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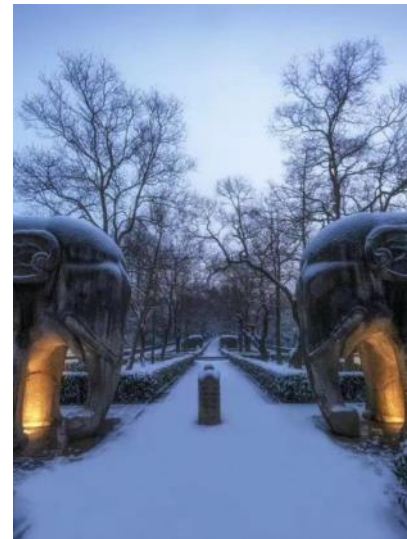
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FOREIGN INVESTMENT AND MARKET ACCESS / 外商投资和市场准入

NDRC and MOFCOM Issued Rules to Govern Foreign Investment Security Review 《外商投资安全审查办法》出台

2020年12月19日，国家发展改革委（“发改委”）、商务部联合发布《外商投资安全审查办法》（“《安审办法》”），将自2021年1月18日起施行。目前我国有关外商投资安全审查的规定主要见于国务院2011年发布的《关于建立外国投资者并购境内企业安全审查制度的通知》和商务部2011年发布的《商务部实施外国投资者并购境内企业安全审查制度的规定》（合称“全国性安审规定”），以及国务院2015年发布的《自由贸易试验区外商投资国家安全审查试行办法》（“自贸区安审规定”，与全国性安审规定合称“现有安审规定”）。《安审办法》在总结梳理现有安审规定的基础上，结合近年来我国外商投资安全审查的实践并借鉴域外相关立法经验，主要从以下方面系统化地规定了外商投资安全审查制度：

1. 纳入审查的投资类型：《安审办法》规定的外商投资是指外国投资者直接或间接在中国境内通过新建、并购及其他方式进行的投资活动。该等定义相较于现有安审规定更为原则化，特别是未对“其他方式”这一兜底规定进行具体说明，在实践中存在较大的解释空间。参考自贸区安审规定将“其他方式”的投资活动明确列举为“通过协议控制、代持、信托、再投资、境外交易、租赁、认购可转换债券等方式投资”，以及近期反垄断立法及执法实践对VIE结构的表态（*具体请见本所《每月立法动态》2020年12月刊*），涉及VIE等特殊交易结构的投资类型很可能纳入安全审查范围。
2. 纳入审查的投资领域：《安审办法》明确了下列范围内的外商投资，相关当事人应当在实施投资前主动进行安全审查申报：第一类是投资军工、军工配套等关系国防安全的领域，以及在军事设施和军工设施周边地域投资，无论是否取得所投资企业实际控制权；第二类是投资关系国家安全的重要领域（例如重要农产品、重要能源和资源、重大装备制造、重要基础设施、重要运输服务、重要文化产品与服务、重要信息技术和互联网产品与服务、重要金融服务、关键技术），并且取得所投资企业实际控制权。

上述规定主要从以下方面拓宽了现有安审规定中的审查范围：*(i)*删除了现有安审规定关于纳入审查的“军事设施周边地域投资”应是“重要、敏感”的限制；*(ii)*列举的“关系国家安全的重要领域”范围更宽，与全国性安审规定相比新增了“重要文化产品与服务、重要信息技术和互联网产品与服务、重要金融服务”，与自贸区安审规定相比新增了“互联网产品与服务、重要金融服务”。值得注意的是，自国家安全审查制度设立以来，虽然有关“关系国家安全的重要领域”所涉及的具体行业的讨论从未间断，但一直未见主管机关出台官方清单，这使得相关当事方在判断所投资领域是否落入安全审查范围时缺乏明确清

On December 19, 2020, the National Development and Reform Commission (“NDRC”) and the Ministry of Commerce (“MOFCOM”) jointly released the Rules on Security Review of Foreign Investments (the “Rules”), which will take effect on January 18, 2021. Based on several existing provisions governing national security review of foreign investments, the Rules has also borrowed international common practice to make amendments and adjustments in various major aspects including, among others:

