

## China

### Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (2006)

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# **Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors**

## **Chapter I General Provisions**

## **Article 1**

For the purposes of promoting and regulating foreign investors' investments in China, absorbing advanced technologies and management experiences from abroad, improving the level of utilizing foreign investments, realizing the reasonable allocation of resources, ensuring employment, as well as maintaining fair competition and state economic security, these provisions are formulated in accordance with the laws and administrative regulations on foreign-funded enterprises, the Company Law and other relevant laws and administrative regulations.

## **Article 2**

The phrase "takeover of a domestic enterprise by a foreign investor" as mentioned in the present provisions means that the foreign investor purchases by agreement the equities of the shareholders of a domestic non-foreign-funded enterprise (hereinafter referred to as "domestic company") or subscribes to the increased capital of a domestic company, and thus changes the domestic company into a foreign-funded enterprise (hereinafter referred to as "share right takeover"); or, a foreign investor establishes a foreign-funded enterprise, and through which it purchases by agreement the assets of a domestic enterprise and operates its assets, or, a foreign investor purchases by agreement the assets of a domestic enterprise, and then invest such assets to establish a foreign-funded enterprise and operate the assets (hereinafter referred to as "asset takeover").

## **Article 3**

To take over a domestic enterprise, a foreign investor shall abide by the laws, administrative regulations, and rules of China, comply with the principles of fairness, reasonableness, making compensation for equal value, as well as good faith, and shall not cause excessive centralization, exclude or limit competition, or disturb the social economic order, or damage the public benefits, or result in any loss to the state-owned assets.

## **Article 4**

To take over a domestic enterprise, a foreign investor shall satisfy the requirements of the laws, administrative regulations, and rules of China concerning the qualifications of investors, and shall comply with the policies on the industry, land, environmental protection, etc.

For the industries where solely foreign-owned operation is not permitted by the "Catalog of Industries for the Guidance of Foreign Investment", the takeover shall not lead to the consequence of a foreign investor's holding all the equity rights of the enterprise; for the industries where it is required for a Chinese party to control or relatively control the shares, the Chinese party shall, after an enterprise in such industries is taken over, still control or relatively control the shares of the enterprise; for the industries where foreign investors are prohibited from operation, no foreign investor shall take over any enterprise in such industries.

The business scope of any enterprise invested by the domestic enterprise prior to the takeover shall meet the requirements in the industrial policies on foreign investments. If it does not, adjustment shall be made.

## **Article 5**

If the takeover of a domestic enterprise by a foreign investor involves the transfer of state-owned property rights of the enterprise and management of state-owned property rights of listed companies, the relevant provisions on the management of state-owned assets shall be followed.

#### **Article 6**

Where a foreign investor intends to establish a foreign-funded enterprise by merging a domestic enterprise, it shall, in accordance with these Provisions, be subject to the approval of the examination and approval organ and modify the registration or go through the establishment registration in the registration administrative organ.

If the enterprise to be taken over is a domestic listed company, it shall, pursuant to the Measures for the Administration of Strategic Investment in Listed Companies by Foreign Investors, go through the relevant formalities in the securities regulatory institution of the State Council.

#### **Article 7**

All parties concerned to the takeover of a domestic enterprise by a foreign investor shall pay taxes under Chinese tax laws and accept the supervision of the tax organs.

#### **Article 8**

All parties concerned to the takeover of a domestic enterprise by a foreign investor shall abide by the laws and administrative regulations of China on the administration of foreign exchange. They shall timely go through the approval, register, archival filing and modification formalities in the foreign exchange control organs.

## **Chapter II Basic System**

#### **Article 9**

For a foreign-funded enterprise established after takeover by a foreign investor, if the foreign investor's proportion of investments exceeds 25% of the registered capital of this enterprise, this enterprise shall be entitled to enjoy the treatments to foreign-funded enterprises.

For a foreign-funded enterprise established after takeover by a foreign investor, if the foreign investor's proportion of investments is less than 25% of the registered capital of this enterprise, this enterprise shall not enjoy the treatments to foreign-funded enterprises unless it is otherwise provided for by any law or administrative regulation. It shall follow the relevant provisions on borrowing foreign loans by non-foreign-funded enterprises when it borrows foreign loans. The examination and approval organ shall issue to it a Foreign-funded Enterprise Approval Certificate (hereinafter referred to as the Approval Certificate") with the remark "The proportion of foreign investments is less than 25%". The registration administrative organ and the foreign exchange control organ shall respectively issue to it a Foreign-funded Enterprise Business License and a Foreign Exchange Register Certificate with the remark "The proportion of foreign investments is less than 25%".

