M&A in Korea
A Practical Guide to Investors

INVEST KOREA
www.investkorea.org
We gratefully acknowledge the contribution of **Kim, Choi & Lim** in preparing this booklet. **Kim, Choi & Lim** is a leading Korean law firm providing comprehensive and general legal services regarding cross-border transactions as well as domestic matters.

For more information about **Kim, Choi & Lim**, please visit the website at: http://www.kcllaw.com or contact the office of the law firm at the following address:

( Korea Coal Center, 10th Floor ) 80-6, Susong-dong, Jongno-gu Seoul, 110-727, Korea

• TEL: 82-2-725-4774 • FAX: 82-2-725-4994 • E-mail:kcllaw@kcllaw.com

This booklet is intended for use as a guide and to provide general information only. Therefore, the contents of this booklet should not be considered as legal advice or opinion. This booklet also does not discuss all the investment considerations or legal issues involved in investment or mergers and acquisitions. Please refer to Invest Korea website at www.investkorea.org or consult a local lawyer for further details regarding the investment procedures and requirements, Korean legal systems and any specific questions on such matters.
# CONTENTS

I. Introduction ................................................................. 4

II. Contribution of Capital into Korea .................................. 6
   1. Introduction ............................................................ 7
   2. Foreign Direct Investment .............................................. 7
   3. Portfolio Investment .................................................. 15
   4. Indirect Investment through Funds ................................. 16

III. Establishment of Business Entity and M&A Transactions in Korea 18
   1. Establishment of Business Entity .................................... 19
   2. M&A through Share Purchase ....................................... 24
   3. Merger or Consolidation .............................................. 29
   4. Business Transfer ...................................................... 32
   5. Limitations on M&A Under the Monopoly Regulation and Fair Trade Law
      (the “Monopoly Law”) ............................................... 35

IV. Operation of Business in Korea ........................................ 38
   1. Corporate Governance .................................................. 39
   2. Personnel Management ............................................... 42
   3. Real Property System .................................................. 49
   4. Intellectual Property Rights .......................................... 53

V. Repatriation of Capital .................................................. 58
   1. Introduction ............................................................. 59
   2. Dividends ................................................................. 59
   3. Capital Reduction ....................................................... 60
Thanks to a series of deregulatory policies launched by the government after the financial crisis in 1997, foreign investment has significantly increased in the past seven years. From the perspective of foreign investors, however, investing in Korea poses certain challenges stemming from local business environment, culture, language, practices and law, and consequently, proper understanding of these variables will be critical to the success of their investment in Korea.

This booklet has been prepared with an aim to assist foreign investors in gaining a basic understanding of the legal requirements for investment in Korea, with a special focus on the foreign direct investment through mergers and acquisitions (M&A) transactions.

In Chapter II, Contribution of Capital into Korea, foreign direct investment and portfolio investment, the two main forms of investment, will be discussed with the Foreign Investment Promotion Law and the liberalized foreign exchange transaction regulations. Thereafter, a new form of investment through fund transaction also will be briefly described.

In Chapter III, Establishment of Business Entity and M&A Transactions in Korea, the methods of establishing a Korean subsidiary or a branch office will be briefly discussed, and the relevant legal issues and requirements with respect to typical M&A transactions in the form of share acquisition, asset transfer, business transfer, and merger or consolidation will be discussed in more detail.

Chapter IV, Operation of Business in Korea, will describe the various legal systems to be considered when foreign investors operate a business in Korea after the M&A and thereby assist with the investment decision and business operation of the foreign investors.

Finally, Chapter V, Repatriation of Capital, will briefly describe the means of repatriating the principal investment as well as profits back to the foreign investors’ home countries.
Chapter II

Contribution of Capital into Korea

1. Introduction ........................................................................................................................................ 7

2. Foreign Direct Investment ........................................................................................................ 7
   2.1 Introduction .............................................................................................................................. 7
   2.2 Foreigners, Foreign Investment and Foreign-Invested Companies ........................................ 8
   2.3 Contributions .......................................................................................................................... 8
   2.4 Report of Foreign Investment ................................................................................................ 9
   2.5 Registration of Foreign-Invested Company ........................................................................... 9
   2.6 Deregulation of Foreign Ownership/Investment and Official Caps/ Restriction on Foreign Ownership/Investment .................................................................................... 9
   2.7 Protection of Foreign Investors ............................................................................................... 10
   2.8 Foreign Investment Zone .......................................................................................................... 10
   2.9 Ongoing Administration of Foreign Investment ..................................................................... 11
   2.10 Support for Foreign Investment .............................................................................................. 12
   2.11 Foreign Investment Support Institutions ............................................................................... 14

3. Portfolio Investment ......................................................................................................................... 14
   3.1 Introduction .............................................................................................................................. 15
   3.2 Foreign Exchange Transaction Management under Foreign Exchange Transaction Law .... 15
   3.3 Penalty for Violation ................................................................................................................ 16

4. Indirect Investment through Funds .................................................................................................. 16
   4.1 Indirect Investment .................................................................................................................. 16
   4.2 Investment Vehicles for Indirect Investment .......................................................................... 16
   4.3 M&A through Investment Specialty Company ....................................................................... 17
1. Introduction

The main laws of Korea that are applicable to the contribution of capital into Korea by foreign investors are the Foreign Investment Promotion Law and the Foreign Exchange Transaction Law. As a general rule, the Foreign Investment Promotion Law would be applicable for direct investment, where a foreign investor invests in a Korean company for the purpose of participating in the management of such company. In contrast, in the case of portfolio investment, the Foreign Exchange Transaction Law will generally be applicable. This booklet will describe direct investment and portfolio investment under separate headings.

