

Regulations on merge and acquisition of Chinese mainland enterprises by foreign investors

- 1. Interim Provisions for Foreign Investors to Merge Domestic Enterprises**
- 2. Interim Provisions on Restructuring State-owned Enterprises with Foreign Investment**

1. Interim Provisions for Foreign Investors to Merge Domestic Enterprises

Article 1 The present provisions are formulated in accordance with the laws and administrative regulations on foreign-funded enterprises and other relevant laws and administrative regulations with a view to promoting and regulating foreign investors' investments in China, absorbing advanced technologies and management experiences from abroad, improving the level of utilizing foreign investments, realizing reasonable allocation of resources, ensuring employment, as well as maintaining fair competition and state economic security.

Article 2 The merger of a domestic enterprise by a foreign investor, which is mentioned in the present provisions, shall mean that the foreign investor purchases by agreement the share rights of the shareholders of a domestic non-foreign-funded enterprise (hereinafter referred to as "domestic company") or subscribes a domestic company to increase the capital, and thus modifying the domestic company to establish a foreign-funded enterprise (hereinafter referred to as "share right merger"); or, a foreign investor establishes a foreign-funded enterprise, and through which 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 operates the assets (hereinafter referred to as "asset merger").

Article 3 Foreign investors shall, when merging domestic enterprises, abide by Chinese laws, administrative regulations and departmental rules, comply with the

principles of fairness, reasonableness, making compensation for equal value, honesty and credibility, and shall not cause excessive market centralization, exclude or limit competitions, or disturb the social economic order or damage the public benefits.

Article 4 Foreign investors shall, when merging domestic enterprises, conform to the requirements in Chinese laws, administrative regulations and departmental rules on the investors' qualification and industrial policies.

For the industries where solely foreign-owned operation is not permitted by the "Catalog for the Guidance of Foreign Investment Industries", the merger shall not lead to a consequence that a foreign investor holds the enterprise's whole share rights; for the industries where a Chinese party needs to control or relatively control the shares, the Chinese party shall, after an enterprise in such industries is merged, still controls or relatively controls the shares of the enterprise; for the industries where foreign investors are prohibited from operation, no foreign investor shall merge any enterprise engaged in such industries.

Article 5 A foreign investor shall, when merging a domestic enterprise to establish a foreign-funded enterprise, apply to the approval organ in accordance with the present provisions for approval, and make registration of modification or establishment in the administrative organ for registration. The proportion of investments contributed by a foreign investor shall not be less than 25% of the registered capital of the foreign-funded enterprise established after the merger. Where the proportion of a foreign investor's contribution of investments is less than 25%, it shall, unless otherwise provided for in laws or administrative regulations, get the approval and make registration by following the procedures on approving and registering the establishment of foreign-funded enterprises. The approval organ shall, when issuing the approval certificate of foreign-funded enterprise, indicate on the certificate the following words: "investments contributed by the foreign party are less than 25%". The administrative organ for registration shall also, when issuing the business license of foreign-funded enterprise, indicate on it the words of "investments contributed by the foreign party are less than 25%".

Article 6 The approval organ in the present provisions shall be the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China (hereinafter referred to as "the MOFTEC") or the department at the provincial level in charge of

foreign trade and economic cooperation (hereinafter referred to as “the approval organ at the provincial level”), while the administrative organ for registration shall be the State Administration for Industry and Commerce of the People’s Republic of China or the authorized local administration for industry and commerce.

Where, in accordance with the laws, administrative regulations or departmental rules, a foreign-funded enterprise established after the merger belongs to the foreign-funded enterprises of certain types or in certain industries that shall be approved by the MOFTEC, the approval organ at the provincial level shall transfer the application documents to the MOFTEC for approval, and the MOFTEC shall decide on whether to grant the approval in accordance with the law.

Article 7 Where a foreign investor carries out a share right merger, the claims and debts of the merged domestic company shall be succeeded to by the foreign-funded enterprise established after the merger.

Where a foreign investor carries out an asset merger, the domestic enterprise that sells assets shall assume its original claims and debts.

The foreign investor, the merged domestic enterprise, the creditors and other parties may reach an agreement separately on the disposition of the claims and debts of the merged domestic enterprise, provided that the agreement shall not damage a third person’s benefits or public benefits. The agreement on disposition of the claims and debts shall be submitted to the approval organ.

The domestic enterprise that sells assets shall, within 10 days as of the day when the resolution on the sale of assets is made, send written notices to the creditors, and promulgate an announcement on a newspaper at or above the provincial level which is issued nationwide. The creditors shall, within 10 days as of the receipt of the written notice or promulgation of the announcement, be entitled to demand the domestic enterprise that sells assets to provide the corresponding guaranty.