Where a domestic company, enterprise or natural person takes over a domestic affiliated company in the name of an overseas company it lawfully established or controls, the foreign-funded enterprise so established shall not enjoy the treatments to foreign-funded enterprises, except that this overseas company subscribes to the increased capital of the domestic company or that it increases the capital of the enterprise established after takeover and the proportion of the capital increase exceeds 25% of the registered capital of the enterprise so established. For a foreign-funded enterprise established in either of the forms as mentioned in this paragraph, if the proportion of investments made by a foreign investor, who is not its actual controller, exceeds the 25% of its registered capital, it shall be entitled to enjoy the treatments to foreign-funded enterprises.

The treatments to a foreign-funded enterprise which is established after a foreign investor takes over a domestic listed company shall be governed by the relevant provisions of the state.

#### **Article 10**

The term “examination and approval organ” as mentioned in these Provisions refers to the Ministry of Commerce of the People’s Republic of China (hereinafter referred to as the MOFCOM) or the provincial commerce administrative departments (hereinafter referred to as the provincial examination and approval organs”). The term “registration administrative organ” refers to the State Administration for Industry and Commerce (hereinafter referred to as the SAIC) or its authorized local administrations for industry and commerce. The term “foreign exchange control organ” refers to the State Administration of Foreign Exchange (hereinafter referred to as the SAFE) or its branches.

Under the provisions of laws, administrative regulations, and rules, if a foreign-funded enterprise established after takeover falls within any special category or sector of foreign-funded enterprises which are subject to the examination and approval of the Ministry of Commerce (hereinafter referred to as the MOFCOM), the provincial examination and approval organ shall forward the application materials to the MOFCOM for examination and approval. The MOFCOM shall make a decision of approval or disapproval in pursuance of law.

#### **Article 11**

Where a domestic company, enterprise or natural person intends to take over its domestic affiliated company in the name of a company which it lawfully established or controls, it shall be subject to the examination and approval of the MOFCOM.

The parties concerned shall not dodge the aforesaid requirements by making investments within China through the foreign-funded enterprise, or by other ways.

#### **Article 12**

Where a foreign investor intends to obtain the actual controlling power of a domestic enterprise it plans to take over, and if any important industry is concerned, or if it has an impact on or may have an impact on the national economic security, or it will lead to the transfer of the actual controlling power of a domestic enterprise which holds a famous trademark or China Time-honored Brand, the parties concerned shall file an application with the MOFCOM.

If the parties concerned fail to do so, but its takeover has had or may have a serious impact on the national economic security, the MOFCOM may, jointly with the relevant departments, demand the parties concerned to terminate the transaction or transfer the relevant equities / assets or take other effective measures to eliminate the takeover's impact on the national economic security.

#### **Article 13**

For an equity-based takeover by a foreign investor, the foreign-funded enterprise established after takeover shall succeed to the credits and debts of the domestic company it takes over.

For an asset-based takeover by a foreign investor, the domestic enterprise which sells its assets shall undertake its former credits and debts.

The foreign investor, the domestic enterprise to be taken over, the creditors and other parties concerned may enter into a separate agreement on the disposal of the credits and debts of the domestic enterprise to be taken over, provided that this agreement shall not impair the interests of any third party or public interests. An agreement on the disposal of credits and debts shall be submitted to the examination and approval organ.

A domestic enterprise to sell assets shall, not later than 15 days before the investor submits the application documents to the examination and approval organ, send a notice to the creditors and shall publish an announcement on a provincial newspaper or above, which is circulated nationwide.

#### **Article 14**

The parties to a takeover shall determine the transaction price on the basis of the assessment result of the equities to be transferred or of the assets to be sold, which is given by an asset assessment institution. The parties to a takeover may agree on an asset assessment institution lawfully established within China. A common international assessment method shall be adopted for the asset assessment. It is prohibited to divert any capital abroad in any disguised form by transferring any equities or selling assets at a price which is obviously lower than the assessment result.

The takeover of a domestic enterprise by a foreign investor, which may cause the modification of any equity formed by investments to state-owned assets or transfer of the property right of state-owned assets, shall satisfy the relevant provisions on the management of state-owned assets.

#### **Article 15**

The parties to a takeover shall state whether there is a connected relationship between the parties to the takeover. If both parties belong to a same actual controller, the parties shall disclose their actual controller to the examination and approval organ and make an explanation about whether the purpose of takeover and the assessment result conform to the fair value of the market. The parties shall not dodge the aforesaid requirements by trust, holding shares on behalf of others, or by other means.

#### **Article 16**

To establish a foreign-funded enterprise by taking over a domestic enterprise, a foreign investor shall, within 3 months from the date of issuance of business license to the foreign-funded enterprise, pay all the considerations to the shareholders who transfer the equities or to the domestic enterprise which sells the assets. In the case of any particular circumstance under which it is necessary to extend the time limit, the foreign investor shall, upon the approval of the examination and approval organ, pay 60% or more of the consideration within 6 months as of the date of issuance of the business license to the foreign-funded enterprise, and pay off the balance of consideration within one year, and distribute the proceeds according to the proportion of investments it has actually contributed.

