

## Shanghai Free Trade Zone

### Study on Establishing Value-Added Telecommunication Service Foreign Invested Enterprises in China (Shanghai) Pilot Free Trade Zone

#### I Trends in China (Shanghai) Pilot Free Trade Zone

The “*China (Shanghai) Pilot Free Trade Zone Foreign Investment in Value-Added Telecommunication Service Pilot Administrative Measures*” (the “**Pilot Measures**”), officially promulgated on April 15, 2014, lays out the procedural guidelines for foreign investment in the value-added telecommunication services (“**VATS**”) sector in the China (Shanghai) Free Trade Zone (“**FTZ**”). This aspect attracted the attention of many foreign investors, each considering how to route through the FTZ to set up a foreign controlled entity in the value-added telecommunications field. On the other hand, it also prompted FTZ government authorities to show a more positive, welcoming attitude towards foreign invested VATS enterprises, with hope that the Pilot Measures will be implemented in practice as soon as possible and thereby being used a model that can be replicated and popularized outside of the FTZ.

Nonetheless, because the Pilot Measures was a single-department rule promulgated only by the Ministry of Industry and Information Technology (“**MIIT**”) rather than a catch-all regulation jointly issued by all relevant authorities on this matter, it

is mostly focused from a perspective of how foreign invested enterprises can obtain the “China (Shanghai) Pilot Free Trade Zone Foreign Investment Value-Added Telecommunication Service Pilot Approval” (“**VATS Approval**”). However, the Pilot Measures has not directly resolved the following puzzle: which governmental procedures must be completed to establish a new foreign invested VATS enterprise beside the VATS Approval? Should a pre-establishment approval approach or a record-filing approach be used to initiate the establishment process? And how these steps should be prioritized in the process? This study will use the call center business as an example, to look at the general process of establishing foreign invested VATS enterprises in FTZ from both regulatory and practical prospective.

#### II Study of the Establishment Process

##### (1) “Negative Lists” Approach and Pre-establishment Approval Approach

According to the “*China (Shanghai) Pilot Free Trade Zone Foreign Invested Enterprise Record Filing Administrative Measures*”, promulgated by the Shanghai Municipal Government on September 29, 2013, and the “*China (Shanghai)*

*Pilot Free Trade Zone Enterprise Registration Administration Rules*” (the “**Registration Rules**”) promulgated by the Shanghai Administration for Industry and Commerce on September 30, 2013, the simplified “record-filing” treatment for foreign invested enterprises (i.e. make filing with the registration authority for company establishment, then register with the MOFCOM authority afterwards) are only available to companies in those industry sectors beyond the “Foreign Investment Access Special Administration Measures List” (the “**Negative List**”). While the establishment of foreign invested enterprises in sectors under the negative list shall still follow the traditional “pre-establishment approval” approach.

The VATS, as a main industry category, is covered on the Negative List (see Negative List category I). According to our consultations with relevant FTZ government officials, call center business, although not specifically listed, shall also be covered on the Negative List. Hence, after completing the name reservation (which takes approximately 5 days), foreign investor seeking to establish call center companies shall first apply for the approval for establishment from the FTZ Management Committee (which takes approximately 20 days), then apply for registration with the FTZ Administration of Industry and Commerce (“**AIC**”) to obtain the business license (which takes approximately 10 days).

## **(2) “Post-Business License Approval” System in Practice**

The “*Several Supporting Opinions on the China (Shanghai) Pilot Free Trade Zone by the State Administration for Industry and Commerce*” (the “**Supporting Opinions**”) promulgated by the State Administration for Industry and Commerce on September 26, 2013, divided all foreign invested companies into two categories – those involving approval and those do not (see Article 1, paragraph 2 and Article 7 of the Registration

Rules). The latter may engage in business activities as soon as the business license is obtained, whereas, no business activities can be carried out for the former unless it obtains all relevant approvals. Further, such approvals shall be divided into “pre-establishment” approvals and other approvals. “Pre-establishment” approvals are required to be obtained before the company applies for a business license with the company registrar, while, the other approvals are not subject to such requirements. Therefore, the so-called “Post-Business License Approval” approach is only applicable for the other approvals.

