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## China Sets Schedule for Implementation of Negative List System for Market Access

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China's State Council on October 19, 2015 published the Opinions on Implementing the Negative List System for Market Access (Opinions), <sup>1</sup> specifying that China intends to implement a unified national negative list system for market access in 2018.

The concept of the negative list with respect to foreign investment was introduced to China in bilateral investment treaty (BIT) negotiations with the United States. Implementation of a negative list is now accepted as part of China's continuing effort to deepen reform of the socialist market economy; combine the role of the market in allocating resources with the role played by government; relax while continuing to regulate market access; streamline administrative approval procedures; strengthen market supervision; and accelerate the establishment of an open, fair, competitive and well-regulated market where enterprises make their own decisions and clear boundaries on government power in the economy are drawn.

The negative list consist of two categories—access prohibited and access restricted—both of which apply to initial investment, expanded investment, M&A and other market access conduct. In the prohibited access category, foreign investors will not be allowed to access the relevant market, and the administrative organs may not review, approve or handle the relevant formalities for such items. In the restricted access category, market access will be permitted subject to administrative approval, and/or in accordance with specified access conditions. Foreign investors may access all other markets on an equal basis with domestic investors.

Constraints imposed by an expansive definition of national security are a concern. In particular, market participants will be restricted or prohibited from entering markets relating to national security (broadly defined as including not only national defense and homeland security but also the security of people's livelihood and property, economic security, financial security, cultural security, social security, science and technology security, information security, ecological security, resource security, nuclear safety and new areas of security), the layout of national productive forces, the development of strategic resources and other significant public interests. Such broad conception of national security indicates that the negative list may have unduly narrow reach.

In terms of the subjects of application, the negative list includes market access in general and

foreign investment in particular. The former applies to both domestic and foreign investors, while the latter applies only to foreign investors.

The Opinions call for relevant departments to promptly formulate their respective proposed draft foreign investment negative lists. The approval procedures for inbound foreign investment areas are to be gradually simplified, with one-stop approval procedures to be explored. A data analysis system and a public information system for foreign investment will be established.

The negative list system will be implemented on a trial basis in selected areas beginning December 1, 2015 and is to be officially adopted nationwide beginning January 1, 2018. The schedule indicates that China anticipates that BIT negotiation may take several years, amid reports that China's most recent negative list submission in those negotiations was regarded as insufficient by the United States. The Opinions clarify that the negative list will be made and issued by the State Council. Any local government adjustments will be subject to the State Council approval. Without State Council authorization, no local government will be allowed to issue its own negative list or depart from the State Council's list.

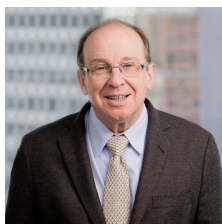
Compared to the administrative approval system, the negative list system stipulates which actions are not allowed and helps to clarify government's role to limit interference with enterprise development. It should also contribute to faster investment approvals. It will not, however, eliminate discrimination against foreign investors, particularly when national security is invoked.

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<sup>1</sup> See "State Council Opinions on Implementing the Negative List System for Market Access" (Guo Fa [2015] No. 55) issued by State Council on October 2, 2015 and released on October 19, 2015, available at [www.gov.cn/zhengce/content/2015-10/19/content\\_10247.htm](http://www.gov.cn/zhengce/content/2015-10/19/content_10247.htm).

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