 万千瓦及以下燃煤凝汽火电站、单机容量 20 万千瓦及以下燃煤凝汽抽汽两用热电联产电站的建设、经营 Construction and operation of, within large 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 extraction dual-purpose unit cogeneration power plants.	Prohibited category	Delete
7	24. 军事、警察、政治和党校等特殊领域教育机构 Military, police, political and party schools and other special educational institutions	Prohibited category	Delete
8	33. 高尔夫球场、别墅的建设 Construction of golf course and villa	Prohibited category	Delete
9	34. 危害军事设施安全和使用效能的项目 Projects that harm the security and efficiency of military installations	Prohibited category	Delete
10	35. 博彩业（含赌博类跑马场） Gambling and lottery industry (including racetrack gambling)	Prohibited category	Delete
11	36. 色情业 Pornography	Prohibited category	Delete

- c. To further open up and improve industry structures, the Revised Draft moves 7 entries from the restricted category to the permitted category and removes shareholding and nationality requirements for 7 encouraged entries, with some entries being moved to the permitted category (see the table below).

#	Original Catalogue Entries	2015 Catalogue	Revised Draft
1	11. 矿井瓦斯利用（限于合资、合作） Mine gas utilization (limited to equity/cooperative joint ventures)	Encouraged category Shareholding limit	Remove shareholding limit Encouraged category
2	209. 轨道交通运输设备（限于合资、合作） Rail transport equipment (limited to equity/cooperative joint ventures)	Encouraged category Shareholding limit	Remove shareholding limit Change to permitted category
3	221. 海洋工程装备（含模块）的制造与修理（中方控股） Manufacture and repair of marine engineering equipment (including modules) (PRC parties control)	Encouraged category Shareholding limit	Remove shareholding limit Change to permitted category
4	223. 船舶低、中速柴油机及曲轴的制造（中方控股） Manufacture of low and medium speed diesel engines and crankshafts for ships (PRC parties control)	Encouraged category Shareholding limit	Remove shareholding limit Change to permitted category
5	261. 民用卫星设计与制造、民用卫星有效载荷制造（中方控股） Design and manufacture of civil satellite; manufacture of civil satellite payload (PRC parties control)	Encouraged category Shareholding limit	Remove shareholding limit Encouraged category

6	318.会计和审计 Accounting and auditing.	Encouraged category Nationality requirement for principal partner	Remove nationality requirement Change to permitted category
7	341.综合水利枢纽的建设、经营（中方控股） Comprehensive water conservancy project construction, operation (PRC parties control)	Encouraged category Shareholding limit	Remove shareholding limit Change to permitted category
8	3.贵金属（金、银、铂族）勘查、开采 Precious metals (gold, silver, platinum group) exploration, mining	Restricted category	Delete Change to permitted category
9	5.锂矿开采、选矿 Lithium mining, mineral processing	Restricted category	Delete Change to permitted category
10	6.豆油、菜籽油、花生油、棉籽油、茶籽油、葵花籽油、棕榈油等食用油脂加工（中方控股），大米、面粉、原糖加工，玉米深加工 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	Restricted category	Delete Change to permitted category
11	7.生物液体燃料（燃料乙醇、生物柴油）生产（中方控股） Production of bio-liquid fuels (fuel ethanol, biodiesel) (PRC parties control)	Restricted category	Delete Change to permitted category
12	17.公路旅客运输公司 Highway passenger transportation	Restricted category	Delete Change to permitted category
13	22.外轮理货（限于合资、合作） Ocean shipping tally (limited to equity/cooperative joint ventures)	Restricted	Delete Change to permitted category
14	29.资信调查与评级服务公司 Credit investigation and rating services	Restricted	Delete Change to permitted category

- d. The Revised Draft deletes the catch-all entries in the 2015 Catalogue. Instead, in the explanatory notes to the Negative List, it is provided that where CEPA-related agreements, international agreements or treaties which China has concluded or in which it participates, or where the laws and regulations of China have provided otherwise, such provisions shall prevail. This approach could offer flexibility for Chinese government to tailor negative list on a country-specific basis without amending the Negative List.