Although the Pilot Measures did not explicitly say that foreign invested VATS enterprise shall follow the “Post-Business License Approval” approach, Article 4 of the Pilot Measures provides that companies applying for the VATS Approval in the FTZ shall submit to Shanghai Municipal Communication Administration Bureau (“**Shanghai MIIT**”) its business licenses in the application package. This essentially means that in practice, Shanghai MIIT is adopting the “Post-Business License Approval” approach for the VATS Approval.

Nevertheless, a more practical question would be raised, which is not answered in the Pilot Measures: can the business license list VATS in the company’s business scope before the VATS Approval has been issued? Or, can the new company apply for a business license first, of which the business scope does not cover VATS (such as the pure consulting services business scope), and amend the business scope to add VATS, once the VATS approval is issued by Shanghai MIIT? Using the call center business as an example – according to the FTZ officials, in practice the Shanghai MIIT allows call center companies to, prior to applying for VATS Approval, include “call center” in the business scope, for the purpose of avoiding the trouble of making amendments in the future.

### (3) Exceptions to the Registered Capital Subscription System

Pursuant to the Supporting Opinions, unless laws and administrative regulations otherwise specify requirements for registered capital, all FTZ companies shall use the capital subscription regime (as opposed to the fully-paid registered capital regime). Based on the “*Decision of the State Council on Temporarily Adjusting the Administrative Examination and Approval Items or Special Access Management Measures Prescribed by Certain Administrative Regulations and State Council Documents in the China (Shanghai) Pilot Free Trade Zone*”, the “*Ministry of Industry and Information Technology and the Shanghai Municipal People’s Government’s Opinions on Further Opening Up of China (Shanghai) Pilot Free Trade Zone Value-Added Telecommunication Services*” (the “**Opening Up Opinions**”) suspended the effect of certain provisions of the “*Provisions on the Administration of Foreign-Invested Telecom Enterprises*” in FTZ<sup>1</sup>. As such, Article 3 of the Pilot Measures further provides that the minimum registered capital of all foreign invested VATS enterprises shall be RMB one million. Using the call center business as an example – according to FTZ officials, Shanghai MIIT, in practice, requires the investors of the VATS companies to inject at least RMB one million registered capital before applying for the VATS Approval, to demonstrate that the company has met the minimum registered capital requirement. Therefore, the establishment of foreign invested VATS enterprises will typically also entail, after obtaining the business license and before applying for the VATS Approval: applying for the foreign exchange

registration certificate (which takes approximately 2 days), opening a foreign exchange account and paying up the required minimum registered capital.

### (4) Other Relevant Procedures

Other than the three core licenses described above: the FTZ approval for establishment, business license, and VATS Approval – the establishment of foreign invested VATS enterprise also requires the completion of other procedures applicable to all foreign invested enterprises. In the absence of special treatment for FTZ companies, those formality requirements shall be equally applied to companies within and out of the FTZ. However, in practice, as we learned from the relevant FTZ government authorities, certain procedures have been simplified in the FTZ: (1) applications for Taxation Registration Certificate and Organization Code Certificate may be submitted simultaneously with the Enterprise Establishment Registration (*i.e.*, the business license application), as the so-called “one-window acceptance”; and (2) the application for Financial Registration Certificate, the opening of basic bank account and taxation account can be processed simultaneously with the VATS Approval application.

## III Future Development

### (1) 2014 Edition of the Negative List

Reportedly, the governmental authorities have been deliberating on the 2014 edition of Negative List, and the new Negative List will probably further streamline the 2013 edition. It remain to be seen whether the 2014 edition of Negative List will exclude certain VATS sectors, to effect the change from the pre-establishment approval approach to the simplified record-filing approach for companies engaging in those businesses.

