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Caution Needed on Amended Version of FTZ Negative List

By David Yu and Teddy Li

On 30 June 2014, the Shanghai government issued the *Special Administrative Measures for Foreign Investment Access in the China (Shanghai) Pilot Free Trade Zone (Negative List) (As Amended in 2014)*, amending the *Special Administrative Measures for Foreign Investment Access in the China (Shanghai) Pilot Free Trade Zone (Negative List) (2013)*.

In this amended version, the special administrative measures for numerous industries, particularly in industries of great concern to foreign investors, such as the healthcare, culture, sports and entertainment industries, have been deleted from the 2014 Negative List.

Culture, Sports and Leisure Industries

"Investment in internet access service business premises (internet cafés) is prohibited", "investment in the gaming industry (including horse-racing tracks with betting) is prohibited", etc., have been deleted from the 2014 Negative List, leading some to wonder if this signifies that the China (Shanghai) Pilot Free Trade Zone (FTZ) is opening access to these industries to foreign investment.

According to the written explanation for the 2014 Negative List, "in addition to the listed special administrative measures for foreign investment access, foreign investment in industries that are prohibited (or restricted) by the state or in international treaties to which China is a signatory or a party is prohibited (or restricted)". Furthermore, both the *General Plan for the China (Shanghai) Pilot Free Trade Zone* issued by the State Council and the *Administrative Measures for the China (Shanghai) Pilot Free Trade Zone* issued by the Shanghai government in 2013 point out that "with respect to sectors other than those subject to special administrative measures for foreign investment access (the negative list), in accordance with the principle of treating domestic and foreign investors identically, foreign-invested projects are made subject to the recordal system instead of the approval system, with the exception of those domestic investment projects for which the State Council has specified approval will be retained".

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Accordingly, the deletion of such investment sectors as internet cafés and gaming from the 2014 Negative Live does not simply signify that access to such investment sectors has been opened to foreign investment in the FTZ. When making relevant investments in the FTZ, foreign investors remain subject to the two restrictive conditions, "industries that are prohibited (or restricted) by the state or in international treaties to which China is a signatory or a party" and "with the exception of those domestic investment projects for which the State Council has specified approval will be retained".

Gaming Industry—Industry Prohibited by the State: with respect to regulations prohibiting wholly Chinese-owned enterprises from engaging in the gaming industry, the *Official Reply of the Ministry of Public Security on How to Handle Such Issues as Opposite Sex Massages, Gaming, Etc.* of 1993 already expressly specified that the public security authorities were to resolutely prohibit the establishment of gaming and other such business projects of a gambling nature. Furthermore, the Bill for Amending the Criminal Law (6) issued by the Standing Committee of the National People's Congress in 2006 sets forth express criminal provisions in respect of "assembling large numbers of people for gambling or establishing gambling as a business for the purposes of making a profit" and "establishing gambling halls".

Furthermore, the *Notice of the Ministry of Public Security, the Ministry of Supervision, the State Administration for Industry and Commerce and the National Tourism Administration on Strictly Investigating and Dealing with Betting Type Horse Racing Activities* dated 26 February 2002 also expressly prohibits activities that involve betting on horse races.

Accordingly, although the special administrative measures prohibiting investment in the gaming industry (including horse racing tracks with betting) are deleted from the 2014 Negative List, foreign investors nevertheless remain subject to the restriction on "industries prohibited by the state" and may not engage in such industry in the FTZ.

Internet Access Service Business Premises—Domestic Projects for Which the State Council Has Specified Approval Will Be Retained: pursuant to the *Administrative Regulations for Internet Access Service Business Premises* issued by the State Council on 29 September 2002, internet café operators must secure approval from numerous authorities and may only engage in such business activities after securing an Online Cultural Business Permit. This indicates that, in addition to the special administrative measures set forth in the Negative List, foreign investors in the FTZ are subject to the condition of "domestic investment projects for which the State Council has specified approval will be retained".

Although "investment in internet access service business premises (internet cafés) is prohibited" has been deleted from the 2014 Negative List, foreign investors still need to observe the relevant provisions of the above mentioned Regulations and may only engage in such business activities in the FTZ after having secured the approvals of the relevant authorities.

Healthcare Industry

In the 2014 Negative List, only the special administrative measure of "establishment of branches not permitted" is retained for the healthcare industry, with the special administrative measures of minimum total investment and maximum term of operation deleted.

However, it should be noted that, outside the FTZ, domestic investors establishing a medical institution are required to observe the *Administrative Regulations for Medical Institutions* and the *Implementing Rules for the Administrative Regulations for Medical Institutions* and foreign investors are additionally required to observe the *Management of Sino-Foreign Equity and Cooperative Joint Venture Medical Institutions Interim Measures*. , Although the first wholly foreign-owned medical institution has been approved, the FTZ still lacks relevant regulations clarifying how these regulatory documents governing the establishment of wholly Chinese-owned and foreign-invested medical institutions are to apply.

The special administrative measures for a number of industries have been amended in the 2014 Negative List, revising the special administrative measures for investment in certain industries in the FTZ. However, in terms of application of the law, certain ambiguities exist that will require further clarification in practice, or even await further clear stipulation, in terms of system, by the relevant authorities in some future regulations and documents.

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