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China Newsletter | Issue No. 31

Summer 2015

# Foreign Direct Investment

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On Feb. 24, 2015, the State Council of China issued the Decision to *Eliminate and Adjust a Series of Items of Administrative Approvals* (the **Decision**), which came into effect on the same day.

With an aim to further reduce regulatory red tape, the Decision terminates and delegates 90 items of administrative review and approval to lower-level government authorities. For example, terminated items include:

- Approval by China Securities Regulatory Commission (**CSRC**) for addition of new shareholders or transfer of shares by original shareholders of companies listed on the National Equities Exchange and Quotation system
- Approval by China Insurance Regulatory Commission (**CIRC**) for equity transfer and change of organization type of insurance companies
- Approval by CIRC for re-insurer's affiliated transaction involving a foreign-invested insurer
- Approval by the Ministry of Industry and Information Technology (**MIIT**) to be certified as a software enterprise and a circuit board design enterprise
- Approval by the State Administration of Taxation (**SAT**) with respect to the establishment of representative offices by foreign accounting firms
- Approval by SAT to be certified as a general VAT payer

The items of administrative approval that have been delegated from the central government to the provincial

governments include, among others:

- Approval by the China Food and Drug Administration (**CFDA**) for the manufacture of APIs for the anesthetics and type-I and type-II psychoactive drugs, which was delegated to the provincial counterpart of CFDA
- Approval by the Ministry of Agriculture (**MOA**) for the manufacture of animal drugs, which was delegated to the provincial counterpart of MOA

In addition, the Decision modifies the approval regime for another 21 business items. Prior to the modification, to engage in these business items, investors were required to obtain an industrial license from the relevant government authority prior to registering their businesses with the Administration of Industry and Commerce (the **AIC**). To further liberalize the business registration regime, the Decision now allows investors to complete the AIC registration of their businesses first and then obtain the requisite industrial licenses. Such industrial licenses include (but are not limited to):

- License by MIIT and its local counterparts for setting up an agro-pesticide manufacturer
- License by MIIT and its local counterparts for foreign investors to set up a company engaging in telecommunication services
- License by MIIT and its local counterparts for engaging in telecommunication services
- License by the Ministry of Public Security (**MPS**) and its local counterparts to engage in hotel business
- License by the Ministry of Transport and its local counterparts for engaging in road passenger transport and road freight business
- License by CSRC for setting up a company trading futures, a public fund management company, and a securities finance company
- License by CIRC for setting up an insurance assets management company, an insurance group company, or a holding company

To implement the Decision, on May 11, 2015, the SAIC released the *Circular to Strictly Implement the Registration-First-and-License-Second Reform and to Strictly Enforce the Pre-Registration License Items* (the **Circular**), clarifying that for business items for which the pre-registration industrial licenses have been canceled, the AIC will not require applicants to submit any industrial licenses or approvals when issuing the business license to the applicants, and within 20 days of the applicants obtaining such industrial licenses, the applicants should update the information regarding their industrial license with the AIC through an online business information system.

In addition, the Circular also sets forth a list of 39 business items for which a pre-registration license is still required. Examples of such licenses include:

- License by the MOA and its local counterparts to engage in trading of seeds of crops
- License by CSRC for setting up a securities company, a stock or futures exchange, or for foreign securities company to set up representative offices in China
- License by the State Tobacco Monopoly Administration and its local counterparts for setting up an enterprise manufacturing or trading tobacco
- License by the Ministry of Commerce and its local counterparts for the establishment of a foreign-invested enterprise
- License by the MPS and its local counterparts for engaging in the manufacture of combustibles or in security guard services
- License by the People's Bank of China for setting up a company providing personal credit information services
- License by the State Administration of Press, Publication, Radio, Film, and Television for setting up a publisher, an importer of publications, or for engaging in printing business
- License by the State Administration of Work Safety for engaging in trading of hazardous chemical products (HCP) or for construction projects for manufacture or storage of HCPs
- License by the China Banking Regulatory Commission for setting up a bank or non-bank financial institution, or for foreign banks to set up representative offices in China
- License by the CIRC for setting up an insurance company or its branch, or for foreign insurers to set up representative offices in China

These pre-registration licenses are either authorized by law or by applicable decisions of the State Council and the business activities subject to such licenses are considered to be the most highly regulated ones in China.

- *Decision to Eliminate and Adjust a Series of Items of Administrative Approvals*
- *《关于取消和调整一批行政审批项目等事项的决定》*
- *Issuing Authority: State Council*
- *Date of Issuance: February 24, 2015 / Effective Date: February 24, 2015.*

- *Circular to Strictly Implement the Registration-First-and-License-Second Reform and to Strictly Enforce the Pre-Registration Approval Items*
- *《关于严格落实先照后证改革严格执行工商登记前置审批事项的通知》*
- *Issuing Authority: State Administration of Industry and Commerce*
- *Date of Issuance: May 11, 2015 / Effective Date: May 11, 2015.*

### 2. Ministry of Commerce Releases Tentative Measures for Administration of Filing of Foreign Investment in Pilot Free Trade Zones

**商**务部发布《自由贸易试验区外商投资备案管理办法（试行）》(4/8/2015)

On April 8, 2015, the Ministry of Commerce (**MOFCOM**) published the *Tentative Measures for Administration of Filing of Foreign Investment in Pilot Free Trade Zones* (the **Tentative Measures**), which became effective May 8, 2015. In view of the geographic expansion of China's Free Trade Zone (**FTZ**) pilot programs from the Pudong New Area of Shanghai to a few other coastal cities and provinces including Tianjin, Fujian, and Guangzhou in December 2014, the Tentative Measures provides a guidance on how to complete the requisite filings for foreign investors planning to make green field investments or acquisitions in these FTZs.

Historically, foreign investors are required to obtain an approval from MOFCOM before the investors can incorporate a business in China. To create a more favorable and friendly environment for foreign investors, in August 2013 China's central government launched the first pilot FTZ in Shanghai, replacing the MOFCOM approval regime with a fast-track record filing system. The filing system applies to foreign investors making investment in the FTZ as long as the investment does not fall within the forbidden and restrictive industries catalogued by Chinese government (the so-called "Negative List").

To follow suit of Shanghai FTZ, the Tentative Measures provides for a similar filing system applicable to foreign investments at any of the four FTZs in China. The filing system under the Tentative Measures has the following features:

- Either before the business registration with the AIC or within 30 days after the registration, foreign investors planning to make an investment in industries outside the scope of the Negative List should submit certain information online regarding the investor and the investment (e.g., name, address, and registered capital of the company the investor is going to set up or acquire, and name, address, and source of funding of the investor) to the administering authority of the FTZ.
- In case the company created by the foreign investor undergoes certain changes, including, without limitation, change of shareholder, registered capital, business term and scope, pledge of its shares, or the engagement in mergers or divisions, the company should submit a supplementary filing through the same online system to update the changes.
- The company created by the foreign investor should make an annual filing through the same online system before June 30$^{th}$ of each calendar year. However, the disclosure requirements for the annual filings are not made clear under the Tentative Measures.
- All information that the company has submitted through the filing system will be archived into a credit database and MOFCOM will take steps to make the database public via appropriate means. However, the Tentative Measures does not clarify what information will be included in such credit database and how the public can access the database.

As MOFCOM gains more experience from the operation of Shanghai and other FTZs in China, it is expected that in the near future MOFCOM will publish more detailed guidance on issues such as the annual filing and the credit database.

- *Tentative Measures for Administration of Filing of Foreign Investment in Pilot Free Trade Zones*
- *《自由贸易试验区外商投资备案管理办法（试行）》*

- *Issuing Authority: Ministry of Commerce*
- *Date of Issuance: April 8, 2015 / Effective Date: May 8, 2015.*

### 3. General Office of the State Council Issues Tentative Measures for the National Security Review of Foreign Investment in Pilot Free Trade Zones

国务院办公厅关于印发《自由贸易试验区外商投资国家安全审查试行办法》的通知 (4/8/2015)

On April 8, 2015, the General Office of the State Council issued the *Tentative Measures for the National Security Review of Foreign Investment in Pilot Free Trade Zones* (the **Measures**). The Measures further expands and enhances the regulatory scope of the *Circular of the General Office of State Council on Establishing the Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors* (the **Circular**), which became effective in 2011, specifying that foreign investment in the Free Trade Zones (the **FTZ**) in Shanghai, Guangdong, Tianjin, and Fujian should be subject to the security review. Below are key points of the Measures.