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<sup>1</sup> According to “*Provisions on the Administration of Foreign-Invested Telecom Enterprises*”, with respect to a foreign-invested telecom enterprise of which the operation is nationwide or covers more than one province, autonomous region, or municipality directly under the Central Government, its registered capital shall be at least RMB 1 billion in the case of operating basic telecom services, or shall be at least RMB 10 million in the case of operating value-added telecom services.

## **(2) Adjustments to the Telecommunication Service Industry Catalogue**

The Opening Up Opinions follows the classification of VATS sectors under the 2003 version of “*Telecommunication Services Industry Catalogue*”. We note that MIIT has already released the draft 2013 edition of “*Telecommunication Services Industry Catalogue*”

for public comments. This draft further adjusts the classification of VATS businesses, and more clearly and comprehensively defined the terms and scope of related businesses. Thus, it is noteworthy how the official 2013 edition of “*Telecommunication Services Industry Catalogue*” will further affect the liberalization of VATS in the FTZ in the near future.

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## 上海自贸区法律热点问题

### 自贸区内设立外商投资增值电信业务企业流程探索

#### 一、 热点趋势

《中国（上海）自由贸易试验区外商投资经营增值电信业务试点管理办法》（以下简称“《**试点办法**》”），于2014年04月15日正式颁布，意味着自贸区外商投资增值电信业务有了程序性的操作指引。这一方面引起了诸多外资的关注，纷纷考虑如何借道自贸区进入增值电信领域，实现控股；另一方面也促使自贸区内的相关政府职能部门对外商投资增值电信业务持有更积极、更欢迎的态度，希望尽快将《试点办法》落实到实践中，从而形成可复制、可推广的经验。

尽管如此，由于《试点办法》是工信部颁布的，而非多个部委联合发文，因此更侧重于外商投资增值电信业务企业如何取得《中国（上海）自由贸易试验区外商投资经营增值电信业务试点批复》（以下简称“**试点批复**”）的角度。对于外国投资者而言，《试点办法》可能无法直接解答以下困惑：新设一家外商投资增值电信业务经营企业，除申请试点批复外，还有哪些政府程序要走？设立适用审批制还是备案制？其他政府程序与申请试点批复的先后顺序如何？本文将结合法规和实践两个层面，以呼叫中心业务为例，探索自贸区内设立外商投资增值电信业务企业的大致流程。

#### 二、 设立流程探索

##### (1) 负面清单与设立审批制

根据上海市人民政府于2013年9月29日颁布的《中国（上海）自由贸易试验区外商投资企业备案管理办法》以及上海市工商行政管理局于2013年9月30日颁布的《关于中国（上海）自由贸易试验区内企业登记管理的规定》（以下简称“《**登记规定**》”），目前自贸区外商投资企业“备案制”（即先向登记机关申请设立登记，并向商务主管部门备案）仅适用于《外商投资准入特别管理措施列表》（以下简称“**负面清单**”）之外的领域。而设立负面清单内领域的外商投资企业，仍适用传统的“审批制”。

增值电信业务领域属于负面清单内的领域（见负面清单第I类）。对于呼叫中心业务，虽未具体列入负面清单，但根据我们向自贸区相关政府部门官员的咨询，实践中仍将呼叫中心业务视为负面清单内的业务领域操作。因此，设立外商投资的呼叫中心企业在完成名称预核准手续（约需5天）后，应先向自贸区管理委员会申请设立批复并取得批准证书（约需20天），再向自贸区工商局申请设立登记，取得营业执照（约需10天）。

##### (2) “先照后证”制度的实践

解读国家工商行政管理总局于2013年9月26日颁布的《国家工商行政管理总局关于支持中国（上海）自由贸易试验区建设的若干意见》（以下简称“《**支持意见**》”）第1条第2款以及《登记规定》第7条，经营项目分为涉及和不涉及许可事项两类：前者的经营以取得许可为开展经营活动的前



提；而后者则取得营业执照后即可从事经营活动。而涉及许可的经营项目又可分为前置许可和其他许可：前者需先取得许可证或批准文件后，再向登记机关申请营业执照；而后者则无此要求，我们理解后者是真正意义上的“先照后证”制度。

