

Several Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors of the PRC

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Chapter I — General Provisions

Article 1 — These Provisions are formulated for the purposes of promoting and regulating the investment of foreign investors in China, introducing advanced technology and management experience, improving the utilization of foreign investment, achieving the rational allocation of resources, ensuring employment, and maintaining fair competition and national economic security, in accordance with the laws and administrative regulations on foreign-invested enterprises, the Company Law, and other relevant laws and administrative regulations.

Article 2 — For the purposes of these Provisions, "merger and acquisition of a domestic enterprise by a foreign investor" means the following circumstances in which a foreign investor purchases the equity of a shareholder of a domestic enterprise that is not a foreign-invested enterprise, or subscribes to the capital increase of a domestic enterprise, thus converting the domestic enterprise into a foreign-invested enterprise (hereinafter referred to as "equity merger and acquisition"); or a foreign investor establishes a

foreign-invested enterprise and through such enterprise purchases and operates the assets of a domestic enterprise, or a foreign investor purchases the assets of a domestic enterprise and invests such assets to establish a foreign-invested enterprise to operate such assets (hereinafter referred to as "asset merger and acquisition").

Article 3 — A foreign investor merging with or acquiring a domestic enterprise shall comply with the laws, administrative regulations, and departmental rules of China, and shall adhere to the principles of fairness, reasonableness, compensation for equal value, and honesty and good faith. It shall not create excessive concentration, eliminate or restrict competition, disturb social and economic order, or harm the public interest. It shall not result in the loss of state-owned assets.

Article 4 — A foreign investor merging with or acquiring a domestic enterprise shall comply with the requirements of the foreign investment industrial policies of China. Where the State provides that a foreign investor is not permitted to hold a controlling interest in an industry, the foreign investor shall not hold a controlling interest in any enterprise in such industry after the merger and acquisition. Where a domestic enterprise in an industry in which a Chinese party is required to hold a controlling interest or hold a relatively controlling interest is merged with or acquired, the Chinese party shall remain in a position of controlling interest or relatively controlling interest in the enterprise after the merger and acquisition. Where the State provides that a foreign investor is prohibited from operating in an industry, the foreign investor shall not merge with or acquire an enterprise in such industry.

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

Article 6 — Where a foreign investor merges with or acquires a domestic enterprise to establish a foreign-invested enterprise, it shall, in accordance with these Provisions, obtain the approval of the examination and approval authority and undergo alteration registration or establishment registration with the registration authority. Where a foreign investor purchases the equity of a shareholder of a domestic enterprise within the territory of China by means of payment within the territory of China or purchases the capital increase of a domestic enterprise, such purchase shall be handled in accordance with the relevant provisions.

Article 7 — Where a foreign investor merges with or acquires a domestic enterprise and involves any of the following circumstances, it shall report to the Ministry of Commerce: (1) a key industry; (2) an industry that involves or may involve the national economic security; (3) an industry that may result in the transfer of an actual controlling right of a domestic enterprise holding a well-known trademark or a time-honored brand; or (4) other circumstances that shall be reported as provided for by the State. Where the parties fail to report and the merger and acquisition involves any of the above circumstances, the Ministry of Commerce may, together with the relevant departments, require the parties to terminate the transaction, assign the relevant equity or assets, or adopt other effective measures to eliminate the impact of the merger and acquisition on national economic security.

Article 8 — The examination and approval authority for merger and acquisition by foreign investors shall be the Ministry of Commerce or the provincial-level department of commerce (hereinafter referred to as the "examination and approval authority"). The registration authority shall be the State Administration for Industry and Commerce or its authorized local administration for industry and commerce.

Chapter II — Basic System

Article 9 — Where a foreign investor purchases the equity of a shareholder of a domestic limited liability company that is not a foreign-invested enterprise or subscribes to the capital increase of a domestic

company, the investment amount of the foreign investor shall generally account for not less than 25% of the registered capital of the enterprise after the merger and acquisition, before the enterprise may enjoy the treatment of a foreign-invested enterprise.