In addition, this booklet will briefly describe investment through investment funds, because foreign investors may invest in Korea by organizing, or participating in, an investment fund that consists of a large number of investors.

By the way, the Securities Transaction Law is also applicable to the acquisition of shares of a company that is listed in the Korea Stock Exchange (the “KSE”) or registered on the KOSDAQ, regardless of whether the investment is direct investment or portfolio investment. Limitations on the acquisition of shares under the Securities Transaction Law will be described separately in Section 2.3 of Chapter III.

2. Foreign Direct Investment

2.1 Introduction

The Foreign Investment Promotion Law was enacted in order to promote investment in Korean companies by foreign investors. The main government agency that handles matters related to the foreign investment subject to the Foreign Investment Promotion Law is the Ministry of Commerce, Industry and Energy (the “MOCIE”). The MOCIE has delegated a large part of its duties related to the Foreign Investment Promotion Law to foreign exchange banks or the Korea Trade and Investment Promotion Agency (“KOTRA”), including its international trade offices, subsidiaries and branch offices.

A foreign exchange bank is any bank in Korea that is registered with the Ministry of Finance and Economy (the “MOFE”) as a foreign exchange bank and provides foreign exchange services. Most of the branch offices of Korean banks and Korean branch offices of foreign banks are registered as foreign exchange banks.
2.2 Foreigners, Foreign Investment and Foreign-Invested Companies

Under the Foreign Investment Promotion Law, a “foreigner” refers to an individual with foreign citizenship, a company established under the laws of a foreign country, or an international economic cooperation organization. In addition, “foreign investment” under the Foreign Investment Promotion Law refers to the ownership of shares or equity of a Korean company for the purpose of establishing a continuous economic relationship with the company, by participating in the management of the company and through other means. Specifically, in order to qualify as “foreign investment” under the Foreign Investment Promotion Law, the amount of the investment by each foreigner must be 50 million won or more and the foreigner must own 10% or more of the voting shares or equity of the Korean company. Even if the foreigner does not own 10% or more of the voting shares or equity of the Korean company, however, the investment by such foreigner will be considered “foreign investment” under the Foreign Investment Promotion Law, if the foreigner enters into one of the following types of contracts with the Korean company: (i) a contract that allows the foreigner to dispatch or elect officers (i.e., directors, representative directors, general partners, auditors or persons in similar positions that have the right to participate in important business decision-making processes; (ii) a contract with a term of one year or more for the delivery or purchase of raw materials or products; or (iii) a contract for the supply or introduction of technology or for joint technology research and development project. A Korean company in which a foreigner has made such foreign investment is called a “foreign-invested company.”

2.3 Contributions

A foreign investor may contribute any of the following as consideration for the acquisition of shares pursuant to the Foreign Investment Promotion Law:

- Foreign currency, or Korean won acquired through foreign currency conversion
- Capital goods
- Income from the shares or equity acquired pursuant to the Foreign Investment Promotion Law
- Industrial property rights
- Assets remaining after liquidation of the Korean branch office or representative office
- Repayment proceeds from certain loans provided to the foreign-invested company by the foreign parent company or its affiliate
- Shares of a foreign company that is listed in or registered with a foreign stock exchange
2.4 Report of Foreign Investment

If a foreigner intends to make a foreign investment under the Foreign Investment Promotion Law, the foreigner is required to file in advance a report of foreign investment (also known as “investment notification”) with a foreign exchange bank or KOTRA (the “Reporting Agency”). The foreigner is also required to file a report in the case of changes in any details of the previously reported matter. As an exception, if a foreign investor intends to acquire the existing shares of a company engaged in the defense industry, the foreigner is required to obtain the approval of the MOCIE.

If a foreigner acquires the shares of a Korean company based on his rights to the existing shares, such as through a merger, etc., the foreigner is required to file a report with the Reporting Agency within 30 days after the date of acquisition.

2.5 Registration of Foreign-Invested Company

If a Korean company becomes a foreign-invested company through the investment by a foreigner, the foreigner or the foreign-invested company must register the investment with a foreign exchange bank or the KOTRA within 30 days after the payment of the contribution or the share purchase price.

2.6 Deregulation of Foreign Ownership / Investment and Official Caps / Restriction on Foreign Ownership / Investment

In general, a foreign investor is free to invest in Korean companies, unless the foreign investment (i) adversely affects the safety and order of Korea; (ii) harms the health and safety or environment of Koreans or public policy of Korean society; or (iii) violates the laws and regulations of Korea.

Each year, the MOCIE compiles and publishes a list of provisions under Korean laws and regulations that limit investment by foreign investors. For example, the list published by MOCIE includes some of the Korean law provisions that limit foreign investment in public companies (strategic companies of public nature, such as Korea Electric Power Corporation...
(“KEPCO”), government-controlled companies, banking businesses, telecommunication businesses, periodical and broadcasting businesses, some farming and fishing businesses, nuclear fuel processing businesses and power generation, transmission and distribution businesses.

2.7 Protection of Foreign Investors

Except for special cases, foreign investors and foreign-invested companies are generally treated the same as Korean citizens or Korean companies with respect to their business activities. In addition, unless otherwise provided under the relevant laws, the provisions on tax benefits under the Korean tax laws applicable to Korean citizens or Korean companies are equally applicable to foreign investors and foreign-invested companies.

