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Indigenous Innovation Products Accreditation Program Raises Concern of Protectionism

On November 15, 2009 the Ministry of Science and Technology (MOST), National Development and Reform Commission (NDRC) and Ministry of Finance jointly issued the Notice on the Promulgation of the 2009 National Indigenous Innovation Products Accreditation Program (Notice 618), which requires enterprises registered in China to apply for accreditation of indigenous innovation products. (See the [English translation of Notice 618](#).)

This Accreditation Program implements the Measures for the Administration of the Accreditation of National Indigenous Innovation Products issued in November 2006 (the Measures), which are intended to carry out the National Science and Technology Development Middle- to Long-Term Plan for 2006-2020.

The Measures authorize the MOST to establish and publish a catalog of accredited products that will be given priority in government procurement including infrastructure construction financed by the government. Product manufacturers will receive priority treatment in the accreditation of "high-tech companies" and within other industry-related policies. According to the Measures, the applicant for accreditation is required to be a legal entity registered in China and must be the owner of the intellectual property related to the product (i.e., patents, nonpatented technology and know-how, copyrights and trademarks). The MOST has jurisdiction to approve the applications for accreditation and will

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Contacts:

Shanghai

[Daniel F. Roules](#)
[Amy L. Sommers](#)
[Rainer Burkardt](#)
[Charles R. McElwee II](#)
[Zijie Li](#)

Beijing

[Sungbo Shim](#)
[James M. Zimmerman](#)

Hong Kong

[James S. Tsang](#)
[Nicholas Chan](#)
[Francis Li](#)

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publish the catalog of accredited products. Once approved, accreditation is valid for two to four years and may be renewed.

Notice 618 requires that all applications to be included in the accredited products catalogue must have been filed by December 10, 2009.

The MOST initiated the Accreditation Program in 2008 on a pilot basis for domestically owned or controlled companies based in national high-technology industrial zones. Pursuant to Notice 618, the Accreditation Program for 2009 will apply on a national level and focus on six high- and new-technology fields including:

- Computers and application equipment;
- Communications products;
- Modern office equipment;
- Software;
- New energy and new energy devices; and
- High-efficiency and energy-saving products.

In addition to restating the requirements of the Measures – including the criteria that the products be sourced from domestically owned intellectual property rights – the application guidelines attached to Notice 618 require that the applicant's use, disposal and improvements of the intellectual property involved in the underlying product must not be subject to **foreign restrictions**, and any trademark used must be registered in China first and must not be **restricted by related foreign brands**.

Notice 618 and the Accreditation Program have raised serious concerns of domestic favoritism and protectionism among non-China-based companies that may be excluded from the benefits of the Chinese government's procurement and stimulus plans. The chief concern is that this circular is a reflection of an actual ongoing and growing practice – namely, that the government has been aggressively promoting the purchase of domestic technology over foreign-developed technology (or even hybrid technology developed in part in China and in part in other countries), and Notice 618 has just made it official (although the PRC government publicly claims that it is showing no favoritism and the accreditation process is voluntary).

Second, the list of six technology categories is broad, and it is unclear as to what specific products or services may or may not be included in the Accreditation Program. Furthermore, it remains to be seen whether additional products and services will be added to the

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program in the future.

The short timeline for participation in the program was unmanageable for most companies (the release of Notice 618 on November 15, 2009 was a mere 25 days from the December 10 deadline for submitting an application). This short fuse on compliance has raised questions concerning the fairness and transparency of the Accreditation Program.

On December 10, 2009 a coalition of business organizations and chambers raised their concerns about the program with the leadership of the Chinese government. It is unclear whether the government will take steps to clarify, modify or abandon the Accreditation Program.

As a side note, China is not a party to the Government Procurement Act (GPA) within the World Trade Organization (WTO) framework, although negotiations concerning China's membership to the GPA are ongoing. After accession to the WTO, China adopted the Government Procurement Law, which provides that China's government agencies must purchase domestic products and services unless the products/services are not available domestically. The United States and other trading partners are hopeful that if China becomes a party to the GPA, there will be greater market access for foreign goods and services with respect to government procurement programs.

We will continue to closely monitor the development of the Accreditation Program. For more information or advice related to this matter, please contact your principal Squire Sanders lawyer or one of the lawyers listed in this Alert.

This China Alert is a collaborative effort of Zijie (Lesley) Li and James M. Zimmerman of the Shanghai and Beijing offices of Squire Sanders.

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