

# JUNHE SPECIAL REPORT



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## NAVIGATING THE NEW FOREIGN INVESTMENT INFORMATION REPORTING SYSTEM

On January 1, 2020, *Foreign Investment Law of the People's Republic of China* (hereinafter referred to as “**Foreign Investment Law**”) and *Implementing Regulations of the Foreign Investment Law of the People's Republic of China* (hereinafter referred to as “**Regulations**”), officially came into effect. They are of epoch-making significance in the field of foreign investment in China in that they bring about a new system that requires pre-entry national treatment plus a Negative List for the administration of foreign investment. In order to better implement such system, *the Measures for Foreign Investment Information Reporting* (hereinafter referred to as the “**Measures**”) also came into effect on the same day.

The purpose of this article is to introduce and interpret the main contents of *the Measures*, and analyze and discuss some of the practical issues that may arise during the information reporting process. We aim to provide guidance for foreign

investors and foreign investment enterprises to better fulfil their information reporting obligations.

### **1. An Introduction to the Newly Established Foreign Investment Information Reporting System**

*The Measures* comprises of six chapters, namely (1) **General Principles**; (2) **Reporting Entities, Contents and Methods**; (3) **Information Sharing, Publication and Correction**; (4) **Supervision and Administration**; (5) **Legal Liabilities** and (6) **Supplementary Provisions**. There are 35 articles in total. In addition to *Foreign Investment Law, Regulations and Measures*, the Ministry of Commerce, the State Administration for Market Regulation and other relevant departments have issued a series of supporting documents, which jointly form the new foreign investment information reporting system. In the first part of this article, we will introduce the laws and regulations related to the new system, as well as their main content.

#### **A. Related Laws and Regulations**

Document	Date of effect	Promulgating Institution	Main Contents
<i>Foreign Investment Law of the People's Republic of China</i>	January 1, 2020	National People's Congress	As a basic law on foreign investment, the <i>Foreign Investment Law</i> clearly lays the foundation for the establishment of a foreign investment information reporting system in Article 34, and stipulates the penalties for violating the information reporting obligations in Article 37.
<i>Implementing Regulations of the Foreign Investment Law of the People's Republic of China</i>	January 1, 2020	State Council	Article 38 of the <i>Regulations</i> further clarifies that foreign investors or foreign investment enterprises shall submit investment information to the relevant commerce department. Meanwhile, Article 39 sets out the principles of the information reporting system: government departments should follow the principles of necessity, efficiency and convenience in collecting information; on the other hand, information submitted by investors or enterprises shall be authentic, accurate and complete.
<i>Measures for Reporting of Foreign Investment Information</i>	January 1, 2020	Ministry of Commerce; State Administration for Market Regulation	<i>The Measures</i> further details and clarifies the rules regarding the system of foreign investment information reporting in <i>Foreign Investment Law</i> and the <i>Regulations</i> and regulates the information reporting in to four

Document	Date of effect	Promulgating Institution	Main Contents
			aspects: reporting, sharing, supervision and penalties.
<i>Announcement on Matters Relating to Foreign Investment Information Reporting (Announcement No. 62 of the Ministry of Commerce)</i>	January 1, 2020	Ministry of Commerce	This provides specific guidance for foreign investors and foreign investment enterprises regarding reporting entities and procedural matters.
<i>Notice by the State Administration for Market Regulation, the Ministry of Commerce and the State Administration of Foreign Exchange on the Proper Handling of the Work of the Reform of "combining multiple reports into one integrated report" for Annual Reports (Guo Shi Jian Xin [2019] No. 238)</i>	December 16, 2019	State Administration for Market Regulation; Ministry of Commerce; State Administration of Foreign Exchange	This Notice is specific to annual reports. It requires the integration of items that were previously reported annually to commerce departments and foreign exchange departments into annual reports to market regulation department, i.e. a new system of "combining multiple reports into one integrated report".
<i>Announcement by the Ministry of Commerce, the State Administration for Market Regulation and the State Administration of Foreign Exchange on the Submission of Annual Reports for 2019 Foreign Investment Information</i>	January 1, 2020	Ministry of Commerce; State Administration for Market Regulation; State Administration of Foreign Exchange	This announcement provides practical guidance on specific matters regarding the 2019 annual foreign investment information reporting, including the timing, method, remedies and progress inquiries for the report.

Document	Date of effect	Promulgating Institution	Main Contents
<i>Reporting</i> ( <i>Announcement No. 72, 2019 of the Ministry of Commerce</i> )			
<i>Notice by State Administration for Market Regulation on Implementing the Foreign Investment Law and the Proper Handling of the Work of the Registration of Foreign-invested Enterprises</i> (Guo Shi Jian Zhu [2019] No. 247)	January 1, 2020	The State Administration for Market Regulation	The State Administration for Market Regulation shall assist the Ministry of Commerce in implementing the foreign investment information reporting system. It also confirmed that submitting foreign investment information reports is not a pre-condition for the registration of foreign investment enterprises.

### B. Reporting Entities of Investment Information

Article 2 of the *Measures* provides that “if foreign investors carry out investment activities in mainland China directly or indirectly, foreign investors or foreign investment enterprises shall submit investment information to the relevant commerce departments in accordance with these

measures”. What kind of natural persons and entities are included in the definition of “foreign investors” and “foreign investment enterprises” here? And who is responsible for the reporting obligations? Based on the analysis of the abovementioned laws, regulations and administrative documents, we have summarized the reporting entities as follows:

Reporting Entity	Analysis
<ul style="list-style-type: none"> <li>A foreign investor who directly invests in the establishment of a company or partnership enterprise, or purchases the equity interest in a non-foreign investment enterprise (including banking, securities, insurance and other financial industries) in mainland China (the “<b>foreign direct investors</b>”)</li> </ul>	According to Article 9 of <i>the Measures</i> and Article 1 of <i>the Announcement on Matters Relating to Foreign Investment Information Reporting</i> (hereinafter referred to as “ <b>Announcement No. 62 of the Ministry of Commerce</b> ”), such foreign direct investors shall submit <b>initial reports</b> .
<ul style="list-style-type: none"> <li>Foreign enterprises (including territories)</li> </ul>	According to Article 1 in <i>Announcement No. 62 of the</i>

Reporting Entity	Analysis
<p>that engage in production and operational activities in mainland China</p> <ul style="list-style-type: none"> <li>Foreign enterprises (including territories) that set up a residential representative office which engages in production and operational activities in Mainland China</li> </ul> <p>(collectively referred to as the “<b>foreign enterprises</b>”)</p>	<p><i>Ministry of Commerce</i>, foreign enterprises shall submit <b>initial reports, change reports and annual reports.</b></p>
<ul style="list-style-type: none"> <li>Investment companies, venture capital enterprises and partnership enterprises with investment as their core business which are set up by foreign investors for reinvestment in mainland China (collectively the “<b>foreign-invested enterprises for reinvestment purposes</b>”)</li> </ul>	<p>According to Article 1 in <i>Announcement No. 62 of the Ministry of Commerce</i>, foreign-invested enterprises for reinvestment purposes shall submit <b>initial reports</b>, the same as foreign direct investors.</p>
<ul style="list-style-type: none"> <li><b>Foreign investment enterprises</b> (including enterprises set up in mainland China by foreign-invested enterprises for reinvestment purposes)</li> </ul>	<p>According to Article 11-14 of the <i>Measures</i>, investment enterprises shall submit <b>change reports, annual reports and dissolution reports.</b></p>
<ul style="list-style-type: none"> <li><b>Ordinary enterprises which are set up in mainland China by foreign investment enterprises via reinvestment</b> (excepting foreign-invested enterprises for reinvestment purposes)</li> </ul>	<p>According to Article 4 in <i>Announcement No. 62 of the Ministry of Commerce</i>, the initial reports, change reports, dissolution reports and annual reports of enterprises set up by foreign investment enterprises (including multi-tier investments) in mainland China shall be shared by the State Administration for Market Regulation with the Ministry of Commerce, and will <b>no longer need to be submitted separately</b> by the relevant enterprises.</p>
<ul style="list-style-type: none"> <li><b>Investors from Hong Kong, Macau and Taiwan, and overseas Chinese</b></li> </ul>	<p>According to Article 33 of the <i>Measures</i>, <b>the Measures shall apply, mutatis mutandis, to</b> investments by investors from Hong Kong, Macau and Taiwan, and overseas Chinese in mainland China.</p>

### C. Types of Investment Information Reports, Annual Reports and Dissolution Reports

According to *the Measures*, there are four types of information reports: **Initial Reports**, **Change**

**Reports**, **Annual Reports** and **Dissolution Reports**. The following table details the reporting entities, reporting times, reporting methods, reporting content, supplementary reports and corrections involved in each report.

