

# JUNHE SPECIAL REPORT



December 31, 2020

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## Brief Comments on the Measures for the Security Review of Foreign Investments

In 2011, China debuted the National Security Review (“NSR”) regime for mergers and acquisitions of domestic enterprises by foreign investors in accordance with the *Notice of the General Office of the State Council on the Establishment of Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (the “**2011 M&A NSR Notice**”). In 2015, the NSR regime was further elaborated on with the issuance of the Notice of the General Office of the State Council on Promulgating the *Trial Measures on National Security Review for Foreign Investment in Free Trade Zones* (“**2015 Free Trade Zone NSR Measures**”), under which Free Trade Zones initiated the pilot implementation of the NSR program for foreign investment that accommodates the negative list administrative regime. Though the *Foreign Investment Law* (Consultation Paper) released in 2015 provides a detailed NSR regime, only principle provisions were kept in the 2018 draft and the final law, which came into effect on January 1, 2020.

On December 19, 2020, with the approval of the State Council, the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) jointly issued the *Measures for the Security Review of Foreign Investment* (“**2021 NSR Measures**”), which will come into effect on January 18, 2021. The 2021 NSR Measures stipulate, in a total of 23

Articles, the types of foreign investments subject to the NSR, the reviewing authority, the industrial sectors covered by the NSR, the reviewing procedures, the supervision of the implementation of the reviewed decisions and punishments for violations of the reviewed decisions. We have summarized below the major provisions of the *2021 NSR Measures* and the key differences between the *2021 NSR Measures* and the *2011 M&A NSR Notice*, as well as the *2015 Free Trade Zone NSR Measures*.

### **I. Types of Foreign Investments Subject to NSR**

The *2011 M&A NSR Notice* differs from the *2015 Free Trade Zone NSR Measures* in terms of the type of transactions subject to NSR. All kinds of foreign investments (including Greenfield investments) in the Free Trade Zone are subject to NSR, while outside the Free Trade Zone, only mergers or acquisitions of domestic enterprises by foreign investors are subject to NSR.

The *2021 NSR Measures* refer to the *2015 Free Trade Zones NSR Measures* and clarifies the types of foreign investments in China which shall be subject to NSR, including: (i) any foreign investor who solely, or jointly with other investors, invests in a new project or establishes an enterprise in China; (ii) any foreign investor who acquires the equities or assets of a

domestic enterprise through merger or acquisition; or (iii) any foreign investor who invests in China in any other way. Namely, all types of foreign investments may be subject to NSR, including a newly established wholly-owned foreign enterprise, a newly established Sino-foreign joint venture, a merger and acquisition of a domestic enterprise by foreign investors, variable interest entity (VIE) structures, shareholding entrustments, etc.

## II. Reviewing Authority

The *2011 M&A NSR Notice* established the *Inter-ministerial Joint Committee (IJC)* responsible for NSR on mergers and acquisitions of domestic enterprises by foreign investors, while the *2021 NSR Measures* replaces the IJC with a working mechanism for NSR on foreign investment, setting up a working office under NDRC (the “**NSR Office**”), for which NDRC and MOFCOM shall jointly organize and undertake the routine work of NSR on foreign investment. (*Note: In accordance with NDRC’s Public Notice [2019] No. 4<sup>1</sup>, the government affairs services hall of NDRC, instead of MOFCOM, has been responsible for accepting the foreign investments declaration for NSR since April 30, 2019.*)

According to the *2011 M&A NSR Notice*, the IJC, under the leadership of the State Council and led by NDRC and MOFCOM, was to conduct NSR on mergers and acquisitions, jointly with the relevant state departments, in light of industrial sectors involved in merger and acquisition transactions by foreign investors. The *2021 NSR Measures* set up the NSR Office to replace the IJC for NSR on foreign investment. However, given the

NSR Office is led by, rather than just composed of NDRC and MOFCOM, and according to the normal working practices of the Chinese government, when conducting NSR on foreign investment, it’s likely that the NSR Office would seek opinions from competent government departments of the relevant industries, and even submit it to the State Council for a final decision. The detailed internal review process remains to be clarified in the follow-up practice.