Article 8 The parties to a merger shall take the result valuated by the asset valuation institution on the value of the share rights under planned transfer or the assets under planned sale as the basis for determining the transaction price. The parties to a merger may determine an asset valuation institution established inside the territory of China

in accordance with the law. The assets shall be valued in a way internationally used.

When a foreign investor merges a domestic enterprise, and thus resulting in the modification of the share rights formed from investment of state-owned assets or transference of the property of state-owned assets, valuation shall be made in accordance with the relevant provisions on the administration of state-owned assets for determination of the transaction price.

Foreign investors are prohibited from diverting capital abroad in a disguised form by transferring share rights or selling assets at a price obviously lower than the valuated one.

Article 9 A foreign investor shall, when merging a domestic enterprise to establish a foreign-funded enterprise, within 3 months as of the day when the foreign-funded enterprise is issued its business license, pay all the consideration to the shareholders who transfer the share rights or to the domestic enterprise which sells the assets. In case of any particular circumstance under which the period needs to be extended, the foreign investor shall, upon the approval by the approval organ, pay 60% or more of the consideration within 6 months as of the day when the foreign-funded enterprise is issued its business license, and pay all the consideration within one year, and the proceeds shall be distributed according to the proportion of investments it has actually contributed.

Where a foreign investor carries out a share right merger, and the capital of the established foreign-funded enterprise after the merger is increased, the investor shall stipulate the time limit for contribution of investments in the contract and articles of association of the foreign-funded enterprise under planned modification and establishment. If the investments are stipulated to be contributed in a lump sum, the investor shall contribute all within 6 months as of the day when the foreign-funded enterprise is issued its business license; while if the investments are stipulated to be contributed by installments, the first installment of investments contributed by each investor shall not be lower than 15% of investment amount it has subscribed, and shall contribute all the investments within 3 months as of the day when the foreign-funded enterprise is issued its business license.

Where a foreign investor carries out an asset merger, it shall stipulate the time limit

for contribution of investments in the contract and articles of association of the foreign-funded enterprise under planned establishment. 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 be stipulated in a way provided for in Paragraph 2 of the present article.

Where a foreign investor merges a domestic enterprise to establish a foreign-funded enterprise, and the proportion of investments it contributes is less than 25%, the investor shall, contribute all the investments in cash within 3 months as of the day when the foreign-funded enterprise is issued its business license; or contribute all the investments in kind or in industrial properties, etc. within 6 months as of the day when the foreign-funded enterprise is issued its business license.

The means of payment as the consideration shall conform to the state's relevant laws and administrative regulations. If the foreign investor uses the shares over which it has the right to disposition or the Renminbi assets it lawfully owns as the means of payment, it shall obtain the approval of the department of foreign exchange control.

Article 10 After a foreign investor purchases by agreement the share rights of a domestic company, and the domestic company has been modified to be established as 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 share rights in the original registered capital. If the domestic company merged by means of share right merger increases its capital at the same time, the registered capital of the foreign-funded enterprise established after the merger shall be the sum of the original domestic company's registered capital and the increased amount; the foreign investor and other original investors of the merged domestic company shall, on the basis of the asset valuation of the domestic company, determine the proportions of their respectively contributed investments in the foreign-funded enterprise's registered capital.

Where a foreign investor subscribes a domestic company's increased capital, the

registered capital of the foreign-funded enterprise established after the modification of the domestic company shall be the sum of the original domestic company's registered capital and the increased amount. The foreign investor and other original shareholders of the merged domestic company shall, on the basis of the asset valuation of the domestic company, determine the proportions of their respectively contributed investments in the foreign-funded enterprise's registered capital.

The Chinese natural person shareholder of a domestic company merged by means of share right merger may, if having been a shareholder in the original company for one year or more, be approved to continue its identity as a Chinese investor of the foreign-funded enterprise established after the modification.

Article 11 Where a foreign investor merges a domestic enterprise by means of share right merger, the upper limit of the total investment amount of the foreign-funded enterprise established after the merger shall be determined according to the following proportions:

- (a) if the registered capital is less than 2,100,000 USD, the total investment amount shall not exceed 7/10 of the registered capital;
- (b) if the registered capital is more than 2,100,000 USD but less than 5,000,000 USD, the total investment amount shall not exceed two times of the registered capital;
- (c) if the registered capital is more than 5,000,000 USD but less than 12,000,000 USD, the total investment amount shall not exceed 2.5 times of the registered capital;
- (d) if the registered capital is more than 12,000,000 USD, the total investment amount shall not exceed 3 times of the registered capital.

