

工业和信息化部（以下简称“工信部”）决定在中国（上海）自由贸易试验区（以下简称“上海自贸区”）进一步放开在线数据处理与交易处理业务（经营类电子商务）的外资股权比例限制。商务部发布了《中华人民共和国外国投资法（草案征求意见稿）》（以下简称“《外国投资法草案》”）将改革当前外资法律体系。国务院决定在全国范围内推广上海自贸区可复制改革试点经验。

一、上海自贸区内进一步放开在线数据处理与交易处理业务的外资股权比例限制

2015 年 1 月 13 日，工信部决定在上海自贸区内试点放开在线数据处理与交易处理业务（经营类电子商务）的外资股权比例限制，外资股权比例可至 100%¹。

（一）背景

在线数据处理与交易处理业务属于第一类增值电信业务。根据《外商投资电信企业管理规定》，经营增值电信业务的外商投资电信企业的外资股权比例最终不得超过 50%。

2014 年 1 月 6 日，工信部、上海市人民政府决定对外开放上海自贸区内的增值电信业务，允许在线数据处理与交易处理业务（经营类电子商务）外资股比不超过 55%。

为支持上海自贸区实现以开放促发展、促改革、促创新，形成可复制、可推广的经验，工信部决定进一步放开在线数据处理与交易处理业务（经营类电子商务）的外资股权比例限制，外资股权比例可至 100%。

（二）法律点评

2014 年 11 月 4 日，国家发展改革委会同商务部等部门对《外商投资产业指导目录》进行了修订，并于 2014 年 11 月 4 日至 12 月 3 日期间向社会公开征求意见²。该征求意见稿删除了对于电子商务的外资比例的限制。

工信部上述决定及《外商投资产业指导目录》的征求意见稿预示着未来有望在全国范围内全面放开在线数据处理与交易处理业务（经营类电子商务）的外资股权比例限制。

更多法律点评请浏览上海自贸区 2015 年外商投资电商领域新政。

二、商务部发布《外国投资法草案》

2015 年 1 月 19 日，商务部就《外国投资法草案》公开征求意见³。

（一）背景

《中华人民共和国中外合资经营企业法》、《中

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<http://www.miit.gov.cn/n11293472/n11293832/n12845605/n13916928/16407135.html>

²
http://www.ndrc.gov.cn/yjzx/yjzx_add.jsp?SiteId=85

³
<http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml>

华人民共和国外资企业法》、《中华人民共和国中外合作经营企业法》（以下统称“三资企业法”）从上世纪 80 年代颁布至今，其制定实施所依据的市场环境已经发生了重大变化，继续施行三资企业法不合时宜。因此，三资企业法的修改被第十二届全国人大常委会列入五年立法规划的第二类立法项目，即需要抓紧工作、条件成熟时提请审议的立法项目。商务部启动了三资企业法修改工作，形成了《外国投资法草案》。

（二） 法律点评

《外国投资法草案》是一部统一的管理和促进外国投资的基础性法律，该法采取准入前国民待遇和负面清单的外资管理方式，以取代三资企业法确立的外商投资逐案审批体制。外国投资主管部门仅对负面清单（即特别管理措施目录）内的投资实施准入许可，审查对象也不再是合同、章程，而是外国投资者及其投资行为。在实施负面清单管理模式下，绝大部分外资进入将不再审批。除了准入管理制度，《外国投资法草案》还确立了国家安全审查制度、信息报告制度、投资促进制度、投资保护制度等制度。

依据《外国投资法草案》，《中华人民共和国外国投资法》（以下简称“《外国投资法》”）颁布生效后，三资企业法将废止，《外国投资法》生效前依法存续的外商投资企业应当在三年内按照《公司法》等法律对企业组织形式和组织机构进行调整。

更多法律点评请浏览外国投资法草案征求意见稿系列研究。

（三） 关注要点

对于认定外国投资者，除了依据国籍、注册地标准外，《外国投资法草案》还引入了“实际控制”