## III. The Industrial Sectors Covered by NSR

Pursuant to the *2021 NSR Measures*, foreign investment in the following industrial sectors shall be subject to NSR:

- 1、 Any military industry, military industrial accessories and other national defense and security-related sectors, and investment surrounding military facilities;
- 2、 Important products and services in these industrial sectors: agriculture, energy and resources, equipment manufacturing, infrastructure, transport, cultural products and services, information technology and Internet, finance, key technologies, as well as any other sectors that have a bearing on national security and where foreign investors have obtained de facto control over these invested enterprises.

We prepared the following table to compare the differences between the industrial sectors covered by NSR according to the *2021 NSR Measures*, the *2011 M&A NSR Notice* and the *2015 Free Trade Zone NSR Measures*.

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<sup>1</sup> Please see [https://www.ndrc.gov.cn/xxgk/zcfb/gg/201904/t20190430\\_961220\\_ext.htm](https://www.ndrc.gov.cn/xxgk/zcfb/gg/201904/t20190430_961220_ext.htm)  
1。

**Table 1: Comparison of the Industrial Sectors Covered by NSR among the 2021 NSR Measures, the 2011 M&A NSR Notice and the 2015 Free Trade Zone NSR Measures**

2021 NSR Measures	2015 Free Trade Zones NSR Measures	2011 M&A NSR Notice
<p>Investment in military industry, military industrial accessories and other national defense and security-related sectors, and investment surrounding military facilities;</p> <p>Investments in important agricultural products, important energy and resources, important equipment manufacturing, important infrastructure, important transport services, <b>important cultural products and services, important information technology and Internet products and services, important financial services</b>, key technologies and other important sectors that have a bearing on national security, while obtaining de facto control over these invested enterprises.</p>	<p>Investment in the Free Trade Zones in military industry, military industrial accessories and other national defense and security-related sectors, and investment surrounding important and sensitive military facilities;</p> <p>Investment by foreign investors in the Free Trade Zones in important agricultural products, important energy and resources, important infrastructure, important transportation services, <b>important cultural and information technology products and services</b>, key technologies, important equipment manufacturing and other important sectors that have a bearing on national security, while obtaining de facto control over these invested enterprises.</p>	<p>Merging with or the acquisition of the domestic enterprises of the military industry, military industrial accessories, enterprises adjacent to important and sensitive military facilities and enterprises in other national security and defense-related sectors by foreign investors;</p> <p>Merging with and the acquisition of domestic enterprises in relation to important agricultural products, important energy and resources, important infrastructure, important transportation services, key technologies, significant equipment manufacturing and other important sectors that have a bearing on national security by foreign investors, and the de facto control of these invested enterprises may be obtained by foreign investors.</p>

As illustrated in the table above, the industrial sectors subject to NSR as stipulated in the *2021 NSR Measures* are broader than those provided in the two previous regulations. The change, in our view, marks an important step toward improving China’s foreign investment management system. This follows the Foreign Investment Law in 2020, which established a new foreign investment management system consisting of three major aspects: the negative list administration system for market access, the foreign investment information reporting system and the NSR system. The issuance of the 2021 NSR Measures is one of China’s major new regulations further promoting foreign investment, expanding further opening up while managing foreign investment rationally and scientifically, and ensuring national security.

In recent years, China has steadily expanded opening up and relaxed restrictions on market access for foreign

investment. For example, in cultural sectors, China has abolished regulations prohibiting foreign investment in businesses that provide internet access services and the restrictions that cinemas and performance agencies must only be controlled by Chinese operators, and it has permitted foreign-invested enterprises to produce and sell gaming devices; in the financial sector, China has abrogated the restrictions on shareholding proportions of foreign investors in the banking, securities, funds, futures and life insurance sectors. While China continues relaxing market access restrictions, the United States, the European Union and other countries are constantly updating their NSR regime (also referred to as a “foreign investment review system”). It appears, given the timing of promulgation, that the 2021 NSR Measures are a reciprocal measure of the security review imposed by foreign authorities on Chinese enterprises, but in fact, this regulation is part of a formulation of

policies managed by the Chinese government cautiously and steadily, which started with the *2011 M&A NSR Notice* and continued through the *2015 Free Trade Zone NSR Measures*, the *2015 Foreign Investment Law (Consultation Paper)* to the *2020 Foreign Investment Law*. For example, Article 59 of the *State Security Law* promulgated in 2015 stipulates that, “The State shall establish a review and regulatory system and mechanism for national security, and carry out national security reviews against foreign investments, specific items and key technologies, network information technology products and services, national security-related projects and other major matters and events that impact or may impact national security, in order to effectively prevent and resolve national security risks”, where the NSR on network information technology products and services (foreign investment involving such products and services should also be included) has already been referenced. In the financial service sector, Article 26 of the *Administrative Measures on Bank Card Clearing Institutions* promulgated in 2016 provides that “merger and acquisition of bank card clearing institutions by foreign investors shall comply with the administrative provisions on security reviews for merger and acquisition of domestic infrastructure by foreign investors.”