Article 12 Where a foreign investor merges a domestic enterprise by means of share right merger, it shall submit the following documents to the approval organ with the corresponding approval power according to the total investment amount of the foreign-funded enterprise established after the merger:

- (a) resolution of the shareholders of the merged domestic limited liability company on unanimous consent of the foreign investor's share right merger, or resolution of the shareholders' meeting of the merged domestic stock limited company on consent of the foreign investor's share right merger;
- (b) application letter for the merged domestic company to be modified in accordance with the law into and be established as a foreign-funded enterprise;
- (c) contract and articles of association of the foreign-funded enterprise established

after the merger;

(d) agreement on the foreign investor's purchase of the share rights of the shareholders of the domestic company or on the subscription of the domestic company to increase capital;

(e) the financial auditing report of the merged domestic company in recent accounting years;

(f) the investor's documents on proof of identity, or proof of the opening of business and proof of credibility;

(g) statement on the enterprises invested by the merged domestic company;

(h) business licenses (copies) of the merged domestic company and of the enterprises it invests in;

(i) the merged domestic company's proposal on settlement of employees;

(j) documents to be submitted as required by Articles 7 and 19 of the present provisions.

Where the business scope, scale and obtainment of land use right of the foreign-funded enterprise established after the merger involves permits from other relevant governmental departments, the relevant permit documents shall be submitted along with those provided for in the preceding paragraph.

The business scope of the company previously invested by the merged domestic company shall meet the relevant requirements on foreign investment industrial policies; otherwise it shall be adjusted.

Article 13 The agreement on purchase of share rights and the agreement on increase of capital by the domestic company, which are provided for in Article 12 of the present provisions, shall be governed by Chinese law, and shall include the following main contents:

(a) information of each party to the agreements, including the name and domicile of each party, the name, position and nationality, etc. of each legal representative;

(b) the amount of the purchased share rights or the capital increased from subscription and the price thereof;

(c) time limit and method for implementation of the agreements;

(d) the rights and obligations of each party to the agreements;

(e) breach liabilities and settlement of disputes;

(f) time and place for conclusion of the agreements.

Article 14 Where a foreign investor merges a domestic enterprise by means of asset merger, it shall determine the total investment amount of the foreign-funded enterprise under planned establishment according to the transaction price for purchasing the assets and the actual scale of production and operation. The proportion of the registered capital of the foreign-funded enterprise under planned establishment in its total investment amount shall conform to the relevant provisions.

Article 15 Where a foreign investor merges a domestic enterprise by means of asset merger, it shall, pursuant to the total investment amount of the foreign-funded enterprise under planned establishment, the type of the enterprise and the industry it engages in, submit the following documents to the approval organ with the corresponding approval power in accordance with the laws, administrative regulations and departmental rules on establishment of foreign-funded enterprises:

- (a) resolution of the property holders or authority of the domestic enterprise on agreeing to sell the assets;
- (b) the application letter for the establishment of the foreign-funded enterprise;
- (c) contract and articles of association of the foreign-funded enterprise under planned establishment;
- (d) the agreement concluded between the foreign-funded enterprise under planned establishment and the domestic enterprise on purchase of assets, or, the agreement concluded between the foreign investor and the domestic enterprise on purchase of assets;
- (e) the merged domestic enterprise's articles of association and business license (copies);
- (f) proof proving that the merged domestic enterprise has notified and announced the creditors;
- (g) the investor's documents on proof of identity, or proof of the opening of business and proof of credibility;
- (h) the merged domestic enterprise's proposal on settlement of employees;
- (i) documents to be submitted as required by Articles 7 and 19 of the present provisions.

Where the assets of the domestic enterprise purchased and operated in accordance with the preceding paragraph involves permits from other relevant governmental departments, the relevant permit documents shall be submitted along with those

provided for 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 16 The agreement on purchase of assets as provided for in Article 15 of the present provisions shall be governed by Chinese laws, and shall contain the following main contents:

- (a) natural conditions of each party to the agreement, including the name and domicile of each party, the name, position and nationality, etc. of each legal representative;
- (b) the list of the assets under planned purchase and the price thereof;
- (c) time limit and method for the implementation of the agreement;
- (d) the rights and obligations of each party to the agreement;
- (e) breach liabilities and settlement of disputes;
- (f) time and place for conclusion of the agreement.

Article 17 Where a foreign investor merges a domestic enterprise to establish a foreign-funded enterprise, the approval organ shall, unless otherwise provided for in Article 20 of the present provisions, decide on, in accordance with the law, whether to grant the approval within 30 days as of the receipt of all the documents submitted. If the approval is to be granted, the approval organ shall issue the approval certificate of foreign-funded enterprise.

Where the approval organ decides to approve a foreign investor to purchase by agreement the share rights of the shareholder of a domestic company, it shall simultaneously make copies of the relevant approval documents separately to the foreign exchange control department at the share rights transferor's locality and that at the domestic company's locality. The foreign exchange control department at the share rights transferor's locality shall handle the registration of foreign investments and foreign exchanges on the collection of exchanges, and issue proof of registration of foreign investments and foreign exchanges which indicates that the consideration to the foreign investor's share right merger has been fully paid.