2.8 Foreign Investment Zone

2.8.1 Designation of Foreign Investment Zone

The foreign investment zone is a system that has been adopted to attract large-scale foreign investment. If a foreign investor wishes to build a factory at a certain location, such location may be designated as a foreign investment zone after investment negotiations between the foreign investor and the relevant government agency.

The requirements for designation as a foreign investment zone are different depending on the investment amount and the type of industry subject to investment. The general requirements may be briefly described as follows:

- Investment of at least US$30 million for building a new factory for the manufacturing business;
- Investment of at least US$20 million for building new facilities for the tourism/hotel business, water resort business, international conference business, recreation business or amusement facility business;
- Investment of at least US$10 million for building new facilities for complex cargo terminal, joint distribution center, cargo transportation business located within port complex or airport complex, or infrastructure facilities construction business; or
- Investment of at least US$5 million for building or expanding research and development facilities that maintain a research staff of 10 or more researchers with at least a master’s
degree related to the fields of industrial support service business or advanced technology business and at least three years of experience.

2.8.2 Assistance for Foreign Investment Zone

A foreign investment zone is supported with construction costs and infrastructure at the level similar to the support provided for a national industrial complex. If an area is designated as a foreign investment zone, a foreign-invested company located within the zone will be entitled to an 100% exemption of national taxes (corporate tax and income tax) for the first five years (three years for foreign-invested companies located within certain foreign investment zones, beginning in year 2005) and 50% reduction of the same taxes for the following two years. In addition, such company will be entitled to a reduction or exemption of local taxes (acquisition tax, registration tax, property tax and composite land tax) for seven to 15 years. Further, a foreign-invested company will be able to lease government-controlled property located within the foreign investment zone free of charge. A foreign-invested company will also be exempt from liability for traffic generation charges resulting from the construction of commercial facilities within the zone, and will be supported with support facilities such as medical, educational and housing facilities pursuant to the determinations of the Foreign Investment Committee.

2.9 Ongoing Administration of Foreign Investment

2.9.1 Restrictions on Disposal of Capital Goods

A foreign-invested company that satisfies certain requirements may be entitled to reduction or exemption of customs duty, special excise tax or value added tax, etc. (See Section 2.10.1.1.) If a foreign-invested company intends to transfer or lease, within five years from the date of import report, the capital goods which the company has imported into Korea under the foregoing reductions or exemptions, or use such capital goods for purposes other than the reported purposes, the company must file in advance a report with a foreign exchange bank or KOTRA.
2.9.2 Engagement in Other Businesses

A company that is registered as a foreign-invested company is prohibited from engaging in a business that is restricted to foreign investment or from acquiring the shares or equity of a Korean company that conducts such restricted business.

2.9.3 Report of Share Transfer, Capital Reduction, Etc.

A foreign investor that intends to either transfer the shares or equity of a Korean company acquired with a report of foreign investment or decrease such shares or equity through capital reduction must file in advance a report with a foreign exchange bank or KOTRA.

2.10 Support for Foreign Investment

2.10.1 Tax Support regarding Foreign Investment

2.10.1.1 Tax Support for a Foreign-Invested Company

For (i) industrial support service business and advanced technology business essential to strengthening of the international competitiveness of domestic industries, (ii) business conducted by a foreign-invested company located within the foreign investment zone, (iii) business conducted by a foreign-invested company located within a Free Economic Zone (which refers to a zone designated by the MOFE as an area established to improve the operational environment of foreign-invested companies and the living environment of foreigners), and (iv) any other business for which tax reduction or exemption is unavoidable, the corporate tax or income tax will be reduced or exempted for a certain period. In addition, acquisition tax, registration tax, property tax and composite land tax on the property acquired and owned by a foreign-invested company for its reported business will be either reduced or exempted.

For importation of capital goods for the industrial support service business and advanced technology business essential to strengthening the international competitiveness of the domestic industries, business conducted by a foreign-invested company located within the foreign investment zone, the customs duty, special excise tax and value added tax will be either reduced or exempted under certain circumstances.
2.10.1.2 Tax Support for Dividends from Foreign Investment

The corporate tax or income tax on dividends will either be reduced or exempted in proportion to the ratio of the income subject to tax exemption or reduction to the total income of such company in the applicable fiscal year.

2.10.1.3 Tax Support for Business Transfer, Etc.

A foreign investment in the industrial support service business and advanced technology business essential to strengthening of the international competitiveness of domestic industries through the business transfer method will receive a tax reduction or exemption for a certain period. Please refer to Section 4.5 under Chapter III.

2.10.1.4 Tax Support for Consideration for Technology License

For a period of five years from the date of payment of the consideration for the licensing of the following technologies, the foreign investor will receive tax exemption from corporate tax or income tax on such consideration: (i) technology qualifying under the standard determined by the MOFE through review by the Foreign Investment Committee that has significant economic or technological effect on the national economy and is vital to the advancement of industrial structure and strengthening of industrial competitiveness; (ii) technology that has been first introduced to Korea not more than three years, or more than three years but is substantially superior to the already introduced technology in terms of its economic effect or performance; and (iii) technology whose process is mainly completed in Korea, pursuant to an agreement that provides highly advanced technology essential to strengthening Korea’s international competitiveness.