**Expanding the Scope of Security Review**

Under the Circular, the scope of security review only covers foreign investors' merger and acquisition of PRC domestic enterprises in the following scenarios:

(1) The purchase of equities of domestic non-foreign funded enterprises or the subscription for capital increase in domestic non-foreign funded enterprises

(2) The purchase of equities of the Chinese investors of domestic foreign-funded enterprises, or the subscription of capital increase in domestic foreign-invested enterprises

(3) The establishment of foreign-invested enterprises and the purchase of domestic enterprises' assets by such foreign-invested enterprises or the purchase of equities of domestic enterprises through such foreign-invested enterprises

(4) Direct purchase of assets of domestic enterprises and the establishment of foreign-invested enterprises to own and operate such assets

The Measures expand the scope of security review to include two additional types of foreign investments to be subject to review: (1) the establishment of a new enterprise with a sole or joint foreign investment; and (2) foreign investment made through mechanisms such as control agreements, holding under authorization, trust, reinvestment, overseas transactions, lease, and the subscription of convertible bonds.

**Adding New Industries subject to National Security Review**

Under the Circular investments, the following sensitive industries fall under the scope of national security review: domestic military industry enterprises, military industry support enterprises, enterprises related to key and sensitive military facilities, and other units which have impact on national defense security, important agricultural products, important energy and resources, important infrastructure, important transport service, key technology, and major equipment manufacturing. The Measures additionally added that investments in important culture and information technology products and services will be subject to national security review.

**Specifying the Responsibilities of FTZ Administrative Organization**

The Measures specify that the FTZ administrative organization shall be responsible for the following functions:

(1) *Initiation of Security Review*. In its handling of the formalities for filing, approval, or review of foreign investment within the range of its functions and powers, the administrative organization of FTZ should timely inform the foreign investors making foreign investments that would fall within the scope of national security review of their obligations to file a national security review application and suspend the handling of the relevant formalities for such foreign investment.

(2) *Supervision and Report*. If the FTZ administrative organization finds that a foreign investor provides false information, omits substantive information, changes investment activities after the security review, or breaches the supplementary conditions, which result in or is likely to result in significant impact on national security, it is

obligated to report the instance to the National Development and Reform Commission and the Ministry of Commerce.

**Conclusion**

The Measures further enhances and expands the national security review regime in the FTZ. Notably, the Measures clarify that foreign investments utilizing the variable interest entity (VIE) structure in sensitive industries would be subject to national security review regime.

*- Circular of the General Office of the State Council on Issuing the Tentative Measures for the National Security Review of Foreign Investment in Pilot Free Trade Zones*
*-《国务院办公厅关于印发〈自由贸易试验区外商投资国家安全审查试行办法〉的通知》*
*- Issuing authority: State Council*
*- Date of issuance: April 8, 2015 / Effective date: May 8, 2015*

### 4. State Council and GAC Releases Negative List for Foreign Investment and Measures Supporting the Development of Fujian, Tianjin, and Guangdong Free Trade Zones

国务院及海关总署分别出台自贸区外商投资负面清单及支持和促进中国福建、天津及广东自由贸易试验区建设发展的若干措施 (4/21/2015)

Eighteen months after the launch of Shanghai pilot Free Trade Zone (the **FTZ**), three new pilot FTZs were officially launched in Tianjin, Guangdong, and Fujian April 21, 2015. The launch coincided with the release by the State Council of the *Special Administrative Measures for Foreign Investment Access to Free Trade Zones* (*Negative List*) (the **Negative List**) for the four pilot FTZs, which became effective May 8, 2015, and the release by the General Administration of Customs (the **GAC**) of the *Customs Support Measures for the Establishment and Development of New Free Trade Zone in Guangdong, the Customs Support Measures for the Establishment and Development of New Free Trade Zone in Tianjin*, and the *Customs Support Measures for the Establishment and Development of New Free Trade Zone in Fujian* (collectively, the **Measures**), which became effective May 8, 2015, as well.

As expected, the details in the Negative List and the Measures generally follow the model established for the Shanghai FTZ, but with certain changes.

**The Negative List**

The Negative List for FTZs applies to four free trade zones (of Shanghai, Guangdong, Tianjin, and Fujian) and is divided into 15 categories, 50 sections, and 122 special administrative measures based on the Industrial Classification for National Economic Activities (GB/T4754—2011). The Negative List only serves to identify where foreign investors are treated differently than domestic Chinese companies. For industries not listed in this document, foreign investors will receive treatment similar to the treatment of domestic companies with regard to the establishment and approval requirements and processes.

Note, however, that industries which are not open to regular Chinese entities will not be open to foreign investors either. Therefore, the absence of an industry on the Negative List does not automatically mean that the industry is open to foreign investors. Other PRC laws and regulations will need to be checked to confirm whether such industry is open to foreign investment in the FTZ.

Note that the Negative List does not affect other laws and regulations that may apply to foreign investments. For example, foreign investors who are natural persons are still prohibited from owning individual businesses, sole proprietorship enterprises, or members of farmers' professional cooperatives. Further, additional regulatory approvals may be required in instances where a foreign investor acquires a domestic Chinese company, strategically invests in a listed company in China, or utilizes its foreign invested entity in the PRC to acquire equity in another PRC entity.

Compared to the 2015 Foreign Investment Catalogue released earlier this year, the Negative List removes certain restrictions, including (but not limited to) the following:

- Restrictions on the exploration and mining of special and rare types of coal

- Restrictions on the manufacturing of medical and pharmaceutical products
- The requirements on the proportion of foreign capital regarding telecommunications industries
- Restrictions on processing of certain edible oils and fats, rice, and flour
- Restrictions on international marine transportation services
- Restrictions on construction and operation of water control projects

**The Measures**

Three Measures introduce 25 specific support measures in five general respects for the Fujian, Tianjin, and Guangdong FTZs, which are summarized below.

**Fujian FTZ**

1. The GAC shall innovate the customs oversight system by:
    - Popularizing the innovative customs supervision system of the China (Shanghai) Pilot Free Trade Zone
    - Deepening the reform of customs clearance integration in the Fujian FTZ
    - Implementing the "three ways of mutual cooperation" to improve the customs clearance efficiency of the Fujian FTZ
    - Innovating the system of supervision, examination, and inspection
    - Innovating the supervision system for processing trade
    - Innovating enterprise management system
    - Promoting the reform in the tax collection and management regime by the customs
    - Introducing on a test basis the system of "proactive disclosure" by enterprises
2. The GAC shall develop the functions of special customs supervision areas and keep the steady growth and facilitate the structural adjustment of the Fujian FTZ by:
    - Implementing the policies of selectively levying customs duties on commodities manufactured for the domestic market
    - Speeding up the integration and optimization of special customs supervision areas
    - Promoting the development of the interactions between areas inside and outside of the Fujian FTZ
3. The GAC shall support the development of emerging business models, and promote the reform and innovation of the Fujian FTZ by:
    - Supporting the development of cross-border e-commerce
    - Supporting the development of pilot schemes of research, development and design, detection and maintenance, and service outsourcing business
    - Supporting the operation of bonded futures delivery business
    - Supporting the operation of bonded exhibition business
    - Supporting the development of financial lease business
4. The GAC shall foster a legal environment for conducting business, and maintain the fair and impartial trade order in the Fujian FTZ by:
    - Implementing intellectual property protection in accordance with the law and maintaining corporate

innovation achievements

- Preventing and controlling risks in accordance with the law and safeguarding the security of national ideology
- Fighting against smuggling in accordance with the law and maintaining a healthy environment for the development of the Fujian FTZ

5. The GAC shall support the economic and trade cooperation between the Fujian province and Taiwan by:
   - Facilitating the simplification of the trade with Taiwan
   - Supporting the development of shipping business to facilitate cross-strait exchanges
   - Supporting the development of industrial clusters
   - Supporting Pingtan to build a Fujian-Taiwan cooperation platform
   - Supporting the construction of the 21st Century Maritime Silk Road
   - Improving the cooperation level between the cross-strait customs

