

## The Thinking of “Negative List” Management Mode Implemented by Administrative Approval System

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### Abstract

“Negative list” management as a key point in the economic system reform will be of great reference to deepen the reform of administrative approval system which can be regarded as a sally port to promote the transformation of government functions. This paper tries to analyses feasibility of the mode to promote administrative system reform and its key points and difficulties in the operation process by drawing lessons from “negative list” management in free trade area and the development of foreign experience as well as combining the characteristics of “negative list” management mode.

**Key words:** Administrative approval; Negative list; Governmental functions; Administrative simplification and power decentralization

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Propositions put forward by the third plenary session of the eighteenth—The reform of administrative system should be further deepened; administrative simplification and power decentralization should be treated as a “priority”. Each department should strengthen the

transparency of public power in the process of power decentralization and shall not create new administrative approval items, at the same time apply “negative list” management mode to administrative approval system to ensure decision-making rights of some items outside approval list which possess by social main bobbies and to enable market as an invisible “hand” to fully play its decisive role in allocation of resources.

### 1. AN INTRODUCTION OF “NEGATIVE LIST” MANAGEMENT MODE

#### 1.1 The Definitoin of “Negative List” Management

“Negative list”, as a real international foreign investment management approach, refers to an industry list about foreign investment that a country bans or limits, which is opposite to the case of “positive list”. It equals to “blacklist” in fields of investment and demonstrates management measures that are inconsistent with foreign investment, national treatment and most-favored-nation treatment, or other measures relating to performance and executive management. The hosts take certain retention measures by using the management mode of “negative list” so that they can protect their own industries when sign international bilateral and multilateral investment agreements. These retention measures are divided into measures of general exception, provisional safeguard measures and non-conforming measures, among which non-conforming measures are usually in the form of “negative list”.

“Negative list” management mode originated from friendly nautical treaty between the United States and Japan in 1953, from which public utilities, aircraft and banking industries are excluded, this is also the “negative list” about obligation of national treatment. Since then, in the 80 s, “negative list” appeared in the bilateral investment treaty of the United States as a form

of list. The existed north American free trade area has adopted the “negative list” in 1994, subsequently, this management mode is emulated by many countries and constantly spreads , but each country’s practices vary. For example, America has so far signed 46 bilateral investment agreements with 46 countries and regions, which both includes developed countries such as Britain, Australia, and backward developing countries such as Chile, India, etc, but among these countries, developing countries occupy the vast majority. An “negative list” in the United States usually just explains industry categories that need to be retained, not covers specific industry in detail, but make a detailed description about the sensitive industries, such as aviation, military, finance and other fields. Compared with developed countries, developing countries more and more began to use “negative list” management mode in investment agreement in recent years, putting public sector, banking, telecommunications and other industries into “negative list”. They know to protect fields which cannot or temporarily cannot be opened in a country by employing this mode. But due to their limited management ability and experience as well as development degree and poor understanding of certain industries, developing countries cannot predict the future development direction of social economy, which make many important but ignored industries or important but unarisen industries not appear in the “negative list”. This means that these industries and fields, especially those that appear in the future strategic industries, are facing strong competition from developed countries since their birth.

### **1.2 The Main Practice of “Negative List” Management in China**

China firstly adopts the “negative list” in free trade zone in Shanghai. Free trade zone in Shanghai has classified all kinds of national economy industries according to a large number of laws and regulations in the process of making a “negative list”. Special Management Action (negative list) about Foreign Investment Access in the Chinese (Shanghai) Free Trade Testing Zone was published in September 2013. It divided national economy into 18 industries, totally involving 89 broad categories, 419 intermediate classes and 1069 subclasses, of which a total of 38 items are prohibited, such as the construction and operation of gambling, prostitution, golf course, and 152 items are limited, such as theme park construction and operation, etc. In order to protect the national treatment right of foreign investment , foreign investment items outside “negative list” are changed from the original system of examination and approval to filing system according to the same domestic and foreign investment principle, which thus greatly simplify programs, save work time and economic cost. Meanwhile, in order to adapt to social development at home and abroad, “negative list” management in Shanghai free trade zone

adopts the dynamic management mode, and the retained industries will be constantly adjusted with the change of international investment rules and patterns as well as China’s political and economic environment.