1. Forms of foreign investments under security reviews. The Rules will generally regulate all investment activities conducted by foreign investors, directly or indirectly within the territory of China, including investment of new projects, investment through mergers and acquisitions and investment through other means. Subject to further government interpretations and based on the security review of foreign investments in the pilot free trade zones which elaborates the foreign investments in other forms as investments through VIE structures, entrusted shareholding agreements, trusts, reinvestments, overseas transactions, lease, subscription of convertible bonds and etc., as well as the recent anti-trust legislation and law enforcement involving VIE structures (*you may find briefings in our December 2020 issue of China Regulatory Updates*), it is highly likely that foreign investments with such special structures as VIEs will generally be subject to national security reviews in China.
2. Areas of foreign investments subject to prior security reviews. The Rules provide that foreign investments in the following two areas are subject to security reviews before any investment could proceed or otherwise be implemented: *(i)* investments in military industries, military affiliates or any other fields associated with national defense and security, or in territories surrounding military facilities or military industry facilities, regardless of the controlling shareholding is obtained by foreign investors or not; and *(ii)* investments in such important fields regarding national security as important agricultural products, important energy and resources, important equipment manufacturing, important infrastructure, important transportation services, important cultural products and services, important information technology and internet products and services, important financial services, critical technologies, among others, where foreign investors acquire controls of the underlying target companies.
Compared to the existing regulations, the Rules extends the scope of security review of foreign investments in a general manner, leaving the list of industries to be further specified by the competent government authorities though. It is also noteworthy that in practice, negative controls by foreign investors through veto rights arrangement or otherwise may also become subject to the security reviews.
3. Government authorities in charge of security review and content of examinations. According to the Rules, NDRC will set up a working mechanism office while MOFCOM and NDRC will be in charge of security review of foreign investments on a routine basis. In terms of the content of review and examination, it is expected that such aspects as

晰的指引。《安审办法》发布后，主管机关是否会发布具体受限行业清单或说明，有待进一步观察；(iii)《安审办法》列举的“取得实际控制权”的情形与自贸区安审规定基本相同，除了股权及表决权方面的控制外，还包括“其他导致外国投资者能够对企业的经营决策、人事、财务、技术等产生重大影响”这一兜底情形，实践中可能更偏向实质判断，因此一票否决权等方式取得的消极控制也可能纳入审查范围。

3. **审查机构及内容：**根据现有安审规定，外商投资安全审查机构是在国务院领导下，由发展改革委、商务部牵头的部际联席会议，并由商务部承担申报材料接收等窗口职责；但根据发改委2019年发布的相关公告，自2019年4月起，由发改委承担安全审查的窗口职责。《安审办法》在此基础上进一步明确了在发改委设立外商投资安全审查工作机制办公室，由发改委、商务部牵头，承担外商投资安全审查的日常工作。就审查内容而言，现有安审规定中对此有明确列举（例如外商投资对国防安全、国家经济稳定运行、社会基本生活秩序、涉及国家安全关键技术研发能力的影响等），但《安审办法》并未进行专门规定，实践中可能会继续沿用现有规定。
4. **其他主要变化：**《安审办法》明确了当事人应在实施投资前主动申报，并可以在申报前向主管部门进行咨询，第三方也可以向主管部门提出进行安全审查的建议；审查流程基本参照现有安审规定并进行了一定优化；明确了审查结果及各类违规行为的惩戒措施（除了限期责令改正、处分股权/资产等现有惩戒措施外，还包括将不良信用记录纳入信用信息系统，实施联合惩戒）；规定证券领域的外商投资安全审查具体规定由证券监督管理机构会同外商投资安全审查工作机制办公室制定。

