

国务院公布了《自由贸易试验区外商投资准入特别管理措施（负面清单）》（以下简称“《**自贸区负面清单**》”），凡是负面清单以外的领域在自贸试验区中将按照内外资一致的原则进行管理。同时，国务院公布了《自由贸易试验区外商投资国家安全审查试行办法》（以下简称“《**自贸区外商投资国家安全审查试行办法**》”），试点实施与负面清单管理模式相适应的外商投资国家安全审查措施。此外，国务院公布了《国务院关于实施银行卡清算机构准入管理的决定》（以下简称“《**银行卡清算机构准入决定**》”），允许符合条件的境内外机构在境内从事银行卡清算业务。

一、 国务院公布自贸区负面清单

2015年4月20日，国务院公布了《自贸区负面清单》¹，从2015年5月8日起，上海、天津、广东、福建四个自贸试验区共用的负面清单正式实施，凡是负面清单以外的领域在自贸试验区中将按照内外资一致的原则进行管理。这意味着自贸区针对外商投资新一轮扩大开放即将启动。同时，也代表着中国以审批为主的投资管理制度正发生变革，并推广至更广泛的区域。

（一）背景

我国现时对外商投资实行“正面清单”的管理模式：即根据现行法律，在我国的外商投资必须参照《外商投资产业指导目录》开展，该目录明确了

鼓励类、限制类和禁止类的外商投资项目。在这种模式下，外商投资企业的合同、章程须经商务部门审核后方能生效。外商享有的，是“准入后的国民待遇”。

而在“负面清单”的管理模式下，国家明确开列不予外商投资准入或有限制要求的领域，清单以外领域则充分开放，将外商投资项目由核准制改为备案制，将外商投资企业合作合同、章程审批改为备案管理。而政府对外商投资的监管也将从事前管理逐渐转向事中、事后监管。外商享有的，将是“准入前的国民待遇”。

2013年，上海自贸试验区推出中国首个外商投资负面清单，特别管理措施一共190条。2014年，新版的上海自贸试验区负面清单修订时，负面清单将特别管理措施减至139条，缩减了51条。此次公布的负面清单共计122项特别管理措施，与上海自贸试验区2014年版的负面清单相比，减少了17项特别管理措施。同时，此次公布的负面清单为四个自贸试验区共用的清单。

（二）法律点评

《自贸区负面清单》列明了不符合国民待遇等原则的外商投资准入特别管理措施，适用于上海、广东、天津、福建四个自由贸易试验区。

《自贸区负面清单》依据《国民经济行业分类》（GB/T4754—2011）划分为15个门类、50个条目、122项特别管理措施。其中特别管理措施包括具体

¹ http://www.gov.cn/zhengce/content/2015-04/20/content_9627.htm

行业措施和适用于所有行业的水平措施。

《自贸区负面清单》中未列出的与国家安全、公共秩序、公共文化、金融审慎、政府采购、补贴、特殊手续和税收相关的特别管理措施，按照现行规定执行。自贸试验区内的外商投资涉及国家安全的，须按照《自贸区外商投资国家安全审查试行办法》进行安全审查。

《自贸区负面清单》之外的领域，在自贸试验区内按照内外资一致原则实施管理，并由所在地省级人民政府发布实施指南，做好相关引导工作。香港特别行政区、澳门特别行政区、台湾地区投资者在自贸试验区内投资参照《自贸区负面清单》执行。内地与香港特别行政区、澳门特别行政区关于建立更紧密经贸关系的安排及其补充协议，《海峡两岸经济合作框架协议》，我国签署的自贸协定中适用于自贸试验区并对符合条件的投资者有更优惠的开放措施的，按照相关协议或协定的规定执行。

（三）关注要点

各地省级人民政府发布的实施指南，备案管理在实践中的具体实施情况，以及国家及地方对于外商投资事中、事后监管所实施的具体措施值得我们进一步关注。

二、 国务院公布自贸区外商投资国家安全审查措施

2015年4月20日，国务院公布了与负面清单管理模式相配套的《自贸区外商投资国家安全审查试行办法》²，引导外商投资有序发展，维护国家安全。该办法将于2015年5月8日起试行。