Where a domestic company subscribes to the increased capital of a domestic company, the shareholders of the limited liability company or of the domestic joint stock limited company established by way of promotion shall pay at least 20% of the newly increased registered capital when the company applies for a business license for foreign-funded enterprise. The time to pay the other newly increased registered capital shall be in line with the Company Law, the laws on foreign investments and the Regulation on the Administration of Company Registration. If it is provided for in any other law or administrative regulation, such law or administrative regulation shall prevail. Where a joint stock limited company increase the registered capital by issuing new stocks, the shareholders shall subscribe to the new stocks in accordance with the relevant provisions on the payment for shares in the establishment of a joint stock limited company.

Where a foreign investor carries out an asset takeover, it shall stipulate the time limit for contribution of investments in the contract and articles of association of the foreign-funded enterprise to be established. Where the foreign investor establishes a foreign-funded enterprise, and through which purchases the assets of a domestic enterprise and operates such assets, it shall contribute the investments equivalent to the consideration of the assets within the time limit for payment of consideration as provided for in Paragraph 1 of the present Article. As for the remaining investments, the time limit for contribution shall satisfy the relevant provisions on the capital contribution for the establishment of foreign-funded enterprise.

Where a foreign investor establishes a foreign-funded enterprise by merging a domestic enterprise, if its investment proportion is less than 25 % of the registered capital of the enterprise and if it plans to make investments in cash, it shall make full contribution within 3 months from the day when a business license is issued to the foreign-funded enterprise; if it plans to make investments in kind or industrial property, it shall make full contribution within 6 months from the day when a business license is issued to the foreign-funded enterprise.

#### **Article 17**

The means of payment for the consideration shall conform to the relevant laws and administrative regulations of the state. If the foreign investor uses the Renminbi assets it lawfully owns as a means of payment, it shall obtain the approval of the department of foreign exchange control. If the foreign investor uses the shares over which it has the right of disposition, it shall comply with Article 4 of these Provisions.

#### **Article 18**

After a foreign investor purchases the equities of a domestic company by agreement, and the domestic company has been modified into a foreign-funded enterprise, the foreign-funded enterprise's registered capital shall be the registered capital of the original domestic company, and the proportion of investments contributed by the foreign investor shall be the proportion of the purchased equities in the original registered capital.

Where a foreign investor subscribes to the capital increase of a domestic limited liability company, the registered capital of a foreign-funded enterprise established after the takeover shall be the summation of the registered capital of the former domestic company and the amount of capital increase. As to the foreign investor and other shareholders of the former domestic company it takes over, their respective proportion of capital contributions to the foreign-funded enterprise shall be determined on the basis of the assessment of the assets of the domestic company.

Where a foreign investor subscribes the capital increase of a domestic joint stock limited company, the registered capital shall be determined under the Company Law.

#### **Article 19**

For an equity-based takeover by a foreign investor, the upper limits on the total investments to the foreign-funded enterprise after takeover shall be determined according to the following rates, unless the state provides otherwise: (1) If the registered capital is less than US\$ 2.1 million, the total investments shall not exceed 10/7 of the registered capital; (2) If the registered capital is not less than US\$ 2.1 million but not more than US\$ 5 million, the total investments shall not exceed two times the registered capital; (3) If the registered capital is not less than US\$ 5 million but not more than US\$ 12 million, the total investments shall not exceed 2.5 times the registered capital; and (4) If the registered capital is more than US\$ 12 million, the total investments shall not exceed 3 times the registered capital.

#### **Article 20**

For an asset-based takeover, the foreign investor shall, according to the transaction price for the purchased assets and the actual production and operation scale, determine the total investments to the foreign-funded enterprise to be established. The proportion between the registered capital and total investments of the foreign-funded enterprise to be established shall conform to the relevant provisions.

## **Chapter III Examination, Approval and Registration**

#### **Article 21**



For an equity-based takeover, a foreign investor shall, pursuant to the total investments of the foreign-funded enterprise to be established after the takeover, the type of the enterprise and the industry it engages in, submit the following documents to the competent examination and approval organ in accordance with the laws, administrative regulations, and rules on the establishment of foreign-funded enterprises: (1) A resolution of the shareholders of the domestic limited liability company or of the domestic joint stock limited company on the full consent to the equity-based takeover or asset-based takeover by the foreign investor; (2) An application for the establishment of the foreign-funded enterprise; (3) A contract and the articles of association of the foreign-funded enterprise to be established after takeover; (4) An agreement on the foreign investor's acquisition of equities of shareholders of the domestic company or on the foreign investor's subscription of the capital increase of domestic companies; (5) The previous-year financial audit report of the domestic company taken over; (6) The certification documents for the identity, registration and credit standing of the investor that have been notarized and certified according to law; (7) The descriptions about the enterprises invested by the domestic enterprise taken over; (8) The (duplicates) of the business licenses of the domestic company taken over and enterprises it invests in; (9) The proposal on the settlement of employees domestic enterprise taken over;

(10) The documents to be submitted as required by Articles 13 through 15 of the present provisions.