《安审办法》是对2020年初生效的《外商投资法》关于“国家建立外商投资安全审查制度”规定的具体落实，系统化地规定了外商投资安全审查制度。但《安审办法》的部分规定仍然比较原则化，主管部门在实践中存在较大的自由裁量权。未来外商投资安全审查是否会常态化，以及目前《安审办法》中的原则性规定是否会有进一步的解释说明，仍有待后续进一步观察。建议相关投资人在实施可能落入《安审办法》规定的审查范围的交易前，提前做好安全审查的风险评估与政府沟通工作，并以此调整交易方案与时间表。

NDRC and MOFCOM Jointly Released 2020 Version of *Negative List for Market Access and Catalogue of Encouraged Foreign Investment Industries* 2020年版《市场准入负面清单》及《鼓励外商投资产业目录》发布

国家发改委、商务部于2020年12月16日发布了《市场准入负面清单（2020年版）》，发布即日起施行；上述两部门随后于12月27日发布了《鼓励外商投资产业目录（2020年版）》，自2021年1月27日起施行。上述清单施行后将各自替代2019年版本的相关清单，总体上将进一步优化投资环境、促进投资便利化，具体而言：

1. 《市场准入负面清单（2020年版）》延续了

the influence of foreign investment on national defense security, stable operation of national economy, order of basic social life, capacity of research and development of key technologies involving national security and etc. under the existing regulations will remain effective.

4. **Other major adjustments.** The Rules provides that (i) foreign investors shall proactively report investment activities and consult with the working mechanism office of NDRC on relevant issues; (ii) any third party may propose a security review over foreign investment to NDRC; (iii) the procedures of security reviews should follow the current practice with appropriate optimization; (iv) the security review may result in a combination of disciplinary measures including, among others, taking corrective actions, disposal of relevant equities or assets within certain period of time, and receiving negative credit records in the credit information system; and (v) security review of foreign investment in securities area will be separately subject to regulations by securities regulatory agency under the State Council and NDRC.

As part of efforts to specify and implement the Foreign Investment Law which came into force in early 2020, the Rules tries to establish a relatively compete system on security review of foreign investments. While expecting further details and interpretations, it is suggested that foreign investors be aware of potential risks associated with security review and get prepared of communications with the competent Chinese government authorities before proceeding with transactions that may be subject to security review and making flexible adjustments to the deal plans and schedules accordingly.

NDRC and MOFCOM on December 16, 2020 jointly issued the *Negative List for Market Access (2020 Version)* (the “2020 Negative List”, with immediate effect), and on December 27, 2020, issued the *Catalogue of Encouraged Foreign Investment Industries (2020 Version)* (the “2020 Encouraged Catalogue”, to be effective on January 27, 2021), each in an effort to further optimize and promote China’s investment environment and will replace their preceding 2019 version:

1. The 2020 Negative List inherited the general principle of

“非禁即入”的管理原则（即清单之外的行业、领域和业务，市场主体均可依法平等进入），一方面放开删减“报关企业注册登记许可”“证券公司董事、监事、高级管理人员任职资格核准”等已整合或不符合清单定位的事项措施；另一方面也审慎增列了少量内容，例如根据国务院的要求增加涉及金融控股公司的准入管理措施、对超规模流转土地经营权的监管等。该清单相较于2019年版本在总数上减少了8项，总体上进一步放开了市场准入。

2. 《鼓励外商投资产业目录（2020年版）》延续了2019年版本的体例，相较于2019年版本增加了127条，修改了88条，鼓励外商投资的范围增幅超过10%，特别是鼓励外资投资先进制造业、现代服务业和中西部地区优势产业。清单范围内的外商投资项目，可以依照法律、行政法规或者国务院的规定享受税收、用地等优惠待遇。

“what is not prohibited is permitted” (that is, all market participants have equal access to industries, fields and businesses that are not included in the list). On one hand, the list further reduced eight negative items such as “license for the registration of customs declaration enterprises”, “approval for the qualifications of directors, supervisors, and senior officers of securities companies” and other items that do not compatible with the list or have been integrated with others; on the other hand, the list cautiously added a few new items, such as the administration of financial holding companies as previously required by the State Council and the supervision on excessive transfer of land operational right.

