



# PILLAR LEGAL

## PRC REGULATION WATCH<sup>1</sup>

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## 1. 2015 Industry Catalogue for Foreign Investment Released

On March 13, 2015, the National Development and Reform Commission (国家发展和改革委员会) (“NDRC”) and the Ministry of Commerce (商务部) (“MOC”) jointly issued the new Catalogue for the Guidance of Foreign Investment Industries (Amended in 2015) (外商投资产业指导目录) (2015 年修订) (the “2015 Catalogue”)<sup>2</sup>, which became effective on April 10, 2015, and replaced the old Catalogue for the Guidance of Foreign Investment Industries (Amended in 2011) (外商投资产业指导目录) (2011 年修订) (the “2011 Catalogue”).

The Catalogue for the Guidance of Foreign Investment Industries was first released in 1995 (the “Catalogue”), making the 2015 Catalogue the sixth amendment to the Catalogue. For the purpose of foreign investment restrictions, the Catalogue and its amendments divide China’s economy into four categories: encouraged, permitted, restricted and prohibited. The Catalogue and its amendments specify the industries in which foreign investment is encouraged, restricted or prohibited. For industries not listed in the Catalogue, foreign investment is permitted. The 2015 Catalogue lifts restrictions on foreign investments by reducing the number of restricted industries from 79 to 38. In addition, the 2015 Catalogue removes the foreign investment equity restrictions in various industries. For example, the 2015 Catalogue reduced the number of industries requiring a sino-foreign equity joint venture or cooperative joint venture from 43 to 15, and the number of industries requiring control by Chinese investors from 44 to 35. Despite adding several new industries to the prohibited industries, the 2015 Catalogue reflects a trend of greater openness to foreign investment.

### A. Internet Industry.

The 2015 Catalogue removes the foreign shareholding restriction on e-commerce under the value-added telecommunications industries, which means a wholly foreign-owned entity is allowed to operate an e-commerce business nationwide. It is worth noting that the Ministry of Industry and Information Technology (工业和信息化部) previously released a notice<sup>3</sup> which states that a wholly foreign-owned entity established in the Shanghai Free Trade Zone is allowed to operate an e-commerce business.

In conjunction with this removal of restrictions on e-commerce, online sales activities (网上销售) have been reclassified from the restricted to the permitted category.

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<sup>2</sup> See [NDRC website](#) for reference.

<sup>3</sup> See [Notice to Lift Shareholding Restrictions on Foreign Investors for Online Data and Trade Processing Businesses \(E-Commerce Businesses\) in China \(Shanghai\) Free-Trade Pilot Program \(关于在中国（上海）自由贸易试验区放开在线数据处理与交易处理业务（经营类电子商务）外资股权比例限制的通告\)](#) issued on January 13, 2015.

However, given the government's strict policies with respect to the internet cultural industry, it is not a surprise that internet publishing remains a prohibited category under the 2015 Catalogue.

## **B. Other Industries with Restrictions Lifted.**

Cultural. The business operation of entertainment venues was reclassified from the prohibited to the permitted category, and does not require a sino-foreign equity joint venture or cooperative joint venture as was the case in the 2011 Catalogue.

Finance. Foreign investment in financial companies, trust companies, currency brokerage companies and insurance brokerage companies is now reclassified from the restricted to the permitted category.

Wholesale, Retail and Logistics Industries. The direct sale, mail order and online sale industries were reclassified from the restricted to the permitted category.

Manufacturing Industry. The 2015 Catalogue reclassifies a number of manufacturing industries from the restricted to the permitted category, including beverage manufacturing, chemical materials and manufacturing, general purpose machinery and special purpose machinery manufacturing (except arms manufacturing), telecommunication equipment manufacturing and computer and other electronic equipment manufacturing.

Real Estate. The 2015 Catalogue lifts the restrictions on foreign investment in the real estate industry, and no longer restricts foreign investors from operating hotels, office buildings and international conference centers.