（一）背景

2015年4月20日，国务院公布了《自贸区负面清单》，在这份清单上，国家明确开列不予外商

投资准入或有限制要求的领域，清单以外领域则充分开放。在“负面清单管理”制度框架之下，外商投资者可以享受准入前国民待遇。但是，负面清单并不意味着“未列明即可投资”，一些涉及国家安全的产业仍需进行国家安全审查。为此，在推出四大自贸区共用的负面清单的同时，国务院办公厅还发布了《自贸区外商投资国家安全审查试行办法》，规定了与负面清单相配套的安全审查措施。

（二）法律点评

《自贸区外商投资国家安全审查试行办法》主要在审查范围、审查内容及安全审查工作机制和程序方面做出了详细的规定。

这一试行办法总的原则是：对影响或可能影响国家安全、国家安全保障能力，涉及敏感投资主体、敏感并购对象、敏感行业、敏感技术、敏感地域的外商投资，进行安全审查。

外商投资国家安全审查范围包括：外国投资者在自贸试验区内投资军工、军工配套和其他关系国防安全的领域，以及重点、敏感军事设施周边地域；外国投资者在自贸试验区内投资关系国家安全的重要农产品、重要能源和资源、重要基础设施、重要运输服务、重要文化、重要信息技术产品和服务、关键技术、重大装备制造等领域，并取得所投资企业的实际控制权。

（三）关注要点

《自贸区外商投资国家安全审查试行办法》实践当中如何具体实施，以及相关立法进展值得进一步关注。

三、 放开银行卡清算机构市场准入

2015年4月22日，国务院公布了《银行卡清算机构准入决定》³，从2015年6月1日起，符合

² http://www.gov.cn/zhengce/content/2015-04/20/content_9629.htm

³ http://www.gov.cn/zhengce/content/2015-04/22/content_9656.htm

条件的境内外机构取得银行卡清算业务许可证后，均可在境内从事银行卡清算业务。这将彻底改变中国目前仅有中国银联股份有限公司唯一一家专门从事人民币银行卡跨行信息转接清算机构的局面。

（一）背景

经国务院同意，中国人民银行于 2002 年成立中国银联股份有限公司，专门建设和运营全国统一的银行卡交易处理和资金清算系统⁴。尽管维萨（Visa）、万事达（Mastercard）等境外银行卡清算机构已在中国设立代表处多年，由于我国未开放银行卡清算市场，它们在境内从事人民币银行卡清算业务受到限制。

2014 年 10 月 29 日，国务院总理李克强主持召开国务院常务会议，决定放开银行卡清算市场，符合条件的内外资企业均可申请在我国境内设立银行卡清算机构。仅为跨境交易提供外币清算服务的境外机构原则上无需在境内设立清算机构⁵。

（二）法律点评

《银行卡清算机构准入决定》从注册资本、出资人、银行卡清算标准体系、基础设施和异地灾备

系统、董事和高级管理人员以及内控制度管理等方面对银行卡清算机构提出了明确的准入要求。

银行卡清算机构的申请程序分为筹备和开业两个阶段，申请人取得中国人民银行颁发的银行卡清算业务许可证方可开办银行卡清算业务。

境外机构为中华人民共和国境内主体提供银行卡清算服务的，应当依法在中华人民共和国境内设立外商投资企业，并取得银行卡清算业务许可证。仅为跨境交易提供外币的银行卡清算服务的，原则上无需在境内设立银行卡清算机构，但应当就业务开展情况向中国人民银行和中国银行业监督管理委员会报告，并遵循相关业务管理要求。外国投资者并购银行卡清算机构的，应当按照相关规定进行外资并购安全审查。

（三）关注要点

《银行卡清算机构准入决定》授权中国人民银行会同中国银行业监督管理委员会制定行政许可条件、程序的实施细则，以及相关审慎性监督管理措施，相关立法的进展值得进一步关注。

⁴ http://www.gov.cn/xinwen/2015-04/22/content_2851112.htm

⁵ http://www.ce.cn/xwzx/gnsz/szyw/201410/29/t20141029_3804026.shtml

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The State Council announced the *Circular of the General Office of the State Council on Issuing the Special Administrative Measures (Negative List) for Foreign Investment Access to Pilot Free Trade Zones* (“**Negative List**”), according to which foreign investment in sectors other than those specified in the Negative List in pilot free trade zones (“**FTZs**”) will be administered in a manner consistent with the manner of administration of domestic investment. Simultaneously, the State Council announced the *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* (“**Tentative Measures**”), implementing on a trial basis the measures for the national security review of foreign investment in support of the “negative list-based” administration mode. In addition, the State Council released the *Decision on the Implementation of Access Management Concerning Bank Card Clearing Institutions* (“**Decision on Bank Card Clearing Institutions Access**”), allowing the qualified domestic and foreign institutions to engage in bank card clearing services in China.