Type	Reporting Entity	Time	Method	Content	Supplementary and Corrections	Notes
<b>Initial Report</b>	<ul style="list-style-type: none"> <li>Foreign direct investors</li> <li>Foreign enterprises</li> <li>Foreign-invested enterprises for reinvestment purposes</li> </ul>	<ul style="list-style-type: none"> <li>When registering the establishment of a foreign investment enterprise</li> </ul>	Via the enterprise registration system of the local administration for market regulation	<ul style="list-style-type: none"> <li>The basic information of an enterprise<sup>1</sup></li> <li>Information regarding the investors<sup>2</sup> and their actual controller<sup>3</sup></li> <li>Investment transaction information<sup>4</sup></li> </ul>	<ul style="list-style-type: none"> <li>Report supplementary information or make corrections via the enterprise registration system</li> </ul>	/
<b>Change Report</b>	<ul style="list-style-type: none"> <li>Foreign enterprises</li> <li>Foreign-invested enterprises</li> </ul>	<ul style="list-style-type: none"> <li>Where change registration (record-filing) of the enterprise is required, the</li> </ul>	Via the enterprise registration system of the local administration for market	<ul style="list-style-type: none"> <li>The reporting entity is only required to fill in the information changed in the</li> </ul>	<ul style="list-style-type: none"> <li>Supplementing or correcting via the enterprise registration system</li> </ul>	Where the enterprise makes a resolution on the changes in accordance with the

<sup>1</sup> Includes basic registration information, the type of business, method of investment, information of the industries for encouraging foreign investment, information of employees, etc.

<sup>2</sup> Includes identity information and the type of investor, capital contributions, transfers of equity/property, etc.

<sup>3</sup> Includes identity information and the type of the actual controller, methods of actual control, ultimate actual controller, etc.

<sup>4</sup> Includes basic information and the results of asset appraisals of the merged or acquired entity, related-party transactions, etc.

Type	Reporting Entity	Time	Method	Content	Supplementary and Corrections	Notes
	<p>for reinvestment purposes</p> <ul style="list-style-type: none"> <li>• Ordinary foreign investment enterprises</li> </ul>	<p>reporting entity shall submit the report while registering (record-filing) the change;</p> <ul style="list-style-type: none"> <li>• Where change registration (record-filing) of the enterprise is not required, the reporting entity shall submit the report within 20 working days after such changes take place.</li> </ul>	regulation	initial report		<p>articles of association, <b>the time of the changes</b> shall be the time when the resolution is made; where the conditions precedent to the effectiveness of the changes are otherwise required by the laws and regulations, <b>the time of the change</b> shall be the time when the conditions precedent are satisfied.</p> <p>Listed foreign investment companies or companies listed on the National</p>

Type	Reporting Entity	Time	Method	Content	Supplementary and Corrections	Notes
						<p>Small and Medium-sized Equities Exchange and Quotations are only required to report changes to its investors and their shareholding when <b>the shareholding percentage of foreign investors has experienced changes of over 5% cumulatively or when the status of foreign investors as controlling or relative controlling shareholder</b></p>



Type	Reporting Entity	Time	Method	Content	Supplementary and Corrections	Notes
						<b>s changes.</b>
<b>Annual Report</b>	<ul style="list-style-type: none"> <li>Foreign enterprises</li> <li>Foreign-invested enterprises for reinvestment purposes</li> <li>Ordinary foreign investment enterprises</li> </ul>	<ul style="list-style-type: none"> <li>From January 1 to June 30 each year</li> </ul>	Via the national enterprise credit information disclosure system	<ul style="list-style-type: none"> <li>The basic information of the enterprise <sup>5</sup></li> <li>Information of the investors and their actual controller</li> <li>Information of the business operation, assets and liabilities, etc.<sup>6</sup></li> <li>For investments concerning <i>Special Administrative Measures (Negative List) for Admission of Foreign Investment</i>, the relevant</li> </ul>	<ul style="list-style-type: none"> <li>In case of any errors or omissions in the annual report, supplementary reports or corrections shall be made via the national enterprise credit information disclosure system before June 30;</li> <li>With effect from July 1, where there are errors or omissions in an annual report or failure to submit an</li> </ul>	Foreign investment enterprises shall start submitting annual reports from the year immediately after the year of its set-up.

<sup>5</sup> Mainly includes basic registration information, business scope, license for accessing relevant industries, enterprise attributes, the total workforce at the end of the previous year, salaries of employees, number of valid patents, etc.

<sup>6</sup> Mainly includes audited financial information and data of the previous year.

Type	Reporting Entity	Time	Method	Content	Supplementary and Corrections	Notes
				<p>industry licensing information shall also be submitted.</p>	<p>annual report, the relevant enterprise shall apply to the relevant commerce department to submit supplementary reports or make corrections via the foreign investment information reporting management system</p> <ul style="list-style-type: none"> <li>• An enterprise that has been included in a list of enterprises with abnormal business operations due to failing to fulfill annual reporting obligations shall go</li> </ul>	

Type	Reporting Entity	Time	Method	Content	Supplementary and Corrections	Notes
					through relevant procedures to apply for removal from the list, in accordance with <i>the Interim Regulations on the Disclosure of Enterprise Information</i> , <sup>7</sup> after fulfilling all relevant obligations.	
<b>Dissolution Report</b>	<ul style="list-style-type: none"> <li>• Foreign-invested enterprises for reinvestment purposes</li> <li>• Ordinary foreign investment enterprises</li> </ul>	/	/	<ul style="list-style-type: none"> <li>• The report of dissolution shall be deemed as submitted after <b>the enterprise dissolution registration</b> has been completed or the change registration of the enterprise</li> </ul>	/	/

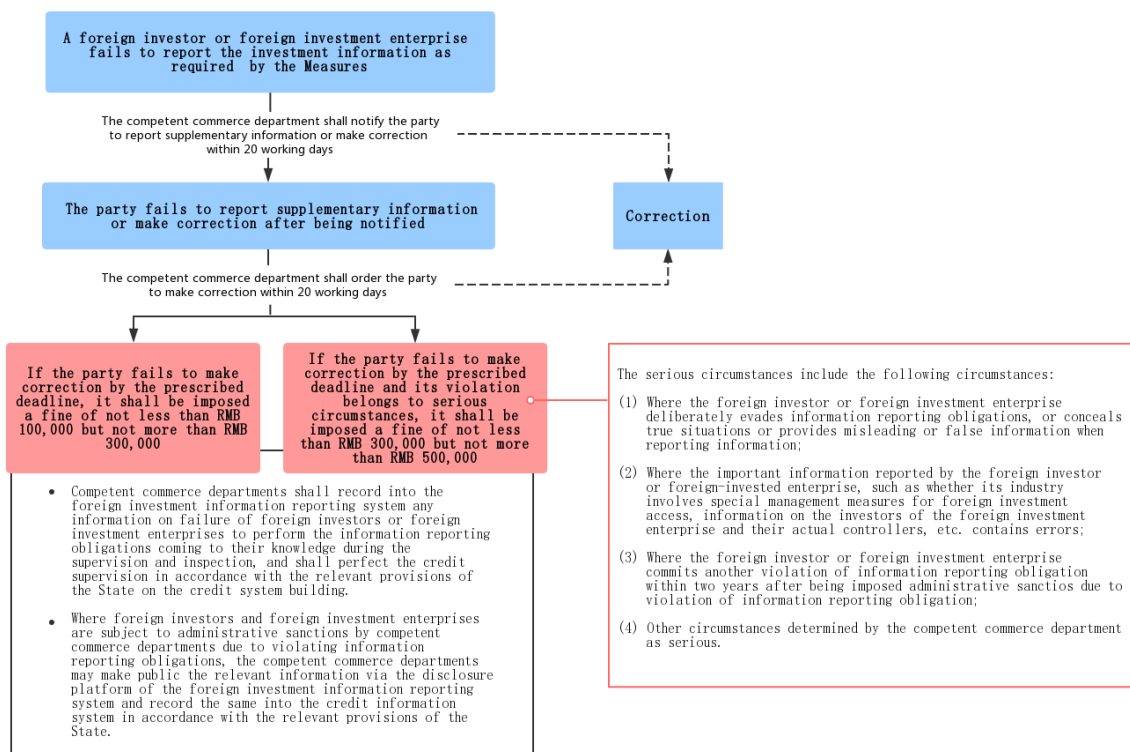
<sup>7</sup> The applicant shall submit the application form, originals of its business license, photocopies of the duplicates of its business license sealed by affixing the official seal, the originals and duplicates of resident identity cards of the legal representative (or the principal), supporting materials for the application and other documents to the market regulatory departments, and the department will decide whether or not to grant removal from the list.

