

## China Newsletter | 2024 Q2-Q3/Issue No. 61



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### Antitrust

#### China Issues New Fair Competition Review Regulations in Effort to Improve Business Environment

国务院发布《公平竞争审查条例》，自 8 月 1 日起施行。

On June 6, 2024, the State Council of China promulgated the final version of the Fair Competition Review Regulations, which took effect Aug. 1, 2024. These regulations aim to unify the domestic market by ensuring fair competition between state-owned and private enterprises. Grounded in the principles of China's Anti-Monopoly Law, the regulations mandate that administrative authorities conduct fair competition reviews while drafting laws, administrative regulations, local regulations, rules, normative documents, and policy measures.

##### 1. Core Provisions of the Regulations

- **Market Access and Exit:** The regulations strictly prohibit including content that may directly or indirectly restrict market access or exit. This includes illegally establishing approval procedures outside the negative list for market access, unlawfully granting franchise rights, and imposing unreasonable or discriminatory conditions for market entry or exit.
- **Free Flow of Goods and Resources:** The regulations disallow any measures restricting the entry of non-local or imported goods and resources into local markets or hindering their export. They also prohibit discriminatory fees, standards, prices, or subsidies for non-local or imported goods and resources.
- **Production and Business Costs:** Without a legal or administrative regulatory basis, authorities are barred from granting selective tax incentives or subsidies that could affect production and business costs. This includes preferential treatment in obtaining resources, administrative fees, or government funds.
- **Production and Business Activities:** The regulations prevent authorities from compelling or facilitating monopolistic behavior, setting government-guided prices beyond legal limits, or intervening in market-regulated price levels.

##### 2. Exemptions and Review Procedures

The regulations provide specific exemptions where restrictive content may be included in policy measures, provided there is no alternative with a lesser impact on fair competition. These exemptions apply in scenarios such as safeguarding national security, promoting scientific and technological progress, and achieving social public interests like environmental protection.

Policy measures must undergo a fair competition review by the relevant government authority, which varies depending on the drafting unit. The review process requires consultation with relevant operators, industry associations, and the public, particularly when public interests are involved. The State

Administration of Market Regulation (SAMR) oversees the fair competition review system and maximizes compliance.

### **3. Business Environment Implications**

The introduction of these regulations is part of China's long-term strategy to establish a "national unified market," aimed at dismantling local protectionism and standardizing rules across regions. While the regulations address concerns of fair competition for private and foreign companies, the exemptions provide local governments some latitude to enact discriminatory laws under certain conditions. This may pose challenges for foreign and non-local companies in contesting policy measures.

Foreign investors should exercise caution and ensure that all agreements align with national regulations to avoid potential nullification. The regulatory environment seeks to create a level playing field but may introduce uncertainties for companies relying on preferential treatments as part of their investment strategy.

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## **Compliance**

### **Strengthening Consumer Protections: New Regulations for E-Commerce and Retail in China**

国务院发布《中华人民共和国消费者权益保护法实施条例》，自 7 月 1 日起施行

The People's Republic of China (PRC) enacted the Consumer Rights and Interests Protection Law in 1993 and amended it in 2009 and 2013. With the rapid expansion of e-commerce and platform-based commerce in China, new challenges have arisen, including false advertising, price discrepancies, refusal to accept returns, and automatic subscription renewals.

On March 19, 2024, the State Council of the PRC introduced the Implementing Regulation on the Consumer Rights and Interests Protection Law (the Regulation), which took effect July 1, 2024. This regulation aims to enhance and clarify existing legislation and strengthen the regulatory framework to protect consumer rights across all channels. The key takeaways of the Regulation include:

1. *Obligations of Sellers and Business Operators:* Under the Regulation, sellers and business operators must:
  - ensure business premises and facilities meet safety requirements.
  - display warning signs and provide quick assistance in emergencies.
  - clearly display business name and logo, even when leasing or selling online.
  - provide a 30-day written notice before closing or relocating.

Business operators must avoid spreading false or misleading information, such as fabricating qualifications or altering transaction data, which can mislead consumers about business reliability. Common fraudulent practices include creating fake positive reviews and manipulating transaction data.