Article 18 Where a foreign investor merges a domestic enterprise by means of asset

merger, it shall, within 30 days as of the receipt of the approval certificate of foreign-funded enterprise, apply to the administrative organ of registration for making registration of establishment, and obtaining the foreign-funded enterprise's business license.

Where a foreign investor merges a domestic enterprise by means of share right merger, the merged domestic company shall, in accordance with the present provisions, apply to the original administrative organ of registration for making registration of modification, and obtaining the foreign-funded enterprise's business license. If the original administrative organ of registration has no jurisdiction of registration, it shall, within 10 days as of the receipt of the application documents, transfer them to an administrative organ of registration with the jurisdiction for handling the registration, and meanwhile attach the domestic company's registration files. The merged domestic company shall, when applying for registration of modification, submit the following documents, and be responsible for their genuineness and validity:

- (a) the application letter for registration of modification;
- (b) resolution of shareholders' meeting (general meeting) made by the merged domestic company in accordance with the Company Law of the People's Republic of China and the company's articles of association on transfer of share rights or increase of capital;
- (c) agreement on the foreign investor's purchase of the share rights of the shareholders of the domestic company or on the subscription of the domestic company to increase capital;
- (d) the amended articles of association of the company or the amendment to the original articles of association, and the contract of the foreign-funded enterprise that needs to be submitted in accordance with the law;
- (e) the foreign-funded enterprise's approval certificate;
- (f) the foreign investor's documents on proof of identity, or proof of the opening of business and proof of credibility;
- (g) the amended name list of the board of directors, the documents stating the names and domiciles of the newly increased directors, and the documents on the positions held by the newly increased directors;
- (h) other relevant documents and certificates provided for by the State Administration for Industry and Commerce.

In case of transfer of state-owned share rights or subscription by a foreign investor of

the increased amount of a company containing state-owned share rights, the approval documents issued by the department in charge of economy and trade shall be submitted in addition.

The investor shall, within 30 days as of the receipt of the foreign-funded enterprise's business license, make registration in the departments of taxation, customs, land administration and foreign exchange control, etc..

Article 19 Where a foreign investor merges a domestic enterprise under any of the following circumstances, it shall report the situation involved to the MOFTEC and the State Administration for Industry and Commerce:

- (a) the sales turnover of the party who merges a domestic enterprise in China's market exceeds RMB 1.5 billion Yuan in the current year;
- (b) the enterprises in domestic associated industries, which it merges within one year, totaled more than 10;
- (c) the market occupancy ratio of the party who merges a domestic enterprise has reached 20% in China;
- (d) the merger leads to the fact that the market occupancy ratio of the party who merges a domestic enterprise has reached 25% in China.

When the foreign investor fails to meet the conditions mentioned in the preceding paragraph, but the MOFTEC or the State Administration for Industry and Commerce considers upon request by a domestic enterprise of competitive relationship, a relevant functional department or industrial association that the merger by the foreign investor involves huge market share, or there are other major factors which seriously impact market competition, national economy and people's livelihood, or state economic security, etc., it may also demand the foreign investor to make a report.

The above said party who merges a domestic enterprise may be any of the foreign investor's associated enterprises.

Article 20 Where a foreign investor's merger of a domestic enterprise is under any of the circumstances mentioned in Article 19 of the present provisions, and the MOFTEC and the State Administration for Industry and Commerce consider that the merger may cause excessive market centralization, hinder fair competition, or damage the consumers' benefits, they shall, within 90 days as of the receipt of all the

documents submitted, either solely through negotiation or jointly, convene the relevant departments, institutions, enterprises and other interested parties and hold a hearing, and shall decide on whether to grant the approval in accordance with the law.

Article 21 Where an overseas merger is under any of the following circumstances, the merging party shall, before announcing the merger proposal or when submitting the said proposal to the competent authority in the country of its locality, submit the merger proposal to the MOFTEC and the State Administration for Industry and Commerce. The MOFTEC and the State Administration for Industry and Commerce shall examine whether there is any circumstance leading to excessive centralization in the domestic market, hindering domestic fair competition, or damaging the domestic consumers' benefits, and shall make a decision on whether approve the proposal or not:

- (a) the overseas party who merges a domestic enterprise owns more than RMB 3 billion Yuan of assets inside the territory of China;
- (b) the sales turnover of the overseas party who merges a domestic enterprise in China's market is more than RMB 1.5 billion Yuan in the current year;
- (c) the market occupancy ratio of the overseas party who merges a domestic enterprise and its associated enterprises in China has reached 20%;
- (d) the market occupancy ratio of the overseas party who merges a domestic enterprise and its associated enterprises in China has reached 25% due to the overseas merger;
- (e) due to the overseas merger, there will be more than 15 foreign-funded enterprises in the relevant domestic industries with the shares of which directly or indirectly participated in by the overseas party who merges a domestic enterprise.