If the business scope, scale, obtainment of land use right of a foreign-funded enterprise established after takeover are subject to the license of the relevant government departments, the relevant licensing documents shall be submitted along with the documents as listed in the preceding Paragraph.

## **Article 22**

An equity purchase agreement, or domestic company capital increase agreement shall be governed by Chinese law and shall contain the following contents: (1) The status of each party to the agreement, including The status of each party to the agreement, including the name and domicile of each party, the name, position and nationality of each legal representative; (2) The proportion of price of the equities purchased or capital increase subscribed; (3) The time period of the agreement, and the method of execution thereof; (4) The rights and obligations of each party to the agreement; (5) The liabilities for breach of contract, and settlement of disputes; and (6) The time and place for the conclusion of agreement.

## **Article 23**

For an asset-based takeover, the foreign investor shall, pursuant to the total investments of the foreign-funded enterprise to be established after the takeover, the type of the enterprise and the industry it engages in, submit the following documents to the competent examination and approval organ in accordance with the laws, administrative regulations, and rules on the establishment of foreign-funded enterprises: (1) A resolution of the property right holders or power authority of the domestic enterprise on the consent to the sale of assets; (2) An application for the establishment of a foreign-funded enterprise; (3) A contract and the articles of association of the foreign-funded enterprise to be established; (4) An asset purchase agreement signed by the foreign-funded enterprise to be established and the domestic enterprise, or by the foreign investor and the domestic enterprise; (5) The articles of association and the business license (duplicate) of the domestic enterprise it has taken over; (6) The notice of the domestic enterprise taken over, certifications of the creditors announced, and statement about whether the creditors have raised any objections; (7) The certification documents for the identity, registration and credit standing of the investor that have been notarized and certified according to law; (8) The proposal on the settlement of employees of the domestic enterprise that is taken over; and (9) The documents as required by Articles 13 through 15 of these Provisions.

If the business scope, scale, obtainment of land use right of a foreign-funded enterprise establishment after takeover involve licensing of the relevant government departments, the relevant licensing documents shall be submitted along with the documents as listed in the preceding Paragraph.

Where a foreign investor purchases the assets of a domestic enterprise by agreement and invests such assets in establishing a foreign-funded enterprise, it shall not, prior to the establishment of the foreign-funded enterprise, carry out any business activities with such assets.

#### **Article 24**

The agreement on the purchase of assets shall be governed by Chinese law and shall contain the following main contents: (1) The status of each party to the agreement, including the name and domicile of each party, the name, position and nationality of each legal representative; (2) A list of the assets to be purchased and the price thereof; (3) The time period and method for the execution of the agreement; (4) The rights and obligations of each party to the agreement; (5) The liabilities for breach of contract, and settlement of disputes; (6) The time and place for the conclusion of the agreement.

#### **Article 25**

Where a foreign investor intends to establish a foreign-funded enterprise by taking over a domestic enterprise, unless it is otherwise provided for in these Provisions, the examination and approval organ shall, within 30 days after the examination and approval organ receives the complete set of documents as required, it shall make a decision of approval or disapproval. If it decides to make a decision of approval, the examination and approval organ shall issue to the foreign investor an approval certificate.

For a foreign investor which intends to purchase the equities of a domestic company by agreement, if the examination and approval organ makes a decision of approval, it shall simultaneously send a copy of the relevant approval documents to the foreign exchange control departments of the places where the equity transferor and the domestic company are located, respectively. The foreign exchange control department of the place where the equity transferor is located shall handle the foreign exchange registration for equity-transfer-based foreign investments, which indicates that the consideration to the foreign investor's equity takeover has been fully paid.

#### **Article 26**

For an asset-based takeover, the foreign investor shall, within 30 days after it receives the approval document, apply to the registration administrative organ for establishment registration so as to fetch a foreign-funded enterprise business license.

For an equity-based takeover by a foreign investor, the domestic company taken over shall apply to the original registration administrative organ for modifying its registration in accordance with these Provisions. If the original registration administrative organ has registration jurisdiction, it shall, within 10 days after it receives the application documents, transfer these application documents to the competent registration administrative organ and simultaneously accompany them by the registration files of the domestic company. When the domestic company taken over applies for modifying the registration, it shall submit the following documents and shall be responsible for their genuineness and validity: (1)An application for modifying registration; (2)An agreement on the purchase of equities of the domestic company or on the subscription of increased capital of a domestic company by a foreign investor; (3)The post-revision articles of association or revisions to the original articles of association, and the foreign-funded enterprise contract which shall be submitted in pursuance of law; (4)The foreign-funded enterprise approval document; (5)The certification for the qualifications of the foreign investor as the subject, or the identity certification of the foreign investor as a natural person; (6) The post-revision name list of the members of the board of directors, the documents which state the name and domicile of the newly increased directors, and the documents on the appointment of the newly increased directors; (7)Other relevant documents and certificates as required by the State Administration for Industry and Commerce.

