

## Decision to Amend the Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign Invested Enterprises

### Order No. 2 of 2017 by the Ministry of Commerce of the People's Republic of China

China Business Solution Office  
RMB Internationalization Business Promotion Office

On July 30, the Ministry of Commerce of the People's Republic of China (MOFCOM) promulgated the "Decision to Amend the Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign Invested Enterprises" (Order No.2 of 2017 by the Ministry of Commerce of the People's Republic of China, hereinafter, "the Decision"). The Decision amends a portion of the "Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign Invested Enterprises" (MOFCOM Order No.3 of 2016). The Decision expands the scope of the record-filing regime, allowing qualified foreign investors to employ the record-filing regime when acquiring domestic enterprises. The Decision was enacted on the date of its promulgation.

#### 1. Background of the Policy

From October of 2013, authority was delegated from the Standing Committee of the National People's Congress and control by use of a Negative List was gradually introduced in the four Pilot Free Trade Zones (PFTZs) of Shanghai, Guangdong, Tianjin and Fujian. In light of the "Decision of the Standing Committee of the National People's Congress on Amending Four Laws Including the Law of the People's Republic of China on Foreign-funded Enterprises" resolved at the 22<sup>nd</sup> Session of the 12<sup>th</sup> Standing Committee of the National People's Congress on September 3, 2016, the incorporation and change of foreign invested enterprises (FIEs) and Taiwanese-funded enterprises became controlled by a Negative List rather than requiring prior application starting on October 1, 2016.

In order to spread the Negative List control system nation-wide, MOFCOM promulgated Order No.3 on October 8, 2016, further detailing the policy to apply the record-filing regime to the incorporation and change of FIEs.

The scope of the record-filing regime was further expanded through the promulgation of the Decision, and the application of the record-filing regime to the acquisition of certain Chinese enterprises by foreign investors not included on the Negative List was announced. Simplification of the traditional system of screening based on the "Administrative Measures for Strategic Investment by Foreign Investors in Listed Companies" (Order No.28 of 2005 by MOFCOM, China Securities Regulatory Commission (CSRC), State Administration of Taxation (SAT), State Administration for Industry and Commerce (SAIC), and the State Administration of Foreign Exchange (SAFE)) was progressed and application of the record-filing regime was allowed with the background of increasing strategic investment of foreign investors in Chinese listed enterprises due to the development of China's capital market.

[Figure 1 Regulations regarding the record-filing regime for foreign invested enterprises (excerpt)]

Date of promulgation (enactment)	Promulgating entity	Name of regulation	Contents
2016/9/30	SAIC	“Circular regarding the Registration Issues after Implementation of Record-filing Regime for FIEs” (Gongshangqizhuzi [2016] No.189)	Clarification of operation of SAIC procedures and rules for the record-filing regime; an effective connection record-filing regime and current rules
2016/10/8 (enacted on the same date)	MOFCOM	“Interim Administrative Measures for the Record-filing of the Incorporation and Change of FIEs” (MOFCOM Order No.3 of 2016)	Official announcement of the record-filing regime
2016/10/8 (enacted on the same date)	National Development and Reform Commission (NDRC) MOFCOM	Announcement No.22 of 2016 by NDRC and MOFCOM	Announcement of the contents of the nation-wide Negative List, which refer to provisions related to demands on equity and high-level managers in Encouraged, Restricted and Prohibited areas in the “Catalogue for the Guidance of Foreign Invested Industries (2015 Amendment)”
2017/6/5 (2017/7/10)	General Office of the State Council	“Special Measures on the Administration of Entry by Foreign Investment in Pilot Free Trade Zones (Negative List)” (Guobanfa [2017] No. 51)	Promulgation of the 2017 version of the Negative List for PFTZs
2017/6/28 (2017/7/28)	NDRC MOFCOM	“Catalogue for the Guidance of Foreign Invested Industries (2017 Amendment)” (NDRC and MOFCOM Order No.4)	Promulgation of the 2017 version of the nation-wide Negative List
2017/7/30 (enacted on the same date)	MOFCOM	“Decision to Amend the Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign Invested Enterprises” (Order No.2 of 2017 by MOFCOM)	Amendment of the “Administrative Measures for the Record-filing of the Incorporation and Change of Foreign Invested Enterprises,” allows the application of the record-filing regime to acquisitions of domestic enterprises by FIEs

