

January, 2011

Industry catalog for guiding foreign investment (amended in 2011) ("2011 Industry Catalog") (外商投资产业指导目录 (2011年修订)), jointly issued by the National Development and Reform Commission ("NDRC") and the Ministry of Commerce ("MOFCOM")

The 2011 Industry Catalog was drafted by NDRC, MOFCOM and other related authorities, and released by the Legislative Affairs Office of the State Council for public comments on April 1, 2011 (see our newsletter of April 2011). On December 24, 2011, the 2011 Industry Catalog was finalized and officially promulgated, and it was officially released by the NDRC on December 29, 2011. From January 30, 2012, the 2011 Industry Catalog will replace the current Industry Catalog for Guiding Foreign Investment (amended in 2007) ("2007 Industry Catalog").

The 2011 Industry Catalog continues to guide foreign investment by categorizing industries as "encouraged," "restricted" or "prohibited," while those not listed under any of these categories are considered "permitted." To reflect the focus of the policy highlighted in the 12th Five-Year Plan, the 2011 Industry Catalog has introduced the following major changes:

- It transfers a number of projects from other categories to "encouraged," mainly relating to high-end manufacturing industries, new and high-technology industries, new energy industries, energy efficient and environmental protection industries, and modern service industries. For example, in the category of modern service industries, foreign investment in venture capital, intellectual property services, and professional training are all "encouraged" under the 2011 Industry Catalog.
- It lifts restrictions on foreign capital equity proportions in several industry fields, meaning the number of projects on which equity proportion restrictions are imposed has decreased by 11.
- It removes many projects from the "restricted" and "prohibited" categories and makes them "permitted," such as medical institutions and financial leasing companies.

The 2011 Industry Catalog also establishes new prohibitions in certain industries, such as domestic courier services, and building and running villa developments.

It also states that if industry-specific regulations enacted by the State Council or industry sector policies provide otherwise, they will prevail over the Industry Catalog. Such wording never appeared in previous versions of Industry Catalogs, and might bring uncertainty to foreign investments in industry in China.

Date of Issue: December 24, 2011. Effective Date: January 30, 2012.



Shanghai Office

27F Shanghai Central Plaza,
381 Huai Hai Middle Road
Shanghai 200020, P.R.C.
+86 21 2327 7000
+86 21 2327 7007
shanghai@cuatrecasas.com

Contact partner:
Omar Puertas

Administrative measures for the record-filing of commercial franchises ("Measures") (商业特许经营备案管理办法), issued by the Ministry of Commerce ("MOFCOM")

These Measures will replace the current *Administrative measures for the record-filing of commercial franchises* (in force since May 1, 2007) from February 1, 2012. Before they were promulgated, the Draft Measures were issued on April 28, 2011, for public comments (see our newsletter of June, 2011). The Measures contain the following changes:

- The Draft Measures removed the requirements for the franchisors of non-store sales (e.g., online sales) and long-distance education to prove the "two store, one year" qualification; i.e., to prove that they already had at least two directly managed stores in operation for more than one year. However, the Measures have reversed this amendment.
- The Measures deleted the definition of "directly managed store," which was introduced by the Draft Measures. They also deleted the clarification made by the Draft Measures providing that a hotel directly operated and managed by a hotel management company can be considered a directly managed store of the company (enabling such company to prove the "two store, one year" requirement).
- The Measures lifted the restriction set by the Draft Measures forbidding an individual business from applying for franchise record-filing as a franchisor.
- The Measures reversed the amendment introduced by the Draft Measures requiring that the certification of trademarks, patent rights and other operational resources relating to the franchise must be issued by relevant PRC authorities. Therefore, foreign franchisors do not have to carry out IP registration in China.

Under the Measures, the record-filing of commercial franchises will be carried out through a national online registration system. MOFCOM and competent provincial-level commerce departments will be responsible for accepting and handling the record-filing of commercial franchises. A franchisor must file the application for commercial franchise record-filing within 15 days of executing the first franchise agreement between the franchisor and the franchisee in China. When any of the changes specified in the Measures occur to the franchisor, the franchisor must file the application for changes within 30 days of them taking place. A franchisor must also give the competent record-filing authority information about any franchise agreements that are entered into, cancelled, terminated and renewed each year by March 31 of the following year. The Measures set out the detailed documentation requirements for the record-filing.

Date of Issue: December 12, 2011. Effective Date: February 1, 2012.

Notice on promoting the regular development of equity investment enterprises ("EIE") (the "Notice") (关于促进股权投资企业规范发展的通知), issued by the National Development and Reform Commission ("NDRC")

The Notice, for the first time, tries to comprehensively regulate various aspects of the administration of EIEs at national level. It sets out provisions to standardize the establishment of EIEs, fund raising, investment fields, risk-control mechanisms, management institutions, information-disclosure mechanisms, record-filing requirements and industry self-discipline, etc.

Under the Notice, the *PRC Company Law and the PRC Partnership Law* governs the establishment of EIEs.