The investor shall, within 30 days after it receives a foreign-funded enterprise business license, go through the registration formalities in the tax, customs, land administration and foreign exchange administration departments.

## **Chapter IV Equity-payment-based Takeover of Domestic Companies by Foreign Investors**

### **Section 1 Conditions for Equity-payment-based Takeover**

#### **Article 27**

The term "equity-payment-based takeover of a domestic enterprise by a foreign investor" means that the shareholders of an overseas company purchase the equities of a domestic company by paying the equities of the overseas company it holds, or that an overseas company purchases the increased capital of a domestic company by paying its increased shares.

#### **Article 28**

The term “overseas company” as mentioned in this Chapter shall be a lawfully established company, there is a sound system of company law in its registration place, and the company and its management level have no record of punishment by the regulatory institution within recent 3 years. Except for special-purpose companies as mentioned in Section 3 of this Chapter, an overseas company shall be a listed company and there shall be a sound securities dealing system in the place where it gets listed.

#### **Article 29**

The equities of the domestic and overseas companies involved in the equity-based takeover of a domestic company by a foreign investor shall meet the following conditions: (1)They are lawfully held by the shareholders and may be transferred in accordance with the law; (2)There is no dispute over their ownership, they are not held in pledge and they are not subject to any other limit of right; (3)The equities of an overseas company shall be listed publicly in an overseas lawful securities exchange market (excluding the over-counter exchange market); and (4)The transaction price of the equities of the overseas company in the recent 1 year remains stable.

The Items (3) and (4) of the preceding Paragraph is inapplicable to the special-purpose companies as mentioned in Section 3 of this Chapter.

#### **Article 30**

For an equity-based takeover of a domestic company by a foreign investor, the overseas company or its shareholders shall hire an intermediary institution registered within China to serve as a consultant (hereinafter referred to as the “takeover consultant”). The takeover consultant shall make due investigations to the genuineness of the takeover application documents, the financial status of the overseas company as well as whether the takeover meets the requirements of Articles 14, 28 and 29 of these Provisions, shall make a takeover consultant report and shall put forward express professional opinions on each of the aforesaid items.

#### **Article 31**

A takeover consultant shall satisfy the following conditions: (1)Having a good reputation and having relevant practicing experiences; (2)Having no record of serious violation of any law or regulation; and (3)Being capable of investigating and analyzing the legal systems of the registration place of the overseas company and the place where the overseas company is get listed, as well as the financial status of the overseas company.

## **Section 2 Application Documents and Procedures**

#### **Article 32**

An equity-based takeover of a domestic company by a foreign investor shall be subject to the examination and approval of the MOFCOM. The domestic company shall not only submit the documents as required in Chapter III of these Provisions, but also the following documents: (1)A statement of the changes of equities and important changes of assets of the domestic company within the recent 1 year; (2)A takeover consultant's report; (3)The business opening certifications or identity certification documents of the relevant domestic and overseas companies and their shareholders; (4)Descriptions about the equities held by the shareholders of the overseas company, and the name list of the shareholders who hold 5 % or more of the equities of the overseas company; (5)The articles of association of the overseas company and a description about the guaranties it provides to outsiders; and (6)The recent annual financial statements upon audit and a report on the stock dealings of the overseas company in the recent half year.

#### **Article 33**

The MOFCOM shall, within 30 days after it receives a complete set of documents, examine a takeover application. If the relevant requirements are satisfied, it shall issue to the applicant an approval document, which is given the remark that "For the equity-based takeover of a domestic company by a foreign investor, it will be valid for 6 months as of the date of issuance of a business license."

#### **Article 34**

The overseas company shall, within 30 days after it receives an aforesaid approval document, it shall modify the registration in the registration administrative organ and the foreign exchange control organ. The registration administrative organ and the foreign exchange control organ shall respectively issue to it a foreign-funded enterprise business license and a foreign exchange register certificate which are given the remark that "To be valid for 8 months as of the date of issuance".

When a domestic company goes through the registration modification formalities in the registration administrative organ, it shall, in advance, submit an equity change application, the revised articles of association, the equity transfer agreement and other documents signed by the legal representative of the domestic company, which are aimed to resume the structure of equities.

#### **Article 35**

Within 6 months as of the date of issuance of a business license, the domestic company and its shareholders shall, in regard to the matters relating to the overseas company's equities it plans to hold, apply to the MOFCOM and the foreign exchange control organ for going through the formalities for the examination, approval and registration of investments to run an enterprise abroad .

The parties concerned shall not only submit to the MOFCOM the documents as required in the Provisions on the Examination and Approval of Investment to Run Enterprises Abroad, but also a foreign-funded enterprise approval certificate with the said remark and a foreign-funded enterprise business license with the said remark. After the MOFCOM examines and approves the overseas company's equities to be held by the domestic company or its shareholders, it shall issue to the applicant a Chinese enterprise overseas investment approval certificate and replace the foreign-funded enterprise approval certificate with a remark by one with no remark.