1. The State Council Announced the Negative List for FTZs

On April 20, 2015, the State Council promulgated the Negative List¹. A negative list generally applicable to FTZs in Shanghai, Tianjin, Guangdong and Fujian will come into effect on May 8, 2015, under which foreign investment in sectors other than those specified in the Negative List in FTZs will be administered in a manner consistent with the manner of administration of domestic investment. This will initiate a new round of expansion of the opening-up to foreign investment, and also promote the reform of the administration mode which was originally based on the administrative examination and approval in China to wider areas.

1.1 Background

A “positive list-based” mode is adopted in China for the administration of foreign investment at present, under which foreign investment is administered according to the *Catalogue of Industries for Guiding Foreign Investment*, which provides for the classes of projects in which foreign investment is encouraged, restricted and

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http://www.gov.cn/zhengce/content/2015-04/20/content_9627.htm

prohibited respectively. Under this administration mode, the contract and articles of association of a foreign-invested enterprise can be effective only when they are examined and approved by the commerce authorities. Foreign investors only enjoy the “post-establishment national treatment”.

However, under the “negative list-based” administration mode, the State will clearly list the sectors in which foreign investment is restricted or prohibited, and the sectors outside the list will be fully open to foreign investment. The approval system for administration of foreign investment projects will be replaced by a record-filing system, and the contract and articles of association of a foreign-invested enterprise will only need to be filed, rather than being approved. The supervision of the government on foreign investment will gradually change from the pre-establishment supervision to the supervision during and after establishment. Foreign investors will enjoy the “pre-establishment national treatment”.

In 2013, Shanghai FTZ promulgated the first negative list in China with 190 special administrative measures in total. The special administrative measures were reduced to 139 (reduced by 51) when the negative list was revised in 2014. The latest Negative List further reduced the special administrative measures to 122, 17 less than the revision in 2014. In addition, the latest Negative List will be generally applicable to four FTZs.

1.2 Legal Review

The Negative List clearly sets out the special administrative measures regulating the access by foreign investment that are not in conformity with the national treatment obligation, and will be applicable to four FTZs in Shanghai, Guangdong, Tianjin and Fujian.

The Negative List includes 122 special administrative measures, which are divided into 15 categories and 50 industry sectors in accordance with the *Classification of National Economic Industries (GB/T4754-2011)*. The special administrative measures include the specific industrial measures and the general measures applicable to all industries.

The special administrative measures relating to the national security, public order, public culture, financial due diligence, government procurement, subsidization, special formalities and tax revenues that are not covered by the Negative List shall be implemented in accordance with the existing regulations. As for the foreign investment in FTZs that relates to the national security, a security review shall be carried out in accordance with the Tentative Measures.

The foreign investment in sectors other than those specified in the Negative List in FTZs will be administered in a manner consistent with the manner of administration of domestic investment, and the local people's governments at the provincial level shall promulgate the guidelines for the administration and provide relevant guidance. The investment in the FTZs by investors from Hong Kong, Macao and Taiwan will be administered by reference to the Negative List. Where there are opening-up measures applicable

to FTZs and more favorable to eligible investors under the arrangements for establishing closer economic partnership among Mainland China, Hong Kong and Macao and supplementary agreements thereto, the *Cross-straits Economic Cooperation Framework Agreement* and the free trade treaties entered into by China, the relevant provisions of such agreements or treaties shall prevail.

1.3 Next Step

We are anxiously waiting to see the guidelines for administration to be promulgated by the local people's governments at the provincial level, the implementation of the record-filing system in practice, and the specific measures to be taken by the national and local authorities for improving supervision during and after establishment of foreign investment.

2. The State Council Announced the Measures for the National Security Review of the Foreign Investment in FTZs

On April 20, 2015, the State Council announced the Tentative Measures² in support of the “negative list-based” administration mode, in order to guide the orderly development of foreign investment and safeguard the national security. The Tentative Measures will come into effect on May 8, 2015.