In addition, under some of the international tax treaties to which Korea is a party, if the tax on consideration for technology is either reduced or exempted by the Korean tax authorities, the tax authorities in the country of residence of the foreign provider of technology will consider such reduced or exempted tax to have been paid and provide a tax credit or deduction for such deemed paid tax.

2.10.1.5 Tax Support for Foreign Technician

The labor income received by a foreign technician that satisfies certain requirements will be exempt from income tax for a period of five years from the first day of employment
(which first day should be before December 31, 2006).

In addition, the labor income received by a foreign technician that provides services pursuant to the technology license agreement under the Foreign Investment Promotion Law will be exempt from income tax for a period of five years after the filing of the report of such technology license agreement, if the consideration for such technology license is exempt from corporate tax or income tax.

2.10.1.6 Tax Support for Foreign Employee

The income tax on the labor income of a foreign officer or employee in Korea may be reduced by treating 30% of such wages as non-taxable income or applying the flat tax rate of 17%.

If the foreign officer or employee elects to have the 17% flat tax rate be applicable to his labor income, any other deductions and exemptions under the income tax laws cannot be applied and the labor income will not be added to the composite income for the purpose of calculating the composite income tax. A foreign employee that wishes to take advantage of the reduction of income tax through this method of electing a flat tax rate of 17% must apply for such reduction.

2.10.2 Lease and Sale of National or Public Property

In the case of the lease or sale of national or public property to a foreign-invested company, special cases regarding the National Property Law or Local Government Finance Law are recognized and broadly applied. The lease or sale of national or public property is possible through private contracts. The term of the lease in such case can last up to 50 years. Payment of the purchase price for national or public property can be postponed or made in installments. Rent reduction and exemption of leases of public land to a foreign-invested company is also possible.

2.11 Foreign Investment Support Institutions

Invest Korea (formerly known as the Foreign Investment Support Center) was established within KOTRA to provide comprehensive foreign investment support services such as consultation and guidance services, public relations and research services, and services for handling of administrative affairs and other support services for start-up businesses.
Invest Korea has on staff the foreign investment ombudsman with ample experience and academic knowledge about foreign investment. The ombudsman is appointed by the President with the recommendation of the MOCIE and evaluation by the Foreign Investment Committee. The foreign investment ombudsman office assists foreign investors by responding to the questions and other concerns of foreign investors and by providing general investment support for foreign investors.

3. Portfolio Investment

3.1 Introduction

Contribution of capital into Korea for portfolio investment is not entitled to the benefits under the Foreign Investment Promotion Law. Instead, such investment is subject to the regulations under the Foreign Exchange Transaction Law.

3.2 Foreign Exchange Transaction Management under Foreign Exchange Transaction Law

The basic law that regulates foreign exchange transactions in Korea is the Foreign Exchange Transaction Law and its subordinate regulations and rules. The main government agency responsible for the regulation of foreign exchange transactions is the MOFE. However, the MOFE directly performs only a few duties such as acceptance of reports for transactions that are considered important at the national economic level in light of the size of the capital transaction, etc., and delegates much of its duties to the Bank of Korea, foreign exchange banks, the Financial Supervisory Committee (the “FSC”), the Financial Supervisory Service (the “FSS”), customs office and national tax office, etc.

Under the current Foreign Exchange Transaction Law, most of the foreign exchange transactions including portfolio investment are not subject to regulation or are otherwise subject to the approval of the Bank of Korea, report to the Bank of Korea, or report to a foreign exchange bank.

Most of the foreign exchange transactions that have been delegated to other institutions by the MOFE for processing require only a report to a foreign exchange bank. A report to a foreign exchange bank is literally a report, so such report is not in practice regarded as a
restriction on foreign exchange transaction. Furthermore, although a report to the Bank of Korea is subject to acceptance by the Bank of Korea, it would be extremely unusual for a report of a normal foreign exchange transaction to be rejected by the Bank of Korea.

3.3 Penalty for Violation

A company that violates the report/approval requirement under the Foreign Exchange Transaction Law may be subject to criminal prosecution and administrative action that imposes certain restrictions on foreign exchange transactions.

4. Indirect Investment through Funds

4.1 Indirect Investment

Under the Indirect Investment Asset Management Business Law enacted in 2003, “indirect investment” means the pooling of capital from investors for investing in various securities (government bonds, local government bonds, stocks, warrants, derivatives, etc.), real property, commodities and other assets and distributing proceeds from such investment to the investors. It is against the law to engage in the indirect investment business without having satisfied all of the conditions prescribed in the Indirect Investment Asset Management Business Law.

4.2 Investment Vehicles for Indirect Investment

Investment trusts, investment companies and investment specialty companies may be used as investment vehicles. An investment trust is a vehicle through which the funds pooled from investors are entrusted to a trustee and are invested by the trustee, and the investors acquire proportionate beneficial interest in trust. An investment company is a company that is established for the purpose of investing the assets of the company and distributing the proceeds to its shareholders. An investment specialty company is a hapja hoesa that is established for the purpose of investing the assets of the company into the shares or equity of other companies and increasing the value of the target company through participation in the management of such company or improving the business structure or control structure of such company. The proceeds from the investment are distributed to its members.
4.3 M&A through Investment Specialty Company

In the case of an investment trust or investment company, the actual investment must be managed by an asset management company that has been licensed by the FSC. When an asset management company manages the assets of an investment trust or investment company, it may not invest more than 10% of the total value of the assets of the investment trust or investment company in the securities issued by companies within the same industry or purchase more than 10% of the shares issued by a single company with the assets of an investment trust or investment company. Therefore, an investment trust or investment company may be an appropriate vehicle for portfolio investment, but it may not be appropriate for M&A.