After a domestic company obtains a foreign-funded enterprise approval certificate without a remark, it shall, within 30 days, apply to the registration administrative organ and the foreign exchange control organ, for replacing the foreign-funded enterprise business license and the foreign exchange register certificate with a remark by new ones with no remark.

#### **Article 36**

With 6 months as of the date of issuance of a business license, if the domestic and overseas companies fail to finish the equity modification formalities, the approval certificate with a remark and the Chinese enterprise overseas investment approval certificate shall be invalidated automatically. The registration administrative organ shall, according to the equity modification registration application documents submitted by the domestic company in advance, examine and approve the modification registration and shall make the equity structure of the domestic company resume to the state prior to the takeover of equities.

In the case of failure to acquire the shares increased by a domestic company, before the registration administrative organ examines and approves the modification registration under the preceding Paragraph, the domestic company shall, pursuant to the Company Law, reduce the registered capital correspondingly and publish an announcement on a newspaper.

If the domestic company fails to go through the relevant registration formalities according to the preceding Paragraph, the registration administrative organ shall punish it in accordance with the Regulation on the Administration of Company Registration.

#### **Article 37**

After a domestic company obtains a foreign-funded enterprise approval certificate with a remark and a foreign exchange register certificate with a remark, it shall not distribute its profits to its shareholders, nor provide a guaranty to any connected company, nor make any payment to any outsider for the capital items such as the equity transfer, capital decrease or liquidation.

#### **Article 38**

A domestic company or its shareholders may, upon the strength of approval document with no remark and the business license with no remark issued by the MOFCOM and the registration administrative organ, go through the tax modification registration in the tax organ.

### **Section 3 Special Provisions on Special-purpose Companies**

#### **Article 39**

The term “special-purpose company” refers to an overseas company which a domestic company or natural person directly or indirectly controls for the purpose of making its actual domestic company equities get listed abroad.

The provisions of this Section shall apply to a special-purpose company, which, for the purpose of getting listed abroad, its shareholders or the special-purpose company purchase (purchases) the equities of the shareholders of a domestic company or the share increase of a domestic company by paying with the equities of the special-purpose company it holds or by paying with the share-increase of the special-purpose company.

If the parties concerned makes an overseas company, which holds any equities of a special-purpose company, serve as a subject to get listed abroad, this overseas company shall satisfy the relevant requirements for the special-purpose company as described in this Section.

**Article 40**

The transaction for the overseas listing of a special-purpose company shall be subject to approval of the securities regulatory institution of the State Council.

The country or region where the special-purpose company gets listed shall have sound legal and regulatory systems, and securities regulatory institution of this country or region shall have signed a memorandum of cooperation and understanding with the securities regulatory institution of the State Council of China and keep an effective cooperation in the regulatory work.

**Article 41**

A domestic company with its equities listed abroad as mentioned in this Section shall satisfy the following conditions: (1)Its property right is clear. There is no dispute or potential dispute over its property right; (2)It has a complete business system and a good sustainable operation capacity; (3)It has a sound corporate governance structure and internal management system; and (4)The company and its main shareholders have no record of serious violation of any law or regulation.

**Article 42**

To set up a special-purpose company abroad, an overseas company shall apply to the MOFCOM for going through the examination and approval formalities. When doing so, the domestic company shall not only submit to the MOFCOM the documents as required in the Provisions on the Examination and Approval of Investment to Run Enterprises Abroad, but also the following documents: (1)The identity certification documents on the final controller of the special-purpose company; (2)The business plan on the overseas listing of the special-purpose company; and (3)The assessment report made by the takeover consultant on the price of the stocks to be issued by the special-purpose company to get listed abroad in the future.

After the party who establishes or controls a special-purpose company obtains approval document for Chinese enterprise to make overseas investment, it shall apply to the foreign exchange control organ of the place where it is located for going through the formalities for the register of overseas investments.

**Article 43**

The total value of the stocks of a special-purpose company listed abroad shall not be lower than the value of the equities of the domestic company upon the assessment of the relevant asset assessment institution.

**Article 44**

Where a special-purpose company intends to take over a domestic company by equities, the domestic company shall not only submit to the MOFCOM the documents as required in Article 32 of these Provisions, but also the following documents: (1)The approval documents and certificate for the investor to run an enterprise abroad at the time of establishment of the special-purpose company; (2)The foreign exchange register form for the overseas investments of the special-purpose company; (3) The identity certification documents on the final controller of the special-purpose company, or the business opening certification or articles of association of the special-purpose company; (4)The business plan on the overseas listing of the special-purpose company; and (5)The assessment report made by the takeover consultant on the price of the stocks to be issued by the special-purpose company to get listed abroad in the future.

