



I. Legal News

I. What Foreign Investors Should Know About the Implementation Rules of Foreign Investment Law

On the last day of 2019, the Implementation Rules of Foreign Investment Law (hereinafter referred to as "FIL Rules") was released by PRC State Council, which took effect simultaneously with PRC Foreign Investment Law¹ on January 1, 2020.

The FIL Rules are still drafted in a general and vague way and remains silent on many details. Compared to the previous draft for comment of FIL Rules ("Draft FIL Rules") published on November 1, 2019, the FIL Rules bring some material changes (please refer to our previous legal update regarding the draft version²). We hereby highlight the following points.

(1) Adopt that foreign investors can set up foreign-invested enterprise with Chinese individuals (Article 3)

FIL Rules specify two ways for Chinese individuals to make foreign investment, namely,

- through **Greenfield Investment**; (the establishment of foreign-invested enterprise ("FIE") jointly with foreign investors); or

- through **Investment in New Projects** (investment in new projects in the PRC jointly with other foreign investors).

However, the detailed explanation of **investment in new projects** remains unknown³.

(2) Confirm that the Commerce Committee ("CC") shall be in charge of publishing details of the new CC Information Reporting system (Article 39)

"CC Information Reporting" system was introduced in the PRC Foreign Investment Law as a new system for reporting to Commerce Committee.

The FIL Rules further clarifies that CC shall determine and publish the content, scope, frequency and specific process of CC Information Reporting in collaboration with other governmental departments.

As a follow up, on December 31, 2019, PRC Ministry of Commerce released Measures for Information Reporting on Foreign Investment as well as its corresponding Announcement No 62⁴, according to which, for newly incorporation/change, the previous nationwide online CC application system⁵ applied since 2016 shall not be used anymore, as the new CC Information Reporting (submission through local SAMR) is in place. Specifically, if the business scope of a new FIE is not within the scope of Negative List, then the foreign investor can file the registration application with local SAMR directly by simultaneously submitting a CC Information Reporting form, and local SAMR will share the information with CC internally. To sum up, the CC formality is now merged into the SAMR formality, and no separate submission at CC is requested anymore.

(3) Remove the six-month grace period (Article 44)

The Draft FIL Rules granted a six-month grace period from January 1, 2025 (after the expiration of the five-year transition period). However, such grace period has been removed from the FIL Rules.

According to the FIL Rules, as of January 1, 2025, SMAR will not handle any registration applied by any existing FIEs that has not adjusted its organizational form according to PRC Foreign Investment Law⁶ as well as will disclose such non-compliance online; however, detailed penalties and specific website for such disclosure have not been released till now.

(http://www.gov.cn/zhengce/content/2019-12/31/content_5465449.htm?from=timeline&isappinstalled=0)

II. SAMR Released Rules on Recall Obligations for Consumer Products

The State Administration for Market Regulation ("SAMR") has issued the Interim Provisions on the Administration of Recalls of Consumer Goods (the "Provisions") on November 26, 2019, with effect from January 1, 2020.

To give a general understanding of the Provisions, we hereby highlight the following points.

(1) Clarify the definition of "**Consumer Products**" (Article 3)

There are rules and regulations in effect in China related to the recall regime of specific product categories, such as automotive products, medical drugs, medical devices, food, children's toys, etc.⁷ The Provisions further broaden the recall obligations to consumer products, which is defined as "products that consumers purchase and use for living consumption". Thus, a wide range of products fall within the scope of Consumer Products, for example, household appliances such as refrigerators, air conditioners, washing machines, microwave ovens and so forth shall be subject to the Provisions. In addition, as Children's toys fall within the definition of consumer products, the Provisions on the Administration of Children's Toy Recalls released in 2007 has been repealed on January 1, 2020 once the Provisions becomes effective.

(2) Clarify that the recall obligations of the consumer goods producers (Article 4) and other operators (Article 16)

The Provisions stipulate that producers shall be responsible for the safety of the consumer goods they produce. In case of any defect in their consumer goods, producers shall recall such consumer goods. Upon receipt of the producer's notice, other operators engaged in the sale, lease, repair of consumer products or other relevant activities shall immediately cease the business operation involving the defective consumer products and assist the producer in implementing the recall.

The Provisions also deal with the circumstances in which such defective products are manufactured by overseas producers. To be specific, the overseas producer may designate a domestic organization to implement recalls within China and that designated organization shall be regarded as the producer of the defective product under the new recall rules. If no such organization is designated by overseas producers, the importers shall be deemed as the producers.

Furthermore, the Provisions stress that where defect investigations reveal that the consumer goods do have defects, the local SAMR organizing such investigations shall notify the problematic consumer goods producer of initiating the recall process. If the producer believes that the consumer goods do have defects, after receipt of the notice, it shall initiate the recall process immediately.

(3) Reporting obligation of producers or operators (Article 8)

The Provisions clearly state that where a producer or operator learns that the consumer goods it produces or sells are involved in either of following two circumstances, the manufacturer or the operator shall report the case to **the provincial level of local SAMR** within **two working days** from the date it is discovered.

- The consumer goods have caused or are likely to cause death, serious personal injuries, or significant property loss; or

- The consumer goods have been recalled outside China,

(4) Penalties for not fulfilling relevant recall obligations (Article 24 and 25)

In case a producer refuses or delays the implementation of recall after being ordered to do so, it shall be subject to the following sanctions:

- a fine not less than one time but not more than ten times the value of the illegal gains;

- in case no illegal gains is involved, the offenders shall be punished with a fine of less than CNY 500,000.

In case a producer or any other operator violates the aforesaid reporting obligations, the provincial level of local SAMR shall order it to make correction within a specified time limit;

- If no correction is made within the specified time limit, the violator shall be fined not less than CNY10,000 but not more than CNY30,000.

(http://gkml.samr.gov.cn/nsjg/fgs/201911/t20191126_308824.html)

¹ See our previous Newsletter on Foreign Investment Law <http://asiallians.com/foreign-investment-law-foreign-investors-know-landmark-legislation/> ;

² see our previous legal update on the Implementing Regulations on the Foreign Investment Law of the People's Republic of China (Draft for Comment):

<http://asiallians.com/zh-hans/china-legal-update-implementing-regulations-foreign-investment-law-peoples-republic-china-draft-comment/>.

³ Draft FIL Rules added one article to define what is investment in new project; however, FIL Rules did not adopt this article.

⁴ See <http://www.mofcom.gov.cn/article/b/c/201912/20191202927046.shtml>

⁵ See: <http://wzzxbs.mofcom.gov.cn/WebProBA/app/entp/question> However, for registration waiting for result via this website, there is a transitional period one month that allowing keeping using the website.

⁶ The corporate governance rules might need to be changed in existing FIES, especially in EJV and CJV, see detailed differences table in our previous Newsletter:

<http://asiallians.com/foreign-investment-law-foreign-investors-know-landmark-legislation/>

⁷ Regulations on the Administration of Recalls of Defective Auto Products promulgated on 1 January 2013; Measures for the Implementation of the Regulation on the Administration of the Recall of Defective Auto Products promulgated 1 January 2016;

Administrative Measures for Drug Recalls promulgated on 10 December 2007; Administrative Measures for Medical Device Recalls promulgated on 1 May 2017;

Provisions on the Administration of Food Recall promulgated on 27 August 2007;

Administrative Measures for Food Recalls promulgated on 11 March 2015; Provisions on the Administration of Children's Toy Recalls promulgated on 27 August 2007.

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