With respect to the determination of “obtaining de facto control over an invested enterprise”, while there are no substantial distinctions among the three documents referenced above, “de facto control” occurs in the following circumstances: (i) a foreign investor holds more than 50% of the equity of a domestic enterprise; (ii) a foreign investor holds less than 50% of the equity of a domestic enterprise while the voting rights vested upon such equity are sufficient for the foreign investor to exert a significant impact on the resolutions of the board of directors, the shareholders’ meeting or the general meeting of shareholders of such domestic

enterprise; or (iii) other circumstances where a foreign investor exerts significant impact on the management decision-making, human resources, finances, or technologies of the domestic enterprise.

#### IV. Reviewing Procedures and Timelines

The *2021 NSR Measures* and the *2011 M&A NSR Notice* are not substantially different with respect to the initiation of NSR, which can be initiated in two ways: (i) a submission of a filing by the foreign investor or relevant entity within China (the “Parties”), and (ii) a proposal for a security review submitted by a third party<sup>2</sup>. According to the *2021 NSR Measures*, for a foreign investment falling within the industrial sectors covered by NSR, the Parties shall take the initiative to make the filing to the NSR Office prior to the implementation of investment. In the event the Parties fail to file the foreign investment with the NSR Office while the relevant authorities, enterprises, social groups or the general public or others believe that such foreign investment impacts or may impact national security, they may submit a proposal to the NSR Office for initiating the NSR.

In the most significant revision from the *2011 M&A NSR Notice*, the *2021 NSR Measures* simplify and clarify the NSR reviewing procedures and timelines. Firstly, by simplifying the NSR reviewing phases and removing the circumstances under which foreign investment is required to be reported to the State Council. The *2021 NSR Measures* establishes a three-tiered reviewing system: preliminary review, regular review and special review. The aforesaid reviewing system is basically consistent with the *2011 M&A NSR Notice*, except for the removal of the circumstances under which foreign investment is required to be reported to the State Council, e.g., “After initiating the special review procedure, in the event IJC has significant divergence on the security assessment of the

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<sup>2</sup> According to Article 16 of the *2021 NSR Measures*, after third parties submit a proposal for security review to the NSR Office, for any foreign investment that falls within the NSR scope upon reviewing, while the Parties fail to submit the NSR filing in accordance with these Measures before they implement the investment, the NSR Office shall order the Parties to make an NSR filing

within a given time limit. In a case whereby the Parties refuse to make the filing, the NSR Office shall order them to dispose of the equity or assets or to adopt other necessary measures within a specified time limit to restore to pre-investment conditions and eliminate the impact on national security.

merger and acquisition transaction, IJC shall submit the case to the State Council for a decision.”

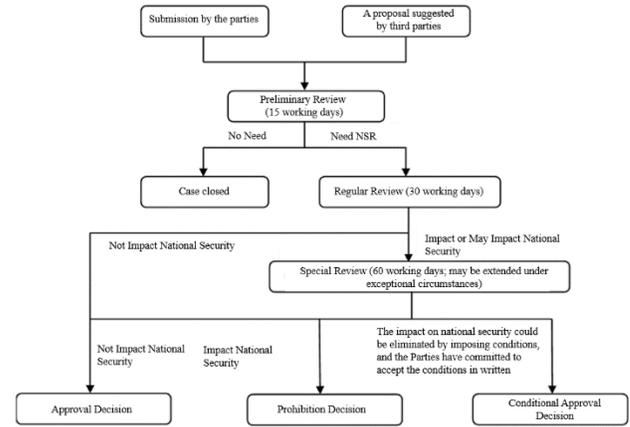
Secondly, the timeline is clarified and simplified for each phase of the reviewing procedure. To be specific, (i) in Phase I of the preliminary review, the NSR Office shall decide whether or not to initiate the NSR within 15 working days from the date of receipt of the materials complying with filing requirements; (ii) in Phase II of the regular review, the NSR Office shall make the decision of passing the NSR or moving on to the next NSR phase within 30 working days of the NSR initiation date; and (iii) in Phase III, a special review lasts for 60 working days and may be extended only under exceptional circumstances. This final phase is unnecessary if a foreign investment succeeds in passing the regular review in phase two.