**Tianjin FTZ**

The first through fourth respects of the Measures for Tianjin FTZ are exactly same as Fujian FTZ. The fifth respect is summarized as follows:

The GAC shall support the development of competitive industries, and promote the Tianjin FTZ to play a radiating and leading role by:

- Supporting the development of aviation industry
- Supporting the expansion of international shipping services
- Supporting industrial transformation and upgrading
- Supporting the improvement of the function of customs clearance services
- Supporting the balanced development of foreign trade
- Supporting the ports to give play to their service radiation function

**Guangdong FTZ**

The first through fourth respects of the Measures for Guangdong FTZ are exactly same as Fujian FTZ. The fifth respect is summarized as follows:

The GAC shall utilize regional industrial advantages and promote in-depth cooperation of Guangdong, Hong Kong, and Macao by:

- Supporting the transformation and upgrading of processing trade
- Supporting the development of shipping and logistics industry
- Supporting the development of modern services industry
- Innovating the expedited customs clearance model of Guangdong, Hong Kong, and Macao
- Supporting Hengqin to continue to explore and innovate the model of tier-based and category-based management
- Promoting the cooperation among Guangdong, Hong Kong, and Macao customs

*- Special Administrative Measures for Foreign Investment Access to Free Trade Zones (Negative List)*

*-自贸区外商投资负面清单*

*- Issuing Authority: State Council*

*- Date of Issuance: April 8, 2015/Date of Effective: May 8, 2015*

*- Custom Support Measures for the building and development of new free trade zones in Guangdong*
*-支持和促进中国广东自由贸易试验区建设发展的若干措施*
*- Issuing Authority: General Administration of Customs*
*- Date of Issuance: May 8, 2015/Date of Effective: May 8, 2015*

*- Custom Support Measures for the building and development of new free trade zones in Tianjin*
*-支持和促进中国天津自由贸易试验区建设发展的若干措施*
*- Issuing Authority: General Administration of Customs*
*- Date of Issuance: May 8, 2015/Date of Effective: May 8, 2015*

*- Custom Support Measures for the building and development of new free trade zones in Fujian*
*-支持和促进中国福建自由贸易试验区建设发展的若干措施*
*- Issuing Authority: General Administration of Customs*
*- Date of Issuance: May 8, 2015/Date of Effective: May 8, 2015*

### 5. State Council Adjusts Administrative Approval and Access-related Special Administrative Measures for Hong Kong and Macau Service Providers in Guangdong

国务院暂时调整在粤对港澳服务提供者有关行政审批和准入特别管理措施 (3/3/2015)

On March 3, 2015, the State Council issued the Decision on *Temporarily Adjusting the Administrative Approval and Access-related Special Administrative Measures for Hong Kong and Macau Service Providers in the Guangdong Province* (the **Decision**). Such Decision was adopted in the aftermath of execution of the *Agreement between Mainland China and Hong Kong on Achieving the Basic Liberalization of Trade in Services in Guangdong Province under the Framework of Mainland China and Hong Kong Closer Economic Partnership Arrangement* (the **Mainland-HK Agreement**) and the *Agreement between Mainland China and Macao on Achieving the Basic Liberalization of Trade in Services in Guangdong Province under the Framework of Mainland China and Macao Closer Economic Partnership Arrangement* (the **Mainland-Macao Agreement**; collective with the Mainland-HK Agreement, the **Agreements**).

According to the Decision, the State Council will temporarily adjust the administrative approval and access-related special administrative measures for Hong Kong and Macao service providers in Guangdong Province as follows:

**Reform of the Supervision Regime**

The Decision provides that generally the contracts and articles of association relating to the establishment of, or changes to companies established by Hong Kong or Macao service providers shall temporarily be subject to only record-filing requirements instead of approval requirements. However, the reserved restrictive measures (which refer to circumstances under which national treatment and most-favored treatment will not apply) under the Mainland-HK Agreement or the Mainland-Macao Agreement will apply. Further, the establishment of and changes in telecommunications and cultural companies and financial institutions as well as the establishment and change in commercial presence in forms other than companies will not be subject to this change.

**Opening-up of the Services Industry**

The Decision makes it clear that the opening-up of the service industry shall be expanded. It also provides that certain requirements (including administrative approval requirements, qualification requirements, restrictions on equity ratio, restrictions on business scope, and other access-related special administrative measures) under the following laws and regulations will be temporarily adjusted (the **Adjustments**):

- Administrative Provisions on Foreign-invested Telecommunications Enterprises
- Regulations of the People's Republic of China on Sino-foreign Cooperative Education
- Regulations of the People's Republic of China on International Maritime Transportation

- Regulations on the Administration of Entertainment Places
- Administrative Regulations on the Credit Reporting Industry
- Circular of the General Office of the State Council on Forwarding the Opinions of the Ministry of Culture and Other Departments on Special Administration over Operation Places of Electronic Games
- Provisions on Foreign Investment in the Civil Aviation Industry

According to the Decision, the relevant departments of the State Council and the People's Government of Guangdong Province will promptly and correspondingly adjust rules and normative documents according to the Adjustments.

*Decision on Temporarily Adjusting the Administrative Approval and Access-related Special Administrative Measures for Hong Kong and Macau Service - Providers in Guangdong Province*

*-《国务院关于在广东省对香港、澳门服务提供者暂时调整有关行政审批和准入特别管理措施的决定》*

*- Issuing authority: State Council*

*- Date of issuance: March 3, 2015/Date of effective: March 3, 2015*

### 6. State Intellectual Property Office Issues Draft Revisions of the Patent Law for Public Comment

国家知识产权局就新发布的专利法修改草案征求公众意见（4/1/2015）

On April 1, 2015, China's State Intellectual Property Office published *Draft Revisions of the Patent Law of the People's Republic of China (Draft for Comment)* (the **Draft**) for public comment. The Draft modifies the current *Chinese Patent Law* (the **Current Law**) to enhance patent enforcements and to adapt to treaties, laws, and regulations such as the *Civil Procedure Law* (2012), *Judicial Interpretation of Civil Procedure Law* (2015), and the *Hague Agreement Concerning the International Registration of Designs* (the **Hague Agreement**) which China is preparing to join. The key provisions of the Draft are summarized below.

**Expanding Patentable Subject Matters and Extending Patent Term**

- Prolonging the term of design patents to 15 years. The term of a design patent under the Current Law is only 10 years, which is lower than the minimum requirement (of 15 years) in the Hague Agreement. Accordingly the Draft would extend the patent term of design to 15 years.
- Partial design becoming patentable. The Current Law provides protection only for the overall design of a product. To follow the international trend and to encourage healthy development of China's design innovation industry, the Draft, if approved, would make partial designs patentable.
- Expanding patentable subject matters to include methods for diagnosing and treating diseases of cultured and bred animals. Under the Current Law, methods for diagnosis and treatment of diseases are not patentable. The Draft, if approved, would make such methods for cultured and bred animals such as aquatic product, poultry, and livestock eligible for patent protection in China.

**Strengthening patent protection**

- Speeding up examination and handling of patent infringement dispute. The Draft, if approved, would improve the patent infringement dispute examination and handling process as well as the enforcement of patent infringement judgments. For example, the Draft provides that administrative mediation agreements for patent infringement disputes are enforceable through the court system.
- Introducing a punitive damage system for willful infringements. The Draft would increase the punitive damages for a willful infringement up to two to three times of the patentee's actual loss. For a repetitive willful infringer, the maximum penalty is increased to five times the illegal revenue if the illegal revenue is over RMB 50,000; or RMB 250,000 if the illegal revenue is less than RMB 50,000.
- Increased penalty on patent infringements and provision of "notice-remove" rule in network infringement. The Draft requires network service providers to bear more legal obligations commensurate with their capability. The Draft also clarifies the network service provider's obligations in connection with the execution of the decisions of patent administrative authorities and the stopping of patent infringing acts.