Article 10 — The parties to the merger and acquisition shall determine the transaction price based on the assessment results of the value of the equity to be transferred or the assets to be sold, as appraised by an asset appraisal institution. The parties to the merger and acquisition may agree on an asset appraisal institution lawfully established within the territory of China. Asset appraisals shall be conducted using internationally accepted appraisal methods. It is prohibited to transfer equity or sell assets at a price obviously lower than the appraisal result, so as to transfer capital out of China in disguised form.

Article 11 — Where a foreign investor merges with or acquires a domestic enterprise, the parties involved shall determine the consideration for the transaction. The consideration for the transaction shall be paid within three months from the date of issuance of the business license of the foreign-invested enterprise. Where an extension is required due to special circumstances, the parties may, with the approval of the examination and approval authority, pay 60% or more of the consideration within six months from the date of issuance of the business license of the foreign-invested enterprise, and pay the full consideration within one year. Allocation of earnings shall be made in proportion to the actual payment of the consideration.

Article 12 — Where a foreign investor makes an equity merger and acquisition, the foreign-invested enterprise established after the merger and acquisition shall succeed to the claims and debts of the merged or acquired domestic company. Where a foreign investor makes an asset merger and acquisition, the domestic enterprise selling the assets shall bear its original claims and debts. Where the foreign investor, the domestic enterprise, the creditors, and other parties reach an agreement otherwise on the disposal of the claims and debts of the domestic enterprise being merged or acquired, such agreement shall prevail, provided that it does not harm the interests of third parties or the public interest. The agreement on the disposal of claims and debts shall be submitted to the examination and approval authority.

Article 13 — Where the parties to a merger and acquisition transaction agree on the establishment of a foreign-invested enterprise, the parties shall work out the contract and the articles of association of the foreign-invested enterprise. The term of business of the foreign-invested enterprise shall generally not exceed 10 years. The total investment amount of the foreign-invested enterprise established after the merger and acquisition shall be determined in accordance with the relevant provisions. Where the total investment amount is required to be determined based on the actual circumstances, the examination and approval authority shall determine the same.

Article 14 — Where a foreign investor makes an equity merger and acquisition, the number of shareholders of the limited liability company formed after the merger and acquisition shall comply with the relevant provisions of the Company Law. Unless otherwise provided for by laws and administrative regulations, the number of shareholders shall not exceed 50.

Article 15 — Where a foreign investor makes a merger and acquisition, the upper limit of the total investment amount of the foreign-invested enterprise established after the merger and acquisition shall be determined in accordance with the following proportions: (1) where the registered capital is not more than USD 2.1 million, the total investment amount shall not exceed 10/7 of the registered capital; (2) where the registered capital is more than USD 2.1 million but not more than USD 5 million, the total investment amount shall not exceed two times the registered capital; (3) where the registered capital is more than USD 5 million but not more than USD 12 million, the total investment amount shall not exceed 2.5 times the registered capital; (4) where the registered capital is more than USD 12 million, the total investment amount shall not exceed three times the registered capital.

Article 16 — Where the foreign investor merges with or acquires a domestic enterprise and the foreign-invested enterprise to be established involves the transfer of state-owned property rights and

changes in the administration of listed companies, it shall also comply with the relevant provisions of the State. Where the amount of foreign exchange required is not clear, the foreign exchange control authorities may require the foreign investor to provide a foreign exchange payment guarantee.

Chapter III — Approval and Registration

Article 17 — Where a foreign investor makes an equity merger and acquisition, or where a foreign investor subscribes to the capital increase of a domestic limited liability company, the domestic company shall, within 30 days from the date of the resolution of the shareholders' meeting, apply to the original registration authority for alteration of registration. The original registration authority shall process the registration in accordance with the provisions.

Article 18 — Where a foreign investor makes a merger and acquisition, the domestic enterprise or the foreign investor shall, in accordance with the provisions, submit the relevant application documents to the examination and approval authority having the corresponding authority. The examination and approval authority shall decide whether to approve or not to approve the application within 30 days from the date of receipt of all the prescribed documents. Where the examination and approval authority decides to grant approval, it shall issue an approval certificate.

Article 19 — Where a foreign investor makes an equity merger and acquisition, the domestic company or the foreign investor shall, within 30 days from the date of receipt of the approval certificate of the foreign-invested enterprise, undergo registration formalities with the registration authority. Where a foreign investor makes an asset merger and acquisition, the foreign investor shall, within 30 days from the date of receipt of the approval certificate of the foreign-invested enterprise, apply for the establishment registration of the foreign-invested enterprise with the registration authority.