2. *Quality Guarantees and Return Policies:* Defective products pose safety risks and can damage a company's finances and reputation. Sellers should implement preventive measures, such as recall

campaigns, and clearly indicate any exclusions from no-hassle return policies. Sellers must inform customers of these exclusions at checkout.

Recent guidelines allow for refund-without-return policies for defective products, preventing unfair competition and collective actions like “store-bombing.”

3. *Pricing Transparency and Payment Terms:* Algorithms and loyalty measures affect the consumer market, especially online, which may lead to price variations. Sellers must clearly distinguish charges for each item, ensuring information is authentic and accurate. Sellers should not set different prices for the same product under the same conditions.

Goods and services offered in bundles must be clearly marked. Prepayments and deposits require a written contract outlining the product features, price, refund process, and breach liabilities.

4. *Consumer Personal Information Protection:* Since June 2023, confidentiality of personal information has been a condition of business transactions. The Regulation prohibits excessive data collection and targeted marketing without explicit consent, allowing customers to opt out at any time.
5. *Handling Complaints and Disputes:* The Regulation aims to reduce cases handled by government hotlines and courts by providing clear guidelines on each party’s rights and obligations. Authorities must accept and address complaints and encourage reporting of illegal transactions. Complainants have a seven-day period for appeal receipt, and public officers have up to 60 days for mediation. In addition, consumer rights associations play a role in optimizing complaint management and ensuring fair outcomes.

The Regulation sets rigorous standards for business-to-customer activities in China. Sectors like food and beverage, consumer goods, apparel, and luxury items may face increased scrutiny from authorities and informed consumers.

### **China Introduces New Guideline for Identifying Sensitive Personal Information**

关于发布《网络安全标准实践指南——敏感个人信息识别指南》的通知

On Sept. 18, 2024, the National Technical Committee 260 on Cybersecurity of Standardization Administration of China issued the Network Security Standard Practice Guideline-Sensitive Personal Information Identification Guideline (SPI Guideline). The SPI Guideline supplements the definition for sensitive personal information (SPI), which follows a risk-of-harm approach, by introducing specific identification methods, intending to provide organizations clearer guidance to self-assess whether or not certain data qualifies as SPI based on risk-of-harm rather than a prescriptive list. Prior to the SPI Guideline, businesses faced uncertainty in identifying SPI, relying on non-exhaustive sample lists from the Personal Information Protection Law (PIPL) and suggestive national standards, such as GB/T 35273-2020 Personal Information Security Specifications, which made compliance with heightened obligations for processing SPI – including stricter consent requirements, enhanced security safeguards, and cross-border transfer filing mandates – challenging.

The SPI Guideline defines SPI the same as the PIPL, i.e. “personal information that, once leaked or illegally used, may easily cause harm to the dignity of natural persons or grave harm to personal safety or property security.” Furthermore, it elaborates on three methods for identifying SPI:

1. *Single-factor identification*: whether the personal information by itself may lead to harms on individual dignity, personal safety, or property security if unlawfully disclosed or used;
2. *Single-factor identification by Exemplar List*: commonly seen SPI listed in Appendix A of the Guidelines;
3. *Multi-factor identification*: whether the personal information, when combined or assessed with other types of personal information as a whole, may cause harm to an individual if unlawfully disclosed or used (the entire set of personal information, including any derived information, shall be considered SPI);
4. Types of personal information *identified under relevant laws and regulations*, such as the Administrative Regulations on the Credit Reporting Industry, which prohibits credit reporting entities from collecting individuals' religion, genetic information, fingerprints, blood type, and medical history; or the Measures for the Supervision and Administration of Online Transactions, where e-commerce operators must obtain customers' consent before processing information containing personal biological features, medical health data, financial accounts, or personal movements.