If the parties concerned makes an overseas company, which holds the equities of a special-purpose company, serve as a subject to get listed abroad, the domestic company shall, apart from the aforesaid documents, submit the following documents: (1)The business opening certification and the articles of association of the overseas company; and (2)The arrangement of the special-purpose company and the overseas company for the transaction of the equities of the domestic company taken over, as well as the detailed descriptions of the method to convert the equities to money.

#### **Article 45**

If the MOFOCOM approves the documents as required in Article 44 of these Provisions upon preliminary examination, it shall issue a letter of in-principle approval. The domestic company shall, upon the strength of the letter of in-principle approval, submit to the securities regulatory institution of the State Council the application documents for getting listed. The securities regulatory institution of the State Council shall make a decision of approval or disapproval within 20 working days.

After the domestic company obtains an approval, it shall apply to the MOFCOM for an approval certificate. The MOFCOM shall issue to it an approval certificate with the remark "For holding equities of overseas special-purpose company, it shall be valid for 1 year as of the issuance of a business license".

If the takeover causes the change of equities of the special-purpose company, the domestic company or natural person holding the equities of the special-purpose company shall, upon the strength of the foreign-funded enterprise approval certificate with a remark, apply to the MOFCOM for going through the formalities for the examination and approval of the change of the overseas investment to run an enterprise abroad and shall apply to the local foreign exchange control organ for modifying the foreign exchange register of overseas investments.

#### **Article 46**

The domestic company shall, within 30 days after it receives an approval document with a remark, apply to the registration administrative organ and the foreign exchange control organ for modifying the registration. The registration administrative organ and the foreign exchange control organ shall respectively issue to a foreign-funded enterprise business license and a foreign exchange register certificate with a remark "To be valid for 14 months as of the date of issuance".



When the domestic company handles the modification registration in the registration administrative organ, it shall, in advance, submit the equity change application, the revised articles of association, the equity transfer agreement and other documents signed by the legal representative of the domestic company, which are aimed to resume the structure of equities.

#### **Article 47**

The domestic company shall, within 30 days after the special-purpose company or its connected overseas company realizes the overseas listing, report to the MOFOCOM about the information about the overseas listing and its plan on the transfer-back of the raised funds and apply for a unremarked foreign-funded enterprise approval certificate. At the same time, it shall, within 30 days after the realization of overseas listing, report to the securities regulatory institution of the State Council the information about the overseas listing and provide it with the relevant documents for archival purposes. It shall also submit to the foreign exchange control organ its plan on the transfer-back of the raised funds and execute this plan under the supervision of the foreign exchange control organ. It shall, within 30 days after it receives an unremarked approval certificate, apply to the registration administrative organ and foreign exchange control organ for replaying its foreign-funded enterprise business license and foreign exchange register certificate with a remark by a new unremarked one.

If the domestic company fails to report to the MOFCOM within the aforesaid time limit, its approval certificate with a remark shall be invalidated automatically, its equities structure will resume to the state prior to the equity-based takeover and it shall go through the formalities for modifying the registration in accordance with Article 36 of these Provisions.

#### **Article 48**

The funds of a special-purpose company raised from overseas listing shall, according to the transfer-back plan submitted to the foreign exchange control organ for archival purposes, be transferred back into China according to the existing foreign exchange control provisions. The raised funds may be transferred back into China by: (1) providing commercial loans to the domestic company; (2) setting up a new foreign-funded enterprise within China; and (3) taking over a domestic enterprise.

To transfer back the funds of a special-purpose company raised overseas under the aforesaid circumstances, the relevant parties shall abide by the laws and administrative regulations on the administration of foreign investments and on foreign debts. If, as a consequence of the transfer-back of the funds a special-purpose company raised overseas, the domestic company or natural person who holds more equities of the special-purpose company or the net assets of the special-purpose company increase, the parties concerned shall faithfully disclose the relevant information and apply for examination and approval. After it finishes the examination and approval formalities, it shall go through the formalities for modifying the foreign exchange register of foreign investments and the register of overseas investments.

The profit, bonus and capital change income in a foreign currency obtained by the domestic company or natural person from the special-purpose company shall be transferred back to China within 6 months after the date of obtainment. The profit or dividends may enter into the foreign exchange account for current items or may be converted into RMB. The capital change income in a foreign currency may, upon the examination and approval of the foreign exchange control organ, be deposited in a special capital account opened for it or be converted into RMB.

**Article 49**

Within 1 year after the date of issuance of a business license, if the domestic company fails to obtain an unremarked approval certificate, the approval certificate with a remark shall be invalidated automatically. The domestic company shall go through the formalities for modifying the registration.

**Article 50**

After the special-purpose company has realized the overseas listing and the domestic company has obtained an approval certificate and a business license with no remark, if the relevant party concerned continues to take over this domestic company by paying its equities, the provisions of Sections 1 and 2 of this Chapter shall apply to this case.