的标准，即受外国投资者控制的境内企业视同外国投资者。但是《外国投资法草案》并未对如何认定“实际控制”作出规定。外国投资主管部门将来如何在实践中认定“实际控制”值得进一步关注。

应当如何处理《外国投资法》生效前既存的以协议控制方式（VIE）的投资，如该投资在《外国投资法草案》生效后仍属于禁止或限制外商投资领域，商务部将待征集公众意见的基础上确定。目前理论界和实务界存在三种观点：（1）申报模式，即实施协议控制的外国投资企业向外国投资主管部门申报其受中国投资者实际控制，可继续保留协议控制结构；（2）申请认定模式，即实施协议控制的外国投资企业向外国投资主管部门申请认定其受中国投资者实际控制，在外国投资主管部门认定其受中国投资者实际控制后，可继续保留协议控制结构；及（3）申请准入许可模式，即实施协议控制的外国投资企业向外国投资主管部门申请准入许可，外国投资主管部门会同有关部门综合考虑外国投资企业的实际控制人等因素作出决定。商务部最终采纳哪种模式值得进一步关注。

三、 在全国范围内推广上海自贸区可复制改革试点经验

2015 年 1 月 29 日，国务院决定在全国范围内推广上海自贸区可复制改革试点经验⁴。

（一） 背景

上海自贸区成立一年多来，在建立以负面清单管理为核心的外商投资管理制度、以贸易便利化为重点的贸易监管制度、以资本项目可兑换和金融业开放为目标的金融创新制度、以政府职能转变

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http://www.gov.cn/zhengce/content/2015-01/29/content_9437.htm

为核心的事中事后监管制度等方面，形成了一批可复制、可推广的改革创新成果。经国务院批准，上海自贸试验区的可复制改革试点经验将在全国范围内推广。

（二） 法律点评

在全国范围内复制推广的改革事项包括投资管理领域、贸易便利化领域、金融领域、服务业开放领域、事中事后监管措施。其中，投资管理领域的改革事项包括外商投资广告企业项目备案制等。金融领域的改革事项包括外商投资企业外汇资本金意愿结汇、直接投资项下外汇登记及变更登记下放银行办理等。服务业开放领域的改革事项包括允许设立外商投资资信调查公司、允许设立股份制外资投资性公司、允许外资企业从事游戏游艺设备生产和销售等。

在全国其他海关特殊监管区域复制推广的改革事项包括海关监管制度创新、检验检疫制度创新。海关监管制度创新包括期货保税交割海关监管制度、融资租赁海关监管制度等措施。检验检疫制度创新包括进口货物预检验、动植物及其产品检疫

审批负面清单管理等措施。

（三） 关注要点

国务院制定了有关部门负责复制推广的改革事项任务分工表和各省（区、市）人民政府借鉴推广的改革事项任务表，并要求各省（区、市）人民政府和国务院各有关部门要制订工作方案，明确具体任务、时间节点和可检验的成果形式，于 2015 年 1 月 31 日前送商务部，由商务部汇总后报国务院。

国务院要求 2015 年 6 月 30 日前在全国范围内，国家工商行政管理总局应实行外商投资广告企业项目备案制；国家外汇管理局应实行外商投资企业外汇资本金意愿结汇、直接投资项下外汇登记及变更登记下放银行办理；商务部应允许设立外商投资资信调查公司、允许设立股份制外资投资性公司；文化部允许外资企业从事游戏游艺设备生产和销售。

国务院有关部门如何落实改革事项及改革的进展情况值得进一步关注。

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The PRC Ministry of Industry and Information Technology (“MIIT”) decided to further lift control over shareholding percentage of foreign investors in the companies that provide online data processing and transactions processing services (E-commerce) in the China (Shanghai) Pilot Free Trade Zone (“Shanghai FTZ”). The PRC Ministry of Commerce (“MOFCOM”) has been soliciting public opinions on the draft Foreign Investment Law which aims to reform the current foreign investment legal system. The State Council decided to expend the replicable experiences accumulated from the pilot reform in Shanghai FTZ nationwide.

1. Lift Control over Shareholding Percentage of Foreign Investors in the Companies that Provide Online Data Processing and Transactions Processing Services in Shanghai FTZ.