Article 22 In case of a merger under any of the following circumstances, the party who merges a domestic enterprise may apply to the MOFTEC and the State Administration for Industry and Commerce for examination of exemption:

- (a) the merger may improve the conditions for fair competition in the market;
- (b) a loss-making enterprise is merged and the employment is ensured;
- (c) the merger absorbs advanced technologies and management talents and is able to improve the enterprise's international competitiveness;
- (d) the merger may improve the environment.

Article 23 An investor shall, when submitting the documents, classify them in

accordance with the provisions, and shall attach a catalogue of the documents. All the documents to be submitted shall be in Chinese.

Article 24 An investment company which is established by a foreign investor inside the territory of China in accordance with the law shall be governed by the present provisions to merge a domestic enterprise.

The share right mergers by foreign investors of foreign-funded enterprises inside the territory shall be subject to the present laws and administrative regulations on foreign-funded enterprises, and the Some Provisions on the Share Right Modification of the Shareholders of Foreign-Funded Enterprises. If there are no applicable laws, such mergers shall be handled by referring to the present provisions.

Article 25 The mergers by investors from Hong Kong Special Administrative Region, Macao Special Administrative Region and Taiwan Region of the enterprises in other regions inside the territory shall be handled by referring to the present provisions.

Article 26 The present provisions shall come into force on April 12, 2003.

2. Interim Provisions on Restructuring State-owned Enterprises with Foreign Investment

Article 1 The present Provisions have been formulated on the basis of the Company Law of the People's Republic of China, the Contract Law of the People's Republic of China and other statutory provisions of the state concerning foreign investment and the administration of state-owned assets for the purpose of guiding and regulating the restructuring of state-owned enterprises with foreign investment, promoting the strategic restructuring of the state-owned economy, accelerating the pace of establishing the modern enterprise institutions in the state-owned enterprises, and for maintaining the stability of the society.

Article 2 The present Provisions shall apply to the restructuring of state-owned enterprises and the enterprises in the form of companies which involve state-owned shares (except financial enterprises and listed companies) with foreign investment and to the establishment of foreign-funded enterprises in the form of companies (hereafter referred to as “restructuring of state-owned enterprises with foreign investment”).

Article 3 The restructuring of state-owned enterprises with foreign investment as described in the present Provisions includes the following situations:

- a. A state-owned enterprise is restructured into a foreign-funded enterprise when the holder of the state-owned property rights of a state-owned enterprise transfers all or part of its property rights to a foreign company, enterprise, other economic organization or individual (hereafter “foreign investor”);
- b. A state-owned enterprise is restructured into a foreign-funded enterprise when the holder of the state-owned shares of a company-based enterprise transfers all or part of its shares to a foreign investor;
- c. A state-owned enterprise is restructured into a foreign-funded enterprise when the creditor of the domestic state-owned enterprise transfers its credits to a foreign investor;
- d. When a state-owned enterprise or a company-based enterprise consisting of state-owned shares sells all or the major part of its assets to a foreign investor, and the foreign investor establishes a foreign-funded enterprise separately with the assets it has purchased or establishes a foreign-funded enterprise jointly with the enterprise that sells the assets; and
- e. A state-owned enterprise or company-based enterprise consisting of state-owned

shares is restructured into a foreign-funded enterprise by absorbing the investment of a foreign investor to increase its registered capital.

Article 4 The state-owned enterprises and the company-based enterprises as described in Items 1, 2, 3 and 5 of the present Provisions are referred to as the restructured enterprises.

The state-owned property rights of a state-owned enterprise and the state-owned shares of a company-based enterprise are referred to in general as the state-owned property rights. The holder of state-owned property rights and state-owned shares are referred to in general as the holder of state-owned property rights.

The holder of state-owned property rights refers to a department authorized by the state or an institution authorized by the state to make investments or an enterprise or any other economic organization that holds state-owned capital. The holders of state-owned property rights, the creditors of the state-owned enterprises that transfer their credits and the enterprises that sell their assets are referred to in general as the restructuring party.

Article 5 The restructuring parties shall choose those foreign investors that meet the following conditions:

- a. Having the management qualifications and technical skills required by the restructured enterprise;
- b. Having good business credit standing and management skills; and
- c. Having good financial standing and economic strengths.

The restructuring parties shall require foreign investors to propose reorganization plans that can improve the governance structure of the enterprise and promote the sustained development of the enterprise. The reorganization plans shall include such elements as the development of new products, technical innovation, corresponding investment plans, and the measures for strengthening the management of the enterprise, etc.