There is no doubt that “negative list” management trial of the free trade zone in Shanghai, China, not only promoted the development of Chinese economy, making it more adaptable to the new trend of global economic development, at the same time, it means our innovation of management concept. The reverse thinking of “deeds are available without law banned” contributes to help us solve the existing and possible problems in economic and political system so as to gradually increase the level and scale of opening-up, to create a fair market competition environment for all enterprises , to improve the vitality and level of economic development .

But after careful observation we will find that the prohibited and restricted items at “negative list” enumerated by Shanghai free trade zone at present are almost completely identical with those items adopted in Catalog of Foreign-Funded Industries Guidance. All prohibited and restricted items listed in the Catalogue can be illustrated, that is to say, items at the list just transplant related matters of the Guidance Catalogue, only changing the way in form without substantial breakthroughs, so implementation effect of the list remains to be seen. And this list is mainly composed in Shanghai with the guidance and support of the National Development and Reform Commission and Commerce Ministry, therefore, applicable feasibility and rationality are of big problems. We still have a lot of weaknesses in formulating, supervising and using the list, and we need to continuously perfect it. In addition, as the management mode of “negative list” is mainly used in field of foreign investment, it has not been widely applied to all enterprises within the territory, which just has a little influence on the whole national economy and plays a limited part in boosting government’s simplification and decentralization as well as transformation of governmental functions. We can consider to promote it into all domestic and foreign enterprises that must be examed and approved by administrative department on the basis of continuous improvement.

## **2. THE “NEGATIVE LIST” MANAGEMENT AS A REALISTIC MEASURE FOR DEEPENING THE REFORM OF ADMINISTRATIVE APPROVAL SYSTEM**

“Negative list” management is not simply to expand opening-up areas, to make some decrease, also is not simply to have administrative ministry streamline administration, it is to explore new means to assume complicated administrative management within the

organizational structure of a small government.

### **2.1 The Consistency Between Administrative Approval System Reform and the Target of “Negative List” Management**

“Negative list” management is a kind of backward management concept, and it forces government to differentiate the scope of activities of social subjects such as the government, market and social parties in the process of economic operation. The government shall be responsible for matters within a “negative list”, on the other hand, market shall be responsible for matters outside a “negative list”. The government mainly creates a fair competition environment for the operation of market economy, and provides resources for the development of enterprises. This has a strong consistency with the purpose of administrative approval reform.

“Negative list” management transforms the former approval system into filing system, which greatly reduces time of administrative examination and approval, simplifies the administrative approval procedures, and corresponds to the reform of administrative approval system that is widely being carried out. Invisible cost loss to enterprises caused by numerous items of administrative approval along with quite tedious program, to a certain extent, has seriously affected market and development environment. Thus exploring a new experience, expanding their horizons, simplifying items of administrative approval, reengineering process of approval, extricating enterprises from shackles of approval, and improving management efficiency and level are the keys to break through bottleneck of administrative approval system reform. In terms of “negative list” management mode, as long as the registered enterprises lie outside the “negative list”, they can be approved immediately, this fundamentally achieved decentralization—completely delegating the power, which can be a successful exploration to deepen the reform of administrative approval system. Therefore it has the significance to popularize throughout China.