On January 13, 2015, MIIT decided to further lift control over shareholding percentage for foreign investors in the companies that provide online data processing and transactions processing services (E-commerce) in Shanghai FTZ. The foreign investors are now allowed to hold up to

100% shares in such companies¹.

1.1 Background

Online data processing and transactions processing services are covered in the Category one of the value-added telecommunication services. Pursuant to the *Administrative Provisions on Foreign-invested Telecommunications Enterprises*, the ultimately maximum shareholding percentage for a foreign investor in a foreign-invested telecommunication enterprise engaging in value-added telecommunication services is 50%.

On January 6, 2014, MIIT and the Shanghai government decided to lift control over shareholding percentage for foreign investors in foreign-invested telecommunications enterprises engaging in value-added telecommunication services in Shanghai FTZ. As a result, the foreign investors were allowed to hold up to 55% shares in those companies that provide online data processing and transactions processing services (E-commerce).

Aiming to promote the development of Shanghai FTZ and to accumulate experiences, MIIT

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<http://www.miit.gov.cn/n11293472/n11293832/n12845605/n13916928/16407135.html>

decided to further lift control over shareholding percentage of foreign investors in the companies that provide online data processing and transactions processing services (E-commerce) in Shanghai FTZ. The foreign investors are now allowed to hold up to 100% shares in such companies.

1.2 Next Step

During the period from November 4, 2014 to December 3, 2014, the PRC government authorities had been soliciting public opinion on the Catalogue of Industries for Guiding Foreign Investment ("**Catalogue**"), which was jointly revised by the National Development and Reform Commission, MOFCOM and other governmental authorities on November 4, 2014². It is notable that the restriction on the shareholding percentage of the foreign investors engaging in E-commerce is removed in the Catalogue.

As per MIIT's decision and the Catalogue, it is predictable that the restriction on shareholding percentage for the foreign investors engaging in online data processing and transactions processing services (E-commerce) is likely to be removed nationally in the near future.

For more details please refer to ***New Shanghai FTZ Policy Further Loosening Shareholding Restriction in E-commerce Sector*** in JunHe Bulletin (January 15, 2015)

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http://www.ndrc.gov.cn/yjzx/yjzx_add.jsp?SiteId=85

2. MOFCOM Circulated the Draft Foreign Investment Law.

On January 19, 2015, MOFCOM circulated the Foreign Investment Law to solicit public opinion³.

2.1 Background

The *Sino-foreign Equity Joint Venture Law*, the *Wholly Foreign-owned Enterprise Law* and the *Sino-foreign Contractual Joint Venture Law* (collectively "**Three Laws on Foreign Investment**") became effective since 1980's. The current market environment is significantly different from the one when Three Laws on Foreign Investment were formulated. It becomes critical to revise the Three Laws on Foreign Investment to keep pace with the new market environment, therefore the revision of Three Laws on Foreign Investment has been included in the second category of legislative program, which refers to the legislative program on the fast track that will be considered once conditions are satisfied, under the five-year legislative schedule by the Standing Committee of the 12th National People's Congress. Accordingly the MOFCOM prepared and circulated the draft Foreign Investment Law.

2.2 Legal Review

The draft Foreign Investment Law is to be a unified and fundamental law to regulate and

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<http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml>

promote the foreign investment, which will introduce the pre-establishment national treatment with the negative list approach to replace the current case by case approval system. According to the draft Foreign Investment Law, only the business which falls within the negative list will be subject to approval by the foreign investment authority, and the foreign investment authority will inspect the foreign investors and the investment rather than the joint-venture contracts and Articles of Association. Under the new approach, most of the foreign investments will not need to be approved by the authorities. Besides the market entry principle, the Foreign Investment Law also entrenches the legal systems of national security review, information reporting system, promotions and protections of investment etc.

Once the Foreign Investment Law comes into effect, it will repeal Three Laws on Foreign Investment. Accordingly the foreign-invested enterprises previously established will be required to adjust their organization form and corporate governance according to the Company Law within 3 years since the Foreign Investment Law takes effect.