**Promoting Patent Development and Utilization**

- Redefining "service inventions." Under the Current Law, service inventions are inventions made by an employee in the course of performing work assigned by the employer. The right to apply for patent registration for service inventions belongs to the employer. With respect to non-service inventions, the Current Law provides that the inventors have the right to register a patent for those inventions. The Draft provides a default rule that if an invention was created by an employee using the material and/or technical resources of the employer (but is not made in the course of performing specific work assignment), the invention would be deemed a non-service invention, unless otherwise agreed by the employer and employee.
- Introducing the general principle on prevention of patent abuse. While the Current Law includes some provisions limiting a patent owner's rights (such as compulsory license and exceptions to patent infringement), it lacks a

general principle dealing with patent abuse. To provide sufficient legal basis to the courts in trying cases and to the administrative authorities in formulating relevant regulations, the Draft introduces the principle that the exercise of the patent right shall be in good faith and shall not damage public interests, unjustifiably exclude or restrict competition, or hinder technological advancement.

**Specifying and Strengthening Functions of Patent Administrative Authorities**

- Clarification of responsibilities of patent administrative authorities. The Draft clarifies the assignment of functions and responsibilities of the patent administrative authorities at the state and local levels. In particular, the Draft expressly requires that patent administrative authorities at all levels be involved in the promotion of patent development and utilization. The Draft also clarifies that the responsibility of the local patent administrative authorities includes carrying out patent administrative enforcement, investigating and handling patent infringement and counterfeiting activities, and the dissemination of public patent information.
- Establishment of patent administrative authority at county level. Under the Current Law, patent administrative enforcement is carried out by intellectual property offices at the provincial and municipal levels. This has shown to be insufficient in meeting practical needs. Accordingly, the Draft further establishes patent administrative authority at the county level in order to timely uncover, investigate, and deal with patent infringement cases, given that offices at the county level are closer to the market and are in a better position to handle such matters.

**Conclusion**

The Draft provides a more comprehensive system of patent protection in China and reflects China's intention of moving toward international standards regarding patent protection.

*- Draft Revision of the Patent Law of the People's Republic of China (Draft for Comment)*
*-《中华人民共和国专利法修改草案（征求意见稿）》*
*- Issuing authority: State Intellectual Property Office*
*- Date of issuance: April 1, 2015 / Effective date: N/A*

### 7. China Food and Drug Administration Promulgates Administrative Measures for Food Recalls

国家食药监局发布《食品召回管理办法》（3/11/2015）

On March 11, 2015, the China Food and Drug Administration (**CFDA**) promulgated the Administrative Measures for Food Recalls (the **Measures**) for implementation Sept. 1, 2015.

The Measures, based on Article 63 of *Food Safety law of the PRC*, propose to set up a food recall system for unsafe foods. Under the Measures, unsafe foods refer to foods that are prohibited by food safety-related laws and regulations to be produced and foods that may be harmful to human health as proved by evidence. The Measures categorize recalls into three levels and prescribe time limits for food manufacturers or traders to conduct food recalls and procedures.

**Three Levels of Food Recalls**

1. Under the Measures, first-degree recalls are applicable to food consumption that has already caused or may cause serious health risks or even death. First-degree recalls are required to be initiated by food manufacturers within 24 hours upon the discovery of the safety risks of the unsafe food in question and to be completed within 10 business days.
2. Second-degree recalls are applicable to food consumption that has caused or may potentially cause general health risks. Second-degree recalls are required to be initiated by food manufacturers within 48 hours upon discovery of the safety risks of the unsafe food in question and to be completed within 20 business days.
3. Third-degree recalls are applicable to foods with misrepresented information on their labels and are required to be completed by food manufacturers within 30 business days from the discovery of the safety risks.

The Measures provide that food operators, upon becoming aware of recalls of unsafe foods by manufacturers, are required to immediately suspend the procurement and sale of such unsafe foods, seal them, post the recall announcements issued by the manufacturers in conspicuous places, and cooperate with the manufacturers' recall efforts.

**Liabilities**

The legal liabilities imposed on the manufacturers and distributors under the Measures are summarized below.

1. For the manufacturers or distributors of food:
   - If they fail to cease production or operation, to take initiatives to recall within requisite time in accordance with recall procedure, or to dispose of the unsafe foods in question, they will face a warning or a fine between RMB 10,000 and RMB 30,000
   - If they fail to perform their reporting obligations with respect to unsafe foods under the Measures, they will face a warning, rectification orders, and/or a fine between RMB 2,000 and RMB 20,000 if they fail to rectify within the provided time limit
   - If they refuse to dispose or were delayed in disposing unsafe foods in accordance with the order of CFDA, they will face a fine between RMB 20,000 and RMB 30,000
   - If they fail to keep records of the discovered unsafe foods and the recall efforts, or fail to keep records for the required period, they will face a warning, rectification orders, and/or a fine between RMB 2,000 and RMB 20,000 if they fail to rectify within the time restrictions
2. For food distributor only:
   - If the distributors fail to cooperate with food manufacturers' recall of the discovered unsafe foods in accordance with the Measures, they will face a warning or a fine between RMB 5,000 and RMB 30,000.

*- Administrative Measures for Food Recalls*

- *《食品召回管理办法》*
- *Issuing authority: China Food and Drug Administration*
- *Date of issuance: March 11, 2015/Date of effective: September 1, 2015*

### 8. New Food Safety Law Passed and to Take Effect in October

新食品安全法审议通过十月施行 (4/24/2015)

On April 24, 2015, the Standing Committee of the 12th National People's Congress passed the newly-amended *Food Safety Law of the People's Republic of China* (the **2015 Food Safety Law**), which will take effect October 1, 2015. The liabilities of food safety violators significantly increased under the 2015 Food Safety Law.

The 2015 Food Safety Law highlights the liabilities of food producers and operators as well as the regulatory responsibilities of government authorities. It also improves the supervision regime of "special foods" such as health foods and infant formulas and foods.

The significant amendments made by the 2015 Food Safety Law to the current version of the Food Safety Law are as follows:

**Responsibilities of Each Authority is Clarified**

Under the 2015 Food Safety Law, the China Food and Drug Administration (the **CFDA**) will be the primary regulator in charge of food production and trading activities. The health administrative department will be responsible for the implementation of risk surveillance and risk assessment measures in connection with food safety and for formulating the national standards for food safety. Other relevant authorities such as the agriculture departments, entry and exit departments, and the Inspection and Quarantine and Quality Supervision Bureau will also have responsibilities in relation to food safety and will coordinate and share information with the CFDA with respect to food safety issues. These administrative departments above the county level are in charge of regulating food safety within their jurisdictions.

**Establishment of a Food Safety Risk Surveillance and Assessment System**

The 2015 Food Safety Law establishes a food safety risk surveillance and assessment system and specifies the factors to be evaluated, the circumstances for risk evaluations, and the impact of the outcomes of such evaluations.

Moreover, it also specifies that information should flow among the different governmental agencies as well as between the regulatory agencies and other stakeholders such as food manufacturers and distributors, inspection and accreditation institutions, industrial associations, consumer associations, and the news media.

**Regulations Regarding Food Additives and Online Food Trading are Strengthened**

The 2015 Food Safety Law strengthens the regulation of food additives, food-related products, and online food-related transactions. The 2015 Food Safety Law further provides that where manufacturers or operators of genetically modified foods fail to affix compliant product labelling, the relevant food and drug department shall confiscate their illegal proceeds as well as foods and food additives used in the illegal production and operation. Tools, facilities, raw materials, and other items that are used for illegal production and operation may also be confiscated.

Third-party online food trading platforms are required to register the real names of the food distributors that sell products on the platforms and obtain the licenses or permits of such distributors. In addition, where consumers purchase foods through third-party online food trading platforms, if their legitimate rights and interests are prejudiced in connection with their transaction on the platforms, they may claim compensation from the operators of the platforms as well as the food distributors and manufacturers.

**Regulations Regarding Special Food are Strengthened**

The 2015 Food Safety Law contains provisions regulating "special foods," which include health foods, baby and toddler foods, and genetically modified organism (**GMO**) foods.

The 2015 Food Safety Law sets up the directory of raw ingredients for health foods (the **Ingredients Directory**) and the directory of health functions that can be claimed by health foods. Health foods containing raw materials which are not

included in Ingredients Directory or are imported to China for the first time are required to be registered with the food and drug administration under the State Council. Note, however, that certain types of health foods such vitamins supplements that are being imported to China for the first time are only required to be filed with food and drug administration under the State Council.