## **Chapter V Antitrust Review**

**Article 51**

If the takeover of a domestic company by a foreign investor is under any of the following circumstances, the investor shall report the relevant information to the MOFCOM and the State Administration for Industry and Commerce (hereinafter referred to as the SAIC): (1)The current-year business volume of any party to the takeover in the Chinese market exceeds RMB 1.5 billion yuan; (2)The foreign investor has accumulatively taken over more than 10 enterprises in the domestic relevant industries; (3)The market share of any party to the takeover has reached 20% in China; and (4)The takeover leads to the fact that the market share of the party to the takeover has reached 25% in China.

When the foreign investor fails to meet the conditions as mentioned in the preceding Paragraph, but upon request of a domestic enterprise of competitive relationship, a relevant functional department or industrial association, the MOFCOM or the SAIC believes that the takeover by the foreign investor involves a huge market share, or that there are other major factors which seriously impact market competition, it may also demand the foreign investor to prepare a report.

The aforesaid merging party includes the connected enterprises of the foreign investor.

**Article 52**

If the takeover of a domestic company by a foreign investor is under any of the circumstances as mentioned in Article 51 and if the MOFCOM and the SAIC believe that it may lead to excessive concentration, hamper fair competition or impair the interests of the consumer, they shall, within 90 days as of the receipt of all the documents as required, either solely convene through negotiation or jointly convene the relevant departments, institutions, enterprises and other interested parties and hold a hearing, and shall make a decision of approval or disapproval in accordance with the law.

**Article 53**

Where an overseas takeover is under any of the following circumstances, the parties to the takeover shall, before announcing the takeover proposal or when submitting the said proposal to the competent authority in the country of its locality, submit the takeover proposal to the MOFCOM and the SAIC. The MOFCOM and the SAIC shall examine whether it will lead to excessive centralization in the domestic market, hinder domestic fair competition, or damage the domestic consumers' benefits, and shall make a decision on whether approve the proposal or not: (1) The overseas party to the takeover owns more than RMB 3 billion Yuan of assets inside the territory of China; (2) The business volume of the overseas party to the takeover in the Chinese market is more than RMB 1.5 billion yuan in the current year; (3) The market share of the overseas party to the takeover and its connected enterprises in China has reached 20%; (4) The market share of the overseas party to the takeover and its connected enterprises in China has reached 25% due to the overseas takeover; or (5) Due to the overseas takeover, there will be more than 15 foreign-funded enterprises in the relevant domestic industries with direct or indirect shares of the foreign-funded enterprises.

#### **Article 54**

Where a takeover is under any of the following circumstances, the parties to the takeover may apply to the MOFCOM and the SAIC for exemption of examination: (1) The takeover may improve the conditions for fair competition in the market; (2) A loss-making enterprise is taken over and the employment is ensured; (3) The takeover helps the absorption of advanced technologies and management personnel and is able to improve the enterprise's international competitiveness; or (4) The takeover may improve the environment.

## **Chapter VI Supplementary Provisions**

#### **Article 55**

Where an investment company established by a foreign investor within China intends to take over a domestic enterprise, it shall be governed by these Provisions.

Where a foreign investor intends to purchase the equities of a foreign-funded enterprise within China or to subscribe to the increased capital of a foreign-funded enterprise within China, it shall be governed by the existing laws and administrative regulations on foreign-funded enterprises as well as the relevant provisions on changes of equities of investors of foreign-funded enterprise; if any matter is not covered by the aforesaid laws, administrative regulations or provisions, it shall be governed by these Provisions.

Where a foreign investor intends to combine with or take over a domestic enterprise through a foreign-funded enterprise established by it within China, it shall be governed by the relevant provisions on the combination and split-up of foreign-funded enterprises and the relevant provisions on domestic investments of foreign-funded enterprise; if any matter is not covered by the aforesaid provisions, it shall be governed by these Provisions.

Where a foreign investor takes over a domestic limited liability company, if it transforms it into a joint stock limited company, or if the domestic company is a joint stock limited company, it shall be governed by the relevant provisions on the establishment of a joint stock limited company; if any matter is not covered by the aforesaid provisions, it shall be governed by these Provisions.

#### **Article 56**

For the submission of documents, an applicant or declarer shall classify the documents into different categories under these Provisions and accompany them with a list of documents. All documents required to be submitted shall be written in Chinese.

**Article 57**

A Chinese natural-person shareholder of a domestic company taken over by equities may, upon approval, continue to be a Chinese investor of the foreign-funded enterprise established after modification.

**Article 58**

If a natural-person shareholder of a domestic company changes his nationality, the enterprise nature of the company will remain unchanged.

**Article 59**

The functionaries of the government organs shall be dutious, shall perform their duties in pursuance of the law, shall not seek any improper benefit by taking the advantage of their positions, and shall keep confidential the commercial secrets they have access to.

**Article 60**

Where an investor from Hong Kong Special Administrative Region, Macao Special Administrative Region or Taiwan Region intends to take over a domestic enterprise of any other region, it shall be governed by these Provisions.

**Article 61**

These Provisions shall come into force as of September 8, 2006.

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