

国务院公布了《国务院关于大力发展电子商务加快培育经济新动力的意见》(以下简称“《**发展电子商务意见**》”)进一步推动电子商务发展。国务院发布了《关于取消非行政许可审批事项的决定》，全面取消非行政许可审批事项。证监会新闻发言人表示，证监会将进一步扩大降低外资参股券商的准入门槛。

一、 国务院公布《**发展电子商务意见**》推动电子商务发展

为了进一步推动电子商务发展，国务院于2015年5月7日公布了《发展电子商务意见》¹，从营造宽松发展环境、促进就业创业、推动转型升级、完善物流基础设施、提升对外开放水平、构筑安全保障防线、健全支撑体系方面提出了29条意见；再次重申放开外商投资电子商务的外方持股比例限制、法定前置审批事项、简化注册资本登记等意见；并明确了具体的任务及其负责部门，要求各部门应在2015年底研究出台具体政策。

(一) 法律点评

除了再次重申放开外商投资电子商务的外方持股比例限制等内容外，《发展电子商务意见》有很多新的亮点。

首先，明确“法无明文禁止即自由”的原则。国务院要求法无禁止的市场主体即可为，法未授权的政府部门不能为，最大限度减少对电子商务市场

的行政干预。这将有利于推动电子商务创新发展。

其次，发展跨境电子商务。国务院要求探索建立跨境电子商务负面清单制度；鼓励国家政策性银行在业务范围内加大对电子商务企业境外投资并购的贷款支持，研究制定针对电子商务企业境外上市的规范管理政策；简化电子商务企业境外直接投资外汇登记手续。

最后，加快推进电子商务法立法。与快速发展的电子商务相比，我国的电子商务立法却相对滞后。目前我国电子商务领域仅有的法律是《电子签名法》，除此之外是国务院各部门，如商务部、工商行政管理总局、工业和信息化部等制定的规章。为了促进电子商务健康发展，需要在现有的法律规定的基础上，吸取国际通行做法，制定我国统一的《电子商务法》。根据十二届全国人大常委会立法规划，电子商务法被列入第二类立法项目，即需要抓紧工作，条件成熟时提请常委会审议的法律草案²。国务院要求研究制定或适时修订相关法规，明确电子票据、电子合同、电子检验检疫报告和证书、各类电子交易凭证等的法律效力，作为处理相关业务的合法凭证。

(二) 关注要点

从短期来看，国务院各部门如国家发展和改革委员会、商务部、工业和信息化部、财政部、海关

¹ http://www.gov.cn/zhengce/content/2015-05/07/content_9707.htm

² http://www.npc.gov.cn/npc/xinwen/tpbd/2013-12/30/content_1822039.htm

总署、税务总局、国家工商行政管理总局、国家质量监督检验检疫总局等需要在今年底按照《发展电子商务意见》制定、修订、甚至废除相关规定。我们注意到，为了落实《发展电子商务意见》，国家质量监督检验检疫总局于5月14日率先发布了《质检总局关于进一步发挥检验检疫职能作用促进跨境电子商务发展的意见》，提出了跨境电子商务负面清单管理等制度。

从长期来看，《电子商务法》草案有望在今年底公布征求意见，并有望在2016年提请全国人民代表大会常务委员会审议。电子商务领域的立法和实践值得进一步关注。

二、 国务院发布《关于取消非行政许可审批事项的决定》全面取消非行政许可审批事项

2015年5月14日，国务院发布《关于取消非行政许可审批事项的决定》，全面取消非行政许可审批事项，今后不再保留“非行政许可审批”这一审批类别³。

（一） 背景

《中华人民共和国行政许可法》（以下简称“《行政许可法》”）于2004年7月1日起施行。依据《行政许可法》和行政审批制度改革有关规定，国务院对所属各部门的行政审批事项进行了全面清理，并同意暂予保留211项非行政许可审批事项。这些事项，主要是政府的内部管理事项，不属于行政许可。

此后，国务院在开展行政审批制度改革过程中，陆续取消和调整了一批非行政许可审批事项。但与此同时，一些行政部门通过各种形式又先后设定了一批非行政许可审批事项。据报道，本届政府