Type	Reporting Entity	Time	Method	Content	Supplementary and Corrections	Notes
				<p>transferring to become wholly owned domestically is completed, and the reporting entity does not need to submit it separately</p>		

**D. Penalties for Violating Information Reporting Obligations**

According to *the Measures*, the reporting entity shall report investment information in a **timely, authentic, accurate and complete** manner, without any false or misleading information or omission of important information. At the same time, the reporting entity also has the obligation to supplement and correct the report where

necessary. Meanwhile, the relevant commerce department may carry out supervision and inspection measures based on the complaints and suggestions of the relevant departments or authorities. For ease of understanding, the legal consequences that one may face in different stages and for different degrees of violation when failing to perform the information reporting obligations correctly are shown as follows:



Compared with the draft of *the Measures*<sup>8</sup>, the final *Measures* provides more opportunities and longer times for the correction of the violation of the information reporting obligations. For example, if a foreign investor or foreign investment enterprise fails to report the investment information as required by *the Measures*, there is an added procedure that the reporting entity shall be notified by the relevant commerce departments to make supplementary reports or corrections within 20 working days; if it fails to do so within the above time limit, another time limit kicks in for the commerce department to further order it to correct. The time limit has also been extended from the 15 days specified in the draft version to 20 working days in the final version. Additionally, the

administrative penalty of warning has been removed from the final version. These "lenient" administrative penalty procedures may have taken into account the fact that the foreign investment information reporting system is not a strict pre-approval or filing procedure and it may also be designed to provide a buffer for foreign investors and foreign investment enterprises to adapt to this new system.

## 2. Interpretation of the Key Features regarding the Measures

The following is a summary of the key features regarding *the Measures* to help readers grasp the key points that foreign investors and foreign investment enterprises need to pay attention to in fulfilling their information reporting obligations.

### A. Consolidating and Optimizing the

<sup>8</sup> See the Notice by the Ministry of Commerce on Soliciting Public Opinions on the Measures for Foreign Investment Information Reporting (Draft for Comments) on November 8, 2019.

## Processes for Information Reporting

According to *the Joint Press Conference by the Ministry of Commerce and State Administration for Market Regulation on Issues Concerning the Measures*, the initial reports, change reports, and dissolution reports by foreign investments shall be carried out **simultaneously** with the set-up, change and dissolution registration of the administration for market regulation, and the annual reports shall be submitted at the same time and through the same channels as the annual reports of the administration for market regulation. **Foreign investors and foreign investment enterprises do not need to submit the same information to two departments separately**<sup>9</sup>. In order to facilitate reporting entities in submitting the reports, the foreign investment information reporting system of many provinces and cities has been embedded in the enterprise registration system. Reporting entities can choose to use either the website of the local administration for market regulation or the website of the government service to register on the internet and report information regarding foreign investment in a "one-stop" manner. Some provinces and cities still retain independent websites for reporting foreign investment information for reporting entities to use<sup>10</sup>. As the enterprise registration system is designed and maintained by local administration for market regulation, there are some differences in the operation of the different local systems in

<sup>9</sup> See *Press Conference by Ministry of Commerce and State Administration for Market Regulation Officials on Issues Concerning the Measures*: <http://www.mofcom.gov.cn/article/ae/sjjd/202001/20200102927607.shtml>.

<sup>10</sup> We noticed that the system of foreign investment information reporting has been embedded in the enterprise registration systems in Beijing, Sichuan, Guangdong; some provinces and cities (i.e. Shanghai) still retain independent websites for reporting.

practice. However, there is no need to submit or upload materials for foreign investment information reporting, and the registration authority does not review the report. The reporting entity can simply follow the instructions, log into the system, check the boxes and enter the relevant information.

## B. Ordinary Foreign Investment Enterprises do not need to Submit Additional Information Reports for Domestic Reinvestment to set up Enterprises

According to Article 28 of *the Measures*, if a foreign investment enterprise (except for foreign-invested enterprises for reinvestment purposes) invests in the set-up of an enterprise (including multi-layer investments) in mainland China, the relevant information shall be forwarded to the relevant commerce department by the administration for market regulation after the registration and submission of the annual report information to the administration for market regulation, and the above-mentioned enterprise does not need to submit a separate information report. We understand that this means in the case of reinvestment by ordinary foreign investment enterprises, if the information in the initial report (the basic information of the enterprise, information of the investors and their actual controllers, information of investment transactions, etc.) submitted by its upper-layer foreign investors has not changed, the ordinary foreign investment enterprises are not required to submit the change report.

## C. Disclosure Requirements for Actual

## Controllers

According to *the Measures*, both **the initial report** and **the annual report** require the submission of information regarding investors and their actual controllers. In the sample form of the initial report and the change report by foreign investments (hereinafter referred to as the "**Sample Report Form**") attached to *Announcement No. 62 of the Ministry of Commerce*, the definition of actual controllers and their control methods are also elaborated by way of information listing.

In the Sample Report Form, the actual controllers are grouped into the following categories:

- Foreign listed companies
- Foreign natural persons
- Foreign government agencies (including government foundations)
- International organizations
- Domestic listed companies
- Domestic natural persons
- Domestic state-owned / collective enterprises
- Others

In addition, the Sample Report Form also specifically lists the following three types of control methods:

1. Directly or indirectly holding more than 50% of the shares, equity, property shares, voting rights or other similar rights and interests of the enterprise;

2. Directly or indirectly holding less than 50% of the shares, equity, property shares, voting rights or other similar rights and interests of the enterprise, however:

- (1) having the right to directly or indirectly appoint more than half of the members of the board of directors or similar decision-making bodies of the enterprise;
  - (2) having the ability to ensure that its nominees have more than half of the seats on the board of directors or similar decision-making bodies of the enterprise; or
  - (3) holding enough voting rights to have a significant impact on the resolutions of the board of shareholders, the shareholders assembly or the board of directors and other decision-making bodies.
3. Being able to determine the operation, finance, personnel or technology of the enterprise through contracts, trusts or other means.

The Ministry of Commerce and the State Administration for Market Regulation further clarified in their response<sup>11</sup> to the relevant questions about *the Measures* that foreign investment enterprises reinvesting (this includes multi-tier investments) in China are also within the scope of foreign investment. In the past, there have been many areas that have adopted the policy of

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<sup>11</sup> Please refer to the questions answered by the heads of the relevant departments and bureaus of the Ministry of Commerce and the State Administration for Market Regulations in the "*Measures for Foreign Investment Information Reporting*": <http://www.mofcom.gov.cn/article/difang/202001/20200102928338.shtml>.

identifying the ultimate actual controller for foreign investment. For example, when reviewing the proportion of foreign investment of enterprises applying for ICP licenses in the fields of value-added telecommunication services, the mainstream opinion of the relevant departments is that the review should identify the ultimate actual controller. Now, under the framework of *Foreign Investment Law* and *the Measures*, the foreign investment component of domestically reinvested enterprises by foreign investment enterprises in all fields will be reviewed and the ultimate actual controller will be identified. Therefore, under the foreign investment information reporting system, no matter how many tiers of enterprises the foreign investors set up in China, they should truthfully report the investors and the ultimate actual controller of the investors. This is also reflected in the online foreign investment information reporting systems in different provinces and cities.

#### **D. Remedial Measures for Failing to Submit Annual Reports on Time**

According to Article 14 of *the Measures*, the timeframe for foreign investment enterprises to submit annual reports is from January 1 to June 30 of each year. According to *the Announcement of the Ministry of Commerce, the State Administration for Market Regulation and the State Administration of Foreign Exchange on Carrying out the Annual Report on Foreign Investment Information in 2019*, from July 1, 2020, if there is any failure, error or omission in the annual report, the foreign investment enterprise shall apply to the relevant commerce department for a supplementary report or correction through the foreign investment

information report management system. That is to say, even after July 1, there still exists certain remedial channels. However, considering that the *Announcement* also stipulates that **if an enterprise is included in the list of abnormal businesses due to its failure to fulfill the obligation of annual reporting, it shall go through the relevant procedures in accordance with the Provisions of the Interim Regulations on Enterprise Information Disclosure** (see part I, table 3 of this article). Therefore, we suggest that foreign investment enterprises should ensure to submit the annual reports before June 30 each year.