《试点办法》虽未直接规定外商投资增值电信业务领域适用“先照后证”制度，但其第4条规定的试验区内申请经营增值电信业务的企业需向上海市通信管理局（以下简称“上海通管局”）提交的申请材料之一即为企业的营业执照。这意味着，上海通管局在实践中，对于自贸区内增值电信业务，是按“先照后证”制度操作的。

尽管如此，一个更为实际，且《试点办法》中并未提及的问题是：先于试点批复取得的营业执照中可否直接载明特定的增值电信业务内容？还是需先申请一个不涉及增值电信业务领域的经营范围（例如咨询服务），待取得试点批复后，再申请变更经营范围，增加特定的增值电信业务内容？以呼叫中心业务为例，根据自贸区内相关官员介绍，上海通管局在实践中允许外商投资呼叫中心企业在申请试点批复前，直接将“呼叫中心”写入经营范围中，免去企业日后修改经营范围的烦恼。

### (3) 注册资本认缴制的例外

根据《支持意见》，除法律、行政法规对公司注册资本实缴另有规定的外，其他公司试行注册资本认缴登记制。《工业和信息化部、上海市人民政府关于中国（上海）自由贸易试验区进一步对外开放增值电信业务的意见》（以下简称“《开放意见》”）以《国务院关于在中国（上海）自由贸易试验区内暂时调整有关行政法规和国务院文件规定的行政审批或者准入特别管理措施的决定》为依据，规定了在自贸区内暂停实施《外商投资电信企业管理规定》<sup>1</sup>的相关规定。基于此，《试点办法》第3条进

<sup>1</sup> 根据《外商投资电信企业管理规定》，外商投资企业经营全国的或者跨省、自治区、直辖市范围的增值电信业务的，其注册资本最低限额为1000万元人民币；经营省、自治区、直辖市范围内的增值电信业务的，其注册资本最低限额为100万元人民币。

一步将自贸区内外商投资增值电信业务企业的注册资本下限统一规定为人民币100万元。以外商投资呼叫中心企业为例，根据自贸区官员的介绍，上海通管局在实践中要求企业在向其申请试点批复前，需至少缴足人民币100万元的注册资本，以证明企业满足《试点办法》中关于注册资本的要求。因此，实践中，外商投资企业在取得营业执照后、申请试点批复前，一般还需办理外汇登记证（约需2天）、开立外汇资本金账户并缴足最低注册资本。

### (4) 其他相关手续

除上文所述的批准证书、营业执照及试点批复三项核心证照外，自贸区内设立外商投资增值电信业务企业还需办理适用于自贸区内一般外商投资企业的其他相关其他手续。对于该等手续的办理，我们理解并非自贸区改革的重点，自贸区对此亦无特别规定。但从实践操作的角度，我们咨询了自贸区的相关政府部门。根据他们的答复：（i）税务登记证和组织机构代码证的申请可与企业设立登记（即营业执照的申办）同时提交，即所谓的“一口受理”；（ii）财政登记证、统计登记证、基本户和纳税户开户等手续可在企业取得营业执照后，与试点批复申请同时并行办理。

## 三、 未来趋势展望

### (1) 2014 版负面清单

据悉，政府部门正在酝酿和研讨2014年版的负面清单，且负面清单很有可能在现行2013年版的基础上进一步简化。2014年版的负面清单是否会将特定的增值电信业务类型排除在外，从而导致程序上从“审批制”简化为“备案制”，令人拭目以待。

### (2) 电信业务分类目录的调整

目前《开放意见》中对增值电信业务的分类按现行2003年版《电信业务分类目录》作出。但我们注意到，工信部已公开发布《电信业务分类目录

（2013版）》（征求意见稿）。该征求意见稿对增值电信业务的分类体例作了进一步的调整，同时对相关业务的概念和范围做了更清晰和全面的界定。因此，若工信部将来正式出台新版的《电信业务分类

目录》，会如何进一步影响自贸区内增值电信业务的开放措施，也是日后值得关注的一个问题。

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