### **2.2 “Negative List” Management Has Opened Up A New Train Of Thought For Administrative Approval System**

The administrative approval system, as the main way for state administrative organ to participate in management activities, is a kind of administrative act and tool to distribute all social resources based on certain laws and regulations and relevant policies. The administrative approval system is an important means to make up for market failure and to adjust the allocation of resources, mainly including some limits for approval authority, approval scope, implementation procedure, enforcement organization and responsibility of approval, etc. However, excessive administrative interference hampers the decisive role of market in resource allocation, also affects

the development of social productivity, which are not conducive to be in line with international standards. So in recent years, the Party Central Committee, the State Council and governments at all levels attach great importance to the reform of administrative approval system, but the current administrative approval system reform has involved in misunderstanding of pure reduction for the sake of reduction and reducing while setting. The primary reason for this phenomenon is that our management idea is relatively backward. We were used to enact such kind of legal documents as Administrative Permit Law to regulate government departments for approval at the previous time. Since 2002, China has conducted seven times reform of administrative approval system, with quite a large number of items requiring administrative approval cancelled and transferred, but with the deepening of reform and opening-up degree, more and more approval items need to be increased, cancelled, and transferred, which require our administrative department constantly to update list of administrative approval according to the change of social reality. Both the increased tasks of policymaking authorities and the difficulties of staff members who occupy in administrative approval work lead to frequent problems.

While the management mode of “negative list” provides a new thought of working for us. Having listed fields that enterprises are banned or restricted to access in detail, along with firm immobility and less contents, “Negative list” offers a larger reference for us in the process of actual operation. A country makes its market subjects more clear about their function orientation by delimiting a clear policy bottom line, thereby; the government can allocate more resources and energy into the supervision during or after courses, thus can provide a good external environment for the market competition mechanism at its full play.

### **2.3 The Replicability And Generalizability Of “Negative List” Management**

The replicability and generalizability of “negative list” management have determined the huge reform effect and dividends. We can follow and promote successful experience during the experience accumulation and the execution of risk prevention so that we can make it step out from the free trade zone in Shanghai. At present, some national districts such as The Tianjin Binhai New Area and Zhejiang Zhoushan have put forward the idea of building free trade zone. There is no doubt that the management experience of Shanghai free trade zone will provide a significant reference for the construction of other free trade areas. Meanwhile, with the continuous maturity of management mode, the application scope of “negative list” can be extended from foreign capital to all domestic enterprises, which can provide basis for the whole country to deepen reform. For example, Nanhai District, Foshan City, Guangdong Province issued the first “negative list”

of administrative approval in Guangdong Province on the basis of “negative list” in free trade zone, Shanghai on December 10, 2013. It listed four huge fields— foreign investment, enterprise investment, regional development and environmental protection, including 355 items. This realization of promoting “negative list” management mode has provided valuable significance to standardize the government market boundaries and to improve operating rules of administrative approval.

### **3. THE DIFFICULTIES AND CHALLENGES OF “NEGATIVE LIST” MANAGEMENT MODE CONFRONTED BY ADMINISTRATIVE APPROVAL SYSTEM**

“Negative list” aims to promote reform through opening-up, so that can create a fair market competition environment for enterprises and stimulate market vigor. The management idea of “deeds are available without law banned”, namely, “everything can be done without prohibition”, is bound to bring a lot of difficulties and risks of management. Especially in China, “negative list” has just been employed without abundant management experience, together with other aspects of reasons. These sorts of realities determine that we have to encounter certain difficulties and challenges when we apply this management mode to administrative approval system.

#### **3.1 The Relationship Between “Positive List” And “Negative List”**

In china, “positive list” is the most commonly used management mode in current administrative approval activities and it points out what kind of fields are encouraged for enterprises to invest by the government. However, the operation of this management mode is relatively complex, and the efficiency is low. Although “positive list” displays the fields of investment for enterprises encouraged by the government, but to what extent, it is difficult to define. Unlike “positive list”, all items in the “negative list” shall be prohibited or restricted, so that its operation is more concise and clear. However, this does not mean that we should completely abandon “positive list”, but to regard the positive and negative list as a kind of complementary management tools. “Positive list” focuses on empowerment, while “negative list” on authority limitation. Both all together delimit the boundary of public power. Enterprises are encouraged to invest in service industries and other fields on the basis of the designated investment scope. Besides, detailed information should be covered when we formulate the “positive list”, thus its function of guidance and encouragement to enterprises will be more obvious. Overrefined items in “negative list” mean that the fields opened up by the government are too narrow, administrative simplification and power decentralization

are not carried out, and the control of market is too much.