#### **E. Attention should be paid to the Adverse Consequences of a Violation of the Information Reporting Obligations**

In addition to the administrative penalties introduced in the first part of this article, according to *the Measures*, violations of information reporting obligations will be recorded in the foreign investment information reporting system, and those who are subject to administrative penalties will also be publicized on the disclosure platform of the foreign investment information reporting system, and included in the credit information system in accordance with the relevant provisions. According to *the Interim Regulations on Enterprise Information Disclosure*, enterprise credit information will be considered as an important factor **in government procurement, project tendering and bidding, state-owned land use right grants** and others, and enterprises listed on an abnormal operation or serious violation list **will be restricted or banned** in accordance with the



law. In addition, due to the wide usage of the enterprise credit information system, enterprises that are subject to administrative penalties for violating information reporting obligations may also be negatively affected in bidding, financing and trading. Therefore, we suggest that foreign investors and foreign investment enterprises attach great importance to and strictly fulfill the obligations of information reporting.

Additionally, it should be noted that Article 21 of *the Measures* clearly stipulates that any citizen, legal person or other organization may report to the relevant commerce department any violation of *the Measures* by foreign investors or foreign investment enterprises. In this environment of all-round societal supervision, the risk becomes even greater if one intends to circumvent or superficially perform its duty of information reporting.

#### **F. Effective Date and Exceptions of the Measures**

*The Measures* came into force on January 1, 2020. Based on the principle of non-retroactivity and pursuant to paragraph 6 of *Announcement No. 62 of the Ministry of Commerce*, *the Measures* is only applicable to foreign investment enterprises established or changed after the effective date. However, *Announcement No. 62 of the Ministry of Commerce* has made transitional provisions on the following situations: if a foreign investment enterprise (that does not concern *Special Administrative Measures (Negative List) for Admission of Foreign Investment*) has completed the establishment registration at the administration

for market regulation before December 31, 2019, or the matters under the provisions of Article 6 and Article 7 of the *Provisional Measures on Administration of Filing for Establishment and Change of Foreign Investment Enterprises* (now repealed) have changed, but the establishment filing or change filing of foreign investment enterprises has not yet been submitted, then it could still be filed via “the comprehensive foreign investment management system” before January 31, 2020. That is to say, if there is a change before December 31, 2019, but the change is not filed in accordance with the old procedures before January 31, 2020, then the change report needs to be submitted in accordance with *the Measures* (since the filing of foreign investment enterprises is a precondition of the establishment registration before December 31, 2019, the exception will not occur in the establishment registration scenario).

### **3. Practical Issues to be Further Clarified**

Although there are detailed instructions as to how foreign investors and foreign investment enterprises can fulfill their obligations of information reporting in *the Measures* and other relevant administrative documents, we believe that there are still some practical issues relating to information reporting that need further guidance from the relevant regulatory authorities during the implementation of *the Measures*. Below are a few practical issues that we believe need to be clarified:

#### **A. The Relationship between Information Reporting and Enterprise Registration**

Although the State Administration for Market Regulation has repeatedly stressed in the *Notice of*

*the State Administration for Market Regulation on Implementation of the Foreign Investment Law for Proper Handling of Foreign Investment Enterprise Registration* and reaffirmed in its answers to the questions from reporters that **the submission of foreign investment information report is not a precondition for the registration of enterprises with foreign investment**, we have noticed that in practice, in some provinces and cities, one can only submit an online registration after completing the foreign investment information reporting procedures, before going further to the relevant administration for market regulation for an on the spot enterprise registration<sup>12</sup>. Subjectively, local government departments may intend to facilitate foreign investors and foreign investment enterprises in their process of reporting, however in reality, it is not completely consistent with the legislative purpose of placing information reporting as a matter for post-event supervision. We suggest that the relevant local administration for market regulation should improve the enterprise registration system as soon as possible, to bring it in line with the purpose of the legislation and effectively reduce the burden on enterprises.

#### **B. The Scope of Information Disclosure**

According to Article 18 of *the Measures*, investment information submitted by foreign investors or foreign investment enterprises **which should be disclosed or agreed to by foreign investors or foreign investment enterprises to disclose according to the Provisional**

**Regulations on Enterprise Information Disclosure**, will be disclosed to the public through the national enterprise credit information disclosure system and foreign investment information reporting system. However, it is worth noting that according to the *Notice of the State Administration for Market Regulation, the Ministry of Commerce and the State Administration of Foreign Exchange on Properly Handling the Work of the reform of "combining multiple reports into one integrated report" for the Annual Reports*, **the items in the annual reports of the relevant commercial department and the foreign exchange management department are added** on top of the existing items in the annual reports submitted to the market regulation department, but **the items added in annual reports should not be disclosed to the public** (which seems inconsistent with the provisions of *the Measures*). Therefore, we suggest that further clarification be made as to which contents in the foreign investment information report should (or may) be disclosed, in accordance with *the Measures* and *the Provisional Regulations on Enterprise Information Disclosure*.

#### **C. The Scope of Foreign Enterprises (including territories) that Engage in Production and Operational Activities in Mainland China that are Obligated to Submit Information Reports**

According to the first paragraph of *Announcement No. 62 of the Ministry of Commerce*, apart from the set-up of companies and partnerships by foreign investors, if foreign enterprises (including territories) engage in production and operational activities or

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<sup>12</sup> For example, when setting up a foreign investment enterprise in Shanghai, investors need to submit information reports online and record a code generated by the system, and inform the administration for market supervision the code when applying for registration.

set up a permanent representative organization in China, it shall also submit information reports. **How to accurately understand the scope of “foreign enterprises (including territories) engaging in production and operational activities in China”** is key to determine whether the relevant foreign enterprises (including territories) have an obligation of information reporting.

According to *the Administrative Measures on the Registration of Enterprises of Foreign Countries (including territories) Engaging in Production and Operational Activities in mainland China* (revised in 2016, hereinafter referred to as “**the Administrative Measures of Foreign Enterprises Engaging in Operational Activities in China**”), registration is required for foreign enterprises (including territories) to engage in the following production and business activities in China:

1. The exploration and exploitation of on-shore and off-shore oil and other mineral resources;
2. contracting for projects such as the construction or renovation of housing or civil projects or the installation of lines, pipelines or equipment;
3. contracting for or accepting commission for the operation and management of a foreign investment enterprise;
4. the establishment of a foreign bank branch in China;
5. other production and operational activities permitted by the State.

The issuing authority of *the Administrative Measures of Foreign Enterprises Engaging in*

*Operational Activities in China* is the State Administration for Industry and Commerce (now the State Administration for Market Regulation), which is different from the issuing authority of *Announcement No. 62 of the Ministry of Commerce* which is the Ministry of Commerce. Therefore, whether the scope of "production and operational activities" of foreign enterprises (including territories) mentioned in *Announcement No. 62 of the Ministry of Commerce* should be interpreted the same way as in *the Administrative Measures of Foreign Enterprises Engaging in Operational Activities in China* still needs to be clarified by the commerce department.

#### **D. The Identification of Actual Controllers**

In the Sample Report Form for foreign investments initial and change reports attached to *Announcement No. 62 of the Ministry of Commerce*, the actual controller is defined by listing the control methods (see Item C of Part II above for more details), but uncertainties still exist in the determination of the actual controller in certain scenarios in practice, such as: (1) for foreign investors who are overseas listed companies, is it enough to trace it to such listed companies or does it need to be traced all the way to the actual controller of such listed companies? (2) in scenarios where the voting rights of a company are decentralized without a controlling shareholder or even a relative controlling shareholder, or where the minority shareholders “acted in concert” to control the company, how should we ascertain the information for such actual controllers? These problems may need to be specifically addressed by the relevant commerce departments in future

practice.

### **E. Assets Appraisals in Mergers and Acquisitions for the Set-up of Foreign Investment Enterprises**

According to the Sample Report Form, foreign investors that set up foreign investment enterprises via merger and acquisition need to provide the basic information of the transaction, including the evaluation of the equity interest/asset value in question. We understand that this requirement is based on Article 14 of *the Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors* ([2006] No. 10) (hereinafter referred to as "**Decree 10**") issued in 2006 by the Ministry of Commerce. The parties to the merger and acquisition shall determine the transaction price on the basis of the appraisal results of the assets appraisal institution on the equity interest to be transferred or the assets to be sold. However, for merger and acquisition transactions between domestic enterprises, except for those involving state-owned assets, there is no mandatory appraisal requirement for the equity interest or assets to be acquired.