成立之初，国务院部门非行政许可审批事项共有453项。经过2013年和2014年前后共七轮清理，国务院取消了其中209项。

2014年4月，国务院印发《关于清理国务院部门非行政许可审批事项的通知》，决定通过一年时间对各部门现有非行政许可审批事项进行全面清理，将面向公民、法人或其他组织的非行政许可审批事项取消或依法调整为行政许可，将面向地方政府等方面的非行政许可审批事项取消或调整为政府内部审批事项，不再保留“非行政许可审批”这一审批类别。

2015年5月14日，国务院发布了《关于取消非行政许可审批事项的决定》，决定采取以下三种方式对非行政许可审批事项进行分类清理，即（1）取消非行政许可审批事项；（2）对于符合设定行政许可的非行政许可审批事项按照《行政许可法》新设行政许可；及（3）调整为政府内部审批事项。清理结果是取消了49项非行政许可审批事项，并将84项非行政许可审批事项调整为政府内部审批事项，今后不再保留“非行政许可审批”这一审批类别。国务院本次取消的非行政许可审批事项包括：企业发行外债的额度审批、非居民享受税收协定（含与港澳台协议）待遇审批、企业就成本分摊协议是否符合独立交易原则的审核、企业符合特殊性税务处理规定条件业务的核准、境外证券交易所驻华代表机构审批等项目。调整为政府内部审批的事项包括：对借用外债规模的管理、国家和省级教育考试机构与外国及港澳台地区考试机构或其他组织合作举办境外考试审批、外国政府贷款事项审批等事项。

（二） 法律点评

行政许可，是指行政机关根据公民、法人或者

³ http://www.gov.cn/xinwen/2015-05/14/content_2861932.htm

其他组织的申请，经依法审查，准予其从事特定活动的行为。根据《行政许可法》的规定，行政许可的设定与实施，都必须依照法定的权限、范围、条件和程序进行。

为了暂时的管理需要，国务院在行政许可以外暂予保留部分非行政许可审批事项。但是法律对非行政许可审批事项的设定权限、范围、条件和程序以及实施的要求等方面均未作出明确的规定。而且，有的非行政许可审批事项实质上是以非行政许可审批名义变相设定的面向公民、法人或其他组织的行政许可。这些具有行政许可性质的非行政许可审批事项却不受《行政许可法》中关于行政许可的设定与实施等方面的约束。此次国务院取消“非行政许可审批”这一审批类别，体现了政府依法行政、简政放权的改革方向。

（三） 关注要点

国务院各部门如国家发展和改革委员会、国家税务总局、商务部、国家税务总局等应执行国务院的决定，尽快清理非行政许可审批事项。国家税务总局于2015年5月25日率先发布了《国家税务总局关于贯彻落实〈国务院关于取消非行政许可审批事项的决定〉的通知》，将23项税务非行政许可审批事项调整为其他权力事项。国务院其他部门的相关立法及实践值得我们关注。

三、 证监会表示将降低外资参股券商准入门槛

2015年5月15日，证监会召开例行发布会，证监会将进一步扩大降低外资参股券商的准入门槛⁴。

（一） 法律点评

根据2012年修订的《外资参股证券公司设立

规则》，境外股东持股比例或者在外资参股证券公司中拥有的权益比例，累计（包括直接持有和间接控制）不得超过49%。同时，外资参股证券公司可以经营的业务仅包括股票（包括人民币普通股、外资股）和债券（包括政府债券、公司债券）的承销与保荐、外资股的经纪、债券（包括政府债券、公司债券）的经纪和自营以及中国证监会批准的其他业务。

依据《内地与香港关于建立更紧密经贸关系的安排》、《内地与澳门关于建立更紧密经贸关系的安排》的补充协议十（以下简称“CEPA”）的规定，内地分别向香港、澳门承诺：允许符合设立外资参股证券公司条件的港/澳金融机构按照内地有关规定在上海市、广东省、深圳市各设立1家两地合资的全牌照证券公司，港/澳资合并持股比例最高可达51%，内地股东不限于证券公司。允许符合设立外资参股证券公司条件的港/澳金融机构按照内地有关规定在内地批准的“在金融改革方面先行先试”的若干改革试验区内，各新设1家两地合资全牌照证券公司，内地股东不限于证券公司，港/澳资合并持股比例不超过49%，且取消内地单一股东须持股49%的限制。在内地批准的“在金融改革方面先行先试”的若干改革试验区内，允许港/澳资证券公司在合资证券投资咨询公司中的持股比例达50%以上。