2017/7/30 (enacted on the same date)	MOFCOM	“Announcement Regarding the Record-filing Regime for the Incorporation and Change of Foreign Invested Enterprises” (Announcement No.37 of 2017 by MOFCOM)	When an FIE applies the record-filing system, the appropriate Negative List is referred to depending on whether the enterprise is located within or outside of a PFTZ
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## 2. Contents of the Policy

### (1) Contents amended through the Decision

- The record-filing regime is additionally applied to the following items related to incorporation and change
  - Cases where a non-FIE becomes an FIE due to merger or acquisition (**Prerequisite: The enterprise is not in a Negative List sector, and the M&A is not the acquisition of an affiliated enterprise**)
  - Cases where a foreign investor conducts strategic investment in a listed non-FIE (Conduct the record-filing procedures before registering securities at China Securities Depository and Clearing Corporation Limited (CSDC), or within 30 days of registration)
  - Cases where the basic transaction information of FIEs established through acquisition is changed
  - Cases where a listed FIE attracts strategic investment from a new foreign investor (Conduct the record-filing procedures before registering securities at CSDC, or within 30 days of registration)
  - Cases where the record information for a strategic investment is to be changed (The record-filing for change shall be conducted within five days from the day when the information disclosure obligor fulfills his or her obligation to disclose information as stipulated in the Securities Law of the People’s Republic of China and related provisions)
  
- Additional required materials when applying the record-filing regime:
  - The ownership structure of the ultimate actual controller of the FIE (Not required unless the amendment is related to a change in the ultimate actual controller of the FIE)

### (2) “Announcement Regarding the Record-filing Regime for the Incorporation and Change of Foreign Invested Enterprises” (Announcement No.37 of 2017 by MOFCOM)

Concurrently with the promulgation of the Decision, MOFCOM promulgated the “Announcement Regarding the Record-filing Regime for the Incorporation and Change of Foreign Invested Enterprises” (Announcement No.37 of 2017 by MOFCOM). That Announcement stated the application of a record-filing regime for enterprises within and outside of PFTZs, referring to the respective Negative List for each area (refer to Fig. 2). The Announcement also clarified the definitions of “acquisition” and “strategic investment” stated in the Decision.

[Fig. 2 Negative Lists for the FIE within and outside of PTFZs]

	Within PTFZs	Outside of PTFZs								
<b>Legal basis</b>	“Special Measures on the Administration of Entry by Foreign Investment in Pilot Free Trade Zones (Negative List)” (Guobanfa [2017] No. 51)	“Catalogue for the Guidance of Foreign Invested Industries (2017 Amendment)” (NDRC and MOFCOM Order No.4)								
<b>Enacted</b>	From July 10, 2017	From July 28, 2017								
<b>Composition and breakdown</b>	<p><b>Categorized by industry sector:</b>                      Special administrative measures for 15 sectors, 40 articles and 95 sections</p>	<p><b>Classified by Encouraged, Restricted and Prohibited categories</b>                      (Image)</p> <table border="1"> <tr> <td>2015 Catalogue</td> <td rowspan="4" style="text-align: center; vertical-align: middle;">  </td> <td>2017 Catalogue</td> </tr> <tr> <td>Encouraged</td> <td>Encouraged</td> </tr> <tr> <td>Restricted</td> <td rowspan="2">Negative List (Restricted + Prohibited)</td> </tr> <tr> <td>Prohibited</td> </tr> </table>	2015 Catalogue		2017 Catalogue	Encouraged	Encouraged	Restricted	Negative List (Restricted + Prohibited)	Prohibited
2015 Catalogue		2017 Catalogue								
Encouraged		Encouraged								
Restricted		Negative List (Restricted + Prohibited)								
Prohibited										

### 3. Impact on Enterprises

With the promulgation of the Decision, the record-filing regime will be applied to the acquisition of Chinese enterprises by qualified foreign investors. Procedures for the acquisition of Chinese enterprises by foreign capital are simplified and it is expected that the impact of screening by regulatory authorities will be lessened. However, screening processes such as the national security review and anti-monopoly review will continue to exist for acquisitions by foreign capital, and compliance based on related regulations must be handled.

The method for foreign enterprises to enter the market based on a combination of the Negative List and the record-filing regime is further clarified, but there are still unclear areas such as the handling of actual operations, so it is thought that confirmation must be made with the local MOFCOM branch and SAIC branch upon the occasion of relevant M&A activity. We will continue to follow up on related information and share it as appropriate.

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