

## 外商投资法律热点问题

### 上海自由贸易试验区 - 拭目以待

#### 一、 2013 年 9 月 29 日上海自由贸易试验区正式成立，相关法规相继出台

2013 年 9 月 29 日，中国（上海）自由贸易试验区（以下简称“**自贸区**”）正式启动。而在自贸区启动前两日，2013 年 9 月 27 日，国务院批准颁布了《中国（上海）自由贸易试验区总体方案》（以下简称“**方案**”），该方案为自贸区的总体政策框架。2013 年 9 月 29 日，在自贸区成立的同一日，上海市政府出台了中国（上海）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“**负面清单**”）以及其他 5 项事关自贸区行政管理与区内外商投资企业设立流程的管理规定。其他行业管理部门与机构也制定颁布了多项支持拟行改革措施的初步规定。

#### 二、 自贸区的改革目标

中央政府对自贸区的定位并不是传统意义上以放松进出口贸易关税监管为重点的保税区类型。自贸区被视为中国的试验田，以试行未来可以在国内其他地区乃至全国范围推广的突破性经济改革措施。由于得到李克强总理的大力支持，自贸区的重要性甚至可以与设立于三十多年前的深圳经济特区相提并论。

#### 三、 自贸区内的主要改革任务和措施

下文将介绍几项最重要的自贸区改革任务和措施。如果试行成功，区内所进行的改革将在未来推向全国。这也就意味着，类似之前所报道的 15% 优惠所得税等财政红利或补贴将不会在自贸区内施行。

##### （一） 投资管理体制改革

##### 1. 负面清单

外商投资管理方面的“负面清单”模式是自贸区内已“落地”的最具体与最重要的改革举措，此模式下，外商投资企业的设立将适用和内资公司同样的程序，除非其行业落入“负面清单”。负面清单涉及 18 个门类，细分为 1069 个小类，一共涵盖了 190 项具体管理措施。这一管理模式体现了中国外商投资管理体制从各类项目必经政府审批的模式向同等对待国内和外国投资者（负面清单内的行业除外）模式转变的巨大进步。

9 月 29 日公布的 2013 年版负面清单基本涵盖了目前所有限制和禁止外商投资的门类（包括几乎所有 2011 年版《外商投资指导目录》中限制类和禁止类项目），同时自贸区内新开放了一部分服务业部门。尽管对于那些寻找新机会的外国投资者而言，自贸区的开放力度低于他们预期，但负面清单日后每年都将进行调整。

##### 2. 备案制取代审批制

作为自贸区改革的核心举措之一，在自贸区内设立负面清单以外行业的外商投资企业将从事先审批制转变为自贸区管理委员会的备案制。该措施，辅以工商行政部门所放宽的认缴注册资本金与实收资本门槛以及年检要求，将会给外商投资企业节约大量时间和精力，并将减少其在与政府部门打交道过程中的不确定性。但是，对于从事需要行业管理部门特别批准和许可的领域（如电信与医疗）的外商投资企业，

他们仍然需要在取得相关特别批准和许可后方可从事上述业务。

## （二） 扩大开放服务业

总体而言，自贸区并不“欢迎”制造业企业。方案对包含金融、文化等 18 个服务业类别（6 个主要投资领域）取消了市场准入限制与资质要求，向外国投资者开放了相关市场。但是，自贸区内的开放措施仍受到全国性法规的限制。另外，并非如某些对自贸区改革的报道所言，在短期内，不会出台程度堪比香港或其他国外地区的自由市场政策。

## （三） 开放金融系统

外界对于自贸区内开放金融体系的改革措施有很多期待。此方面改革将是一个通过循序渐进的逐步试行与长期过程。方案提出了一系列金融改革目标，如人民币资本项目可兑换以及利率市场化。同时，证监会也出台措施，支持鼓励向境内外资本市场投资。目前，上述改革目标尚处于政策阶段，仍需等待外汇管理和其他政府机构出台相应实施规定。

同样的，此次金融体系改革绝非无边界自由化。自贸区内向区外境内的资本流动仍受到诸多现有外汇管理法规的限制。不同于其他针对外国投资者的优

惠措施，金融体系改革旨在给予国内投资者更多好处与优惠。

## （四） 转变政府职能

在自贸区内，管理委员会被定位为与企业相衔接的窗口，企业因此将享受一站式服务并无需与其他各类部门分别打交道。该行政体制改革昭示了未来一段时期内中国进行政府改革的方向。

## 四、 简评

迄今为止所颁布的自贸区政策框架远非完备。大多数领域（如金融体系改革）尚缺乏实施细则。国务院旨在通过方案更全面地推动改革而提出的目标，如何通过具体规定得到落实仍有待观察。但是，自贸区改革的重要性并不因为具体措施的缺位而降低。来自政府最高层的坚定决心预示改革正朝着既定的目标进发。

对于已经在中国设立实体的跨国企业（尤其是那些已经在自贸区内经营的跨国企业），总体看来，目前尚无因自贸区所进行的改革措施而在区内设立新的实体或将现有实体搬迁至自贸区内的迫切需要。

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## Foreign Investment

### Shanghai Free Trade Zone - Still Much to Expect

**The Shanghai Pilot Free Trade Zone is Officially Launched On September 29, 2013, Followed by a Series of Legislations**

On September 29, 2013, China officially launched the China (Shanghai) Pilot Free Trade Zone (the “**Zone**”). Two days earlier, on September 27, 2013, the State Council approved the Blueprint for the Zone (the “**Blueprint**”), which is the overarching framework for policies within the Zone. On September 29, 2013, the same day of Zone’s launch, the Shanghai municipal government issued the negative list (discussed in details below) and five other administrative measures governing the administration of the Zone, the procedures of establishing foreign-invested enterprises (“**FIEs**”) in the Zone. A series of rules were also issued by various industry regulators and other agencies to support the contemplated reforms in very general terms.