2. Compared with the 2019 version, the 2020 Encouraged Catalogue has added 127 new articles and revised 88 articles, expanding the encouraged foreign investment scope by more than 10%, especially investments in advanced manufacturing, modern service and advanced industries in central and western regions of China. Foreign-invested projects in the list may receive preferential treatments in such aspects as taxation and land using right pursuant to the applicable laws and regulations.

CRIMINAL LAW / 刑法

NPC Adopted a New Amendment to Criminal Law

《刑法修正案（十一）》正式通过

2020年12月26日，全国人大常委会通过了《刑法修正案（十一）》，将于2021年3月1日起施行。《刑法修正案（十一）》立足于当下的社会现实，对大量社会关切的犯罪问题进行了补充、修改，共新增条文13条，修改条文34条。主要亮点包括：对法定最低刑事责任年龄作个别下调；加大金融证券领域犯罪的惩治力度；修改完善知识产权犯罪规定；与药品及生物安全领域最新立法相衔接，强化医药卫生领域的刑法治理，增加了非法采集人类遗传资源、非法基因编辑等犯罪行为。

On December 26, 2020, the Standing Committee of the National People's Congress adopted the *Amendment XI to the Criminal Law* (“Amendment XI”), which will come into force on March 1, 2021. The Amendment XI has added 13 new articles and revised 34 articles, supplemented and modified a large number of criminal regulations that have mirrored various modern developing social issues. The major highlights include, among others: (i) lowering the statutory minimum age for criminal liabilities; (ii) imposing heavier punishment on financial and securities crimes; (iii) revising and improving provisions regarding intellectual property crimes; and (iv) strengthening criminal regulations in the healthcare sector to coordinate with latest legislations in medicine and biosafety (including adding criminal activities such as illegal collection of human genetic resources and illegal gene editing).

CIVIL LAW / 民法

Supreme Court Released First Batch of Judicial Interpretations to Work with New Civil Code

首批《民法典》配套司法解释出台

为配合2021年1月1日生效的《民法典》，确保法律适用标准统一，最高人民法院于2020年12月30日正式宣布，已全面完成了591件司法解释及相关规范性文件的清理工作。其中，共116件司法解释被废止，共111件司法解释需对名称或部分条款进行修改，剩余364件与《民法典》规定一致的司法解释则继续沿用。

与此同时，最高人民法院还制定并公布了与《民法典》配套的首批共7件司法解释，于2021年1月1日和《民法典》同步施行。其中，关于适用《民法典》时间效力的司法解释，旨在解决《民法典》与合同法、物权法等废止的法律的衔接适用问题，明确了“法不

In order to implement the *Civil Code* came into force on January 1, 2021, the Supreme People's Court (the “Supreme Court”) on December 30, 2020 announced that it has finished reorganization of 591 judicial interpretations and relevant regulatory documents, among which, 116 have been abolished, 111 need to be modified, and the remaining 364 judicial interpretations and regulations continue unchanged and effective.

Meanwhile, the Supreme Court also formulated and issued the first batch of seven new judicial interpretations of the *Civil Code*, effective simultaneously therewith on January 1, 2021. Among them, (i) the Supreme Court has clarified the potential time conflicts between the implementation of the *Civil Code* and the abolishment of such laws as the *Contract Law* and the *Property*

溯及既往”的基本原则及其例外规则，以确保《民法典》正确实施。另外，鉴于《民法典》对担保制度进行了重大修改完善，最高人民法院在清理废止与担保制度有关的司法解释的基础上，新制定了关于适用《民法典》担保制度的司法解释。其余5件首批司法解释则分别涉及物权、婚姻家庭、继承、建设工程施工合同以及劳动争议等方面。

Law, with the reiterated basic principle of “non-retroactivity” with certain exceptions; (ii) it has issued a new judicial interpretation to implement certain major improvements to the guarantee legal system under the *Civil Code*; and (iii) the other five judicial interpretations are related to property rights, marriage and family, inheritance, construction contracts and labor disputes.

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