Article 6 The following principles shall be observed in restructuring state-owned enterprises with foreign investment:

- a. Abiding by the statutory provisions of the state and safeguarding the economic security of the state;
- b. Satisfying the requirements of the industrial policies of the state. Where the business scope of an enterprise (including the direct and indirect share-holding

enterprises) is an industry in which foreign investment is prohibited as provided in the Catalog for Guiding Foreign Investment in Industry, foreign investors may not participate in the restructuring. If it is necessary for the Chinese party to have a controlling or relatively controlling share, the Chinese party shall have a controlling or relatively controlling share after the restructuring.

c. Being favorable for the readjustment of economic structure and promoting the optimized distribution of state-owned assets;

d. Paying attention to introducing advanced technologies and management experiences, establishing a good governance structure of the company, and promoting the technological progress and industrial upgrade of the enterprise.

e. Persisting to the principles of openness, fairness, justice and honesty. State-owned assets shall be prevented from draining. One shall not avoid banks or turn banks into mere figureheads or shirk the credit of other creditors or infringe upon the lawful rights and interests of the employees, and shall protect the lawful rights and interests of foreign investors.

f. Promoting fair competition and refraining from market monopolization.

Article 7 To transfer the property rights of a state-owned enterprise or the state-owned shares of a company solely funded by the state or a limited liability company established by two or more state-owned enterprises or invested by two or more other state-owned investment subjects, the restructuring party shall consult, in advance, the employees congress of the restructured enterprise. To transfer the state-owned shares of a company-based enterprise, the consent of the shareholders' meeting of the restructured enterprise shall be obtained. To transfer the credit of a state-owned enterprise, the prior consent of the holder of the state-owned property rights of the restructured enterprise shall be obtained. To sell all or the major part of the assets of an enterprise, the prior consent of the holders of the state-owned property rights of the enterprise or the shareholders' meeting shall be obtained, and the creditors shall be informed.

Article 8 The following requirements shall be met in the restructuring of state-owned enterprises with foreign investment:

a. Before an enterprise is restructured, the holder of the state-owned property rights shall organize the restructured enterprises to check their assets, define their property rights, and straighten out their credits and debts, shall hire eligible intermediary institutions to make financial audits, and make asset appraisals according to relevant

provisions including the Measures for the Administration of the Appraisal of State-owned Assets (Order No. 91 of the State Council), and the Provisions Concerning Some Issues in the Administration of the Appraisal of State-owned Assets (Order No. 14 of the Ministry of Finance), etc. The appraisal results shall, after being verified or put in archivist files according to relevant provisions, be used as the basis for determining the price of the state-owned property rights or assets.

b. If, after restructuring, the control of the enterprise is shifted or all or the major part of the management assets of the enterprise is sold to a foreign investor, the restructuring party and the restructured enterprise shall formulate plans for proper replacement of the employees, which shall be subject to adoption by the employees congress upon deliberation. The restructured enterprise shall clear off the various expenses such as the defaulted salaries of the employees, the unrefunded funds raised, and the due social security premiums, etc. with the existing assets. The restructured enterprise and the employees shall be entitled to select each other. If any of the employees are to be retained, labor contracts shall be concluded anew or be altered. For those employees whose labor contracts are dissolved, economic indemnities shall be made thereto, and for the employees that are transferred to social security institutions, the social security premiums thereof shall be paid lump sum and in full amount according to law, with the money required being deducted from the net assets of the restructured enterprise before the restructuring is made or being paid in priority from the earnings of the holder of the state-owned property rights incurred from the transfer of state-owned assets.

c. Where the restructuring is made by selling assets, the credits and debts of the enterprise shall remain to be those of the original enterprise. If the restructuring is made by any other means, the credits and debts of the enterprise shall be inherited by the restructured enterprise. To transfer the state-owned property rights or assets that have been mortgaged or pledged, the relevant requirements of the Guaranty Law of the People's Republic of China shall be met. The undertaker of debts shall enter into agreements with the creditor for the settlement of relevant credits and debts.

d. The restructuring party shall publicize the information of restructuring, widely collecting foreign investors, and make investigations into the qualifications, credit standing, financial status, management capacities, guarantees for payment, qualities of the management personnel, etc. of the foreign investors. Priority shall be put on choosing the mid- and long-term investors that can bring advanced technology and management skills, and that are highly connected in industry.

The restructuring parties and the foreign investors shall provide real and detailed

information and materials as required by the other party, may not conduct any misleading or fraudulent acts, and shall be obliged to keep secrets.

e. Where the restructuring of an enterprise is done by way of transferring the state-owned property rights or selling assets, the restructuring party shall take priority in adopting the public bid method to determine the foreign investor and the price of transfer. If the transfer is to be made by public bid, the relevant procedures shall be followed according to law, and public announcements shall be made concerning the state-owned property rights to be transferred to the assets to be sold. If the property rights are to be transferred by agreement, it shall also be done in public.