The *2021 NSR Measures* expressly provide the timeline for each review phase and abolishes the provisions in the *2011 M&A NSR Notice* regarding internal working processes and the time limits for security reviews. For example, “For merger and acquisition transactions falling within the NSR scope, MOFCOM shall submit the NSR filing within five working days to IJC for review”, “Upon receipt of an NSR filing submitted by MOFCOM for security review, IJC shall solicit opinions from relevant departments in writing within five working days. Upon receipt of the written letter for solicitation of opinions, the relevant departments shall provide written opinions within 20 working days”, “In the event that any department deems that the merger and acquisition transactions may have an impact on national security, IJC shall initiate the special review within five working days upon receipt of the written opinions.”

It is worth noting that pursuant to the *2021 NSR Measures*, the NSR Office may request additional information from the Parties and ask the Parties about the relevant matters during the course of its review, which will stop the clock on the timelines described above. That is to say, the time for the Parties to provide supplemental relevant materials shall not be counted as part of the review time period. Besides, before a

preliminary review, there is no explicit time limit required by law for the NSR Office to examine whether the materials meet the filing requirements.

### The Reviewing Procedure of Foreign Investments



## **V. Review Decisions and Implementation Supervision**

The NSR Office shall appraise and issue decisions accordingly to: (i) approve a declared foreign investment, where it does not impact national security; (2) prohibit a declared foreign investment, where it impacts national security; (3) conditionally approve a declared foreign investment, where its impact on national security can be eliminated by imposing certain conditions and the Parties give written undertakings accepting such conditions.

If a declared foreign investment passes the NSR, the Parties may implement the investment; if a conditional approval decision is made, the Parties shall implement the investment in accordance with the additional conditions; in case a declared foreign investment is decided as prohibited, the Parties shall not implement the investment, however, if the investment has been implemented, the Parties shall dispose the equity or assets and/or adopt other necessary measures within a specified time period to restore the pre-investment conditions and eliminate the impact on national security. The above provisions are similar to the relevant rules in *2015 Foreign Investment Law (Consultation Paper)*.

Additionally, the *2021 NSR Measures* also provide the supervision on the implementation of the NSR decision. The implementation of the NSR decision will be supervised by the NSR Office together with the relevant

government departments and local governments. For foreign investment that passed the NSR with additional conditions, the implementation of the additional conditions may be verified by requiring the submission of the relevant documentation, an onsite inspection or by some other means.

## **VI. Consequences of a Violation of the 2021 NSR Measures**

Unlike the *2011 M&A NSR Notice* which makes no mention of legal liability clauses, the *2021 NSR Measures* explicitly provides for legal liability clauses. Pursuant to the *2021 NSR Measures*, for violations such as refusing to file, providing fraudulent materials and failing to implement additional conditions, the NSR Office may order the Parties to dispose of equity or assets within a specified time period, as well as record the dishonest credit information of the Parties on the relevant national credit information systems and joint punishment shall be imposed on the Parties in accordance with the relevant provisions of the State. We understand that the relevant national credit information systems may include the national credit information sharing platform “Credit China” website and the National Enterprise Credit Information Publicity System. The joint punishment may include administrative, market, industrial and social restraints and punishments for conducting dishonest activities.<sup>3</sup>

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<sup>3</sup> According to the Guiding Opinions of the State Council on Establishing and Improving the System of Joint Incentive for Keeping Honesty and Joint Punishment for Dishonesty and Accelerating the Advancement of the Development of Social Honesty (No. 33 [2016] of the State Council) and subsequent policy provisions, China will improve the mechanism to restrain and punish dishonest behaviors, and jointly punish dishonest behaviors in key areas and serious dishonest behaviors. For example, (i) strengthening administrative restraint and punishment on dishonest conducts in accordance with laws and regulations: including (a) strictly examining and verifying administrative licensing and approval programs, strictly controlling the issuance of production licenses, restricting approval and examination of new programs, etc., strictly restricting the application for financial fund programs, restricting the participation in transactions involving relevant public resources, and restricting the participation in the licensed operation of infrastructures and public undertaking; and (b) imposing measures such as market and industry prohibition against enterprises with serious dishonesty, their legal representatives, principal persons in charge, registered professionals directly responsible for dishonest conducts, etc.; (ii) strengthening market-oriented restraint and punishment on dishonest conduct: including (a) indexing seriously dishonest entities with the unified social credit codes by relevant departments and institutions, and timely disclosing the relevant information for the purpose of better identification