It specifies that EIEs are only allowed to raise funds through private offerings to qualified investors that can identify and assume risks. Fundraisers must fully inform investors of the risks and possible losses that may occur from the investment. Fundraisers must not give guarantees to the investors regarding the investment principal or promise them a fixed return.

Date of Issue: November 23, 2011. Effective Date: November 23, 2011.

Circular on further improving the administration of foreign-invested investment companies (the "Circular") (关于进一步完善外商投资性公司有关管理措施的通知), jointly issued by the Ministry of Commerce ("MOFCOM") and the State Administration of Foreign Exchange ("SAFE")

The Circular requires commerce departments at all levels to strengthen the examination and approval of statistical information on foreign-invested investment companies (foreign-invested holding companies), and indicate these companies as "investment companies" in the information system. It specifies that domestic loans of foreign-invested investment companies must not be used for domestic re-investment.

Date of Issue: December 8, 2011. Effective Date: December 8, 2011.

Supplement VIII to the Mainland and Hong Kong Closer Economic Partnership Arrangement ("CEPA VIII") (〈内地与香港关于建立更紧密经贸关系的安排〉补充协议八), signed between Mainland China and Hong Kong Special Administrative Region

CEPA VIII introduces 32 measures to further liberalize trade in service, facilitate trade and investment, and strengthen collaboration between mainland China and Hong Kong, in areas such as finance, tourism and innovative technology. Industry access will also be further opened up in 13 existing sectors: legal, construction, technical testing, analysis and product testing, personnel placement and supply services, distribution, insurance, banking, securities, hospital, tourism, road transportation, technician professional qualification examinations and individual business.

Date of Issue: December 13, 2011. Effective Date: April 1, 2012.

Following regulations on the pilot program on converting from business tax ("BT") payer to value added tax ("VAT") payer for the transportation industry and certain modern service industries in Shanghai, issued by the Shanghai National Tax Bureau and the Local Tax Bureau

Followed by Caishui [2011] No. 111 mentioned in our last newsletter, the State Administration of Taxation ("SAT") issued SAT Public Notice No. 65 (国家税务总局关于上海市营业税改征增值税试点增值税一般纳税人资格认定有关事项的公告), and the Shanghai national tax bureau and local tax bureau jointly issued Public Notice 2011 No. 3 (上海市国家税务局、上海市地方税务局关于营业税改征增值税试点纳税人资格认定及相关管理事项的公告) and No. 4 (上海市国家税务局、上海市地方税务局关于交通运输业和部分现代服务业营业税改征增值税试点过渡政策具体操作事项的公告), to further address the issue of verification of general VAT payer status.

Under Notice No. 65, taxpayers with an annual taxable service of at least RMB 5 million must apply for general VAT payer status with the responsible tax bureau. This amount refers to an aggregate amount within a consecutive period of a maximum of 12 months corresponding to providing transportation and modern industry services, including the tax-exempt and tax-deductible parts.

For those amounts lower than RMB 5 million, and for newly opened services, taxpayers may apply for the general VAT payer status if they have: 1) a fixed place of business, and 2) a reasonable and reliable accounting book.

Under Notice No. 65, a six-month training period management is added if taxpayers have been involved in tax evasion or tax fraud activities after obtaining general VAT payer status.

Date of Issue: January 1, 2012. Effective Date: January 1, 2012. Under Notice No. 3, existing VAT taxpayers that have taxable services must apply for confirmation of general VAT payer status before December 20, 2011. There is no need for other existing VAT taxpayers to apply for this.

Taxpayers with an annual taxable service amount lower than RMB 5 million or a newly opened service can apply directly to the responsible tax authority for general VAT payer status. There is no time limit for doing this.

Under Notice No. 4, those with a tax exemption/deduction or tax rebate valid after January 2012 do not need to reapply for these tax benefits after changing from a BT payer to a VAT payer.

Other taxpayers who are qualified to apply for the above-mentioned tax benefits need to apply to the responsible tax authority before January 10, 2012.

Date of Issue: December 19, 2011. Effective Date: December 19, 2011.

Management measures on tax rebates on the purchase of domestic-produced machinery by research and development institutions (SAT Public Notice [2011] No.73) (研发机构采购国产设备退税管理办法), issued by the State Administration of Taxation ("SAT")

Under Notice No. 73, research and development ("R&D") institutions must apply to the responsible tax authority for the tax rebate within 180 days of the issuance of the special VAT invoice for the purchase of domestic-produced machinery (the "Machinery"), presenting the purchase agreement, the invoice and the receipt for payment.

The special VAT invoice will be checked before applying the tax rebate, and the proportionate amount will be returned if the taxpayer did not pay the full purchase price for the Machinery.

No VAT can be rebated if it has already been credited as input VAT.

The tax authorities will monitor the corresponding Machinery for five years from the date the special VAT invoice was issued. If the ownership or the usage of the Machinery changes, the R&D institutions will pay the tax to be rebated according to the following formula:

Tax payable=The VAT amount on the special VAT invoice*(The residual value/the original value of the Machinery)*Applicable VAT rate.

Date of Issue: December 14, 2011. Effective Date: January 1, 2011, until December 31, 2015.