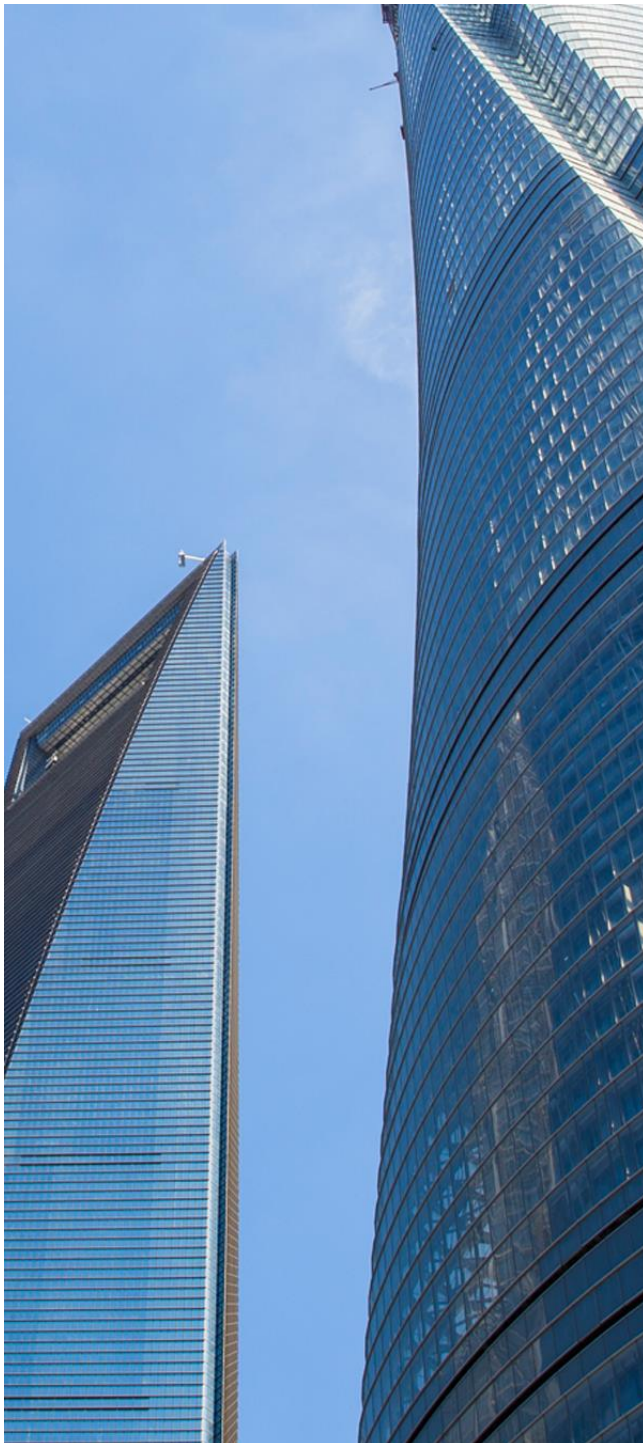

China offices

Legal flash

December 2019



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Administrative Measures for Business Offices Established by Overseas Arbitration Institutions in Lin-gang Area of the China (Shanghai) Pilot Free Trade Zone issued (《境外仲裁机构在中国（上海）自由贸易试验区临港片区设立业务机构管理办法》发布)

On October 19, 2019, Shanghai Municipal Bureau of Justice issued the Administrative Measures for Business Offices Established by Overseas Arbitration Institutions in Lin-gang Area of the China (Shanghai) Pilot Free Trade Zone, effective January 1, 2020 (the “Administrative Measures”).

In July of this year, the State Council issued a circular on Issuing the Overall Plan for the New Lin-gang Area of the China (Shanghai) Pilot Free Trade Zone (the “Lin-gang FTZ Overall Plan”). Under this circular, the State Council announced that foreign arbitration institutions will be able to register business offices and administer certain civil and commercial matters in Lin-gang Area..

The Administrative Measures further develop the plan by specifying the registration requirements and the management rules for the business offices of foreign arbitration institutions. Under the Administrative Measures, the business offices of foreign arbitration institutions can only administer foreign-related cases.

The Administrative Measures and the Lin-gang FTZ Overall Plan suggest that, once registered, foreign arbitration institutions will be allowed to administer foreign-related cases seated in mainland China. However, certain issues remain unclear, including whether (i) these awards will be recognized as domestic awards subject to enforcement under the Civil Procedure Law or non-domestic awards subject to recognition and enforcement under the New York Convention; (ii) the domestic civil procedures for interim measures are referable; and (iii) Chinese Arbitration Law will apply to the institutions registered in Lin-gang Area and to the arbitration rules and procedures; and (iv) the competent court to set aside the award (if any).