On the contrary, an investment specialty company must invest by purchasing 10% or more of the total number of issued and outstanding shares or total equity of another company or by making investments that would allow the investment specialty company to control the important management areas of the target company, such as the appointment and dismissal of the officers of the target company. In addition, the investment specialty company must hold the shares or equity of the target company for at least six months. Therefore, the investment specialty company would be an appropriate vehicle for M&A.

When an investment specialty company is established, the number of persons that are solicited to become members (akin to shareholders in a corporation) must be no more than 50, and the solicitation should not be directed to the general public. In addition, the members of an investment specialty company must be composed of one or more unlimited liability member and one or more limited liability member, and the total number of members must be no more than 30. Finally, limited liability members have certain minimum contribution obligations.
Chapter III

Establishment of Business Entity and M&A Transactions in Korea

1. Establishment of Business Entity ................................................................. 19
   1.1 Establishment of Branch Office .......................................................... 19
   1.2 Establishment of Company ............................................................... 20
2. M&A through Share Purchase ................................................................. 24
   2.1 Acquisition of New Shares through Participation in Capital Increase .......... 24
   2.2 Acquisition of Existing Shares through Share Purchase ......................... 25
   2.3 Foreign Exchange Reporting regarding Share Purchase ......................... 26
   2.4 Limitations on Investment in Publicly Listed Company ......................... 26
3. Merger or Consolidation ........................................................................... 29
   3.1 Definition and Procedure of Merger or Consolidation ............................. 29
   3.2 Appraisal by Independent Valuation Firms .......................................... 30
   3.3 Shareholders’ Meeting to Approve the Merger ...................................... 30
   3.4 Public Notice and Individual Notice to Creditors .................................. 31
   3.5 Put Rights of Shareholders ................................................................ 31
   3.6 Business Combination Report ........................................................... 32
4. Business Transfer ...................................................................................... 32
   4.1 Definition and Procedure of Business Transfer ...................................... 32
   4.2 Shareholders’ Meeting to Approve the Business Transfer ...................... 33
   4.3 Put Rights of Shareholders ................................................................ 33
   4.4 Joint and Several Liability ................................................................ 34
   4.5 Tax Benefits on Business Transfer by Foreign Investor ......................... 34
   4.6 Distinction from Asset Transfer .......................................................... 34
5. Limitations on M&A Under the Monopoly Regulation and Fair Trade Law (the “Monopoly Law”) ..................................................... 35
   5.1 Introduction ....................................................................................... 35
   5.2 Presumption of Anticompetitive Business Combination ......................... 35
   5.3 Permission of Business Combinations With Anticompetitive Effect .......... 35
   5.4 Business Combination Report ........................................................... 36
   5.5 Sanctions ........................................................................................... 37
A foreign investor is not always required to establish a subsidiary or a branch office in Korea in order to acquire shares or equity of a Korean company. Such foreign investor may directly acquire shares or equity of a Korean company. However, if a foreign investor intends to operate a business in Korea by acquiring the business facilities through a business transfer, for example, such foreign investor must establish a subsidiary or a branch office in Korea. If a foreign company establishes a branch office and conducts business through such branch office in Korea, the foreign company will become the principal of the rights and obligations related to such business. Therefore, when a foreign investor intends to engage in a business transfer, the foreign investor generally establishes a subsidiary rather than a branch office in Korea and the subsidiary then acquires the business of an existing Korean company and conducts business.

1. Establishment of Business Entity

1.1 Establishment of Branch Office

1.1.1 Requirement for Establishment of Branch Office

When a foreign company establishes a branch office, the foreign company must register the branch office with a commercial registry of the court with jurisdiction over the branch office. The items that need to be registered are the laws of the country in which the foreign company is incorporated and name and address of the representative in Korea. Unless the foreign company registers its branch office with the commercial registry, the foreign company is not allowed to conduct business on an ongoing basis.

If a foreign company conducts business in Korea without first establishing a branch office, the foreign company may be subject to a fine up to 5 million won, even though the legal validity of the business operation would remain unaffected. If the foreign company continues to conduct business without registration, however, the foreign company may be subject to a fine equal to twice the applicable registration tax.

1.1.2 Order for Closing of Branch Office

Even if a foreign company establishes a branch office in Korea, the court may order the closing of the branch office at the request of an interested party or a public prosecutor, if the
branch office falls within any of the following: (i) the purpose for the establishment of the branch office was unlawful; (ii) the branch office fails to conduct business within one year after the registration of its establishment or suspends business for one year or more without justifiable cause or suspends to fulfill its payment obligations without justifiable cause; or (iii) the representative of the branch or another person that executes the business of the branch engages in any act that violates the applicable laws and regulations or public policy of Korea.

1.1.3 Legal Status of Foreign Company

Unless otherwise provided under the relevant law, with respect to the application of laws a foreign company will be treated as a Korean company of the same or similar type.

1.1.4 Foreign Exchange Transaction with respect to Branch Office

If a foreign company intends to establish a branch office in Korea, the foreign company is required to file a report of establishment of a branch office with a foreign exchange bank. If the branch office of a foreign company intends to bring in funds from its head office for the purchase of business or assets of a Korean company, the foreign company is not required to file a separate report for foreign investment.