of their dishonest conduct by the market and the prevention of credit risks; (b) supporting credit investigation institutions in collecting serious dishonesty information and incorporating such information into credit records and credit reports; and (c) guiding commercial banks, insurance companies and other financial institutions to raise the loan rates, property insurance premium rates, etc. for seriously dishonest entities according to the principle of risk pricing; (iii) strengthening industry-oriented restraint and punishment on dishonest conduct: including (a) guiding industry associations and chambers of commerce to improve the internal credit information collection and sharing mechanisms, and recording seriously dishonest conduct into member credit archives; and (b) supporting industry associations and chambers of commerce in, according to the industrial standards, industrial provisions and industrial regulations and the seriousness of the conduct, taking disciplinary measures such as warnings, circulation of a notice of criticism in the industry, public condemnation, refusal to accept, persuasion, etc.; (iv) strengthening social-oriented restraint and punishment on dishonest conduct: including (a) establishing and improving the dishonesty report system, encouraging the public to report seriously dishonest conduct of enterprises, and strictly keeping the information of the whistleblowers confidential; and (b) encouraging the impartial, independent and qualified social institutions to carry out public

## VII. Summary

Based on the NSR legislation and the implementation practices over the past ten years, particularly in the Free Trade Zones, the *2021 NSR Measures* makes adjustments and supplements to the NSR review authorities, the industrial sectors subject to NSR, review

procedures, supervision on implementation of review decisions, as well as punishments for violations, which further enhances the operability and transparency of China's NSR regime.

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opinion monitoring on big data of dishonest conduct, as well as compiling and publishing regional and industrial credit analysis reports, etc.

# 君合专题研究报告



2020年12月22日

## 简评《外商投资安全审查办法》

2011年，中国始建外国投资者并购境内企业安全审查制度，主要法规依据是《国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知》（下称“《2011 并购安审通知》”）。随着《国务院办公厅关于印发〈自由贸易试验区外商投资国家安全审查试行办法〉的通知》（下称“《2015 自贸区安审办法》”）的颁布，国家安全审查制度有了进一步发展，自2015年起，自贸区开始试点实施与负面清单管理模式相适应的外商投资安全审查措施。2015年公布的《外国投资法（草案征求意见稿）》中有相对比较详细的国家安全审查制度的规定，但在2018年公布的《外商投资法》（草案）以及2020年1月1日开始实施的《外商投资法》中，关于国家安全审查制度仅有非常原则性的规定。

2020年12月19日，经国务院批准，国家发展改革委、商务部发布《外商投资安全审查办法》（下称“《2021 安审办法》”），该办法将于2021年1月18日正式施行。《2021 安审办法》共23条，规定了适用安全审查的外商投资类型、审查机构、审查范围、审查程序、审查决定监督执行和违规处理等。下文将对《2021 安审办法》的主要内容，以及其与《2011 并购安审通知》和《2015年自贸区安审办法》的主要区别进行简要梳理。

### VIII. 适用安全审查的外商投资类型

《2011 并购安审通知》中规定的适用安全审查的交易类型与《2015 自贸区安审办法》中规定的不同，自贸区适用安全审查的投资类型包括各类外商投资（包括绿地投资），而非自贸区适用安全审查的投资类型仅包括外商并购境内企业的情形。

《2021 安审办法》借鉴《2015 自贸区安审办法》的规定，明确中国境内适用安全审查的外商投资类型包括：（1）外国投资者单独或者与其他投资者共同在境内投资新建项目或者设立企业；（2）外国投资者通过并购方式取得境内企业的股权或者资产；（3）外国投资者通过其他方式在境内投资。换言之，所有的投资类型都可能涉及国家安全审查，包括：新设外商独资企业、新设中外合资企业、外资并购、VIE架构、代持等等。

### IX. 外商投资安全审查机构

《2011 并购安审通知》建立了外国投资者并购境内企业安全审查部际联席会议（下称“**联席会议**”）制度，《2021 安审办法》对审查机构的称谓进行了变更，即，建立外商投资安全审查工作机制，工作机制办公室设在国家发展改革委，由国家发展改革委、商务部牵头，承担外商投资安全审查的日常工作（注：根据国家发展改革委2019年第4号公

