Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors

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Unofficial English translation prepared for reference only. The official Chinese text prevails.

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Chapter I — General Provisions

Article 1. These Provisions are formulated in accordance with laws and administrative regulations concerning foreign-invested enterprises and other relevant laws and administrative regulations to promote and regulate foreign investors' investment in China, introduce advanced technologies and management experience, improve the utilization of foreign capital, rationalize the allocation of resources, safeguard employment, and protect fair competition to ensure national economic security.

Article 2. "Merger and acquisition of a domestic enterprise by a foreign investor" as used in these Provisions refers to a foreign investor's acquisition by agreement of the equity interest of a shareholder of a domestic enterprise that is not a foreign-invested enterprise ("domestic company"), or a foreign investor's subscription to the capital increase of a domestic company resulting in the conversion of the domestic company into a foreign-invested enterprise; or the establishment of a foreign-invested enterprise by a foreign investor to purchase the assets of a domestic enterprise through agreement and operate such assets; or a foreign investor's purchase of assets of a domestic enterprise through agreement and the subsequent investment of such assets to establish a foreign-invested enterprise for the operation of the assets.

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Article 3. Mergers and acquisitions of domestic enterprises by foreign investors shall comply with the laws, administrative regulations, and departmental rules of China, and shall be consistent with the requirements of the state industrial policy, land use policy, environmental protection policy, and other policies.

Article 4. Mergers and acquisitions of domestic enterprises by foreign investors shall not result in excessive concentration, exclusion or restriction of competition, or disruption of the social and economic order. They shall not cause loss of state-owned assets. They shall not harm the lawful rights and interests of employees.

Article 5. Where a merger or acquisition of a domestic enterprise by a foreign investor involves the transfer of state-owned property rights or the change of administration of a listed company, the foreign investor shall comply with the relevant provisions on the administration of state-owned assets and securities.

Chapter II — Basic Regime

Article 6. Where a foreign investor merges with or acquires a domestic enterprise and establishes a foreign-invested enterprise, it shall be subject to the examination and approval of, and registration with, the relevant authorities having the jurisdiction in accordance with these Provisions.

Article 7. The parties to a merger or acquisition of a domestic enterprise by a foreign investor shall determine the transaction price on the basis of the valuation of the equity interest or assets to be transferred as appraised by an asset valuation institution. The parties shall not transfer the equity interest or sell the assets at a price lower than the appraised value, unless otherwise provided by the State.

Article 8. The parties to a merger or acquisition of a domestic enterprise by a foreign investor shall agree on the time limit for the foreign investor's payment of consideration. Where the foreign investor acquires the equity interest of a shareholder of a domestic enterprise, the parties shall agree on the time limit for payment, and the foreign investor shall pay all the consideration within three months from the date of issuance of the business license of the foreign-invested enterprise. Under special circumstances, upon approval, the foreign investor may pay 60 percent or more of the total consideration within six months and pay the remaining amount within one year.

Article 9. Where a foreign investor acquires the equity interest of a domestic enterprise, the foreign-invested enterprise established after the merger or acquisition shall succeed to the claims and debts of the original domestic enterprise. Where a foreign investor acquires assets of a domestic enterprise, the original domestic enterprise shall continue to bear its original claims and debts.

Article 10. The parties to a merger or acquisition of a domestic enterprise by a foreign investor shall make proper arrangements for the employees of the merged or acquired domestic enterprise, and the employment contracts of the employees shall not be terminated as a result of the merger or acquisition. The parties shall negotiate with the trade union or employee representatives concerning matters relating to employee arrangements.

Chapter III — Approval and Registration

Article 11. A foreign investor that merges with or acquires a domestic enterprise shall submit an application and the relevant documents to the competent commerce authority having the examining and approving power in accordance with these Provisions. The commerce authority shall decide whether to approve or not within 30 days from the date of receiving all the prescribed documents.

Article 12. Where the merger or acquisition involves key industries, exerts or may exert a controlling influence on the national economy, or involves a famous trademark or time-honored Chinese brand, the parties shall report to the Ministry of Commerce. Where the applicant fails to report, the parties shall be ordered to do so, and the foreign investor may not exercise its shareholder rights until the report is made.

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Article 13. Where the equity interest to be acquired is held in the name of an affiliate and the actual controller is a domestic enterprise or individual, the acquisition shall not be treated as a foreign merger or acquisition, and the parties shall truthfully disclose the structure of the actual controller.

Article 14. The commerce authority may refuse to approve an application for a merger or acquisition by a foreign investor under any of the following circumstances: the merger or acquisition may adversely affect national economic security; the merger or acquisition may result in excessive market concentration or may exclude or restrict competition; the merger or acquisition may disrupt the social and economic order; the merger or acquisition may cause significant loss of state-owned assets; or the merger or acquisition fails to meet the requirements of the state industrial policy.