Article 20 — The registration authority shall, within 30 days from the date of acceptance of the application, decide whether to approve the registration in accordance with the law. Where the registration authority decides to grant registration, it shall issue a business license.

Article 21 — After obtaining the business license, the foreign-invested enterprise established after the merger and acquisition shall, in accordance with the relevant provisions of the State, undergo registration formalities with the taxation, customs, foreign exchange control, and other relevant authorities.

Article 22 — Where a foreign investor merges with or acquires a domestic enterprise in any of the following manners, the domestic enterprise shall notify the creditors and publish an announcement in a newspaper in accordance with the provisions of the Company Law: (1) a foreign investor purchases the equity of a shareholder of a domestic company, resulting in the alteration of the form of the domestic company; (2) a foreign investor subscribes to the capital increase of a domestic limited liability company; (3) a foreign investor purchases the assets of a domestic enterprise; or (4) other circumstances provided for by laws and administrative regulations.

Article 23 — Where the creditors of the domestic enterprise request the domestic enterprise to provide corresponding security or pay off the debts in advance within the period specified by law, the domestic enterprise shall make proper arrangements for the relevant creditors.

Article 24 — Where the parties to the merger and acquisition apply for approval, the examination and approval authority may require the parties to provide information on market concentration, including the market share and the state of market competition of the relevant enterprises before and after the merger and acquisition.

Chapter IV — Cross-Border Share Swap

Article 25 — For the purposes of these Provisions, "cross-border share swap" means the following conduct in which a foreign investor purchases the equity of a shareholder of a domestic company, or a foreign

investor subscribes to the capital increase of a domestic company, and the domestic company or its shareholder acquires the equity of the foreign investor by means of the equity of the domestic company or through a capital increase. Overseas companies shall be lawfully established and their registration shall be valid. The equity of overseas companies shall be shares listed on an overseas public securities exchange market, or special-purpose companies whose equity has been approved for listing on an overseas securities exchange market.

Article 26 — Where a foreign investor makes a merger and acquisition by way of a cross-border share swap, the examination and approval authority shall report to the Ministry of Commerce for examination and approval. A domestic company or natural person who intends to transfer or receive the equity of a domestic company through a domestically established or controlled special-purpose company shall apply to the Ministry of Commerce for approval.

Article 27 — The equity of an overseas company used for a share swap shall be evaluated by an asset appraisal institution lawfully established within the territory of China. The parties to the merger and acquisition may agree on the asset appraisal institution. The evaluation report shall adopt internationally accepted appraisal methods.

Article 28 — A domestic company or natural person who intends to establish or control a special-purpose company overseas with assets or equity legally owned by it within the territory of China shall apply to the Ministry of Commerce for approval. The parties concerned shall truthfully explain their overseas interests to the foreign exchange control authorities and provide the relevant approval documents.

Article 29 — The term of business of a foreign-invested enterprise established through a cross-border share swap shall be determined in accordance with the relevant provisions. Where a foreign investor establishes a foreign-invested enterprise through a share swap, it shall submit a business development plan for the foreign-invested enterprise to the examination and approval authority to prove that the transaction will promote technological progress, introduce advanced technology, and improve management, and that it will help to enhance the international competitiveness of the enterprise.

Article 30 — A foreign-invested enterprise established through a cross-border share swap shall, within 30 days from the date of issuance of the business license, undergo the relevant formalities with the foreign exchange control authority. Where the foreign exchange control authority verifies that the foreign exchange matters involved in the cross-border share swap comply with the provisions, it shall process the foreign exchange registration and issue a foreign exchange registration certificate.

Chapter V — Supplementary Provisions

Article 31 — These Provisions shall 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 with reference to the provisions on foreign investors.

Article 32 — The Ministry of Commerce shall be responsible for the interpretation of these Provisions. Matters not covered by these Provisions shall be governed by the provisions of laws and administrative regulations.

Article 33 — These Provisions shall come into force on September 8, 2006. Where the State provides otherwise for the merger and acquisition of domestic enterprises by foreign investors, such provisions shall prevail.

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