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Respite or False Dawn: MOFCOM Hints at Softening of Tough PRC E-commerce Policies

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International health food companies and infant formula food suppliers rejoiced on March 17, 2017, when the China Ministry of Commerce ("MOFCOM") confirmed that the current supervision model will likely be adjusted for cross border e-commerce retail imports ("CBEC"). The announcement advised that the new model, which will take effect from January 1, 2018, will apply to 15 pilot zones.

The mood was markedly different back in April 2016, when several PRC authorities officially issued new policies regulating cross border e-commerce. The most concerning aspect of the April 2016 measures was that a range of products, including health food, infant formula, cosmetics and medical devices, would need to be registered or filed with the PRC authorities. These polices caused panic in the market and resulted in a sharp drop (almost one third) of CBEC business revenue. A later notice in May 2016 granted a grace period for the implementation of registration and filing requirements until May 2017, which was extended by MOFCOM in November until the end of 2017.

More than a grace period

In its most recent news release, MOFCOM not only confirmed a further extension of the grace period for registration and filing until 1 January 2018, but also suggested a number of positive potential changes for CBCE exporters. These potential changes include:

1. Products sold through CBEC will be temporarily treated as personal items

It has been a long-standing debate as to whether products sold through CBEC should be treated as goods under general trade or items of personal import. The importance of making this differentiation is that goods under general trade are of a commercial nature and therefore are subject to strict regulation and higher tax rates, whilst items of personal import are more of a contingent and personal use nature and therefore do not necessary need to be strictly regulated - taxes rates for personal items are also lower and offer an with exemption amount.

Although the April 2016 polices set a separate tax regime for CBEC, which is a comprehensive tax method with certain tax rate discounts, tax regime is currently not changed. The recognition of the personal item nature of CBEC products may rightly be interpreted as the authority intending not to regulate goods imported under CBEC as strictly compared to goods imported under general trade. This also raises the hope that the registration and filing requirements on these special products may not be imposed on CBEC products in the end.

2. Authority intents to maintain the stability of CBEC

In the March 17 news release, MOFCOM stated that it aimed to promot the health and stable development of CBEC, along with maintaining stable supervision. This signifies that the authority may reconsider whether the registration and filing requirements imposed in the April 2016 CBEC policy are too rigid, and whether the adverse impact on CBEC caused by such requirements would be worthwhile.

The registration and filing requirements have created chaos among CBEC participants, as the application process for special products is difficult and time consuming - sometimes even impossible due to different standards of foreign manufacturing between other countries and China. As such, a strict implementation of such requirements might result in stop of CBEC business of some foreign companies.

What is certain?

Following the latest news release by MOFCOM, it is certain that:

The registration and filing requirements on special product will not be imposed on CBEC products until December 31, 2017

Starting from January 1, 2018, the CBEC products will temporarily be treated as personal items

The comprehensive tax regime will still apply to CBEC sales until further actions by a relevant authority

The current “white list” for products that can be sold through CBEC still remains in effect

The 15 CBEC pilot zones will be the experimental areas for trial of new supervision mode to be implemented by PRC authorities after January 1, 2018, - including Hangzhou, Tianjin, Shanghai, Chongqing, Hefei, Zhengzhou, Guangzhou, Chengdu, Dalian, Ningbo, Qingdao, Shenzhen, Suzhou, Fuzhou and Pingtan

What is uncertain?

Formal legal status of CBEC products - despite positive signals, the recognition of CBEC products as personal items has only been provided in the form of a temporary treatment without a clear timeline (no formal rules have been released.

White list and specific registration requirements for CBEC products - Whether the white list model would still be adopted after January 1, 2018 remains unclear. There is still a high risk that the authorities will use a white list or black list to screen products sold through CBEC.

Registration requirements for CBEC products - although the latest news release has sent some positive signals about changing previously issued policies on CBEC, the extent to which such policies will be changed remains unclear. Despite wishes to promote CBEC economy, Chinese authorities also bear huge responsibility on consumer’s safety. The careful balancing of these two two considerations means it is still not definite whether the previous policy will be completely overruled.

Summary

It is prudent to note that the recent MOFCOM news release news release is relatively informal and that it represents only one stakeholder in this debate. Various Chinese authorities and stakeholders will need to manage the promotion of CBEC’s economic development against the responsibility to provide for consumers, in order to balance the interests of major online retailers against those of local manufacturers, in addition to considering the concerns of PRC authorities such as customs and tax.

In our opinion, this is good news for international companies seeking to access the China market by way of CBEC. However, we do caution companies from reading too much into the news release and advise companies monitor the situation regularly and continue to preparing for the filing and registration oftheir products – particularly if such products are being shipped in commercial quantities.

Please find below a translation of the 17 March, 2017 MOFCOM news release provided by us:

On 17 March 2017, the Spokesman of MOFCOM announced post grace period supervision arrangements of products imported through cross-border e-commerce.

In May 2016, approved by the State Council, China issued policies regarding the grace period for the supervision requirements of products imported through cross-border e-commerce. In November 2016, the grace period was extended until the end of 2017. In order to ensure smooth transition of after the grace period, and accord with the requirements of the State Council, MOFCOM, together with the National Development and Reform Commission (NDRC), Ministry of Finance (MOF), General Administration of Customs (Customs), State Administration of Taxation (State Tax), General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) and China Food and Drug

Administration (CFDA), by conducting extensive researches, considering the opinions of local governments, industries and enterprises, and taking into consideration of the trade nature as well as the personal use and relatively low value nature of products imported through cross border e-commerce, have been actively developing a supervision mode which fits such nature of cross-border e-commerce.

For the smooth development of cross-border e-commerce, and to maintain the stable supervision of cross-border e-commerce, as approved by the State Council, at current stage, cross-border ecommerce products shall be treated as personal items temporarily for supervision perspective. Based on this, the responsibilities of e-commerce entities will be emphasized and the supervision measures will be optimized, quality safety control will be adopted. A risk emergency processing mechanism will be established. With regards to the import products which have a relatively greater quality risk, further measures will be taken. In the future, the supervision will be further updated as necessary based on the E-commerce Law and the development of the cross-border retail import.

In order to promote the “first act and first trial” of cross-border e-commerce and to control risk, the new supervision mechanism will be implemented within the approved pilot cities of cross-border e-commerce retail imports and the cross-border e-commerce business comprehensive pilot zone, which includes 15 cities (Hangzhou, Tianjin, Shanghai, Chongqing, Hefei, Zhengzhou, Guangzhou, Chengdu, Dalian, Ningbo, Qingdao, Shenzhen, Suzhou, Fuzhou and Pingtan).

The above supervision mechanism will be implemented from 1 January 2018. The supervision policies for grace period will still applicable until then. Relevant authorities shall issue the detailed enforcement regulations based on its functions to promote the health development of cross-border e-commerce.