Article 15. Upon obtaining the approval certificate for a foreign-invested enterprise, the foreign-invested enterprise shall complete registration formalities with the company registration authority within the prescribed period and obtain a business license. The foreign-invested enterprise shall be deemed established on the date of issuance of the business license.

Chapter IV — Consideration and Valuation of Cross-Border Share Swap

Article 16. As used in these Provisions, a cross-border share swap by a foreign investor means that an overseas company, the equity interest of which is legally established and listed on an overseas securities market, or a special purpose vehicle directly or indirectly controlled by it, acquires an equity interest or assets of a domestic company by means of an equity swap. The domestic company or its shareholders shall acquire the equity interest of the overseas company as consideration.

Article 17. The parties to a share swap transaction shall appoint an intermediary institution registered in China to act as the financial adviser and shall engage a valuation institution registered in China to conduct a valuation. The valuation report shall be prepared in accordance with internationally accepted valuation methods.

Article 18. The equity interest of the overseas company used as consideration in a share swap transaction shall be legally held and may be transferred in accordance with the law, and shall be free from ownership disputes and encumbrances. The overseas company and its shareholders shall have a standardized corporate governance structure and shall have not been subject to material penalties imposed by regulatory authorities in the last three years.

Article 19. A special purpose vehicle that intends to list overseas shall obtain approval from the China Securities Regulatory Commission. The overseas listing and the domestic merger and acquisition transaction shall be conducted within the time limit specified in the approval.

Article 20. Where the overseas company has completed its listing, the domestic company or its natural person shareholders holding the equity interest of the overseas company may transfer such equity interest and repatriate the proceeds in accordance with the relevant foreign exchange administration provisions.

Chapter V — Anti-Monopoly Review

Article 21. Where a merger or acquisition of a domestic enterprise by a foreign investor falls under any of the following circumstances, the parties shall report to the Ministry of Commerce and the State Administration for Industry and Commerce: the business revenue of one of the parties in the China market in the current year exceeds RMB 1.5 billion; the aggregate number of enterprises merged or acquired by the foreign investor in the relevant industry in China within one year exceeds 10; the business revenue of one of the parties in the China market in the current year exceeds RMB 2 billion; or the merger or acquisition would give the foreign investor a market share of 25 percent or more in the relevant market in China.

Article 22. Where a merger or acquisition by a foreign investor may result in excessive market concentration, exclusion or restriction of competition, the Ministry of Commerce and the State Administration for Industry

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and Commerce may jointly or, following consultation, separately convene a hearing with the relevant departments, institutions, enterprises, and other interested parties, and decide to approve or disapprove the merger or acquisition in accordance with the law.

Article 23. Where a foreign investor acquires a domestic enterprise by means of a merger or acquisition and the transaction falls within the notification threshold prescribed in the Anti-Monopoly Law, the foreign investor shall file a notification of concentration of business operators with the anti-monopoly enforcement authority of the State Council in accordance with the provisions of the Anti-Monopoly Law.

Chapter VI — Special Provisions

Article 24. Where a foreign investor acquires actual control over a domestic enterprise through a merger or acquisition, and such acquisition involves a key industry, exerts or may exert a controlling influence on the national economy, or involves a famous trademark or time-honored Chinese brand, and where the foreign investor would control the actual operations, the foreign investor shall report to the Ministry of Commerce.

Article 25. The establishment of a foreign-invested enterprise by a foreign investor to purchase the assets of a domestic enterprise through agreement and the operation of such assets shall not constitute an evasion of these Provisions re-characterized as a different transaction structure. Any scheme, trust, proxy, or multi-layer investment structure designed to evade the application of these Provisions shall be disregarded, and the substance of the transaction shall be examined.

Article 26. Where any of the documents submitted by the parties proves to be false, the approving authority shall revoke the approval certificate, the registration authority shall revoke the registration, and the foreign exchange administration authority, customs authority, and tax authority shall revoke the relevant certificates and clearances granted. Legal liability shall be pursued in accordance with the law for any consequent loss of state-owned assets or evasion of foreign exchange controls.

Article 27. These Provisions shall also apply to mergers and acquisitions of domestic enterprises by investors from the Hong Kong Special Administrative Region, the Macao Special Administrative Region, and the Taiwan region.

Article 28. Matters not covered by these Provisions shall be governed by the laws, administrative regulations, and departmental rules relating to foreign-invested enterprises. These Provisions shall be interpreted by the Ministry of Commerce and the State Administration of Foreign Exchange.

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