Public comment sought on the Provisions on Foreign Investment Information Report (外商投资信息报告办法公开征求意见)

China's new Foreign Investment Law will come into effect on January 1, 2020. The new Foreign Investment Law introduces a foreign investment information reporting system (the "Reporting System"). On November 8, 2019, the Ministry of Commerce ("MOFCOM") issued the Provisions on Foreign Investment Information Report (Draft for Comment) and the Notice on Matters Related to the Report on Foreign Investment Information (Draft for Comment) (together, the "Drafts"), establishing rules for implementing the Reporting System.

Currently, the incorporation and change of foreign-invested enterprises ("FIEs") without involving the prohibited and restricted sectors (referred to as the "Negative List") must be filed with MOFCOM. Instead, incorporation and change of FIEs involving the restricted sectors must be approved by MOFCOM or its local counterparts.

The Foreign Investment Law does not incorporate the above filing and approval procedures; it introduces the new Reporting System. Although it is not expressly stated that the new Reporting System will replace the current MOFCOM approval/record-filing procedures, the latter will become groundless when the Foreign Investment Law becomes effective.

The Reporting System established by the Drafts seems to be based on the current MOFCOM record-filing regime, but its scope goes beyond the incorporation and change of FIEs. The Drafts state that the obligation to report investment information to MOFCOM will apply to all direct and indirect investment activities that foreign investors carry out in China. The Drafts establish four types of reports for FIEs: initial report, alteration report, deregistration report, and annual report. They also formulate the detailed reporting forms. The foreign investments without setting up FIEs will be regulated by reference to the same reporting rules.

> Initial report

According to the Drafts, the following activities are subject to the initial report:

- Establishing an FIE
- Foreigner investor's equity acquisition of a domestic enterprise
- Foreign-invested investment company's investment in enterprise in China
- Foreign enterprises carrying out production and operation activities in China



- Foreign enterprises setting up permanent representative offices or branches in China to carry out production and operation activities

The foreign investor or FIE must submit the initial report to MOFCOM through the “Online Enterprise Registration System.”

According to the Drafts, the initial report must include the following:

- Basic information regarding the enterprise
- Information regarding the investor and its actual controller
- Basic information regarding the merger transaction (if applicable)
- Any other information required by MOFCOM

➤ Alteration and deregistration reports

If any information filed in the initial report changes, the foreign investor or FIE must (i) file an alteration report through the same online platform when the change has to be registered with the State Administration for Market Regulation (the “SAMR”); or (ii) within 15 days from the date of the change if it does not have to be registered with the SAMR. If an FIE is deregistered, the FIE must submit a deregistration report when handling the deregistration with the SAMR.

➤ Annual report

The Drafts also require all FIEs to submit an annual report to MOFCOM for the preceding year. They must do this between January 1 and June 30 through the “National Enterprise Credit Information Publicity System.”

The annual report includes the following:

- FIE’s operation information
- FIE’s asset and debt information
- Information regarding the FIE’s domestic investment and branch
- Information regarding the industrial license obtained by the FIE (applicable to Negative List investment)
- Any other information required by MOFCOM



> FIEs' reinvestment and information sharing between governmental authorities

According to the Drafts, non-investment FIEs do not need to submit additional reports for their reinvestment activities; the SAMR will forward information regarding these FIEs' reinvestments to MOFCOM. When investment FIEs reinvest in China, the same reporting rules as those that apply to FIEs will apply.

Through the sharing of information between governmental authorities, MOFCOM will obtain the investment information regarding:

- foreign law firms' representative offices in China; and
- Sino-foreign cooperative educational institutions.

No reporting duties are expected to be imposed on foreign investors/FIEs investing in the above two methods.

> Penalties

According to the Drafts, failure to fulfill the obligations required under the Reporting System will result in a warning and a correction order from MOFCOM, and failure to correct the situation will result in a fine of up to RMB 500,000.

> Cut-off date

The Foreign Investment Law will come into force on January 1, 2020. However, the Drafts state that, until January 31, 2020, FIEs not on the Negative List may still use the old record-filing system for filing incorporations and changes. For this exception to apply, incorporations must be registered with the SAMR before December 31, 2019.

The Draft is open to public comment until December 2, 2019.

Interim Provisions on the Administration of Consumer Goods Recall issued (《消费品召回管理暂行规定》发布)

On November 21, 2019, the State Administration of Market Regulation ("SAMR") issued the Interim Provisions on the Administration of Consumer Goods Recall (the "Interim Provisions"), effective January 1, 2020.