The 2015 Food Safety Law requires manufacturers of baby and toddler foods to implement quality control measures starting from the time the raw ingredients enter the food manufacturer's facilities to the time the finished products exit the facilities. Manufactures must also inspect each batch of products to ensure food safety and to make a filing with the provincial food and drug administration regarding food ingredients, additives, product formulations, as well as labelling. Recipes for baby formula and toddler formula are required to be registered with the CFDA. In addition, baby and toddler formula are not allowed to be repackaged. A manufacturer cannot use the same recipe to produce baby or toddler formula under different brands.

Regarding GMO foods, proper and compliant labels must be placed on the GMO food product in a conspicuous position. A GMO food manufacturer or distributor who fails to label GMO foods as required will be subject to administrative penalties such as the confiscation of illegal income and products; a fine between RMB 5,000 and RMB 50,000; suspension of operation; and/or revocation of business licenses.

**The Compensation for Consumers for Punitive Damages is Adopted**

The 2015 Food Safety Law allows consumers to claim compensation against food manufacturers or distributors. Furthermore, it adopted an option for consumers with respect to claiming punitive damages. Previously, a consumer may only claim an amount 10 times the purchase price of the food product. Currently, a liquidated damage equivalent to three times the loss suffered by the consumer is also available.

*- Food Safety Law of the People's Republic of China*

*- 中华人民共和国食品安全法*

*- Issuing Authority: Standing Committee of the National People's Congress*

*- Date of Issuance: April 24th, 2015/Date of Effective: October 1st, 2015*

### 9. Ministry of Commerce Solicits Public Comments on the Commodity Circulation Law (Draft for Comment)

商务部就《商品流通法（草案征求意见稿）》公开征求意见 (3/31/2015)

On March 31, 2015, the Ministry of Commerce published the *Commodity Circulation Law (Draft for Comment)* (the **Proposed Law**) for public comments. The Proposed Law is aimed to regulate and promote commodity circulation; establish a uniform, open, healthily competitive, safe, efficient, and urban-rural integrated market system for commodity circulation; and to ultimately protect legitimate interests of business operators and consumers.

**Fundamental Principals and Legal Definitions**

The Proposed Law applies to all commodity circulation activities occurring within the territory of People's Republic of China (**PRC**). It stipulates the fundamental free circulation principle. Under this principle, the state will guarantee the free circulation of all commodities nationwide, except for certain commodities the circulation of which may be prohibited or restricted.

Under the Proposed Law, commodity circulation means domestic trading activities, including but not limited to commodity wholesale, retail, transportation, and other related services. Commodity circulation operators include any legal entity or individual who engages in commodity circulation activities, such as business operators participating in direct commodity transactions, funders of physical or virtual centralized trading platforms (**Funders**), and logistics service providers.

**Commodity Circulation Facilities**

The Proposed Law contains provisions relating to the construction and set up of commodity circulation facilities:

- The Proposed Law provides that the draft construction plan for circulation facilities (including various places of operations for commodity circulation and other related facilities) must be disclosed to the public for comments before being submitted for government approval. The extent to which public comments are adopted should be described and attached to application materials.
- The Proposed Law requires local government to set up agricultural products wholesale markets, community food markets, and other necessary commodity circulation facilities that can meet the basic living needs of residents. The local governments are mandated to determine the minimum land occupation ratio of such facilities.

**Commodity Circulation Safety**

The Proposed Law contains several provisions relating to the safety of commodity circulation, particularly in the areas of tracing management and increased obligations of Funders:

- *Tracing*. The Proposed Law provides that the government will implement tracing management of commodity circulation, including the set-up of a circulation tracing system for key products relating to human health and safety, and the set-up of a uniform commodity circulation tracing data platform. Commodity circulation operators are required to verify qualifications of vendors and certificates of products, and record and preserve relevant product sourcing and flow direction information for at least 20 years.
- *Funder Obligations*. The Proposed Law requires Funders to set up operation and management rules and transaction safety guarantee mechanisms for its trading platforms. If the Funders know or should have known that a business operator in its trading platforms infringes other parties' legitimate interests but does not take necessary measures, the Funders will assume joint and several liabilities with the infringing party.
- *Operator Obligations*. Under the Proposed Law, commodity circulation operators are required to establish product delisting rules. If the operator discovers that there are defects in its products that may endanger human health and safety, the operator is required to cease the transactions involving such products, inform the vendor, take proper disposal measures, and report to the relevant supervision government authority.

**Commodity Circulation Order**

The Proposed Law contains a number of provisioning aiming at establishing "order" of commodity circulation. We summarized a few provisions below:

- Commodity Circulation Credit Information. The Proposed Law provides that the government will set up uniform rules for collecting, handling, checking, and publishing commodity circulation credit information. A database of the credit information will be established and shared among different government authorities.
- Promotional Materials. Under the Proposed Law, when promoting products, commodity circulation operators are required to clearly indicate the reason, method, rules, term, scope, and conditions of the promotion. Operators are prohibited from using any deceptive or misleading methods in their promotions. For instance, operators are prohibited from using fictitious original price of promoted products or fictitious price of gifts to mislead consumers. Also, operators are prohibited from degrading product quality and after-sale services in order to promote its products.
- Others. The Proposed Law prohibits local governments from impeding the inflow and outflow of products between local areas. The Proposed Law also provides that in transactions between wholesalers and retailers, no party can abuse its dominant market position to demand the other party to pay any fee irrelevant to products sold or for services not yet provided.

**Conclusion**

While there are existing laws and regulations that regulate aspects of commodity circulation, the Proposed Law is the first and most comprehensive piece of legislation on commodity circulation. The Proposed Law allows the market to play the key role and establishes many fundamental rules for the healthy development of commodity circulation in PRC.

*- Commodity Circulation Law (Draft for Comment)*
*-《商品流通法（草案征求意见稿）》*
*- Issuing authority: Ministry of Commerce*
*- Date of issuance: March 31, 2015 / Effective date: N/A*

### 10. MOC Solicits Comments on the Draft Administrative Measures for the Operation of Non-store Retailing (for Trial Implementation)

商务部就《无店铺零售业经营管理办法（试行）（征求意见稿）》公开征求意见 (5/5/2015)

On May 5, 2015, the Ministry of Commerce (the **MOC**) published the proposed draft of *Administrative Measures for the Operation of Non-store Retailing (for Trial Implementation)* (the **Draft Measures**) to seek public comments. The Draft Measures aim to standardize non-store retailing activities, maintain circulation order and business environment, protect legitimate interests of consumers and retailers, and promote healthy and orderly development of non-store retailing industry. The key terms of the Draft Measures are summarized as follows.

**Fundamental Legal Definitions**

The Draft Measures, once being enacted, will apply to non-store retailing operation and related service activities that occur within the territory of the People's Republic of China. According to the Draft Measures, (a) "non-store retailing" refers to the retail format under which manufacturers or dealers directly deliver products to consumers without physical store operation such non-store retailing includes, without limitation, TV shopping, mail-order, online stores, telephone shopping, and automated sale kiosks (vending machines); (b) "non-store retailers" refer to enterprises, other economic organizations, or individuals engaging in non-store retailing business; (c) "related service providers" refer to platform operators which provide product promotion, display, transaction, and other services for non-store retailing business. Both non-store retailers and related service providers should comply with the honesty and trustworthiness principle and the fair competition principle.

**Non-store Retailers and Related Service Providers**

- According to the Draft Measures, where non-store retailers and related service providers are required by law to

obtain certain administrative approvals or go through certain filing formalities, they should do so as required. Where a non-store retailer is a natural person, he or she should have full capacity for civil acts. Non-store retailers should submit to the related service providers the required licenses and permits (e.g., business license, operation approval, and authorization documents) or certain personal information (e.g., ID card, contact information, and business operation location).

- The Draft Measures require the related service providers to (a) strengthen internal management and routine inspection, (b) stop and correct the activities of retailers that are in violation of laws and regulations, and (c) report such violation to local competent commerce departments and industrial departments. If the related service providers fail to fulfill their management duties and thus cause damages to lawful rights and interests of consumers, they should bear several joint liabilities with retailers.