If the branch office of a foreign company intends to transfer its settled net profits overseas, the branch office must submit an “application for remittance of settled net profits of a domestic branch office of a foreign company” (together with the balance sheet, profit and loss statement, tax payment certificate, etc.).

If the foreign company intends to close the branch office, the foreign company must submit a “report of closing of the branch office of a foreign company” to the foreign exchange bank where the initial report establishing the branch office was filed in order to repatriate the proceeds of liquidation.

1.2 Establishment of Company

1.2.1 Types of Companies and Characteristics

Under the Commercial Code, there are four legal forms of companies that may be established: “hapmyong hoesa,” “hapja hoesa,” “chusik hoesa” and “yuhan hoesa.” A hapmyong hoesa is a company that is established with partners with unlimited liability. A hapja
hoesa is a company that is established with some partners who have unlimited liability and other partners who have limited liability. Chusik hoesa and yuhan hoesa are companies established with shareholders or members with limited liability.

Unlimited liability means that the members will be liable for the debts of the company, and limited liability means that the shareholders or members will not be liable for corporate indebtedness. Therefore, most foreign investors establish companies in Korea in the form of a chusik hoesa or yuhan hoesa to take advantage of limited liability.

1.2.2 Differences Between Chusik Hoesa and Yuhan Hoesa

A chusik hoesa is a company form that was adopted in anticipation of the establishment of a large company by a large number of investors. On the contrary, the company form of a yuhan hoesa was adopted for a relatively small number of investors establishing a relatively small company. Therefore, a chusik hoesa may have unlimited number of shareholders, while a yuhan hoesa may only have up to 50 members. In addition, a yuhan hoesa may not issue share certificates that represent the equity interests of its members and may be subject to restrictions on the transfer of equity interest.

In practice, a chusik hoesa is often preferred over yuhan hoesa irrespective of the size of the company, and the number of companies established as a yuhan hoesa is relatively small. However, in the case of a company established as a joint venture between a foreign investor and Korean company, the yuhan hoesa is sometimes preferred over the chusik hoesa because of the closed character of the yuhan hoesa. Moreover, a yuhan hoesa may be preferred by U.S. investors because of certain tax advantages.

Because chusik hoesa is the Korean company form that is typically preferred by foreign investors, this booklet will explain the procedures and descriptions of foreign investment in terms of chusik hoesa.

1.2.3 Method and Procedure for Incorporation of Chusik Hoesa

1.2.3.1 Incorporation by Promotion and Incorporation by Subscription

Under the Commercial Code, a chusik hoesa may be incorporated by promotion or subscription. If a company is incorporated by promotion, the promoters must subscribe for all shares to be issued at the time of incorporation. Under incorporation by subscription, the
promoters are required to subscribe for at least one share per promoter and have the subscribers acquire the remainder of the shares. At the time of subscription, the subscribers must use a share subscription application form that includes certain mandatory information.

1.2.3.2 Adoption of Articles of Incorporation

The promoters must prepare articles of incorporation that include the items required under the Commercial Code. The articles of incorporation must include the purpose, company name, total number of authorized shares, par value per share, number of shares issued at incorporation, location of the head office, method of giving public notice and the names, resident registration numbers and addresses of the promoters. The articles of incorporation will become effective only after notarization by a notary public.

1.2.3.3 Issuance of Shares

Although the number of shares to be issued at the time of incorporation and par value per share must be included in the articles of incorporation, other specific matters related to the issuance of shares may be determined through the unanimous agreement of the promoters, unless such matters are provided in the articles of incorporation. In addition, if a promoter or a prospective shareholder intends to acquire shares by making an in-kind contribution, the name of such person, the type, quantity and price of the relevant assets forming such in-kind contribution, and the class and number of shares to be issued must be included in the articles of incorporation.

1.2.3.4 Cash Contribution and In-Kind Contribution

When the total number of shares to be issued at the time of incorporation are subscribed, the promoters must select a bank at which the subscriptions should be paid and ensure that the consideration corresponding to all issued shares are fully paid by the payment due date. If some of the promoters or subscribers pay the subscriptions by making in-kind contribution, they must have an appraiser inspect the assets to be used as in-kind contribution for review and approval by the court.
1.2.3.5 General Promoters Meeting or General Incorporation Meeting

A general promoters meeting or general incorporation meeting must be convened without delay after the full payment of the consideration for all issued shares. At the general promoters meeting or general incorporation meeting, the promoters and/or subscribers will approve the articles of incorporation, appoint directors and statutory auditor and hear reports by the directors and statutory auditor regarding the incorporation procedure.

1.2.3.6 Board of Directors

In the case of incorporation by promotion, the general promoters meeting may appoint the initial representative director and decide the location of the head office. However, if the general promoters meeting does not determine such matters, the board of directors, which consists of the directors appointed at the general promoters meeting, must appoint the representative director and decide the location of the head office.

In the case of incorporation by subscription, the representative director must be appointed by the board of directors that consists of the directors appointed at the general incorporation meeting, unless the representative director is appointed at the general incorporation meeting pursuant to the articles of incorporation.

1.2.4 Registration of Incorporation and Taxation on Incorporation

Once the foregoing procedure is completed, the incorporation must be registered with a commercial registry that has jurisdiction over the location of the head office within two weeks after the closing of the general promoters meeting or general incorporation meeting. The company will be considered incorporated under the relevant law only after the registration of its incorporation.