### **Exemplar List**

The Guideline also provides an Exemplar List of common SPIs in eight categories:

- Biometric data used for unique identification;
- Religious beliefs;
- Special identity information (such as disability or military status);
- Medical health information (the final Guideline specifies that only examination and testing data from health care services may be classified as SPI, not all data from medical devices);
- Financial account information;
- Movement information (includes only information indicating a continuous track of movements over time, rather than any location information of an individual);
- Personal information of children under 14 years old; and
- Other sensitive information that may cause harm to individual.

It is uncertain to what extent China's data protection regulators will rely on the finalized SPI Guideline for enforcement due to its non-binding nature. However, given the continued emphasis on the "risk of harm" approach in defining SPI in China, businesses should consider proactively adopting a case-by-case, risk-focused approach in identifying SPI, emphasizing context and potential harm to individuals.

## Corporate

### China Enhances Beneficial Owner Filing System

中国人民银行、国家市场监督管理总局联合印发《受益所有人信息管理办法》，自 11 月 1 日起施行。

On April 29, 2024, the People's Bank of China (PBOC) and the State Administration for Market Regulation (SAMR) jointly issued Measures on the Management of Beneficial Owner's Information. These new regulations aim to enhance market transparency and combat money laundering and terrorism financing in China. Effective Nov. 1, 2024, the Measures require all companies and entities in China to file information on their beneficial owners unless exempted.

Below is a detailed summary of the filing requirements.

#### 1. *Filing Obligations*

- **Entities Required to File:** All companies, partnership enterprises, and foreign company branches registered in China, along with other entities specified by the PBOC and SAMR, must file beneficial owner information. Entities with a registered capital of RMB 10 million or less, solely owned by natural persons, and not controlled by any other individual, may submit an undertaking instead of a formal filing.
- **Scope of Filing:** The filing must identify the natural person who ultimately owns or controls the entity. Beneficial owners are defined as individuals who:
  - (i) own more than 25% of equity, shares, or partnership interest in a filing entity by direct or indirect means;
  - (ii) enjoy more than 25% beneficial ownership or voting rights of a filing entity;
  - (iii) solely or jointly have actual control over a Filing Entity. “Actual control” herein includes, without limitation, the control exercised by way of agreement or through any closely related person or otherwise, such as the right to appoint the legal representative, directors or senior management, or take significant operational and management decisions, etc.
- **Information to be Filed:** The filing must include the beneficial owner's name, identity information, contact details, and details of ownership type, term, and ratio.

#### 2. *Filing Process and Timeline*

- **Initial Filing:** Entities must file beneficial owner information through an online registration system upon establishment. If unavailable, in-person filing is allowed, followed by online submission within 30 days.
- **Updates and Changes:** Any changes in beneficial ownership or loss of exemption status must be filed within 30 days.
- **Grace Period:** Entities established before Nov. 1, 2024, have until Nov. 1, 2025, to comply.

#### 3. *Access to Filed Information*

The filed information is confidential and accessible only to government authorities, financial institutions, and special non-financial institutions through the PBOC system, as required by law for fulfilling anti-money laundering and anti-terrorism obligations.



#### **4. Consequences of Non-Compliance**

Failure to file or incorrect filings may result in orders to correct the filing within a specified period. Continued non-compliance can lead to fines of up to RMB 50,000.

#### **5. Implications for Businesses**

The PBOC and SAMR will provide guidelines to assist entities in identifying beneficial owners. Businesses operating or planning to establish operations in China should assess their compliance with these filing requirements. Entities wishing to maintain confidentiality of ownership may need to consult legal and tax professionals to navigate these new regulations.

### **Provisions on the Implementation of the Registered Capital Management System under the Company Law**

关于实施《中华人民共和国公司法》注册资本登记管理制度的规定

The State Council issued new provisions, effective July 1, 2024, that explain how existing companies must comply with capital contribution requirements under China's new Company Law. These provisions specifically address companies established before the law took effect.

For limited liability companies established before June 30, 2024, companies must ensure the payment period for capital contributions due after July 1, 2027, does not exceed five years. Companies must update their articles of association to reflect this change by June 30, 2027. However, no changes are required if the remaining payment period is already less than five years from July 1, 2027, or if capital contributions have been fully paid.

For companies limited by shares established before June 30, 2024, the promoters must pay all subscribed shares by June 30, 2027.