Whichever way is adopted for the transfer, the restructuring party shall enter into agreements of transfer with foreign investors according to the relevant provisions of the state and the present Provisions. The agreements of transfer shall include such key elements as the basic information about the state-owned property rights to be transferred, the replacement of employees, the settlement of credits and debts, the proportion of transfer, the price of transfer, the terms and conditions of payment, the delivery of property rights, and the reorganization of the enterprise, etc.

Article 9 The restructuring of state-owned enterprises with foreign investment shall be carried out according to the following procedures:

a. The restructuring party (in case of two or more restructuring parties, one shall be determined) shall file an application to the administrative department in charge of economy and trade on the same level. The application materials for restructuring shall include such documents as a feasibility study report, an introduction of the restructuring party and the restructured, information about the foreign investors (including the financial reports for the recent three years that have been audited by certified accountants and the market shares of the products or services of the enterprises in the same industry in China in which they have are of practical control), the plans for restructuring (including the replacement of employees, the settlement of debts and credits, and the plan for enterprise reorganization), the scope of business and share-holding structure of the enterprise after reorganization (including the enterprises that it directly or indirectly has shares).

The administrative department of economy and trade that accepts the application shall conduct the examinations within the power as stipulated in the Provisions Guiding the Orientation of Foreign Investment and other relevant statutory provisions. The restructuring of a centrally-governed enterprise or any of the enterprises wholly owned thereby or which it controls shall be subject to the examination of the

administrative department of economy and trade under the State Council if the restructured enterprise directly or indirectly holds the shares of any listed company, and if the total assets of the restructured enterprise is no less than 30 million US dollars. If the restructuring may lead to market monopolization and thus hampering fair competition, a hearing shall be made prior to the examination. The administrative department of economy and trade shall, within 45 days after receiving the application materials for restructuring, give a reply whether to approve or not. Where it is necessary to hold a hearing, it shall give a reply whether to approve or not within three months.

Where there are different provisions by the state concerning the change of the nature of the state-owned shares held by the restructured enterprise or the enterprise which it directly or indirectly has shares resulting from use of foreign investment or the transfer of property rights of the holder of state-owned shares in listed companies, such provisions shall apply.

b. The transfer agreements entered into between the restructuring party and foreign investors shall be subject to approval according to the relevant provisions of the Notice of the Ministry of Finance on Distributing the Interim Measures for the Administration of the State-owned Capital and Finance of Enterprises (No. 325 [2001]). The transfer agreements shall not take effect until approval has been granted. The agreements of transfer shall be accompanied by such documents as the registration certificate of state-owned property rights, the verification or archivist filing of the auditing reports and asset appraisal reports of the restructured enterprise, plans for the replacement of employees, agreements of credit and debt, plans for the reorganization of the enterprise, the relevant resolutions of the restructuring party and the restructured enterprise, the opinions or resolutions of the employees congress of the restructured enterprise, etc.

c. The restructuring party or the restructured enterprise shall go through the procedures of examination and approval of foreign-funded enterprises by presenting its application for restructuring and the approval documents of the agreements of transfer. If the enterprise after restructuring becomes a stock-limited company, it shall go through the procedures according to the relevant provisions of the Company Law of the People's Republic of China.

d. The enterprise after restructuring or the investors shall file registration with the original registration authority that has the power to register foreign-funded enterprises or the registration organ of the place where it is situated that has the power to register foreign-funded enterprises according to the statutory provisions concerning

registration by presenting the approval documents as described in Items 1 and 3 of the present Article. If the enterprise after restructuring becomes a stock-limited company, it shall go through the procedures according to the relevant provisions of the Company Law of the People's Republic of China.

e. The restructuring party shall complete the delivery of state-owned property rights and the change of ownership according to the relevant provisions by presenting the application for restructuring, the approval documents of the agreements of transfer, registration certificates of foreign investment and foreign exchange, and other relevant documents, and shall entrust certified accountants to issue asset appraisal reports. If the land used by the enterprise after restructuring was allocated by the state, it shall be subject to the examination and approval of land use rights and complete the procedures of transfer of land use rights.

f. The foreign exchange earnings of the restructuring party obtained from the transfer of state-owned property rights or credits or from the sale of assets shall be settled by presenting the application for restructuring, the approval documents of the agreements of transfer and other relevant documents to the foreign exchange administration for approval.