Under the Local Tax Law, the company must pay a registration tax equal to 0.4% of the paid-in capital and education tax equal to 20% of the registration tax amount. However, if a company is incorporated in the greater metropolitan Seoul area (including Incheon and Suwon), the registration tax will be three times as much. In addition, a housing bond or municipal railroad bond equal to 0.1% of the paid-in capital must be purchased at the time of incorporation.
2. M&A through Share Purchase

The acquisition of a business entity through M&A may be accomplished through the acquisition of new shares issued at the time of capital increase or acquisition of existing shares held by a shareholder or shareholders.

2.1 Acquisition of New Shares through Participation in Capital Increase

2.1.1 Issuance of New Shares

Unless otherwise provided under the articles of incorporation, the issuance of new shares will be determined by the board of directors. The board of directors must determine the class and number of shares to be issued, issuing price per share and payment date, etc.

2.1.2 Pre-Emptive Rights

The pre-emptive right means the right of an existing shareholder to acquire all or part of the new shares issued by the company before the shares are offered for subscription to a third party. Under the Commercial Code, if the company issues new shares, each existing shareholder will have the right to acquire the new shares in proportion to the number of the existing shares of the company held by such shareholder. To limit or exclude the pre-emptive right of the existing shareholders, appropriate provisions that limit or exclude such right should be provided in the articles of incorporation. Put another way, if the articles of incorporation of a company do not specifically allow the issuance of new shares to a third party (i.e., other than existing shareholders), an investor that wishes to acquire shares in such company may not be allotted the desired number of new shares because of the exercise of pre-emptive rights by existing shareholders.

In addition, a shareholder whose pre-emptive right has been infringed may exercise the right to demand suspension of the issuance of new shares. Therefore, a potential investor should review the articles of incorporation of the company and ensure that the pre-emptive right of existing shareholders does not restrict the investor’s subscription to the new shares.
2.1.3 Procedure for Issuance of New Shares

In order to fix the subscribers, the company must determine the record date for allocation of new shares and give a public notice at least two weeks prior to such date. Thereafter, the company must determine the subscription date and give a notice of the terms of the subscription right at least two weeks prior to the subscription date.

The acquisition of new shares is accomplished through subscription and allocation. A director must prepare the share subscription application form and deliver such application form to the existing shareholders with pre-emptive rights, and the existing shareholders that intend to acquire the shares must subscribe through the subscription application form. The subscription application form must include the company name, total number of new shares to be issued, par value per share, issuing price and payment date, the bank to which the payment should be made, etc. The subscriber has the obligation to pay the price by the payment date, and the subscriber that completes the payment will become a new shareholder on the day following the payment date.

2.2 Acquisition of Existing Shares through Share Purchase

2.2.1 Transferability of Shares

The company may place restrictions on the transfer of shares only if the articles of incorporation of the company allow such restrictions. Even if the articles of incorporation allow such restrictions, however, the means of restriction is limited only to the requirement for the approval of the board of directors. If the articles of incorporation do not restrict the transfer of shares, the company may not restrict the transfer by requiring the resolution of the board of directors or shareholders or through other means.

If the articles of incorporation restrict the transfer of shares by requiring the approval of the board of directors and the board of directors refuses to approve the transfer of shares by a shareholder based on such restrictions, the shareholder may demand the company to purchase the shares or find a third party purchaser. Therefore, a foreign investor that intends to acquire the existing shares through purchase of shares must first confirm whether the articles of incorporation include provisions on share transfer restrictions.
2.2.2 Method of Share Transfer

The transfer of shares requires an agreement between the seller and purchaser. However, such agreement is not required to be in any specific form.

For a valid transfer of shares, the delivery of share certificates is required. Even in the case of share certificates in registered form, the shares may be transferred simply by delivering the share certificates, and endorsement is not necessary. However, even the delivery of share certificates is not required for transfer of shares of KSE-listed or KOSDAQ-registered companies that are deposited with the Korea Securities Depository.

The company is required to prepare a shareholders registry that records the names and addresses of the shareholders and class and number of shares held by each shareholder. If the purchaser of shares intends to exercise his rights as a shareholder, such purchaser needs to be listed in the shareholders registry. Therefore, when a foreign investor acquires the shares in registered form from an existing shareholder, the foreign investor must receive the share certificates from the existing shareholder, present such share certificates to the company and ask the company to amend the shareholders registry. However, a purchaser that acquires share certificates in bearer form is not required to request the amendment of the shareholders registry, but he needs to deposit the share certificates with the company in order to exercise his rights.

2.3 Foreign Exchange Reporting regarding Share Purchase

If a foreigner acquires the shares or equity of a Korean company, the foreigner must file in advance a foreign exchange transaction report with a foreign exchange bank in accordance with the Foreign Exchange Transaction Law or a foreign investment report to the MOCIE, KOTRA or a foreign exchange bank in accordance with the Foreign Investment Promotion Law.

2.4 Limitations on Investment in Publicly Listed Company

If a foreign investor intends to acquire the shares of a KSE-listed or KOSDAQ-registered company, the foreign investor will be subject to the regulations under the Securities Transaction Law. The limitations on acquisition of shares described below have been adopted primarily to regulate investors, domestic or foreign, that acquire shares through the stock market for the purpose of portfolio investment. Nevertheless, such limitations also are applicable to the investors that acquire shares for direct investment.
2.4.1 Restrictions on Percentage Ownership Interest

With respect to shares issued by a public company (such as KEPCO), (i) for a shareholder owning 10% or more of the total issued and outstanding shares of the public company at the time of registration of the shares with the FSC, the ownership is limited to such ownership percentage, and (ii) for other shareholders, their ownership percentages must not exceed the percentage set forth in the articles of incorporation of the public company but in any event 3% or less.