For more details please refer to JunHe series bulletins on the draft Foreign Investment Law.

2.3 Nest Step

For the purpose of identifying the foreign investor, besides the nationality and registered address, the draft Foreign Investment Law also introduces

the concept of “ultimate control”, which means that a domestic company ultimately controlled by foreign investor(s) will be treated as a foreign investor. But the draft Foreign Investment Law does not give details about how to identify such “control”. It is worthy to pay close attention to how the foreign investment authority may judge “control” in practice.

Meanwhile, MOFCOM will consider the public opinions and decides on how to regulate the Variable Interest Entities (“VIEs”) established before the effectiveness of the Foreign Investment Law, especially if the businesses run by such VIEs still fall within the prohibited or restricted category as per the Foreign Investment Law. Currently in academic and practical circles there are three different views on this issue: (i) Declaration Mode: the investors may declare that the business is actually controlled by Chinese investors and the VIE structure can remain unchanged; (ii) Application and Verification Mode: after receiving the application from the investors, if MOFCOM verifies that the business is actually controlled by Chinese investors, the VIE structure can remain unchanged; and (iii) Application for Entry Permit Mode: where the business is controlled by foreign investors, a market entry permit by MOFCOM will be required and MOFCOM will examine and decide based on the relevant factors. It is worthy to keep a watchful eye on which mode the MOFCOM may eventually adopt to regulate the existing VIEs.

3. To Expend the Replicable Experiences Accumulated from the Pilot Reform in Shanghai FTZ. Nationwide

On January 29, 2015, the State Council decided to expend the replicable experiences accumulated from the pilot reform in Shanghai FTZ⁴. nationwide

3.1 Background

Shanghai FTZ has been established for more than one year. It has accumulated replicable experiences, including the foreign investment administration system based on the negative list, the simplified trade supervision system, the financial innovative system to allow the foreign currency in capital account convertible and to open financial service market, and the government administrative function which changed from pre-approval mode into interim and ex-post supervision mode. With the approval of the State Council, these replicable experiences from the pilot reform in Shanghai FTZ can be expended nationwide.

3.2 Legal Review

The policies to be duplicated nationwide cover the fields of investment administration, trade facilitation, finance, services, government function of interim and ex-post supervision. The reform on investment administration includes the

filing system for foreign investors to establish advertising enterprises. The financial reform includes allowing foreign-invested enterprises to settle foreign exchange capitals at their discretion, and delegation of foreign exchange registration to the banks. The reform on service areas includes allowing foreign investors to set up foreign-invested credit standing investigation companies, foreign-invested joint-stock holding companies, as well as to engage in the manufacturing and trading of video game consoles, etc.

The reform which will be duplicated in the other special customs-supervision zones in China covers customs regulatory system and inspection and quarantine system. The customs regulatory system reform includes the customs supervision systems over the futures bonded delivery, and the financing lease. The inspection and quarantine system reform includes adopting the negative list administration on pre-inspection of imported goods, and quarantine inspection of animals, plants and their products.

3.3 Next Step

The State Council has made task tables for the authorities under the State Council and the provincial governments to implement the reform. The State Council requested authorities under the State Council and the provincial governments to work out the working plan, defining the specific

⁴ http://www.gov.cn/zhengce/content/2015-01/29/content_9437.htm

task, time points and the working results, and report to MOFCOM before January 31, 2015. Then, MOFCOM will consolidate and report to the State Council.

It is required by the State Council that by June 30, 2015, the following measures shall be implemented: the State Administration for Industry and Commerce shall implement the filing system for foreign-invested advertising enterprises; the State Administration of Foreign Exchange shall allow foreign-invested enterprises to settle foreign exchange in their capital

accounts discretionarily, and shall delegate foreign exchange registration to banks; MOFCOM shall allow the establishment of foreign-invested credit standing investigation companies and foreign-invested joint-stock holding companies; the PRC Ministry of Culture shall allow foreign-invested enterprises to engage in the production and sales of game and amusement equipment.

It is worthy to pay close attention to how these reform will be implemented.

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