If the restructured enterprise is reorganized by absorbing the investment of foreign investors so as to increase its registered capital, it may, upon the approval of the foreign exchange administration concerned, open a capital account of foreign exchange so as to retain the foreign exchange capital invested by foreign investors.

g. The application for restructuring, agreements of transfer and the corresponding approval documents of the enterprises which are below the limited amount and subject to the examination and approval of the administrative department of economy and trade and the administrative department of public finance of the local place but which concern any of the key enterprises of the state and whose debt-equity conversion has been approved by the state or of the enterprises which fall into the restricted industries as provided in the Catalog for Foreign Investment in Industry shall be submitted to the administrative department of economy and trade under the State Council and the administrative department of finance under the State Council for archival purposes.

Article 10 Foreign investors shall pay for the prices of transfer or make their contributions with freely convertible currencies remitted from beyond the territory or any other lawful property rights. They may also pay for the prices of transfer or make their contributions with the net profits of RMB obtained from their investment within

the territory of China or with any other lawful property rights subject to the approval of the foreign exchange administration. The lawful property rights as mentioned above shall include:

- a. The properties obtained by foreign investors from the liquidation, transfer of equity, advance reclaim of investment or reduction of registered capital of any other foreign-funded enterprises established within the territory of China;
- b. The state-owned property rights or assets of any state-owned enterprise or company-based enterprises that consist of state-owned equity purchased by foreign investors;
- c. The credits of the creditors of any of the state-owned enterprises purchased by foreign investors;
- d. Any other contribution provided by any law or regulation.

Certified accountants shall, when appraising the assets of foreign investors and issuing asset appraisal reports, observe the procedures of asset appraisal as provided in the Notice of the Ministry of Finance and the State Administration of Foreign Exchange on Further Enhancing the Asset Appraisal of Foreign-funded Enterprises and Perfecting the Registration of Foreign Capital and Foreign Exchanges (No. 1017 [2002] of the Ministry of Finance).

Article 11 If the restructuring is to be conducted by way of transfer, the foreign investor shall, as a general rule, pay off the total value within three months as of the day when the foreign-funded enterprise obtained its business license. If it find it difficult, it shall pay off no less than 60% of the total value within six months as of the day when it obtained its business license, and shall provide surety according to law for the balance which shall be paid off within one year.

Article 12 If, after the transfer of state-owned property rights, the control of the enterprise shifts, or if all or the major part of the management assets are sold to any foreign investor, the restructuring party shall be entitled, before the foreign investor pays off the total value, get to know and supervise the production and management as well as the financial situation of the enterprise after restructuring, and the foreign investor and the enterprise after restructuring shall provide corresponding conveniences.

Foreign investors may not, before establishing any foreign-funded enterprises with the purchased assets as mentioned above, engage in any business operations.

Article 13 State-owned property rights and the earning from the transfer of assets shall be collected by the restructuring party, and shall be managed and used according to the relevant provisions of the administrative department of finance under the State Council.

Article 14 The net profits shared by foreign investors from the enterprise after restructuring, the incomes obtained from the transfer of equity, the capital obtained from the enterprise at the expiration of the term of operation or upon termination of the enterprise, and any other lawful earnings may be remitted out of the territory according to law. They may also be used for reinvestment within the territory upon the approval of the foreign exchange administration concerned.

Article 15 In the process of restructuring state-owned enterprises with foreign investment, the tax policies shall be the provisions in the laws and administrative regulations of the state concerning taxation, and the fee-collecting policies shall be the Notice Concerning the Reduction and Exemption of Relevant Fees in the Restructuring and Reorganization of Enterprises issued by the State Development Planning Commission, the State Economic and Trade Commission, the Ministry of Government Supervision, the Ministry of Finance, the State Auditing Administration, and the Malpractice Redressing Office of the State Council (No. 1077 [1998] of the State Development Planning Commission).

Article 16 In case any of the employees of the restructuring party or the restructured enterprise infringes upon the lawful rights and interests of the state, creditor or employees by overstepping his authority, neglecting his duties or conspiring with foreign investors or embezzles or takes bribes, he shall be given an administrative punishment or sanction by competent departments. If any crime has been constituted, he shall be subject to criminal liabilities.

Article 17 In case any of the functionaries of the government organs in charge of examination and approval violates any of the present Provisions by unlawfully granting approval or seeking private benefits in the process of examination and approval so that the lawful rights and interests of the state, creditor or employees are infringed upon, the persons who are held to be directly responsible and the persons in-charge shall be subject to taking criminal liabilities according to the authority of the administration of cadres. If any crime is constituted, the offender shall be subject

to criminal liabilities.

Article 18 The present Provisions shall be applicable by reference to the investors from the Hong Kong Special Administrative Region, the Macao Special Administrative Region and Taiwan and the already established foreign-funded enterprises in their participation in the restructuring of state-owned enterprises.

Article 19 The power to interpret the present Provisions shall remain with the State Economic and Trade Commission, the Ministry of Finance, the State Administration for Industry and Commerce, and the State Administration of Foreign Exchange.

Article 20 The present Provisions shall take effect on January 1, 2003.