告<sup>4</sup>，外商投资安全审查申报于 2019 年 4 月 30 日已从商务部改由国家发展改革委政务服务大厅接收）。

根据《2011 并购安审通知》，联席会议在国务院领导下，由国家发展改革委、商务部牵头，根据外资并购所涉及的行业和领域，会同相关部门开展并购安全审查。尽管《2021 安审办法》取消了联席会议，安全审查工作由工作机制办公室处理。但是，由于《2021 安审办法》中规定工作机制办公室由国家发展改革委和商务部牵头，而并非由前述两个部门组成，根据中国政府部门的惯常工作程序，在对具体交易进行国家安全审查时，大概率仍然会征求相关行业主管部门的意见，甚至提交国务院作出最终决定。这一程序的具体操作仍有待后续实践进一步明确。

## X. 外商投资安全审查范围

根据《2021 安审办法》，对下列范围内的外商投资需要进行安全审查：

- 3、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；
- 4、投资关系国家安全的重要农产品、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、关键技术以及其他重要领域，并取得所投资企业的实际控制权。

为方便了解《2021 安审办法》与《2011 并购安审通知》以及《2015 自贸区安审办法》在安审范围上的调整，我们制作了以下对比图表。

**表 1：《2021 安审办法》、《2015 自贸区安审办法》、《2011 并购安审通知》安审范围对比**

《2021 安审办法》	《2015 自贸区安审办法》	《2011 并购安审通知》
<p>投资军工、军工配套等关系国防安全的领域，以及在<b>重点、敏感</b>军事设施和军工设施周边地域投资；</p> <p>投资关系国家安全的重要农产品、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、<b>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</b>、关键技术以及其他重要领域，并取得所投资企业的实际控制权。</p>	<p>外国投资者在自贸试验区内投资军工、军工配套和其他关系国防安全的领域，以及重点、敏感军事设施周边地域；</p> <p>外国投资者在自贸试验区内投资关系国家安全的重要农产品、重要能源和资源、重要基础设施、重要运输服务、<b>重要文化、重要信息技术产品和服务</b>、关键技术、重大装备制造等领域，并取得所投资企业的实际控制权。</p>	<p>外国投资者并购境内军工及军工配套企业，重点、敏感军事设施周边企业，以及关系国防安全的其他单位；</p> <p>外国投资者并购境内关系国家安全的重要农产品、重要能源和资源、重要基础设施、重要运输服务、关键技术、重大装备制造等企业，且实际控制权可能被外国投资者取得。</p>

从上表可以看出，《2021 安审办法》规定的应进行国家安全审查的范围较之前两个审查办法有所增加。我们认为，这是中国完善新型外商投资管理制度

制度的重要一步。2020 年《外商投资法》建立了负面清单管理市场准入+外商投资信息报告制度+国家安全审查制度的新型外商投资管理制度。这是中国

<sup>4</sup> 见网址  
[https://www.ndrc.gov.cn/xxgk/zcfb/gg/201904/t20190430\\_961220\\_ext.htm](https://www.ndrc.gov.cn/xxgk/zcfb/gg/201904/t20190430_961220_ext.htm)  
 1。

促进外商投资，扩大开放，同时合理科学管理外商投资，保障国家安全的重要制度建设。

近些年来，中国持续推动扩大对外开放，减少外资准入限制。例如，在文化领域，取消了禁止投资互联网上网服务营业场所的规定，取消电影院、演出经纪机构须由中方控股的限制，允许外资企业从事游戏设备的生产和销售等；在金融领域，取消了银行、证券、基金、期货、人身险领域外资股比限制等。在中国不断减少市场准入限制的同时，美国、欧盟等国家则在不断更新其国家安全审查（或称外国投资审查制度）。《2021 安审办法》从颁布时间上看似乎是对外部环境针对中国企业的国家安全审查的对等措施，但实际上，这一规定是中国政府自《2011 并购安审通知》开始，历经《2015 自贸区安审办法》、2015 年《外国投资法（草案征求意见稿）》、2020 年《外商投资法》到现在的节奏稳健、步骤清晰的制度建设。例如，2015 年颁布的《国家安全法》第 59 条规定，“国家建立国家安全审查和监管的制度和机制，对影响或者可能影响国家安全的外商投资、特定物项和关键技术、网络信息技术产品和服务、涉及国家安全事项的建设项目，以及其他重大事项和活动，进行国家安全审查，有效预防和化解国家安全风险。”其中便提及需对网络信息技术产品和服务（理应包括外商投资涉及该类产品和服务的情形）进行国家安全审查。在金融服务领域，2016 年颁布的《银行卡清算机构管理办法》第 26 条规定，“外国投资者并购银行卡清算机构，应当执行外资并购境内基础设施安全审查的管理规定。”