According to the principle of "**equal treatment of foreign investment**" (except investment within the scope of the Negative List) set forth by *the Foreign Investment Law*, and the provision of Article 24, that unless the laws and administrative regulations stipulate otherwise, **the legitimate rights and interests of foreign investment enterprises shall not be impaired, their obligations shall not be increased, and the conditions for market access and exit shall not be set.** Obviously, after

the implementation of *the Foreign Investment Law*, if there is no justification based on the laws or administrative regulations, the relevant provisions in Decree 10 (only a departmental rule) which distinguish between domestic and foreign investment shall no longer be effective. Therefore, we suggest that the relevant commerce department clarify the concrete scenarios which require the submission of appraisal reports in the information report (for example, whether it is only applicable to the acquisition of state-owned equity interest or assets), so as to avoid increasing the unnecessary transaction costs to foreign investors. In addition, we notice that the financial audit report numbers also need to be provided in the column of "value appraisal" in the Sample Report Form. Since the definition of asset appraisal and audit is different<sup>13</sup>, does the "financial audit report" here refer to the asset appraisal report? This issue needs to be further clarified.

### **F. Whether Foreign Enterprises Engaging in Production and Operational Activities in China Need to Submit Dissolution Reports**

According to *Announcement No. 62 of the Ministry of Commerce*, foreign enterprises engaging in production and operational activities in China need

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<sup>13</sup> According to *the Law of the People's Republic of China on Assets Appraisal*, asset appraisal shall mean the professional services provided by appraisal organizations and their appraisal professionals as entrusted for the assessment and appraisal of immovable, movable, intangible assets, enterprise value, asset losses or other economic interests and the issuance of an appraisal report thereto; according to the definition of the China Audit Society, audit refers to the act of independently examining the accounting records and supervising the authenticity, legality and efficiency of financial revenues and expenditures.

to submit initial reports, change reports and annual reports. However, for the dissolution report, the announcement only stipulates that the relevant information of foreign investors or foreign investment enterprises does not need to be submitted separately; instead it shall be shared by the State Administration for Market Regulation with the Ministry of Commerce. According to *the Administrative Regulations on the Registration of Representative Offices of Foreign Enterprises* and *the Administrative Measures of Foreign Enterprises Engaging in Operational Activities in China*, foreign enterprises engaging in production and operational activities in China need to apply for dissolution for the cancellation of representative offices or the expiry of business licenses, etc. *The Measures* and other administrative documents don't specify whether the dissolution information herein is also directly forwarded to the relevant commerce department by the market regulation department, or should be submitted separately by the relevant foreign enterprise. Therefore, we suggest that the relevant department make further clarification in this regard.

#### 4. Conclusion

The foreign investment information reporting system is an important part of China's latest foreign investment legal system, and on the one hand greatly simplifies procedures and lessens the time constraints for foreign investment to enter China, but on the other hand, it raises the standards for foreign investors and foreign investment enterprises for information disclosure with regard to their investment, production and operational activities in China, particularly in terms of punctuality, authenticity, accuracy and completeness; the failing of which will lead to severe risks both in terms of administrative penalties and corporate credit worthiness. Foreign investors and foreign investment enterprises need to attach great importance to these new regulatory changes and actively adapt to and comply with them. At the same time, there are practical issues that need to be further clarified in the implementation of the foreign investment information reporting system. It would be helpful if the relevant regulatory authorities provide timely and specific advice for foreign investors and foreign investment enterprises to fulfill their information reporting obligations accurately and smoothly.

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Legal advice or opinion of Jun He Law Offices. For more information, please visit our official website at [www.junhe.com](http://www.junhe.com) or our WeChat public account “君合法律评论”/WeChat account “JUNHE\_LegalUpdates”



## 外商投资信息报告填报导航

2020年3月10日

2020年1月1日，在中国外商投资领域具有划时代重要意义的《中华人民共和国外商投资法》（以下简称“《外商投资法》”）和《中华人民共和国外商投资法实施条例》（以下简称“《实施条例》”）正式生效实施。为配套落实《外商投资法》和《实施条例》对外商投资实行准入前国民待遇加负面清单的管理制度，《外商投资信息报告办法》（以下简称“《办法》”）也于当日同步实施。本文旨在梳理和解读《办法》主要内容，分析和讨论填报过程中可能遇到的实务问题，为外国投资者和外商投资企业进行信息填报提供指引。

《办法》分为六章，包括（1）总则，（2）报告主体、内容与方式，（3）信息共享、公示与更正，（4）监督管理，（5）法律责任和（6）附则，共三十五条。除《外商投资法》、《实施条例》和《办法》外，商务部、市场监管总局等政府部门还发布了一系列涉及外商投资信息报告的配套文件，共同初步构成外商投资信息报告制度体系。在本文第一部分，我们对截至目前涉及外商投资信息报告制度的相关法律法规及其主要内容进行梳理。

### （一）主要法律法规依据

#### 一、外商投资信息报告制度的主要内容

名称	生效日期	制定机关	主要内容
《中华人民共和国外商投资法》	2020年1月1日	全国人大	《外商投资法》作为外商投资领域的基础性法律，在第三十四条中明确规定我国建立外商投资信息报告制度。同时在第三十七条规定了违反外商投资信息报告制度的法律责任。
《中华人民共和国外商投资法实施条例》	2020年1月1日	国务院	《实施条例》在第三十八条中再次明确，外国投资者或者外商投资企业应当向商务主管部门报送投资信息。同时在第三十九条中确立了信息报告制度的原则：政府部门收集信息应当遵循必要、高效、便利原则；投资者和企业报送信息应当真实、准确、完整。
《外商投资信息报告办法》	2020年1月1日	商务部、市场监管总局	《办法》进一步细化和明确了《外商投资法》及《实施条例》针对外

名称	生效日期	制定机关	主要内容
			商投资信息报告制度的有关规定，从报告、共享、监管和责任四个方面规范了外商投资信息报告工作。
《关于外商投资信息报告有关事项的公告》(商务部公告 2019 年第 62 号)	2020 年 1 月 1 日	商务部	主要针对信息报告的报告义务主体和程序性问题，为外国投资者以及外商投资企业提供具体指导。
《市场监管总局、商务部、外汇局关于做好年报“多报合一”改革有关工作的通知》(国市监信〔2019〕238 号)	2019 年 12 月 16 日	市场监管总局、商务部、外汇局	主要针对企业年报信息，要求年报内容在现有向市场监管部门报送年报信息的基础上，增加商务主管部门和外汇管理部门年报事项，即实行“多报合一”制度。
《商务部、市场监管总局、外汇局关于开展 2019 年度外商投资信息报告年度报告的公告》(商务部公告 2019 年第 72 号)	2020 年 1 月 1 日	商务部、市场监管总局、外汇局	主要针对 2019 年度外商投资信息报告年度报告具体事项，包括报告时间、报告方式、补救方法、报告进度查询等提供操作指导。
《市场监管总局关于贯彻落实<外商投资法>做好外商投资企业登记注册工作的通知》(国市监注〔2019〕247 号)	2020 年 1 月 1 日	市场监管总局	市场监管总局配合商务部门落实外商投资信息报告制度，明确提交外商投资信息报告不是办理外商投资企业登记注册的必要条件。

## (二) 投资信息的报告主体

《办法》第二条规定：“外国投资者直接或者间接在中国境内进行投资活动，应由外国投资者或者外商投资企业根据本办法向商务主管部门报

送投资信息。”这里的“外国投资者”以及“外商投资企业”具体包括哪些自然人和机构，各项报送义务又具体由谁来承担？通过对前述法律法规以及规范性文件的梳理，我们做出以下总结：

报告主体	解读
<ul style="list-style-type: none"> <li>直接在中国境内投资设立公司、合伙企业、股权并购境内非外商投资企业（上述包括银行、证券、保险等金融领域）的外国投资者（“外国直接投资者”）</li> </ul>	根据《办法》第九条和《关于外商投资信息报告有关事项的公告》（商务部公告 2019 年第 62 号）（下称“《商务部第 62 号公告》”）第一项，此类外国投资者应提交 <b>初始报告</b> 。
<ul style="list-style-type: none"> <li>在中国境内从事生产经营活动的外国（地区）企业</li> <li>在中国境内设立从事生产经营活动的常驻代表机构等的外国（地区）企业</li> </ul>	根据《商务部第 62 号公告》第一项，左侧两类外国（地区）企业应提交 <b>初始报告、变更报告和年度报告</b> 。