2.1 Background

On April 20, 2015, the State Council announced

the Negative List for FTZs, under which the State clearly lists the sectors in which foreign investment is prohibited or restricted, and the sectors excluded from the list will be fully open to foreign investment. Under the framework of the “negative list-based” administration mode, foreign investors can enjoy the “pre-establishment national treatment”. However, the “negative list-based” administration mode does not necessarily mean that the sectors outside the Negative List will be completely open to foreign investment. For the industries relating to national security, the national security review is still required. Therefore, when introducing the Negative List generally applicable to four FTZs, the State Council also promulgated the Tentative Measures, providing for the national security review measures in support of the negative list approach.

2.2 Legal Review

The Tentative Measures mainly provide for the scope of review, the contents of review, and the working mechanism and procedures for security review.

The general principle of the Tentative Measures is to carry out security review with respect to the foreign investment that affects or may affect the national security, national safety security competence, or that involves a sensitive investment subject, sensitive object of merger and acquisition, sensitive industry, sensitive technology or sensitive territory.

The scope of security review covers: foreign investment in the military industry, military

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http://www.gov.cn/zhengce/content/2015-04/20/content_9629.htm

accessory sectors and other sectors relating to the national defense security as well as in the peripheral territories of key and sensitive military installations in the FTZs; foreign investment in the sectors relating to the national security such as crucial agricultural products, energy and resources, infrastructures, transportation services, culture and information technology products and services, key technologies, major equipment manufacturing in FTZs, whereby the foreign investors acquire the actual control thereof.

2.3 Next Step

It is worthy of further study how the Tentative Measures will be implemented in practice and how the relevant legislation will develop.

3. China Opens Bank Card Clearing Market

On April 22, 2015, the State Council released the Decision on Bank Card Clearing Institutions Access³. Since June 1, 2015, the qualified domestic and foreign institutions, which obtain the bank card clearing licenses, can engage in bank card clearing services in China. This will completely change the current situation that China UnionPay Co., Ltd. (“**UnionPay**”) is the only clearing institution in China eligible to provide interbank information transfer services involving the RMB-denominated bank cards.

3.1 Background

Approved by the State Council, the People’s Bank

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http://www.gov.cn/zhengce/content/2015-04/22/content_9656.htm

of China (“**PBOC**”) set up UnionPay in 2002 to be responsible for building and operating the unified inter-bank card clearing and settlement system in China⁴. Because China did not open up the bank card clearing market, the foreign bank card clearing institutions, such as Visa and MasterCard, are not allowed to engage in RMB-denominated bank cards clearing services in China, even though they have set up representative offices in China for many years.

On October 29, 2014, Chinese Premier Keqiang Li chaired a State Council executive meeting, at which he announced the decision to open up the bank card clearing market, according to which all qualified domestic and foreign enterprises can apply for establishment of a bank card clearing institution in China. The foreign institutions solely providing foreign currency clearing services for cross-border transactions basically need not establish domestic bank card clearing institutions⁵.

3.2 Legal Review

The Decision on Bank Card Clearing Institutions Access provides for the specific requirements for access by bank card clearing institutions, including the registered capital, shareholders, standard bank card clearing system, facilities and offsite disaster recovery system, directors, senior managers, internal control and other aspects.

The application process for establishing a bank card clearing institution includes the application

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http://www.gov.cn/xinwen/2015-04/22/content_2851112.htm

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http://www.ce.cn/xwzx/gnsz/szyw/201410/29/t20141029_3804026.shtml

for preparation and application for business opening. The applicants may engage in the bank card clearing services only after obtaining the bank card clearing licenses from PBOC.

If a foreign institution intends to provide bank card clearing services for entities in China, it must establish a foreign-invested enterprise in China and apply for the bank card clearing license. If the foreign institution only provides the foreign currency-denominated bank card clearing services for cross-border transactions, in general, it is not required to establish a bank card clearing institution in China, but must report the business operation status to PBOC and the China Banking Regulatory Commission and observe the relevant

business management requirements. If a foreign investor merges and acquires a domestic bank card clearing institution, such merger and acquisition will be subject to the national security review.

3.3 Next Step

The Decision on Bank Card Clearing Institutions Access authorizes PBOC and the China Banking Regulatory Commission to formulate the implementing rules for administrative licensing conditions and procedures and the relevant prudential supervision and administration measures. It is worthy to pay attention to the progress of relevant legislation.

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