关于“取得所投资企业的实际控制权”的认定，上述 3 份文件并无实质不同，主要包括下列情形：

（1）外国投资者持有企业 50% 以上股权；（2）外国投资者持有企业股权不足 50%，但其所享有的表决权能够对董事会、股东会或者股东大会的决议产

生重大影响；（3）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的情形。

## XI. 安全审查的程序和时限

关于安全审查的启动方式，《2021 安审办法》与《2011 并购安审通知》没有实质区别，主要包括两种启动方式，即当事人主动申报，以及第三方提出安全审查的建议<sup>5</sup>。根据《2021 安审办法》的规定，对属于安审范围的外商投资，外国投资者或者境内相关当事人应当在实施投资前主动向工作机制办公室申报；对于当事人未主动申报的情形，有关机关、企业、社会团体、社会公众等认为外商投资影响或者可能影响国家安全的，可以向工作机制办公室提出进行安全审查的建议。

相较于《2011 并购安审通知》，《2021 安审办法》最显著的变化是简化并明确了安全审查的程序和时限。首先，简化安全审查阶段，删除需报国务院处理的情形。《2021 安审办法》规定了三个审查阶段，分别是初步审查、一般审查和特别审查，前述审查程序与《2011 并购安审通知》基本一致，但删除了《2011 并购安审通知》中关于需报国务院处理的情形。例如“启动特别审查程序后，联席会议组织对并购交易的安全评估……存在重大分歧的，由联席会议报请国务院决定。”

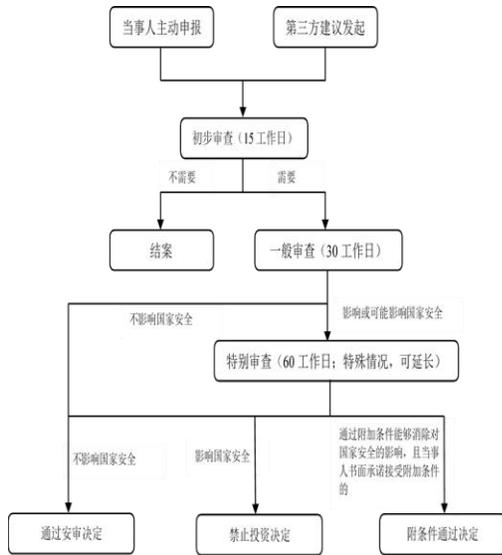
其次，明确并简化安全审查程序各阶段的时限。具体而言，（1）在初步审查阶段，在收到符合申报要求的材料之日起 15 个工作日内，决定是否启动安全审查；（2）在一般审查阶段，在启动审查之日起 30 个工作日内作出通过审查的决定，或进入下一阶段审查；（3）第三阶段是为期 60 个工作日的特别审查，这一阶段不是必经程序，只有未通过一般审查的外商投资才会进入特别审查，特殊情况下，可能延长特别审查时限。

<sup>5</sup> 根据《2021 安审办法》第 16 条，在第三方向工作机制办公室提出进行安全审查的建议后，经审查属于申报范围内的外商投资，当事人未申报即实施投资的，由工作机制办公室责令限期申报；拒不申报的，责令限期处分股权或者资产以及采取其他必要措施，恢复到投资实施前的状态，消除对国家安全的影响。

《2021 安审办法》直接明确每一审查阶段的具体审查时限，删除了《2011 并购安审通知》中有关安全审查的内部工作流程及其时限的规定。例如，“对属于安全审查范围内的并购交易，商务部应在 5 个工作日内提请联席会议进行审查”，“联席会议收到商务部提请安全审查的并购交易申请后，在 5 个工作日内，书面征求有关部门的意见。有关部门在收到书面征求意见函后，应在 20 个工作日内提出书面意见”，“如有关部门认为并购交易可能对国家安全造成影响，联席会议应在收到书面意见后 5 个工作日内启动特别审查程序”。