Energy. Various industries related to clean energy were added to the encouraged industries category.

## **C. Industries with More Control Imposed.**

However, it is worth noting that in contrast to the relatively open policy towards foreign investors in the permitted and encouraged industries, the 2015 Catalogue also strengthens the regulation of certain industries, including:

Automobile. Automobile manufacturing, and special purpose vehicle and motorcycle manufacturing are listed in the catalogue of restricted industries, and the 2015 Catalogue requires that the equity ownership of Chinese investors cannot be less than 50%. Previously, the automobile manufacturing was one of the permitted industries under the 2011 Catalogue, and one of the encouraged industries under the 2007 Catalogue.

Education. The 2015 Catalogue places higher educational institutions (高等教育机构) (previously an encouraged industry under the 2011 Catalogue) and childcare institutions (学前教育机构) into the restricted category, with the investment method limited to the form of a cooperative joint venture controlled by Chinese investors<sup>4</sup>. The same requirement for Chinese controlled shareholding applies to ordinary high school education, which was already categorized as a restricted industry under the 2011 Catalogue.

Accounting and Auditing. Even though accounting and auditing is still listed as an encouraged industry in the 2015 Catalogue, and no longer is required to be in the operation form of a cooperative joint venture, the 2015 Catalogue requires that the managing partner of a foreign accounting firm shall have Chinese nationality, which may have an impact on foreign accounting firms since dual nationality is not allowed in China.

On January 19, 2015, the Ministry of Commerce published a draft of the proposed Foreign Investment Law (the “Draft FIL”), pursuant to which foreign investors would be entitled to national treatment when making investments within China, unless the investment is in an industry listed in the catalogue of special administrative measures for foreign investment (外国投资特别管理措施目录) (the “Negative List”). Unlike the Catalogue, the Negative List will only consist of two categories: prohibited and restricted. If a foreign investment is in an industry other than those listed as restricted or prohibited in the Negative List, such foreign investment will be classified as permitted.

It is not yet clear how the 2015 Catalogue will interact with the Negative List. However, based on the prior practice in the Shanghai Free Trade Zone and the catalogue of special administrative measures for foreign investment for Shanghai Free Trade Zone as amended in 2014 (中国（上海）自由贸易试验区外商投资准入特别管理措施（负面清单）（2014年修订）)<sup>5</sup>, it appears as though the Negative List will be based on the 2015 Catalogue. In addition, the 2015 PRC government work report states that establishing a system for foreign investment access into industries from the Negative List is one of the tasks of PRC government in 2015<sup>6</sup>. As a result, it appears that the PRC government is satisfied with the prior practice in the Shanghai Free Trade Zone with respect to the Negative List, and would like to expand the Negative List practice throughout the nation. It is therefore possible that the 2015 Catalogue could be replaced by the Draft FIL and the Negative List.

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<sup>4</sup> According to the 2015 Catalogue, “Controlled by Chinese investors” means that the principal or person primarily in charge of administration shall have Chinese nationality, and the number of Chinese members of the board of governors, the board of director or joint administrative committee of a sino-foreign contractual educational institution shall be not less than 50%.

<sup>5</sup> See [Shanghai government website](#) for reference.

<sup>6</sup> See [People.com](#) for reference.

## 2. China Implements New Consumer Data Protection Rules

On March 15, 2015, the State Administration for Industry and Commerce (国家工商行政总局) (“SAIC”) implemented the Measures on Penalties for Infringing upon the Rights and Interests of Consumers (侵害消费者权益行为处罚办法)<sup>7</sup> (the “Measures”), which provides additional details regarding the consumer information protections prescribed in the Consumer Rights Protection Law (中华人民共和国消费者权益保护法)<sup>8</sup>.

The Measures first define consumer personal information as any information collected by an enterprise operator during the sale of products or provisions of services, that can, singly or in combination with other information, identify a consumer, including a consumer’s name, gender, occupation, date of birth, identification document number, residential address, contact information, status of income and assets, health status and consumption habits.