报告主体	解读
(合称“外国企业”)	
• 在中国境内进行 <b>再投资设立企业</b> 的外商投资举办的投资性公司、创业投资企业 and 以投资为主要业务的合伙企业(合称“ <b>外商投资性企业</b> ”)	根据《商务部第 62 号公告》第一项,外商投资性企业在中国境内投资设立企业的,参照外国直接投资者,应提交 <b>初始报告</b> 。
• <b>外商投资企业</b> (包括外商投资性企业在境内设立的企业)	根据《办法》第十一至十四条,外商投资企业应提交 <b>变更报告、年度报告和注销报告</b> 。
• 在中国境内进行 <b>再投资设立企业的普通外商投资企业</b> (外商投资性企业除外)	根据《商务部第 62 号公告》第四项,外商投资企业境内投资(含多层次投资)的企业的初始报告、变更报告、注销报告和年度报告,由市场监管总局向商务部共享, <b>企业无需另行报送</b> 。
• <b>港澳台投资者和华侨投资者</b>	根据《办法》第三十三条,香港特别行政区、澳门特别行政区、台湾地区投资者以及定居在国外的中国公民在大陆境内的投资 <b>参照适用《办法》</b> 。

### (三) 投资信息的报告类型

内容和报告方式,我们将每种报告涉及的报告义务人、报告时间、报告方式、报告内容、补报与更正等内容介绍如下。

《办法》中规定了**初始报告、变更报告、年度报告和注销报告**四种报告类型及相对应的报告

类型	报告义务人	报告时间	报告方式	报告内容	补报与更正	备注
<b>初始报告</b>	<ul style="list-style-type: none"> <li>•外国直接投资者</li> <li>•外国企业</li> <li>•外商投资性企业</li> </ul>	•办理外商投资企业设立登记时	•通过各地市场监管部门的企业登记系统	<ul style="list-style-type: none"> <li>•企业基本信息<sup>14</sup></li> <li>•投资者<sup>15</sup>及其实际控制人信息<sup>16</sup></li> <li>•投资交易信息等<sup>17</sup></li> </ul>	通过企业登记系统进行补报或更正	/
<b>变更报告</b>	<ul style="list-style-type: none"> <li>•外国企业</li> <li>•外商投资性企业</li> </ul>	•涉及企业变更登记(备案)的,于办理企业变更登记	•通过各地市场监管部门的企业登记系统报告	•仅填报初始报告中发生变更的信息	通过企业登记系统进行补报或更正	<ul style="list-style-type: none"> <li>•企业根据章程对变更事项作出决议的,以<b>作出决议的时间为变更事项的发生时间</b>;法律法规对变更事项的生效</li> </ul>

<sup>14</sup> 包括工商登记信息、业务/合伙企业/经营活动类型、投资方式、是否属于鼓励外商投资项目、人员信息等信息。

<sup>15</sup> 包括投资者身份信息、出资情况、股权/财产份额转让情况、投资者类型等信息。

<sup>16</sup> 包括实际控制人身份信息及类别、实际控制方式、是否为最终实际控制人等信息。

<sup>17</sup> 包括被并购方情况、被并购股权/资产价值评估情况、是否涉及关联并购等信息。



类型	报告义务人	报告时间	报告方式	报告内容	补报与更正	备注
	<ul style="list-style-type: none"> <li>•普通外商投资企业</li> </ul>	<ul style="list-style-type: none"> <li>•（备案）时</li> <li>•不涉及企业变更登记（备案）的，于变更事项发生后20个工作日内</li> </ul>				<p>条件另有要求的，以<b>满足相应要求的时间为变更事项的发生时间</b>。</p> <ul style="list-style-type: none"> <li>• 外商投资的上市公司及在全国中小企业股份转让系统挂牌的公司，<b>仅在外国投资者持股比例变化<b>累计超过5%</b>或者引起<b>外方控股、相对控股地位发生变化</b>时，报告投资者及其所持股份变更信息。</b></li> </ul>
年度报告	<ul style="list-style-type: none"> <li>•外国企业</li> <li>•外商投资性企业</li> <li>•普通外商投资企业</li> </ul>	<ul style="list-style-type: none"> <li>•每年1月1日至6月30日期间</li> </ul>	<ul style="list-style-type: none"> <li>•通过国家企业信用信息公示系统</li> </ul>	<ul style="list-style-type: none"> <li>•企业基本信息<sup>18</sup></li> <li>•投资者及其实际控制人信息</li> <li>•企业经营和资产负债等信息<sup>19</sup></li> <li>•涉及外商投资准入特别管理措施的，还应当报送获得相关行业许可信息</li> </ul>	<ul style="list-style-type: none"> <li>•6月30日前，年度报告存在错报、漏报的，应通过国家企业信用信息公示系统进行补报或更正；</li> <li>•7月1日起，年度报告存在未报、错报、漏报的，应向商务主管部门申请，通过外商投资信息报告管理系统进行补报或更正；</li> <li>•因未履行年度报告义务被列入经营异常名录的，</li> </ul>	<ul style="list-style-type: none"> <li>•当年设立的外商投资企业，自下一年起报送年度报告。</li> </ul>

<sup>18</sup> 主要包括基本注册信息、经营范围、行业许可情况、企业属性、年末从业人数、本年职工薪酬、有效发明专利数等信息。

<sup>19</sup> 主要包括经过审计的上一年度财务信息和数据。

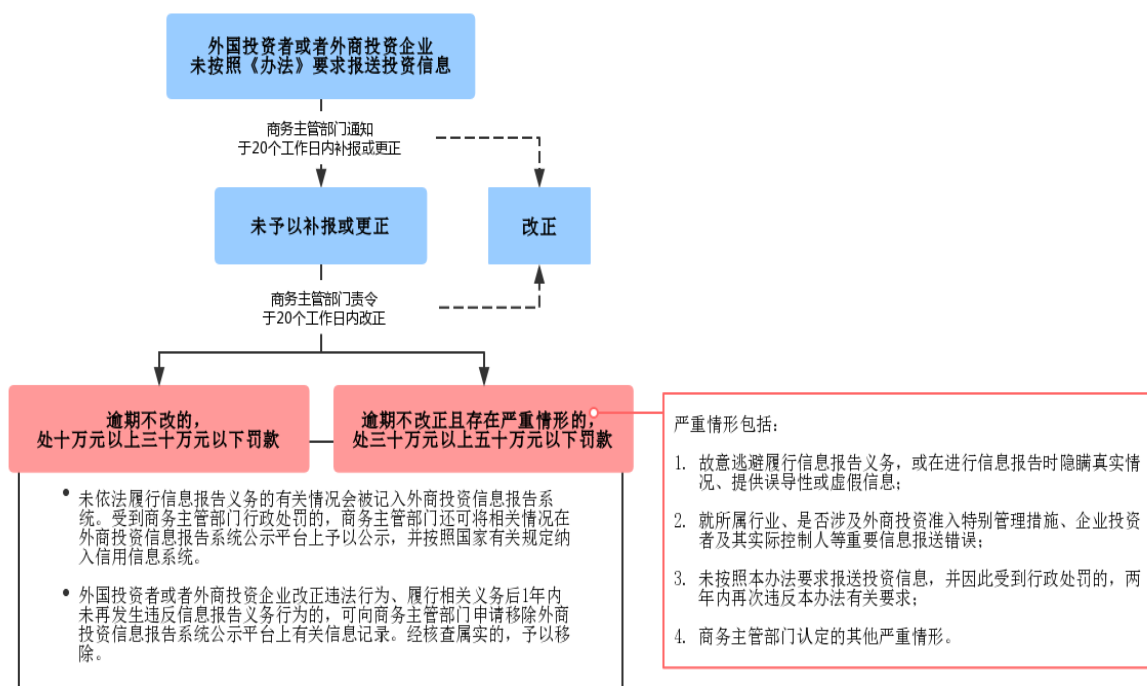
类型	报告义务人	报告时间	报告方式	报告内容	补报与更正	备注
					还应根据《企业信息公示暂行条例》的规定,履行义务后向市场监管部门申请办理移出经营异常名录的手续 <sup>20</sup> 。	
注销报告	<ul style="list-style-type: none"> <li>•外商投资性企业</li> <li>•普通外商投资企业</li> </ul>	/	/	<ul style="list-style-type: none"> <li>•在办理企业注销登记或者<b>转为内资</b>的变更登记后视同已提交注销报告,无需另行报送</li> </ul>	/	/