2015年修订的《外商投资产业指导目录》规定，证券公司设立时限于从事人民币普通股、外资股和政府债券、公司债券的承销与保荐，外资股的经纪，政府债券、公司债券的经纪和自营；设立满2年后符合条件的公司可申请扩大业务范围；外资比例不超过49%。

证监会于2015年5月15日在其官方微博透露：符合条件的合资证券公司可逐步增加业务范围；与

⁴ <http://finance.people.com.cn/stock/n/20150515/c67815-27008344.html>

此同时，证监会正在加快落实 CEPA 项下对港澳金融机构的开放措施。

（二）关注要点

证监会将如何落实 CEPA 及 2015 年修订的《外商投资产业指导目录》有关证券公司的外资比例及业务范围的规定值得我们关注。

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The State Council released the *State Council's Decision Regarding the Further Development of E-commerce and the Nurturing of a New Economic Force* (“**Decision Regarding the Development of E-commerce**”) to stimulate the development of E-commerce. The State Council also released the *State Council's Decision Regarding the Cancellation of Non-Administrative Licensing Examination and Approval Items* (“**Decision Regarding the Non-administrative Licensing Items**”) to remove the non-administrative licensing items completely. A China Securities Regulatory Commission (“**CSRC**”) spokesperson disclosed that CSRC will further lower the barriers to entry in the market for foreign-invested securities companies.

1. The State Council Released the Decision Regarding the Development of E-commerce to Further Stimulate the Development of China's E-commerce Industry.

To further stimulate the development of China's E-commerce industry, the State Council released its *Decision Regarding the Development of E-commerce* on May 7, 2015.¹ The 29-point

decision focuses on: fostering a lenient business environment, encouraging employment and entrepreneurship, stimulating industry restructuring, improving the logistical infrastructure, further opening of the industry to foreign investment, better security for internet transactions, and creation of a comprehensive system. In this decision, the State Council reiterated its decision to remove the restriction on the ratio of foreign equity for foreign-invested E-commerce companies, to reduce administrative pre-approvals, as well as to simplify registration procedures for registered capital. The State Council also assigned tasks to the relevant authorities, and requested that these relevant authorities promulgate regulations to enforce the *Decision Regarding the Development of E-commerce* by the end of 2015.

1.1 Legal Review

In addition to removing the restriction on the ratio of foreign equity for foreign-invested E-commerce companies, the *Decision Regarding the Development of E-commerce* also contains new information worthy of note.

Firstly, the legal principle that “everything which

¹ http://www.gov.cn/zhengce/content/2015-05/07/content_9707.htm

is not forbidden is allowed” applies in E-commerce. The State Council stated that market players are allowed to conduct activities that are not forbidden by laws. In contrast, to restrict intervention by government authorities in the E-commerce market, government authorities are not allowed to conduct activities that are not authorized by laws. This will stimulate innovation, creativity, and development in the E-commerce industry.

Secondly, in order to further develop cross-border E-commerce, the *Decision Regarding the Development of E-commerce* seeks: (1) to introduce negative lists for cross-border E-commerce; (2) to encourage policy banks to provide loans to E-commerce companies to invest overseas and to introduce the regulations for E-commerce companies to go public in foreign stock markets; and (3) to simplify foreign currency exchange registration for outbound investment for E-commerce companies.

Lastly, the *Decision Regarding the Development of E-commerce* seeks to expedite legislation governing E-commerce. In contrast to the rapidly growing E-commerce industry, legislation in this area is stagnating. So far the only law in this area is the *Electronic Signature Law of the People’s Republic of China*. In addition, there are certain regulations released by various authorities of the State Council, such as the Ministry of Commerce, Administration for Industry and Commerce, and Ministry of Industry and Information Technology. For the healthy growth and development of China’s E-commerce

industry, it is necessary to formulate the E-commerce Law, based on current legislation and international customs and practices. According to the plans of the Standing Committee of the Twelfth National People’s Congress, the E-commerce Law is categorized in the secondary legislative class, meaning the drafts of the E-commerce Law must be formulated and submitted to the Standing Committee for review as soon as practical.² The State Council is also required to study and to formulate or revise the relevant regulations from time to time, specifying the evidentiary effect of business records such as electronic bills, electronic contracts, electronic inspection and quarantine reports and certificates, and various electronic trading certificates.

