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China Moves Forward with Negative List for (Domestic and Foreign) Market Access

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In recent years, the business community in China has been abuzz with talk of various market access "negative lists" — lists of exceptions to what would otherwise be open market access. China has now introduced a new market access negative list for all forms of investment in the country, both domestic and foreign. Before describing the implications of this new list, we first note the existing and proposed negative lists that have drawn widespread attention over the past couple of years:

- **US-China BIT Negative List (*Under Negotiation*).** There has been extensive discussion of the negative list for the *US-China Bilateral Investment Treaty ("BIT")* currently under negotiation. Foreign investment activities included on the BIT's negative list would not be eligible for the market access benefits and protections of the BIT — particularly, national treatment (that is, equal treatment with domestic investors), a core principle of standard US bilateral investment treaties with other countries.

- **Nationwide Foreign Investment Negative List (*Announced*).** Among other reforms proposed in the draft *Foreign Investment Law* that was released in early 2015, Chinese authorities plan to issue a nationwide negative list for foreign investment market access. As with the US-China BIT, unlisted items would be given national treatment (with some procedural differences between the treatment of investments by foreign and domestic investors).

- **Pilot FTZ Foreign Investment Negative List (*Issued*).** Following the issuance of a negative list for foreign investment activities in China's *first pilot free trade zone ("Pilot FTZ")* in Shanghai, Chinese authorities have now adopted one unified negative list that governs all Pilot FTZs established to date — specifically, the Pilot FTZs in Shanghai, Fujian Province, Guangdong Province, and Tianjin.

In December 2015, the State Council announced its decision to introduce a market access negative list that applies to all investment activities in China, by both domestic and foreign investors. Swiftly acting on the State Council's decision, the National Development and Reform Commission and the Ministry of Commerce issued a trial version of the list ("Trial Negative List") in March to be piloted throughout the entirety of the four provinces and municipalities that currently host Pilot FTZs (not just in the FTZ zones themselves): Shanghai, Tianjin, Fujian Province, and Guangdong Province. The respective governments for these four regions are to propose their own methods for implementing the Trial Negative List and obtain the approval of the State Council. Central government authorities are seeking feedback from the implementation of the Trial Negative List to facilitate the roll-out of a nationwide market access negative list in 2018.

The Trial Negative List includes 96 prohibited items in 17 sectors and 232 restricted items in 22 sectors. These items have been compiled from several sources, and include (1) investment projects requiring administrative approvals as set out in the *Consolidated List of Administrative Approval Items by Departments under the State Council* (included in the list as restricted items); (2) project categories designated for elimination or closed for new investment under the *Catalogue for Guiding Industry Restructuring (2011 version)*, which make up 46 of the 96 prohibited items; (3) projects requiring approvals from the relevant development and reform departments under the *Catalogue of Investment Projects Subject to Government Verification and Approval (2014* *version)* (included in the list as restricted items); and (4) projects restricted or prohibited under other national laws, administrative regulations, and State Council decisions. 12 of the 328 total items are (or include sub-items that are) entirely new and were not restricted or prohibited under previous laws and regulations. These new items include an approval requirement for collaborations between domestic media and foreign news agencies and censorship requirements for gaming and entertainment equipment.

Foreign investors, including those without interests in the four pilot regions, should pay close attention to these developments. Those investing in the four regions where the Trial Negative List is being piloted should note that they are to be subject to both the Trial Negative List and any other restrictions on foreign investment that may concurrently exist (whether written restrictions or *de facto* ones — for instance if no procedural pathway for approval of a particular type of investment in a regulated industry is provided under existing laws and regulations). Consequently, in the four Pilot FTZs, foreign investors will need to heed both the restrictions and prohibitions contained in the Trial Negative List as well as those on the foreign investment negative list for the Pilot FTZs.

In short, the Trial Negative List does not, itself, offer any improvements in market access for foreign investors in China. Rather, it represents an effort on the part of the Chinese government to consolidate in one place a list of all restrictions applicable to both domestic and foreign investors. The goal, hopefully, is to lay the groundwork for procedural reforms, as well as for revisions to the list in the future that would provide improved market access.

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