Before the Interim Provisions become effective, generally, the recall of specific consumer goods is subject to special regulations such as the Measures on the Administration of Drug Recall and the Provisions on the Administration of Food Recall, while the recall of general consumer goods is subject to the Administration of the Recall of Defective Consumer Goods issued by the General Administration of Quality Supervision, Inspection and Quarantine (the “Administrative Measures” and “AQSIQ”). The Administrative Measures adopt catalogue management, mainly governing the recall of the consumer good types listed in the catalogue issued by AQSIQ. Consumer goods not listed in this catalogue may be recalled taking the Administrative Measures as a reference.

Unlike the Administrative Measures, which only govern certain consumer goods and establish no penalties for non-compliance, the Interim Provisions (i) govern the recall of all products purchased and used by consumers for living consumption, and (ii) establish penalties for not complying with certain clauses.

The Interim Provisions establish the following obligations for the producer and other operators of consumer goods (the latter being those that sell, lease, repair or carry out other activities related to consumer goods):

➤ Reporting obligation

A producer or operator must inform the competent provincial SAMR within two days from the date it becomes aware of the circumstance if it learns that the consumer goods it produces or sells:

- have caused or are likely to cause death, serious personal injuries, or serious property loss; or
- have been recalled outside China.

➤ Recall obligation

If a producer considers that its consumer goods are defective (defined as “unreasonable danger affecting personal or property safety generally found in the same batch, model or category of consumer goods due to faulty design, manufacturing, warning or other reasons”) or SAMR orders a recall, it must (i) immediately stop producing, selling or importing the defective consumer goods; and (ii) notify other operators to stop their operations.

The other operators must stop operating as soon as they receive this notice and assist the producer with implementing the recall.



> Recall plan

The producer carrying out a recall must file a detailed recall plan with the competent SAMR within the deadline established in the Interim Provisions, which is required to cover the following contents:

- Scope of consumer goods to be recalled, the existing defects, and emergency plan to avoid damage;
- Detailed recall measures;
- Organization in charge of the recall, contact information and the recall schedule.

> Publish recall information

The producer must publish the recall information within three business days from the date it reported its recall plan. It must publish this information in a way that is accessible to the public, and it must accept public consultation.

Other operators must publicize the recall information released by the producer in their stores, on their websites and at any other business premises.

> Summary and record-keeping

The producer must submit (i) an interim summary of the recall to the competent SAMR every three months, starting from the date it implements the recall, and (ii) a final summary of the recall within fifteen business days from the date it completes the recall plan.

Producers must keep their recall records for at least five years.

> Imported consumer goods

The institution that an overseas producer designates to recall imported consumer goods in China (or the importer, if no designation is made) will be considered the producer under the Interim Provisions, and therefore, will be imposed with the abovementioned obligations.

As soon as the Interim Provisions become effective, the Management Measures on the Recall of Children's Toys is abolished simultaneously. While it is not expressly mentioned in the Interim Provisions, the Administrative Measures are also expected to be abolished. The regulations in effect relating to the recall of other specific product categories (e.g., automobile, drug, medical device, and food) will remain effective.



Negative List for Market Access (2019 edition) issued (市场准入负面清单（2019年版）发布)

On November 22, 2019, the National Development and Reform Commission and the Ministry of Commerce jointly issued the Negative List for Market Access (2019 Edition) (the “New Negative List for Market Access”). This is the first adjustment since the Negative List for Market Access was first issued in 2018 (the “Old Negative List for Market Access”).

The Negative List for Market Access is a unified list that applies to all investors across the country, and it provides easy reference when investing in mainland China. Foreign investors must refer not only to the Negative List for Market Access, but also to the Negative List for Foreign Investment Access.

The items on the Negative List for Market Access are classified as prohibited items and items requiring permits. In principle, items not listed as prohibited or that do not require a permit are open to investors, and they are only subject to registration or record-filing.

The Old Negative List for Market Access consists of 4 prohibited items and 147 items requiring permits. The New Negative List for Market Access incorporated into the prohibited list the “Negative List for Industry Access in National Key Ecological Functional Areas” and the “Negative List for Industry Access in Major Agricultural Production Areas.” It also updated the list of items requiring permits by removing several items from the list and adding new ones. As a result, the items subject to permits or approval are now 126.

The New Negative List for Market Access also codifies each prohibited item and gives items requiring permits a reference number, paving the way for the extensive use of online applications in the future.



Contact

Omar Puertas

Partner

omar.puertas@cuatrecasas.com

Cuatrecasas Shanghai office

20 F Shui On Plaza,
333 Huai Hai Middle Road
Shanghai 200021, PRC
+86 21 2327 7000
+86 21 2327 7007
shanghai@cuatrecasas.com

Pablo Cubel

Partner

pablo.cubel@cuatrecasas.com

Cuatrecasas Beijing office

15/F Parkview Green, Tower B,
9 Dong Da Qiao Road
Beijing 10002, PRC
+86 10 5651 0200
+86 10 5651 0268
beijing@cuatrecasas.com

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