1.2 Next Step

In the short term, the various authorities of the State Council (such as the National Development and Reform Commission, Ministry of Commerce, Ministry of Industry and Information Technology, Ministry of Finance, General Administration of Customs, State Administration of Taxation, State Administration for Industry and Commerce, and General Administration of Quality Supervision, Inspection, and Quarantine) need to promulgate, revise, and repeal regulations in accordance with the *Decision Regarding the Development of E-commerce*. We note that, to implement this Decision and to introduce negative lists for cross-border E-commerce and other purposes, the General Administration of Quality Supervision,

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http://www.npc.gov.cn/npc/xinwen/tpbd/2013-12/30/content_1822039.htm

Inspection, and Quarantine promulgated (on May 14) its *Opinions on Better Performing the Functional Role of Inspection and Quarantine to Promote the Development of Cross-border E-commerce*.

In the long term, the draft of the E-commerce Law is likely to be published for public review by the end of 2015, and is likely to be proposed for review by the Standing Committee of the National People's Congress next year. The E-commerce legislation and practices need to be followed with interest.

2. The State Council Released the Decision Regarding the Non-administrative Licensing Items to Remove the Non-administrative Licensing Items Completely.

On May 14, 2015, the State Council released the *Decision Regarding the Non-administrative Licensing Items*. This decision completely removed the non-administrative licensing examination and approval items,³ which no longer exist as one kind of examination and approval.

2.1 Background

The *Administrative Licensing Law of the People's Republic of China* ("**Administrative Licensing Law**") became effective on July 7, 2004. In accordance with the *Administrative Licensing Law* and relevant regulations on reforming administrative licensing, the State Council cleaned up various administrative licensing items created by its authorities and temporarily

reserved 211 items as non-administrative items. These reserved items mainly relate to the internal administration of the government and are not within the scope of administrative licensing.

Afterwards, while reforming the administrative examinations, the State Council removed various non-administrative licensing items. Meanwhile, however, certain authorities created new non-administrative licensing items using different means. According to news reports, at the beginning of this term of government, there were 453 non-administrative licensing items. After a total of seven rounds of cleanups in 2013 and 2014, the State Council removed 209 non-administrative licensing items.

In April 2014, the State Council released the *Decision to Clean up Non-Administrative Licensing Items of All Authorities of the State Council*, and decided to comprehensively clean up non-administrative licensing items created by all authorities within one year. The State Council elected to remove or convert into administrative licensing items all non-administrative licensing items for citizens, legal persons, and other institutions. As for non-administrative licensing items for district governments, the State Council decided to remove such items or convert them into internal approval items. "Non-administrative licensing examination and approval", as one kind of examination and approval, will not exist any longer.

On May 14, 2015, the State Council released the *Decision Regarding the Non-administrative Licensing Items* and adopted three methods to

³ http://www.gov.cn/xinwen/2015-05/14/content_2861932.htm

clean up non-administrative licensing items: (1) to remove non-administrative licensing items; (2) to convert non-administrative licensing items into new administrative licensing items in accordance with the *Administrative Licensing Law* when applicable; and (3) to convert non-administrative licensing items into internal approval items. As a result, the State Council removed 49 non-administrative licensing items and converted 84 non-administrative licensing items into internal approval items, which resulted in the deletion of the “non-administrative licensing examination and approval”, as one kind of examination and approval.

The deleted non-administrative licensing items include, *inter alia*: examination and approval of amounts of foreign debt issued by enterprises; examination and approval of provisions regarding the treatment of non-residents under tax conventions (including the conventions with Hong Kong, Macao and Taiwan); review of whether cost apportionment agreements of enterprises conform to independent trade principles; approval of special tax treatment for enterprises; and examination and approval of representative offices of foreign stock exchanges in China.

The non-administrative licensing items converted into internal approval items include, *inter alia*: management of the scale of foreign debts; examination and approval of overseas examinations cooperatively organized by national and provincial educational examination institutions and examination institutions or other organizations in foreign countries and Hong

Kong, Macao and Taiwan; and examination and approval of matters relating to loans of foreign governments.

2.2 Legal Review

“Administrative licensing” refers to permission to undertake specified activities in accordance with an application to do so (submitted by a citizen, legal person or other organization) as approved by an administrative authority upon examination according to the law. According to the *Administrative Licensing Law*, the creation and enforcement of an administrative licensing item must follow the prescribed limits, scope, conditions, and procedures.