#	Original Catalogue Entries	2015 Catalogue	Revised Draft
1	十四、国家法律法规和我国缔结或者参加的国际条约规定限制的其他产业 Other industries that are restricted by laws and regulations and international treaties concluded or participated in by China	Restricted category	Delete

2	十三、国家法律法规和我国缔结或者参加的国际条约规定禁止的其他产业 Other industries that are prohibited by laws and regulations and international treaties concluded or participated in by China	Prohibited category	Delete
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## Comments

The proposed revisions to the 2015 Catalogue are of great significance for they will create a clearer, more open investment environment. However, perhaps due to time constraints, the Draft Revision does not break from the concept of a guidance catalogue, and many adjustments are more with respect to the classification and layout to satisfy the negative list form requirements. The current Negative List is still in a transitional phase, as its expressions are overly generalized, and the restrictive measures are not sufficiently specific or clear. We look forward to broader changes to the catalogue, or a new and independent negative list to be introduced.

Based on the current organizational structure, the restricted category also includes certain encouraged entries subject to shareholding limit. As listed in the table above, industries categorized as both encouraged and Negative Listed include oil and gas exploration, construction and operation of nuclear power plants, construction and operation of power grids, etc. According to the Negative List explanatory notes in the Revised Draft, entries that are listed both in the encouraged category and on the Negative List enjoy preferential treatment and, at the same time, are subject to access requirements. This indicates the continuation of incentives for encouraged industries, such as reduced tariffs for imported equipment. In this sense, the 2015 Category, after revisions, can be viewed to consist of both a “positive list” and a “negative list”. The encouraged works as a “positive list” listing sectors eligible for preferential treatments under laws and regulations, while the Negative List lists sectors offered with less-favorable national treatment.

According to the Negative List explanatory notes in the Revised Draft, the Negative List only contains restrictive measures for foreign investment. This change in administrative approach conforms to the principle of national treatment for foreign investment, and corresponds to the ongoing market access negative list reform. Under this approach, foreign investors must first comply with the foreign investment access requirements, and, after entry, follow the same administrative measures as other market players, including state-owned and private enterprises, based on their respective industries, areas, and business. The restricted and prohibited entries deleted from the Revised Draft are those applicable to both foreign and domestic investment, such as large-scale theme parks, military, police, political and party schools and other special educational institutions, golf courses, villas, activities harmful to military installations, pornography and gambling. These entries are now reflected in the *Market Entry Negative List Draft (Pilot)*, issued by NDRC and MOFCOM on March 2, 2016.



In addition, the explanatory notes in the Revised Draft point out in particular that “where an offshore company legally established or controlled by a domestic company, enterprise, or individual acquires or merges with a domestic company affiliated with such domestic company, enterprise, or individual, the existing provisions relating to foreign projects, establishment and amendments to foreign invested enterprises shall continue to apply.” The situation to which this provision applies is similar to that of Article 11 of the *Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (MOFCOM Decree No. 6 of 2009), which regulates related-party mergers and acquisitions. Per this provision, a M&A transaction involving a domestic affiliate is required to be submitted to MOFCOM for examination and approval. The purpose of this note in the Revised Draft can be understood to emphasize that related-party M&A transactions are to be approved by MOFCOM, regardless of whether they involve a Negative Listed industry. On the other hand, according to the joint announcement by NDRC and MOFCOM dated October 8, 2016, foreign investment by way of M&A transactions will continue to be subject to the existing approval system, regardless of whether it involves a Negative Listed industry. The joint announcement appears broader in scope than the Revised Draft, which only mandates that related-party M&A transactions be subject to the existing approval regime and does not mention other types of M&A. Could this mean that the Revised Draft contemplates that M&A transactions by foreign investors of domestic enterprises will be subject to record-filing, rather than administrative approval, if the sector involved is not on the Negative List and the deal does not constitute a related-party transaction? Whether this “aggressive” interpretation of the note is valid is subject to further clarification by policymakers.

## ● **Important Announcement**

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