Companies must hold a shareholders' meeting where changes require approval from shareholders holding over two-thirds of voting rights. Companies must then pass a resolution to modify their articles of association, adjust their capital contribution schedule if needed, and modify their registered capital if necessary. Following these steps, companies must file all changes with the company registration authorities.

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## **Foreign Investment**

### **Foreign Investment Market Access Management Update**

外商投资准入管理措施更新

On Sept. 8, 2024, the National Development and Reform Commission of China (NDRC) and the PRC Ministry of Commerce of China (MOFCOM) jointly issued China's updated foreign investment negative list, i.e. the Special Administrative Measures (Negative List) for Foreign Investment Market Access, 2024 Version (2024 National Negative List). The 2024 National Negative List came into effect Nov. 1, 2024, and replaced the 2021 Negative List.

Since the introduction of the negative list, the number of restricted industries and sectors for foreign investment has decreased. In the 2024 National Negative List, the restricted entries have dropped from 31 to 29, compared to their 2021 counterparts. The 2024 National Negative List removes two entries: (i) The requirement for Chinese majority ownership in publication printing; and (ii) The prohibition on foreign investment in traditional Chinese medicine processing and proprietary medicine production. The 2024 National Negative List now has no restricted entries in the manufacturing sector.

Although there are no changes in the medical service sector in the 2024 National List, on Sept. 7, 2024, the MOFCOM, the National Health Commission, and the National Medical Products Administration jointly issued a circular on pilot programs to further open the PRC's medical sector to foreign investment. This circular includes two key initiatives:

1. *Investment in Biologic technology*

Foreign investment enterprises are **permitted** to develop and apply human stem cell technology and gene diagnosis and treatment in the Beijing, Shanghai, and Guangdong Free Trade Zones as well as the Hainan Free Trade Port. All products registered, marketed, and approved for production in these zones may be used throughout the country.

2. *New standards for establishing hospital ownership*

The circular also proposes permitting wholly foreign-owned hospitals (excluding traditional Chinese medicine hospitals and acquired public hospitals) in Beijing, Tianjin, Shanghai, Nanjing, Suzhou, Fuzhou, Guangzhou, Shenzhen, and the entire island of Hainan. The specific conditions, requirements, and procedures for establishing wholly foreign-owned hospitals will be provided in a separate circular.

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## International Trade

### China Passes New Tariff Law

全国人大常委会通过《中华人民共和国关税法》

On April 26, 2024, the Standing Committee of the 14th National People's Congress (NPC) enacted the Tariff Law of the People's Republic of China. An updated Import and Export Tariff Schedule will accompany the law's implementation.

Previously, the Regulations on Import and Export Duties regulated China's customs duties. The new Tariff Law has been crafted to respond to shifting domestic and international landscapes, building on the experiences of the former Regulations, which will be repealed upon the new law's enactment.

Key updates in the new Tariff Law include:

1. *Retaliatory Tariffs:* The Tariff Law maintains provisions for retaliatory tariffs, empowering China to impose them in response to foreign entities violating trade agreements. The updates introduce countermeasures for breaches of most-favored-nation treatment or tariff preferences, emphasizing reciprocity. The procedure now mandates the Tariff Policy Commission to present recommendations to the State Council for approval.



2. *Technical Tariff Standards*: A new chapter on “Taxable Items and Tariff Rates” clarifies the core elements of tariffs, including classification rules for goods. Rules for determining the origin of goods align with international standards, with international treaties taking precedence where applicable.
3. *Cross-Border E-Commerce Administration*: The law designates tax withholding agents in cross-border e-commerce, including platform operators and logistics companies, establishing a legal basis for taxation. The law also specifies non-compliance penalties, with fines for withholding agents ranging from 50% to three times the unpaid tariffs.

The new Tariff Law provides a robust legal framework for tariffs in China, addressing previous regulatory gaps and aligning with international practices. Businesses involved in cross-border e-commerce and international trade should prepare to adapt to these changes to enhance compliance.

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*\* This GT Newsletter is limited to non-U.S. matters and law.*

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