需要注意的是，根据《2021 安审办法》，工作机制办公室对申报的外商投资进行安全审查期间，可以要求当事人补充提供相关材料，并向当事人询问有关情况，补充材料时间不计入审查期限。另外，对于初步审查前的阶段，法律对工作机制办公室审查申报材料是否符合申报要求并无明确的时限规定。

**图 1：外商投资安全审查程序**



## XII. 安全审查决定的类型及其执行监督

对于需要进行安全审查的外商投资，工作机制办公室可以根据审查情况作出以下审查决定：（1）申报的外商投资不影响国家安全的，作出通过安全审查的决定；（2）申报的外商投资影响国家安全的，作出禁止投资的决定；（3）通过附加条件能够消除对国家的影响，且当事人书面承诺接受附加条件的，可以作出附条件通过安全审查的决定，并在决定中列明附加条件。

对于通过安全审查的，可实施投资；对于附条件通过审查的，应当按照附加的条件实施投资；对于禁止投资的，不得实施投资，已经实施的，应当限期处分股权或者资产以及采取其他必要措施，恢复到投资实施前的状态，消除对国家的影响。上述规定与 2015 年的《外国投资法（草案征求意见稿）》中的相关内容类似。

此外，《2021 安审办法》还规定了安全审查决定的执行监督。外商投资安全审查决定，由工作机制办公室会同有关部门、地方人民政府监督实施；对附条件通过安全审查的外商投资，可以采取要求提供有关证明材料、现场检查等方式，对附加条件的实施情况进行核实。

## XIII. 违反《2021 安审办法》的后果

《2011 并购安审通知》没有规定关于法律责任的条款，《2021 安审办法》则对此进行了明确规定。根据《2021 安审办法》，对于拒不申报、弄虚作假、不执行附加条件等违规行为，可责令当事人限期处分股权或者资产，亦可将其不良信用记录纳入国家有关信用信息系统并按照国家有关规定实施联合惩戒。我们理解，国家有关信用信息系统可能包括：全国信用信息共享平台“信用中国”网站和企业信用信息公示系统；联合惩戒则可能包括对失信行为

实施行政性、市场性、行业性、社会性约束和惩戒。

6

#### XIV. 小结

《2021 安审办法》总结了近十年来国家安全审查工作的立法和实践，特别是自贸区外商投资

安全审查的做法，对审查机构、审查范围、审查程序、审查决定的执行监督，以及违规行为的惩戒等进行了调整和补充，进一步提高了中国国家安全审查的可操作性和透明度。

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<sup>6</sup> 根据《国务院关于建立完善守信联合激励和失信联合惩戒制度加快推进社会诚信建设的指导意见》（国发〔2016〕33号）以及后续的相关政策规定，中国将健全约束和惩戒失信行为机制，对重点领域和严重失信行为实施联合惩戒，例如：（1）依法依规加强对失信行为的行政性约束和惩戒：包括从严审核行政许可审批项目，从严控制生产许可证发放，限制新增项目审批、核准等，严格限制申请财政性资金项目，限制参与有关公共资源交易活动，限制参与基础设施和公用事业特许经营；对严重失信企业及其法定代表人、主要负责人和对失信行为负有直接责任的注册执业人员等实施市场和行业禁入措施等；（2）加强对失信行为的市场性约束和惩戒：包括对严重失信主体，有关部门和机构应以统一社会信用代码为索引，及时公开披露相关信息，便于市场识别失信行为，防范信用风险；支持征信机构采集严重失信行为信息，纳入信用记录和信用报告；引导商业银行、保险公司等金融机构按照风险定价原则，对严重失信主体提高贷款利率和财产保险费率等；（3）加强对失信行为的行业性约束和惩戒：包括引导行业协会商会完善行业内部信用信息采集、共享机制，将严重失信行为记入会员信用档案；支持行业协会商会按照行业标准、行规、行约等，视情节轻重对失信会员实行警告、行业内通报批评、公开谴责、不予接纳、劝退等惩戒措施；（4）加强对失信行为的社会性约束和惩戒：包括建立完善失信举报制度，鼓励公众举报企业严重失信行为，对举报人信息严格保密；鼓励公正、独立、有条件的社会机构开展失信行为大数据舆情监测，编制发布地区、行业信用分析报告等。