**Other Requirements on Business Operations**

- Non-store retailers should, before sales activities, disclose certain crucial information to consumers, including basic information of the retailer, product and service related information, delivery methods, return or exchange policies, product license or distribution authorization, civil liabilities, contact information, relevant additional conditions, and other information that required by laws and regulations to be disclosed. Such information must be lawful, true, and accurate, which should not mislead consumers. On the other hand, the related service providers should also establish the information disclosure rules and policies.

- Non-store retailers and related service providers should conduct marketing and promotion activities in accordance with relevant laws and regulations. Exaggerated, cheating, and misleading advertising is forbidden. When promoting products, non-store retailers or related service providers should expressly indicate reasons, methods, rules, term, scope, and restrictive conditions of the promotion. Any restrictive condition, additional condition, or exceptional product of the promotion should be marked expressly to consumers.

- Without consent or request of consumers or where consumers have expressly refused, non-store retailers and related service providers should not send any promotion information to such consumers through fixed telephone, mobile telephone, SMS, WeChat, email, letter, or any other channel.

*- Administrative Measures for the Operation of Non-store Retailing (for Trial Implementation) (Draft for Comment)*

*-《无店铺零售业经营管理办法（试行）（征求意见稿）》*

*- Issuing authority: Ministry of Commerce*

*- Date of issuance: May 5, 2015 / Effective date: N/A*

# Tax

### 11. Circular on Enterprise Income Tax Concerning the Payment from PRC Companies to Offshore Affiliates

国家税务总局关于企业向境外关联方支付费用有关企业所得税问题的公告 (3/18/2015)

On March 18, 2015, State Administration of Taxation (**SAT**) issued the Circular on Enterprise Income Tax Concerning Payment from PRC Companies to Offshore Affiliates (the **Circular**), which became effective the same day. This Circular, based on PRC Enterprise Income Tax Law, aims at reinforcing the administration on transfer pricing with respect to payments made by a PRC onshore company to its offshore affiliates.

As a general principle, when paying service fees or royalties to its offshore affiliates, the PRC company must enter into these transactions on an arm-length basis; otherwise the applicable tax authorities may make adjustment. The Circular expressly provides that the SAT has the authority to require the PRC company to present contracts or agreements entered into with its offshore affiliates underlying the service fees or royalties in order to justify that transactions are arm-length and actually carried out by the parties.

In cases where the offshore affiliates do not have the capacity to perform the services, are not able to bear the associated risks or liabilities, or have no substantial business, if the PRC company pays service fees or royalties to these affiliates, when calculating enterprise income tax deduction such fees or royalties will not be deductible. The Circular further enumerates specific circumstances in which the service fees or royalties provided by offshore affiliates will not be deductible, including, but not limited to, situations where the services provided is irrelevant to the business of the PRC company and where the offshore affiliate is providing supervision services for the purposes of protecting the interests of the investors of the PRC company.

Additionally, if the PRC company pays royalties on intangible properties provided by its offshore affiliates then the contribution to the intangible properties made by the affiliates should be considered. If the PRC company pays royalties to the offshore affiliate holding the legal title of the intangible property, but the affiliate contributes nothing to create such intangible property, then such transaction will not be deemed to be on arms-length and the royalties will not be deductible in the calculation of enterprise income tax of the PRC company.

In cases where an offshore financing subsidiary or a holding company is set up for financing or listing purposes, royalties made to such subsidiary with respect to the incidental benefits arising as a result of the financing or listing will not be deductible.

Last but not the least, the tax authorities have 10 years after the underlying transactions take place to make any tax adjustments with respect to non-arms-length transactions.

*- Circular on Enterprise Income Tax Concerning the Payment from PRC Companies to Offshore Affiliates Issued by State Administration of Taxation*
*-《国家税务总局关于企业向境外关联方支付费用有关企业所得税问题的公告》*
*-Issuing authority: State Administration of Taxation*
*-Date of issuance: March 18, 2015 / Effective date: March 18, 2015*

### 12. SAT Publishes Circular on Amending Administrative Measures Concerning Assessment and Collection of Non-Resident Enterprise Income Tax and other Regulations

国家税务总局关于修改《非居民企业所得税核定征收管理办法》等文件的公告 (4/17/2015)

On April 17, 2015, the State Administration of Taxation (the **SAT**) issued Circular on Amending Administrative Measures Concerning Assessment and Collection of Non-Resident Enterprise Income Tax and other Regulations (the **Circular**), which became into effective June 1, 2015.

The Circular amends several tax related regulations to streamline the administrative procedures:

- *Administrative Measures Concerning Assessment and Collection of Non-Resident Enterprise Income Tax (Article 9 is amended).* Previously, if a non-resident enterprise intends to pay enterprise income tax based on assessed

taxable income it must file the assessment form and report to local tax authority. Based on the assessment form, local tax authority may review and comment on the industry and margin rate applicable to the non-resident enterprise. In the event the local tax authority deems that the non-resident enterprise is not qualified to tax payment based on assessed taxable income, the tax authority may deliver a notice to the non-resident enterprise within 15 business days upon receipt of the assessment form. If the non-resident enterprise doesn't receive the notice from local tax authority after the 15 business-day period, the local tax authority has accepted its application for tax payment based on assessed taxable income. Pursuant to the Circular, the SAT now requires the local tax authority must promptly deliver the assessment form (as amended by the Circular) to the non-resident enterprise to complete within 10 business days upon receipt of the form. The non-resident enterprise, upon completion of the form, has to send the form back to local tax authority and they may accept or reject the assessment within 20 business days upon receipt of the completed form.

- *Administrative Measures on Income Tax on Overseas Registered Chinese-funded Holding Resident Enterprises (Article 5 is amended).* Previously, it provides that the tax authority in charge of the overseas registered Chinese-funded resident enterprise should be determined in three different scenarios based on the various localities of its major investor and de facto management body. The Circular unifies these scenarios and sets forth that the tax authority where the major investor of the overseas resident enterprise is registered will be the authority in charge of the overseas resident enterprise.

- *Announcement of the SAT on Matters Concerning Special Taxation Treatment Applicable to Non-Resident Enterprises' Equity Transfer (Article 7 is amended).* Prior to the amendment, it provides that when the non-resident enterprise transfers its equity interests based on special taxation treatment (a) without filing for special taxation treatment or (b) with filing for special taxation treatment, but being investigated and exposed that the filing is not applicable to the transfer, the non-resident enterprise should apply general taxation treatment and pay enterprise income tax pursuant to enterprise income tax related regulations. However, according to the Circular, if the non-resident enterprise transfers its equity interests based on special taxation treatment without filing for special taxation treatment, the tax authority should notify it to go through the filing procedures. On the other hand, if an equity interest transfer by the non-resident enterprise based on the filing of special taxation treatment has been investigated and exposed that the filing is not applicable, the non-resident enterprise should still apply general taxation treatment and pay enterprise income tax pursuant to enterprise income tax related regulations.

**Conclusion**

These amendments reduce the burdens on the enterprise and provide straight-forward guidelines on tax compliance.

*- Circular on Amending Administrative Measures Concerning Assessment and Collection of Non-Resident Enterprise Income Tax and other Regulations*
*- 国家税务总局关于修改《非居民企业所得税核定征收管理办法》等文件的公告*
*- Issuing authority: State Administration of Taxation*
*- Date of issuance: April 17, 2015 / Effective date: June 1, 2015*

# Foreign Exchange

### 13. SAFE Publishes Circular Regarding the Reform of the Administration of the Conversion of Foreign Currency Registered Capital for Foreign-Invested Enterprises

国家外汇管理局发布《关于改革外商投资企业外汇资本金结汇管理方式的通知》(4/8/2015)

On April 8, 2015, the State Administration of Foreign Exchange (the **SAFE**) published the *Circular Regarding the Reform of the Administration of the Conversion of Foreign Currency Registered Capital for Foreign-Invested Enterprises* (the **Circular**). Taking effect from June 1, 2015, the Circular is considered an important move to liberalize the restrictions on capital accounts of foreign-invested enterprises (the **FIEs**) in China.