<sup>20</sup> 需向市场监管部门提交经营异常名录申请表、营业执照原件、加盖公章的营业执照复印件、法定代表人(负责人)或被委托人身份证(件)原件及复印件、申请移出经营异常名录的证明材料等,由市场监管部门决定是否移出。

#### （四）未正确履行信息报告义务的法律后果

根据《办法》规定，报告义务人报告投资信息应当及时、真实、准确、完整，不得有虚假或误导性陈述，也不得遗漏重要信息。同时，报告

义务人还负有补报和更正的义务。商务主管部门可以依举报、依有关部门建议或依职权开展监督检查。为方便理解，我们对出现未正确履行信息报告义务时，根据不同阶段和不同违法程度所可能面临的法律后果图示如下。



与《办法》的公开征求意见稿<sup>21</sup>相比，《办法》最终稿中对于违反信息报告义务给予了更多的改正机会和改正时间。例如，外国投资者或者外商投资企业未按照《办法》要求报送信息的，增加了由商务部门通知其在 20 个工作日内补报或更正这一环节；逾期不改的，商务部门再责令其改正的期限也由征求意见稿中规定的 15 日延长为 20 个工作日，且取消了警告这一行政处罚。该等具有“柔软度”的行政处罚程序规定可能是考虑到外商投资信息报告制度并非严格的前置审批或备案程序，同时也可能旨在为外国投资者和外商投资企业适应这一全新的制度给予一定缓冲。

## 二、《办法》所涉重点问题解读

以下是我们对《办法》所涉的一些重点问题的总结，以帮助读者把握外国投资者和外商投资企业履行信息报告义务中所需注意的重点问题。

### （一）合并和优化信息报送流程

根据商务部、市场监管总局就《办法》相关问题的答记者问，外商投资初始、变更、注销报告与市场监管部门的设立、变更、注销登记同步进行，年度报告与市场监管部门年报的报送时间和渠道相同，外国投资者或者外商投资企业无需向两部门分别报送投资信息。<sup>22</sup>为方便外国投资者和外商投资企业报送信息，许多省市的外商投

<sup>21</sup> 参见 2019 年 11 月 8 日商务部关于《外商投资信息报告办法（征求意见稿）》公开征求意见的通知。

<sup>22</sup> 参见商务部、市场监管总局有关司局负责人就《外商投资信息报告办法》有关问题答记者问：<http://www.mofcom.gov.cn/article/ae/sjld/202001/20200102927607.shtml>。

资信息报告系统已嵌入企业登记系统。报告主体可通过当地市场监管局网站或政务服务网，选择网上办理企业登记业务并“一站式”填报外商投资相关信息；还有一些省市同时仍保留了独立的外商投资信息报告网站，供报告主体选择使用。<sup>23</sup>由于企业登记系统由地方市场监管部门设计改造，实践中各地系统的操作方法存在一定差异，但外商投资信息报告流程中不需要提交或上传材料，登记机关也不对报告进行审查，填报人按照提示登陆系统，勾选或输入相关信息即可。

## （二）普通外商投资企业境内再投资设立企业无需另行提交信息报告

根据《办法》第二十八条，外商投资企业（外商投资性企业除外）在中国境内投资（含多层次投资）设立企业的，在向市场监管部门办理登记备案、报送年报信息后，相关信息由市场监管部门推送至商务主管部门，上述企业无需另行报送信息报告。我们理解这是指，在普通外商投资企业再投资的情况下，如果不涉及其上层外国投资者提交的初始报告（企业基本信息、投资者及其实际控制人信息、投资交易等信息）中的信息变更时，该普通外商投资企业是无需提交变更报告的。

## （三）对实际控制人的披露要求

根据《办法》，无论是**初始报告**还是**年度报告**都要求提交投资者及其实际控制人信息。《商务部第62号公告》所附外商投资初始、变更报告样表（下称“**报告样表**”）中，还通过列举的方式，对实际控制人和控制方式进行了说明。

报告样表中将**实际控制人**分为以下几类：

- 境外上市公司
- 境外自然人
- 外国政府机构（含政府基金）
- 国际组织
- 境内上市公司
- 境内自然人

<sup>23</sup> 我们注意到，北京、广东、四川等多地的外商投资信息报告系统已嵌入企业登记系统，还有部分省市（如上海）在此基础上仍然保留了独立的外商投资信息报告填报系统。

- 境内国有/集体企业
- 其他

此外，报告样表还具体列举了如下三大类的**控制方式**：

1. 直接或者间接持有企业百分之五十以上的股份、股权、财产份额、表决权或者其他类似权益的；

2. 直接或者间接持有企业的股份、股权、财产份额、表决权或者其他类似权益虽不足百分之五十，但具有以下情形之一的：

(1) 有权直接或者间接任命企业董事会或者类似决策机构半数以上成员；

(2) 有能力确保其提名人员取得企业董事会或者类似决策机构半数以上席位；或

(3) 所享有的表决权足以对股东会、股东大会或者董事会等决策机构的决议产生重大影响。

3. 通过合同、信托或者其他方式能够决定企业的经营、财务、人事或者技术等事项的。

商务部、市场监管总局在就《办法》相关问题的答记者问<sup>24</sup>中则更进一步明确指出，外商投资企业在中国境内投资（含多层次投资）设立企业也属于外商投资的范围。在之前的实践中，已有很多领域对外商投资采取穿透式审查的政策，例如增值电信服务领域审查申请 ICP 证照的企业的外资比例时，主管部门的主流意见都要求审查时穿透到最终实际控制人。目前，在《外商投资法》以及《办法》的框架下，全部领域的外商投资企业境内再投资企业的外资成分都将被“穿透”。因此，在外商投资信息报告制度下，无论外国投资者在中国境内设立多少层企业，都应如实填报投资者以及投资者的最终实际控制人。这一点也在各地的外商投资信息网上报告系统中有所体现。

## （四）未及时提交年度报告的补救措施

根据《办法》第十四条，外商投资企业提交

<sup>24</sup> 参见商务部、市场监管总局有关司局负责人就《外商投资信息报告办法》有关问题答记者问 <http://www.mofcom.gov.cn/article/difang/202001/20200102928338.shtml>

年度报告的时间是每年1月1日至6月30日。根据《商务部、市场监管总局、外汇局关于开展2019年度外商投资信息报告年度报告的公告》，2020年7月1日起，年度报告存在未报、错报、漏报的，外商投资企业应向商务主管部门申请，通过外商投资信息报告管理系统进行补报或更正。也就是说，即使在7月1日后，也存在一定的补救渠道。但考虑到该公告还规定，**因未履行年度报告义务被列入经营异常名录的，还应根据《企业信息公示暂行条例》的规定办理相关手续**（见本文第一部分，表三），因此，建议外商投资企业还是应当确保在每年6月30日前提交年度报告。

### （五） 须重视违反信息报告义务的不利后果

除第一部分介绍的法律責任外，根据《办法》，违反信息报告义务会被记入外商投资信息报告系统，受到行政处罚的还将在外商投资信息报告系统公示平台上予以公示，并按照国家有关规定纳入信用信息系统。根据《企业信息公示暂行条例》，在**政府采购、工程招投标、国有土地出让**等工作中，企业信息会被作为重要考量因素，对被列入经营异常名录或者严重违法企业名单的企业依法予以**限制或者禁入**。此外，由于企业信用信息系统的广泛使用，因违反信息报告义务受到行政处罚的企业在招投标、融资和交易等方面也可能会受到负面影响。因此，建议外国投资者和外商投资企业高度重视并严格履行信息报告义务。

此外，值得注意的是，《办法》第二十一条明确规定，任何公民、法人或其他组织发现外国投资者或者外商投资企业存在违反《办法》的行为的，可向商务主管部门举报。在这种实施全社会监督的情况下，想通过侥幸的方式不履行或不严格履行信息报告的行为将面临更大的风险。

### （六） 《办法》适用的时间节点及例外

《办法》于2020年1月1日正式生效施行，按照不溯及既往的立法原则，以及《商务部第62号公告》第六项，《办法》只对其生效日期之后设立或发生变更的外商投资企业适用。但《商务部