The Measure also clarified that without the consumer’s consent, the seller may not collect or use consumer personal information, disclose or sell consumer personal information or send advertisement information to consumers.

It is worth noting that China has recently formulated various regulations to strengthen the protection of personal information, including the Administrative Measures for Online Trading (网络交易管理办法)<sup>9</sup>, Provisions on Protecting the Personal Information of Telecommunication and Internet Users (电信和互联网用户个人信息保护规定)<sup>10</sup> and Decisions on Strengthening Online Information Protection (全国人民代表大会常务委员会关于加强网络信息保护的決定)<sup>11</sup>. In addition, on February 1, 2015, Yang Chunyan (杨春燕), the senior officer of the China Cyberspace Administration, stated that China will push forward with the formulation of personal information protection laws<sup>12</sup>.

## 3. Cross-Border E-Commerce Pilot Zone to be Established in Hangzhou

On March 12, 2015, the State Council (国务院) released the Reply on Agreeing to Establish a Cross-Border E-Commerce Pilot Zone in China (Hangzhou) (国务院关于同意设立中国（杭州）跨境电子商务综合试验区的批复) (the “Reply”)<sup>13</sup>, which

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<sup>7</sup> See [SAIC website](#) for reference.

<sup>8</sup> See Article 29 of [China’s Consumer Rights Protection Law \(中华人民共和国消费者权益保护法\)](#) amended in 2013.

<sup>9</sup> See [Administrative Measures for Online Trading \(网络交易管理办法\)](#) issued in March 2014 by SAIC.

<sup>10</sup> See [Provisions on Protecting the Personal Information of Telecommunication and Internet Users \(电信和互联网用户个人信息保护规定\)](#) issued by MIIT on July 16, 2013.

<sup>11</sup> See [Decision of the Standing Committee of the National People’s Congress on Strengthening Information Protection on Networks \(全国人民代表大会常务委员会关于加强网络信息保护的決定\)](#) issued on December 28, 2012.

<sup>12</sup> See [Xinhua website](#) for reference.

<sup>13</sup> See [State council website](#) for reference.

allowed Hangzhou, the capital city of East China's Zhejiang Province, to set up the country's first cross-border e-commerce pilot zone.

According to the Reply, the pilot zone will focus on cross-border e-commerce transactions, payments, logistics, customs clearances and exchange settlements to ultimately build a comprehensive industry chain, which will be useful for cross-border e-commerce all over the world. Currently, neither Zhejiang Province nor Hangzhou City have issued the detailed implementation measures for the cross-border e-commerce pilot zone, so it is still not clear how the pilot zone will actually operate.

#### **4. China Adjusts Unemployment Insurance Rate**

On February 27, 2015, the Ministry of Human Resources and Social Security (人力资源社会保障部) (the “MOHRSS”) and the Ministry of Finance (财政部) (“MOF”) jointly released the Circular on Adjusting the Unemployment Insurance Rate (关于调整失业保险费率有关问题的通知)<sup>14</sup> which took effect on March 1, 2015.

The circular instructs the local government of each province and municipality to reduce the unemployment insurance rate from 3% to 2%. Under Section 47 of the PRC Social Insurance Law (社会保险法)<sup>15</sup>, the rate of unemployment insurance is determined by the local government of each province and municipality. However, a Notice on Adjustment of Shanghai Social Insurance Rate (关于调整本市城镇职工社会保险缴费比例的通知) issued by the Shanghai government has been in effect since October 1, 2013<sup>16</sup>, which already reduced Shanghai's unemployment insurance rate for the employee in Shanghai to 2%. As a result, this new circular will not affect the unemployment insurance rate in Shanghai.

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<sup>14</sup> See [MOHRSS website](#) for reference.

<sup>15</sup> See [PRC government website](#) for reference.

<sup>16</sup> See [Shanghai government website](#) for reference.