The Circular has introduced a few changes to the country's current grip on the capital account flows:

- With the Circular in place, the SAFE now permits the FIEs throughout the country to convert a percentage of the foreign currency registered capital paid by their foreign investors into Renminbi (RMB) at any time the FIEs deem appropriate. The SAFE initially sets the percentage at 100 percent and makes clear in the Circular that the percentage may be adjusted upon changes of China's balance of payment. The RMB fund converted from the foreign currency registered capital should be deposited in a special RMB account of an FIE
- The Circular removes the ban on FIEs' use of the fund converted from the foreign currency registered capital for equity investment in China. The ban was introduced by the SAFE in 2008 to curb the inflow of "hot money" attracted by China's booming economy. Pursuant to the Circular, all FIEs are now permitted to use the capital paid by its foreign investors to either establish a new company or acquire an existing company in China
- The Circular clarifies that the fund converted from the foreign currency registered capital of an FIE can be used for the following purposes: (1) expenditures consistent with the approved business scope of the FIE; (2) payment for equity investment in China or as a RMB deposit; (3) repayment of RMB loans that the FIE has actually borrowed and used; (4) repayment of foreign currency loans; (5) payment of current account expenditures or other capital account expenditures that have been registered with or approved by the SAFE or the bank

In addition, the Circular has retained and reiterated certain limitations:

- The Circular reaffirms that any fund converted from the foreign currency registered capital of an FIE cannot be paid for the following purposes: (a) expenditures beyond the approved business scope of the FIE; (b) unless otherwise approved by law, securities investment in China; (c) issuing entrusted loans, repayment of inter-company lending (including third party advances), and repayment of RMB bank loans that have been relend to a third party; or (d) payment of any expenses in relation to the purchase of real estate not for self-use, unless the FIE qualifies as a foreign-invested real estate enterprise
- The Circular reiterates that banks are responsible to verity the "authenticity" of the transactions under which payment is made from the FIE's special RMB account, and that banks should require the FIE to submit, when handling such payment, transaction documents with regards to the preceding payment from the special RMB account

*- Circular Regarding the Reform of the Administration of the Conversion of Foreign Currency Registered Capital for Foreign-Invested Enterprises*

*- 《关于改革外商投资企业外汇资本金结汇管理方式的通知》*

*- Issuing Authority: State Administration of Foreign Exchange*

*- Date of Issuance: April 8, 2015 / Effective Date: June 1, 2015.*

# Anti-Monopoly

### 14. SAIC Releases Provisions for the Prohibition of Abuse of Intellectual Property Rights to Exclude or Restrict Competition

工商总局印发《关于禁止滥用知识产权排除、限制竞争行为的规定》（4/7/2015）

On April 7, 2015, China's State Administration for Industry and Commerce (the **SAIC**) released the Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition (the **Provisions**), which will come into effect Aug. 1, 2015.

**Background**

*The People's Republic of China Anti-Monopoly Law* (the Anti-Monopoly Law) which became effective Aug. 1, 2008, provides that in the event business operators abuse intellectual property rights to exclude or restrict competition, such behaviors shall be subject to the Anti-Monopoly Law. Compared to the Anti-Monopoly Law, the Provisions set forth more detailed rules for regulating abuse of intellectual property rights that has adverse effect on competition. The key contents of the Provisions are summarized as follows:

**Prohibited Actions**

The "abuse of intellectual property rights to exclude or restrict competition" in the Provisions refers to operators violating the Anti-Monopoly Law when exercising the intellectual property rights, implementing monopoly agreements, abusing dominant market positions, and conducting other monopolistic behaviors (except for the price monopoly). Such prohibited actions include the following:

1. Refusal License. An operator who is of dominant market position may not, without justification, refuse to license other operators to use its intellectual property rights on reasonable terms so as to exclude or restrict competition under the circumstance that the intellectual property rights constitute a necessary facility for the relevant production and operating activities.

2. Certain Use of Patent Pool. Patent pool refers to at least two patentees collectively license their respective parent rights to third parties. An operator is prohibited from using a patent pool to exchange sensitive information regarding competition such as price, production amount, and market division, and entering into monopoly agreements prohibited by the Anti-Monopoly Law. An operator is also prohibited from using a patent pool to implement other behaviors to abuse its dominant market position, such as restricting members of the patent pool to license patent rights independently outside the patent pool.

3. Certain Behaviors related to Standards. An operator is prohibited to exclude or restrict competition during the formulation and implementation of the standards (including the mandatory requirements of national technical specifications) in exercising intellectual property rights.

4. Other Prohibited Actions. An operator who is of dominant market position also may not place certain restraints on transactions, implement certain tied sale, or implement differential treatment on the transaction parties so as to exclude or restrict competition in exercising intellectual property rights.

**Safe Harbor for Exercising Intellectual Property Rights**

According to the Provisions, when an operator's exercise of intellectual property rights falls under the following circumstances, the relevant agreement may not be regarded as a prohibited monopoly agreement:

- The competitive operators' share in the relevant market affected by their behaviors does not exceed 20 percent in total, or there are at least four alternative technologies under other independent control in the relevant market which may be obtained at reasonable costs
- Neither the shares of the operator nor the shares of the transaction counterparty in the relevant market exceed 30 percent or, there are at least two alternative technologies under other independent control in the relevant

market which may be obtained at reasonable costs

**Definition of Relevant Markets**

In defining "relevant markets," the Provisions include the relevant commodity markets and the relevant geographic markets. The relevant commodity markets may be either technology markets or product markets containing specific intellectual property rights. Relevant technology markets refer to the markets formed through the competition between technologies involved in the exercise of intellectual property rights and similar alternative technologies.

- *Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition*
- *《关于禁止滥用知识产权排除、限制竞争行为的规定》*
- *Issuing authority: State Administration for Industry and Commerce*
- *Date of issuance: April 7, 2015/ Effective date: Aug. 1, 2015*

# Miscellaneous

### 15. CSDC Releases Guidelines for the Registration and Settlement Operations for the Pilot Implementation of Employee Stock Ownership Plan by Listed Companies

中国证券登记结算有限责任公司发布《上市公司员工持股计划试点登记结算业务指引》（3/6/2015）

On March 6, 2015, China Securities Depository and Clearing Corporation Limited (the **CSDC**) released the *Guidelines for the Registration and Settlement Operations for the Pilot Implementation of the Employee Stock Ownership Plan by Listed Companies* (the **Guidelines**), which came into effect the same date.

**Background**

*The Guiding Opinions on the Pilot Implementation of Employee Stock Option Plans by Listed Companies* (the **Guiding Opinions**) released by the China Securities Regulatory Commission on June 20, 2014, provides general guidelines for pilot implementation of employee stock option plans (the **ESOP**). In accordance with the Guiding Opinions, the CSDC released the Guidelines to further regulate the registration and settlement operations for the ESOP pilot implementation under the Guiding Opinions. The key contents of the Guidelines are summarized as follows:

**Definition of ESOP**

The ESOP under the Guidelines and the Guiding Opinions refers to the arrangement of a listed company under which the company's employees lawfully obtain long-term shares of the company according to their will and enjoy distribution of relevant share interests as agreed.

**ESOP Registration and Settlement Operations**

The Guidelines provide the following operations in connection with the registration and settlement of the ESOP trial implementation:

1. ESOP Securities Account Opening. The listed company should apply with the CSDC for opening securities accounts of the ESOP, and may apply with the CSDC for opening capital accounts of the ESOP. The former are used to record shares granted or vested in all employees participating in the ESOP, and the latter are used to record the capital vested in all employees participating in the ESOP.

2. Transfer of Share Ownership and Capital of the ESOP. The CSDC provides transfer services of share ownership and capital in respect of the ESOP at stages such as ESOP establishment, alteration, and termination. Where an applicant applies for the transfer of ownership of shares or capital, the CSDC will handle transfers of capital during a trading day and handle transfers of the share ownership at the end of a trading day.

3. ESOP Inquiry and Reporting. The CSDC provides inquiry services in respect of daily balance and changes of the ESOP securities account for listed companies at the end of each trading day. For a listed company that maintains ESOP capital account with the CSDC, the CSDC will provide inquiry services in respect of the balance of the ESOP capital account during a trading day and provide inquiry services in respect of daily balance and changes of the ESOP capital account at the end of each trading day.