For temporary necessity, the State Council reserved the non-administrative licensing items.. The law, however, does not clearly regulate the limits, scope, conditions, procedures and enforcement of non-administrative licensing items. Furthermore, some non-administrative licensing items actually create administrative licensing obligations for citizens, legal persons, and other institutions. These non-administrative licensing items, however, are not subject to the *Administrative Licensing Law*. The State Council’s decision to remove the “non-administrative licensing examination and approval” reveals the trend to reform and simplify government administration.

2.3 Next Step

The authorities of the State Council, such as the National Development and Reform Commission, State Administration of Taxation, and Ministry of

Commerce, need to implement the *Decision Regarding the Non-administrative licensing Items* and clean up the non-administrative licensing items. On May 25, 2015, the State Administration of Taxation released the *Decision Regarding the Implementation of the State Council's Decision Regarding the Cancellation of Non-Administrative Licensing Examination and Approval Items*, and converted 23 non-administrative licensing items into internal approval items. The relevant legislation and the practices of other authorities need to be followed closely.

3. CSRC Disclosed that It Will Lower the Barriers to Enter the Market for Foreign-invested Securities Companies.

On May 15, 2015, CSRC held its routine press conference and disclosed that it will further lower the barriers to enter the market for foreign-invested securities companies.⁴

3.1 Legal Review

According to the *Rules on the Establishment of Foreign-invested Securities Companies*, which was revised in 2012, the ratio of foreign equity or the rights and interests of foreign shareholders in a foreign-invested securities company cumulatively (including direct shareholding and indirect control) cannot exceed 49%. In addition, a foreign-invested securities company may only undertake business activities including underwriting and sponsorship of stocks (including common stock denominated in RMB and stock denominated in a foreign currency) and bonds

(including treasury bonds and corporate bonds); foreign stock brokerage; brokerage of bonds (including government and corporate bonds) and proprietary trading; and other business activities approved by the CSRC.

As stated in the Supplementary Agreement X of the *Closer Economic Partnership Arrangement between Mainland and Hong Kong* and the *Closer Economic Partnership Arrangement between Mainland and Macao* (“CEPA”), the Mainland has made commitments to Hong Kong and Macao respectively as follows.

Hong Kong/Macao-funded financial institutions that satisfy the requirements for establishing foreign-invested securities companies will be allowed to set up one fully-licensed joint venture securities company in Shanghai, Guangdong Province and Shenzhen in accordance with the relevant Mainland requirements. The Hong Kong/Macao-funded securities company may not hold more than 51% of the shares of the joint venture. The Mainland shareholders are not necessary to be securities companies.

Additionally, Hong Kong/Macao-funded financial institutions that satisfy the requirements for establishing foreign-invested securities companies will be allowed to set up one new full-licensed joint venture securities company in accordance with the relevant Mainland requirements in certain reform experiment zones for “piloting financial reforms” as approved by the Mainland. The Mainland shareholders are not necessary to be securities companies. The Hong Kong/Macao-funded securities company may hold no more than 49% of the total shares in

⁴ <http://finance.people.com.cn/stock/n/2015/0515/c67815-27008344.html>

the joint venture. The requirement for a single Mainland shareholder to hold 49% of the shares in the joint venture was removed.

Lastly, Hong Kong/Macao-funded securities companies will be allowed to hold more than 50% of the shares in joint venture securities investment advisory companies in certain reform experiment zones for “piloting financial reforms” as approved by the Mainland.

Pursuant to the *Catalogue for the Guidance of Foreign Investment Industries*, which was revised in 2015, a securities company, upon establishment, is limited to engaging in the underwriting and sponsorship of ordinary RMB-denominated stocks, foreign stocks, treasury bonds and corporate bonds, the brokerage of foreign stocks, and the brokerage and proprietary trading of treasury bonds and corporate bonds. The securities company may apply to expand its business scope two years

after establishment, provided that it satisfies the relevant conditions. The ratio of foreign equity in a foreign-invested securities company cannot exceed 49%.

On May 15, 2015, the CSRC disclosed on its official Weibo that Sino-foreign joint venture securities companies that satisfy relevant requirements will be allowed to gradually expand their business scope. In the meantime, the CSRC is accelerating the implementation of the commitments to Hong Kong and Macao financial institutions under CEPA.

3.2 Next Step

The CSRC’s implementation of CEPA and provisions regarding the proportion of foreign investment as well as the business scope of securities companies in the *Catalogue for the Guidance of Foreign Investment Industries* deserve our special attention.

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