#### **3.2 The Standards for Making a “Negative List”**

At present, the “negative list” of free trade zone, Shanghai is mainly set in Shanghai, however, the National Development and Reform Commission and the Ministry of Commerce only play a role of guidance and supervision. This kind of list is more targeted, having more guiding significance to the free trade zone of Shanghai, but its generalization is weak. For example, if it is applied to other free trade areas or the whole domestic enterprises, its reference effect will not be particularly evident. But on the other hand, if each region and city has a separate “negative list”, confusion will be caused, and the scientificity and rationality will be questioned. Therefore, it is necessary to develop a national “negative list” on the basis of detailed research and make it rise to the level of national law. Each region supplements and perfects it according to practical situations on the basis of the unified national list, without any violation. So we should guarantee its coherency, meanwhile, we keep the list fixed in the form of law, so as to avoid the frequent change with the leadership transition and to avoid providing a hotbed of rent-seeking for some sectors or individuals.

In addition to ensuring the national unity and immobility of the list, we also consider its comprehensiveness. While too long “negative list” will inhibit market vitality, the list needs to include all sensitive industries that should be banned or restricted to access in order to ensure healthy, stable and sustainable development of the domestic market economy. Meanwhile, we should strengthen the prediction of emerging industries in the future. On the one hand, we should forecast the likely arisen industries which will produce a negative social effect in order to ensure the health and stability of operation of the national economy; on the other hand, we should have the foresight of strategic industries, developing a “negative list” in advance to enable these industries avoid shocks from foreign capital in their infancy and to protect core interests of Chinese industries.

#### **3.3 Regulatory Problems of “Negative List”**

“Negative list” management greatly weakens the government’s approval power, further prompting the government to streamline and delegate, and plays a revolutionary role in transformation of governmental functions. But with the gradual popularization of “negative list” management mode, the government’s main focus of work will shift from prior approval to later supervision, and this time establishing a perfect supervision system becomes a difficulty of the work. “Negative list” management has the focus of governmental supervision shifted backward, and pays much attention to the supervision in actual operational process and improves the management efficiency of procedural supervision.

Together involving both “negative list” and “positive list” into approval and supervision system and promoting the open and transparent degree of administrative approval procedures, we can supervise the whole chain of administrative approval through three links of before, during and after the matters. In this regard, we can refer to “Three Lists” management mode in Nanhai District, Foshan City, that is the “negative list”, “approval list” and “regulatory list”. The whole processes of administrative approval can be supervised through these three lists to standardize approval power, to ensure fair and efficient approval process, also to strengthen the supervision of enterprises, master the dynamic of business operation, formulate a “blacklist”, and regulate the behavior of market competition. Moreover, we will construct a comprehensive supervision and management system through some means and measures such as building a perfect information sharing platform, a social credit system and risk prevention mechanism for the purpose of putting “negative list” management into real effect. Only supervision be realized during processes or afterwards that a lot of matters for approval can achieve their real devolution.

#### 4. THE HIDDEN BARRIERS

Eliminating hidden barriers is the premise for administrative approval system to implement the “negative list” management mode. The application of “negative list” management mode in free trade zone, Shanghai has broken through limitation of the form of corporate ownership, which means equal treatment enjoyed by both domestic and foreign capital outside the list, but there still exist difficulties in practice. For example, though “negative list” management mode means that state-owned enterprises, foreign enterprises and private enterprises have the right to enter industries outside the list, the influence of private enterprises on national economy

is still weaker than other enterprises. This indeed has a direct link with their own capabilities, but various hidden barriers are essential reasons for that situation. Having existed in the free trade zone of Shanghai and economic operation of China, invisible barriers hindered the normal operation of market economy and affected enthusiasm of related subjects, therefore, the administrative approval system must pay attention to eliminating hidden barriers in the process of carrying out the “negative list” management. Coordinated reform shall be realized in the fields of administrative management, finance and project approval and so on.

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