第62号公告》对下述情况作了过渡规定：即如果不涉及国家规定实施外商投资准入特别管理措施的外商投资企业2019年12月31日前已在市场监管部门办理设立登记，或发生《外商投资企业设立及变更备案管理暂行办法》（现已废止）第六条、第七条规定的变更事项，但尚未办理外商投资企业设立或变更备案，2020年1月31日前仍可通过外商投资综合管理系统办理备案。也就是说，如果在2019年12月31日前出现了规定的变更事项，但未在2020年1月31日前依照旧程序办理变更备案，就需要按照《办法》提交变更报告（由于在2019年12月31日前，外商投资企业办理备案是设立登记的前提，故设立登记不会发生该例外情形）。

## 三、有待进一步澄清的实务问题

尽管《办法》及相关配套部门规范性文件对外国投资者和外商投资企业如何履行信息报告填写义务已有比较详细的规定，但我们认为还有一些涉及信息报告的实务问题需要有关监管机关在《办法》的实施过程中，进一步给予具体指导意见。以下初步列举几个我们认为需要澄清的实务问题。

### （一） 厘清信息报告与企业登记的关系

尽管市场监管总局在《关于贯彻落实〈外商投资法〉做好外商投资企业登记注册工作的通知》以及答记者问中多次强调，**提交外商投资信息报告不是办理外商投资企业登记注册的必要条件**。然而我们注意到，在实践中部分省市存在着只有先完成外商投资信息报告程序才能提交网上登记，从而进一步前往窗口办理企业登记注册的情形<sup>25</sup>。当地政府部门可能主观上是为了在填报形式上方便外商投资者与外商投资企业，然而在实质上却与信息报告作为事后监管的立法宗旨不完全相符。建议相关市场监管部门尽快改进企业登记系统的流程设计，从而真正落实立法精神，切实减轻企业负担。

### （二） 信息公开的范围

<sup>25</sup> 例如，在上海的外商投资企业设立流程中，需要投资者在网上提交信息报告并记录系统生成的凭证号，在到市场监管部门办理登记时将凭证号告知工作人员。

根据《办法》第十八条，外国投资者或者外商投资企业报送的投资信息，**根据《企业信息公示暂行条例》应当向社会公示或者外国投资者、外商投资企业同意公示的**，将通过国家企业信用信息公示系统及外商投资信息报告系统向社会公示。但值得注意的是，根据《市场监管总局、商务部、外汇局关于做好年报“多报合一”改革有关工作的通知》，年报内容在现有向市场监管部门报送年报信息的基础上，**增加商务主管部门和外汇管理部门年报事项，但新增的年报事项不对社会公示**（这个规定似乎与《办法》规定不完全一致）。因此，建议根据《办法》和《企业信息公示暂行条例》，进一步明确外商投资信息报告中具体哪些内容应当或可以对外公示。

### （三） 须提交信息报告外国（地区）企业 在华从事生产经营活动的范围

《商务部第 62 号公告》第一项规定，除外国投资者设立公司和合伙企业外，外国（地区）企业在中国境内从事生产经营活动的，外国（地区）企业在中国境内设立从事生产经营活动的常驻代表机构等均需提交报告。如何准确理解“**外国（地区）企业在中国境内从事生产经营活动**”的范围，是确定相关外国（地区）企业是否负有信息报告义务的关键。

根据 2016 年修订的《国家工商行政管理总局关于外国(地区)企业在中国境内从事生产经营活动登记管理办法》(下称“**《外国企业在中国境内从事生产经营活动登记管理办法》**”), 外国(地区)企业在中国境内从事下列生产经营活动需要办理登记注册:

- 1、 陆上、海洋的石油及其它矿产资源勘探开发;
- 2、 房屋、土木工程的建造、装饰或线路、管道、设备的安装等工程承包;
- 3、 承包或接受委托经营管理外商投资企业;
- 4、 外国银行在中国设立分行;
- 5、 国家允许从事的其它生产经营活动。

由于《外国企业在中国境内从事生产经营活动管理办法》的

发文机关是国家工商管理总局（现为国家市场监督管理总局），不同于《商务部第 62 号公告》的发文机关商务部，因此《商务部第 62 号公告》中所称外国（地区）企业在中国境内从事“生产经营活动”的范围是否是按《外国企业在中国境内从事生产经营活动管理办法》所列举的生产经营活动理解，有待商务部门给予明确。

### （四） 实际控制人的认定问题

《商务部第 62 号公告》所附外商投资初始、变更报告样表中，通过列举控制方式对实际控制人进行了定义（详见上文第二部分第（三）项论述），但在实践中对于某些情形下实际控制人的认定仍存在不确定性，例如：（1）对于外国投资者是境外上市公司的，实际控制人是追溯到上市公司这一层即可，还是必须再追溯上市公司的实际控制人？（2）对于控制权比较分散，没有控股股东或相对控股股东，或是分散的小股东通过“一致行动人”安排来控制企业等情形，应如何判断和填写实际控制人信息？该等问题，可能需要商务部门在实践中进一步给予更为具体的相关指导意见。

### （五） 并购设立外商投资企业时的资产评估问题

根据报告样表，外国投资者并购设立外商投资企业的需要填写交易基本信息，其中包括被并购股权/资产价值评估情况。我们理解，这项要求的依据是 2006 年商务部《关于外国投资者并购境内企业的规定》（2006 年第 10 号）（下称“**10 号令**”）第十四条，并购当事人应以资产评估机构对拟转让的股权价值或拟出售资产的评估结果作为确定交易价格的依据。然而，对于国内企业之间的并购交易，除涉及国有资产的情况外，其他的并购交易中并无对拟并购的股权或资产的强制性评估要求。

根据《外商投资法》所确定的除负面清单领域之外**实施“内外资一致”管理**的原则，以及第二十四条关于**没有法律、行政法规依据的，不得减损外商投资企业的合法权益或者增加其义务，不得设置市场准入和退出条件的规定**，显然，在

《外商投资法》实施后，作为部门规章的 10 号令中的涉及内外资不一致的相关管理规定，如果没有法律或行政法规的依据，我们理解应当不再适用。因此，建议商务部门对于信息报告中需要填写评估报告的情形进行澄清，例如，是否是仅适用于被收购的股权或资产涉及国有股权或资产的情形，以避免给外国投资者增加不必要的交易成本。另外，我们注意到，在报告样表中价值评估情况一栏中还要求填写财务审计报告编号，由于资产评估与审计的定义并不相同<sup>26</sup>，此处的“财务审计报告”是否指资产评估报告？该问题也需要进一步明确。

#### **（六） 在华从事生产经营活动的外国企业是否需要提交注销报告**

《商务部第 62 号公告》中规定，在华从事生产经营活动的外国企业需要提交初始报告、变更报告和年度报告。但对于注销报告，该公告仅规定了外国投资者或者外商投资企业的相关信息无需另行报送，由市场监管总局向商务部共享。根据《外国企业常驻代表机构登记管理条例》和《外国企业在华经营活动管理办法》，在华从事生产经营活动的外国企业出现撤销代表机构或营业执照届满等事项均需申请注销登记，《办法》及配套文件中未明确此处的注销信息是否也直接由市场监管部门向商务主管部门推送，或者需要相关外国企业单独报送。因此，建议有关部门也对此做出说明。

## **四、结语**

外商投资信息报告制度，作为中国最新外商投资管理法律制度的重要组成部分，一方面极大简化了外商投资进入中国的程序和时间，但另一方面对外国投资者和外商投资企业就其在中国的投资和生产经营活动进行信息披露的及时性、真实性、准确性和完整性提出了更高的要求，如果不能正确地遵守这些要求，将会面临严重的行政处罚风险和企业信用风险。这些新的监管变化，需要外国投资者和外商投资企业高度重视，积极适应和遵守。与此同时，对于外商投资信息报告制度实施中一些有待进一步澄清的实务问题，如果相关监管部门可以及时给予具体的指导意见，也将有利于外国投资者和外商投资企业更加准确和顺利地履行其信息报告义务。

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<sup>26</sup> 根据《中华人民共和国资产评估法》，资产评估是指评估机构及其评估专业人员根据委托对不动产、动产、无形资产、企业价值、资产损失或者其他经济权益进行评定、估算，并出具评估报告的专业服务行为；而根据中国审计学会的定义，审计是指独立检查会计账目，监督财政、财务收支真实、合法、效益的行为。

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