#### **Objectives of the Zone Reforms**

On the Chinese central government level, expectations of the Zone are much more than just a traditional bonded zone, which features primarily import and export businesses with released customs intervention. The Zone is expected to serve as China’s testing ground for groundbreaking economic reforms to be extended to other areas or even nationwide in China. With Premier Li Keqiang’s strong backing, the Zone’s

significance could be comparable to that of the Shenzhen Special Economic Zone established more than 30 years ago.

#### **Major Reforms in the Zone**

We touch on a few of the most significant reforms in Zone below. The reforms explored in the Zone are designed to be adoptable and implantable nationwide in the future if the pilot in the Zone turns to be successful. That means no financial benefits/subsidies, like the previously reported lower 15% income tax rate, will be implemented in the Zone.

##### *A. Reform on Investment Administration System.*

###### *i. Negative List*

Until now, the most concrete and significant reform can be seen in the Zone is the adoption of the “negative list” approach towards foreign investment administration, which means that foreign investment in all sectors should be allowed to set up in the same manner as domestic companies, unless listed in the “negative list” (the “**Negative List**”). The Negative List covers 18 main sectors divided further into 1,069 subcategories, incorporating 190 special regulatory measures. This approach represents a long leap for foreign investment administration in China, from the government authorities’ approval

on each project to a treatment equally applied to domestic and foreign investors (unless the foreign investment is on the Negative List).

The 2013 version of the Negative List, as published on September 29, basically list all categories that are already restricted or forbidden (including almost all the items under the restricted and forbidden categories for foreign investment under the 2011 Foreign Investment Industrial Guidance Catalogue), with only a few service sectors newly opened to foreign investors in the Zone. For foreign investors looking for new opportunities in the Zone, the extent of open-up is below their expectation, but the Negative List will be subject to annual updates in the following years.

#### ii. Filing System Supersedes Approval Review

One of the centerpieces of the Zone reforms is a change from a pre-approval system for foreign investment to a filing system with the Administrative Committee of the Zone, for FIEs to be established in the Zone (except for the industry sectors on the Negative List). The filing system, as well as loosened requirements of registered and paid-in capital and annual inspection with the Administration of Industry and Commerce, will save those FIEs substantial time and effort, and will reduce the uncertainty inherent in the interaction with Chinese government authorities. Nonetheless, for FIEs engaged in special industry (e.g. telecom and healthcare) where special permit/license from industry regulator is required, they are still not able to engage in full-fledged business until such special permit/license is obtained.

#### *B. Further Open up Service Sector*

In general, the Zone does not “welcome” manufacturing enterprises. The Blueprint provides more market access to foreign investors by lifting market entry restrictions and eliminating certain qualification thresholds in 18 service sectors (in six

major investment areas) ranging from finance to cultural services. Nevertheless, the open-up in the Zone will still be subject to the existing nation-wide limitation, and below some hype over the reform in the Zone, there will no free-market policies totally matching those of Hong Kong or other foreign jurisdictions in the short term.

#### *C. Financial System Liberalization*

There has been much anticipation over the financial system liberalization reform in the Zone. Such reform will be a multi-step and time consuming process, and implemented step-by-step on a trial basis. The Blueprint commits to a wide range of financial reforms, including convertibility for RMB in capital account items and liberalization of interest rates. The China Securities Regulatory Commission's measures also contemplate to support inbound investment in domestic capital market and outbound investment in foreign capital market. Currently, the reform is only at the general policy level, while implementing regulations still need to be promulgated by the State Administration of Foreign Exchange and other government agencies.

Likewise, the financial system reform will not be boundless. The capital outflow from the Zone to the rest of China will remain subject to restrictions under the exiting foreign exchange control regulations. Unlike other reforms that mostly benefit foreign investors, the financial system reform is anticipated to benefit domestic investors more.

#### *D. Transform Government Functions*

In the Zone, the Administrative Committee functions as the window to interface with enterprises, so that enterprises will enjoy one-stop services and do not have to deal with various government authorities separately. The bureaucratic reform illustrates the direction of governmental reform in China in the long haul.

## Our Thoughts

The framework of Zone policies, as released to date, is far from mature. In most areas (such as financial system reforms), there is little articulation on the detailed implementing rules. It remains to be seen how the detailed rules will give effect to the objectives announced in the Blueprint by the State Council, which intended to push forward the reforms more extensively. However, the lack of detailed implementing measures does not diminish the significance of the Zone reforms. With

high aspirations on the highest level of the government, the reform is on the direction towards what it is set out to achieve.

For multi-national companies already having presence in China (especially those having entities doing business in the Zone), generally we see no immediate demand to set up new entities in, or relocate existing entities to, the Zone in light of the reforms within the Zone.

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