*- Guidelines for the Registration and Settlement Operations for the Pilot Implementation of the Employee Stock Ownership Plan by Listed Companies*

*-《上市公司员工持股计划试点登记结算业务指引》*

*- Issuing authority: China Securities Depository and Clearing Corporation Limited*

*- Date of issuance/ Effective date: March 6, 2015*

### 16. SAIC Releases Opinions on Improving the Systems of First Approach and Advance Compensation Payment of Business Operators of the Consumption Stage to Duly Protect the Lawful Rights and Interests of Consumers

工商总局关于完善消费环节经营者首问和赔偿先付制度切实保护消费者合法权益的意见 (3/4/2015)

On March 4, 2015, the State Administration for Industry and Commerce (the **SAIC**) issued the *Opinions on Improving the*

*Systems of First Approach and Advance Compensation Payment of Business Operators of the Consumption Stage to Duly Protect the Lawful Rights and Interests of Consumers* (the **Opinions**), which became effective on the same day. The Opinions require that the business operators involved in the consumption stage shall bear first approach responsibilities and urge business operators to be primarily liable for safeguarding the rights and interests of consumers.

First approach responsibilities are the responsibilities of business operators to guarantee satisfactory solutions when they are first being asked by consumers whose lawful rights and interests are damaged. The Opinions provide that where consumers suffer damages to their lawful rights and interests arising from their purchase of commodities or receiving of services through online trading platforms, they may directly claim against the vendors of the commodities or the service providers. If the online trading platform operators fail to provide the real name, address, and effective contact information of a vendor or service provider, the consumers may claim against the online trading platform operators. The Opinions also stipulate that consumers whose lawful rights and interests are damaged when purchasing commodities or receiving services at an exhibition, trade fair, or a rented counter, even if the exhibition or trade fair is completed or the lease of the rented counter is expired, they may directly claim against the organizer of the exhibition or trade fair or the lessor of the rented counter.

The Opinions encourage business operators of the consumption stage to establish a system of advance payment of compensation to improve the efficiency of consumer dispute resolution. Such a system would operate as follows: (a) the business operators of large shopping centers, markets, and online or television shopping platforms (the **Mall or Platform Operators**) may enter into agreements regarding advance payment of compensation to consumers with the vendors or service providers operating in shopping malls, markets, or platforms on a voluntary basis, the agreements should provide that the Mall or Platform Operators may be liable for advance payment of compensation to a consumer when the relevant vendor or service provider deliberately delays the handling of consumer complaints or refuses to make compensation without justifiable reasons, or when the relevant vendor or service provider has exited the shopping center, market, or platform; and (b) after compensating the consumer in advance, the Mall or Platform Operators may seek recourse against the relevant vendor or service provider pursuant to the law or according to the relevant agreements.

*- Opinions on Improving the Systems of First Approach and Advance Compensation Payment of Business Operators of the Consumption Stage to Duly Protect the Lawful Rights and Interests of Consumers*
*-《关于完善消费环节经营者首问和赔偿先付制度切实保护消费者合法权益的意见》*
*- Issuing Authority: the State Administration for Industry and Commerce*
*- Date of Issuance: March 4, 2015/ Effective Date: March 4, 2015*

### 17. China Meteorological Administration Promulgates Administrative Measures for the Release and Dissemination of Meteorological Forecasts

中国气象局颁布《气象预报发布与传播管理办法》 (3/12/2015)

On March 12, 2015, the China Meteorological Administration (the **CMA**) promulgated the *Administrative Measures for the Release and Dissemination of Meteorological Forecasts* (the **Measures**). The Measures modify and replace the *Measures for the Administration on the Release and Broadcast of Meteorological Forecast* (the **Old Regulation**) promulgated by the China Meteorological Administration Dec. 31, 2003. The key contents of the Measures are summarized below.

**Key Points of the Decision**

Below are key points of the Measures:

- Clearer definitions are provided. The Measures provide that (1) the meteorological forecast includes public meteorological forecast, disastrous meteorological forecast, and meteorological disaster warning signal, as well as the detailed explanations of the three meteorological forecast categories mentioned above; (2) the release of meteorological forecast refers to the process of releasing meteorological forecast to the public for free; (3) the dissemination of meteorological forecast refers to the process of rebroadcasting (转播) and reprinting (转载) the released meteorological forecast.
- Unified release system for meteorological forecast is established. In order to avoid the meteorological forecast being published through various channels and causing adverse effects to the society, the Measures explicitly

stipulate that the meteorological observatories subordinate to the competent meteorological departments at all levels (i.e., the local meteorological observatories) are the only authorized entities to release meteorological forecast. No other organizations or individuals are authorized to release any meteorological forecast to the general public.

- Principles for encouraging dissemination of meteorological forecast are established. Under the Old Regulation, only the media (媒体) are encouraged to disseminate meteorological forecast, while the Measures add that "entities (单位)" are also encouraged. However, the media and entities are still required under the Measures to use the latest meteorological forecast provided by the local meteorological observatories and cite the release time and the name of the meteorological observatory that releases the forecast and are prohibited from changing the contents and conclusion of the meteorological forecast.

In addition, the Measures abolished the requirements for the media to sign a broadcasting agreement with local meteorological observatories to spread meteorological forecast. Instead the Measures request that the local governments work with relevant departments and entities (such as those in the ratio, television, and Internet industries) to establish and improve the channels for releasing and disseminating meteorological forecast.

The Measures also abolished the prohibition on the media to rebroadcast and reprint meteorological forecast obtained from other sources by any form. Instead, the Measures only require that the media and entities not illegally release meteorological forecast, and when disseminating the meteorological forecast to the public, the media and entities must use the latest meteorological forecast provided by the local meteorological observatories.

**Conclusion**

The Measures reflects a more open attitude of the CMA regarding the spread of meteorological forecast and provide clearer guidance on the release and dissemination of meteorological forecasts.

*- Administrative Measures for the Release and Dissemination of Meteorological Forecasts*
*- 《气象预报发布与传播管理办法》*
*- Issuing authority: China Meteorological Administration*
*- Date of issuance: March 12, 2015 / Effective date: May 1, 2015*

### 18. MIIT Solicits Comments on Administrative Measures for Restricted Use of Hazardous Substances in Electrical and Electronic Products

工信部就《电器电子产品有害物质限制使用管理办法》征求意见 (5/18/2015)

On May 18, 2015, the Ministry of Industry and Information Technology (the **MIIT**) released for public comments the proposed draft of the *Administrative Measures for Restricted Use of Hazardous Substances in Electrical and Electronic Products* (the **Draft**). The public comment period ended June 17, 2015.

The Draft will, once enacted, replace the *Administrative Measures for the Control of Electronic Information Products Pollution* (the **Existing Regulation**). The Existing Regulation is commonly called "China RoHS 1" and the Draft is referred to as "China RoHS 2."

The Draft proposes a number of important changes to the Existing Regulation, including, without limitation:

- *Introducing a new definition of "electrical and electronic products," replacing "electronic information products" defined in the Existing Regulation.* The new definition of "electrical and electronic products" refers to "devices and accessory products with rated working electrical voltages of no more than 1500 volts direct current and 1000 volts alternating current, which function on the basis of currents or electromagnetic fields, or for the purpose of generating, transmitting and measuring such currents and electromagnetic fields;"

- *Modifying the "compulsory certification" approach reflected in the Existing Regulation to a potentially more flexible "conformity assessment system."* The MIIT would propose the establishment of such "conformity assessment system" to the Certification and Accreditation Administration (the CNCA) and the CNCA and MIIT would issue and implement the detailed policies for such system, with input from other agencies; and

- *Removing the "products manufactured for export" exemption included in the Existing Regulation.*

*- Administrative Measures for the Restricted Use of Hazardous Substances in Electrical and Electronic Products (Draft for Comment)*
*-《电器电子产品有害物质限制使用管理办法（征求意见稿）》*
*- Issuing Authority: the Ministry of Industry and Information Technology*
*- Date of Issuance: May 18, 2015 / Public Comment Deadline: June 17, 2015*

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