

China's Foreign Investment Security Review Rules Promulgated

On 19 December 2020, the Ministry of Commerce and the National Development and Reform Commission of the People's Republic of China ("PRC"), with approval from the State Council, published the Foreign Investment Security Review Rules ("FISRR"). The FISRR will come into force 30 days after its promulgation (i.e., 18 January 2021).

This update summarises the salient terms of the FISRR.

What kind of foreign investment is captured?

The FISRR deals with the following types of foreign investment:

- Incorporation of new companies in the PRC by foreign investor(s) with/without local PRC partner(s);
- Acquisition of assets within the PRC or shares of PRC-incorporated companies; and
- Other types of investment within the PRC.

Who and what needs to be reported?

According to the FISRR, the foreign investor, its local partner or the target company needs to report any proposed investment in the following industries before effecting the investment:

- Weapons industry, or industries in any other military-related area;
- Industries situated in physical "locations near military facilities" and military industries; and
- Industries relating to "key agricultural products, key energy and resources, key equipment manufacturing, key infrastructure, key transportation services, key cultural products and services, key information technology and internet products and services, key financial services, key technology and other important industries" where the foreign investors enjoy "actual control" of the target companies.

The FISRR interprets "actual control" as follows:

- Where the foreign investor(s) own(s) 50% of the shares of the target company;
- Where the foreign investor(s) own(s) less than 50% of the shares of the target company but may exercise material influence over the resolutions of the board or general meeting of the target company *via* its voting rights; or
- Where the foreign investor(s) may otherwise exert material influence over the operation, human resource, financial and technical affairs of the target company.

What needs to be submitted?

The parties concerned should submit the following for security review purposes:

- The application, including details such as name, address, business scope, investment details of the foreign investor;
- The investment plan;
- An explanation as to whether the proposed foreign investment will affect national security; and
- Other details as may be required by the security review office.

Timeline

The FISRR provides that the security review office will inform the parties concerned whether a security review will be required within 15 working days after receipt of the complete set of application documents.

The following process will apply:

- If the security review office determines that a security review is *not* required, the parties concerned may proceed to complete the foreign investment;
- If the security review office determines that a security review *is* required, the security review office will complete the general review within 30 working days from the date of such determination. If a special review is required after the general review, a decision will be made within 60 working days (subject to extension in exceptional cases) after the special review is triggered;
- If the security review office determines that the foreign investment affects national security, the foreign investment will be prohibited; and
- The security review office may determine that the foreign investment will be subject to additional conditions for national security purposes, and if so, the foreign investment may only be allowed subject to the parties' acceptance of the additional conditions.

Consequence of non-compliance

If the parties concerned complete the foreign investment without the security review and the security review office determines that the foreign investment is not allowed, the parties concerned may be ordered to unwind the deal by disposing of any shares acquired within a grace period (to be determined by the security review office) and to take all necessary steps to restore the *status quo* before completion of the foreign investment.

Comments

The requirement of the security review under the FISRR marks a significant change in the PRC foreign investment regime.

However, the FISSR addresses this new requirement in 23 relatively succinct clauses. It is hoped that further details will in due course be released on, for example:

- The kind of details required by the security review office;
- The meaning and scope of “locations near military facilities” and “key agricultural products, key energy and resources, key equipment manufacturing, key infrastructure, key transportation services, key cultural products and services, key information technology and internet products and services, key financial services, key technology and other important industries”; and
- Whether an acquisition of a foreign company which indirectly owns certain assets in the PRC or shares of PRC-incorporated companies will be captured by the FISRR.

Guidance and clarity on these issues will be welcomed by industry players and stakeholders prior to/at the time of the FISRR coming into force.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



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