With respect to government-controlled companies, a party and its specially-related parties may own among themselves only up to the percentage set by the articles of incorporation but in any event no more than 15% of the total issued and outstanding shares with voting rights, and may not have actual control over such companies. In addition, a government-controlled company may include additional limitations through its articles of incorporation.

In addition, a party and its specially-related persons cannot own more than 10% of the total issued and outstanding shares with voting rights of a bank (15% for regional banks). Nonetheless, if such party and its specially-related persons satisfy certain requirements under relevant laws and obtain approval from the FSC, such persons and their specially-related persons can own ownership interest in a bank in excess of this 10% limitation (15% for regional banks).

2.4.2 Procedural Restrictions (Tender Offer)

If a party and its specially-related parties acquire, in aggregate, 5% or more of the total issued and outstanding voting shares or equity (including convertible bonds, bonds with warrants, etc.) of a KSE-listed company or KOSDAQ-registered company (including the case where a shareholder with 5% or more ownership acquires additional shares) from 10 or more persons outside the KSE or KOSDAQ over a period of six months, such party must make a tender offer in compliance with the required procedures such as making a tender offer announcement and filing a tender offer report with the FSC.

2.4.3 Reporting on Significant Shareholdings

If a party and its specially-related parties acquire in the aggregate 5% or more of the total issued and outstanding shares or equity of a KSE-listed company or KOSDAQ-registered company, or if such party and its specially-related parties with 5% or more of the total issued and outstanding shares or equity of a KSE-listed company or KOSDAQ-registered company
increase or reduce their shares or equity by 1% or more point, such party must report to the FSC and the KSE or KOSDAQ.

2.4.4 Additional Restrictions Applicable to Foreigners Only

2.4.4.1 “Foreigner” Defined

With respect to a securities transaction, a “foreigner” is an individual of foreign nationality or a foreign company that does not maintain a Korean address or residence for a period of 6 months or more.

2.4.4.2 Public Company

Regardless of in whose name the foreigner undertakes ownership, (i) a single foreigner cannot exceed the ownership limitation set forth in the articles of incorporation of a public company, and (ii) foreign shareholders in the aggregate may not own more than 40% of the total issued and outstanding shares of a public company. If the foreign shareholder acquires such shares in violation of these restrictions, the foreign shareholder will not be able to exercise the voting rights with respect to such shares, and the FSC may take corrective measures against the foreign shareholder who acquired the shares in violation of such restrictions. In addition, a foreigner’s acquisition of shares may be restricted pursuant to individual laws, and, as mentioned in Section 2.6 of Chapter II, the MOCIE will compile such restrictions and announce them on an annual basis.

2.4.4.3 Procedural Restrictions

If a foreigner intends to newly acquire or dispose of shares listed on the KSE or registered with KOSDAQ, or publicly offered shares for the purpose of listing on a stock market, such foreigner must register in advance its personal details and obtain a foreign investment registration certificate from the FSC and, in principle, should acquire or dispose such shares through a stock market.

As exceptions, however, if a foreigner acquires shares pursuant to the Foreign Investment Promotion Law, or through exercise of its rights based on the ownership of foreign securities (such as depository receipts), or through the exercise of shareholders’ rights, or through a tender offer, etc., such acquisitions do not have to take place through a stock market.
In addition, if a foreigner’s acquisition of KSE-listed or KOSDAQ-registered shares qualifies as a foreign investment under the Foreign Investment Promotion Law, the foreigner must report the share acquisition to the FSC after the acquisition.

3. Merger or Consolidation

3.1 Definition and Procedure of Merger or Consolidation

A merger is where one of the constituent companies survives and the other(s) merges into it. A consolidation is where none of the constituent companies survives and a new company is formed.

The merger or consolidation becomes effective upon registering the merger or consolidation with a commercial registry of the court with jurisdiction over the surviving or consolidated company. After effectuation of merger or consolidation (collectively referred to as “merger” hereinafter), the surviving or consolidated company (collectively referred to as “surviving company” hereinafter) has all rights, powers, immunities, properties, liabilities, and penalties of the constituent companies.

A typical procedure of a merger under the Commercial Code is as follows (the steps with asterisk (*) are required for KSE-listed or a KOSDAQ-registered company only), and certain special regulations relating to merger will be briefly discussed in the following sections:

- Resolution of board of directors on merger
- Execution of merger agreement
- Submission of merger report to FSC and KSE or KOSDAQ*
- Public notice of record date for closing of shareholders registry
- Public notice and individual notice of convening of shareholders’ meeting
- Notice of objection by dissenting shareholders to the company
- Convening of shareholders’ meeting to approve merger
- Public notice and individual notice for objections by creditors
- Exercise of put rights by dissenting shareholders
- Closing of merger
- Merger registration with commercial registry
- Purchase of shares subject to dissenting shareholder’s put rights
- Submission of report on completion of merger to FSC and KSE or KOSDAQ*
3.2 Appraisal by Independent Valuation Firms

If a KSE-listed company or a KOSDAQ-registered company, on the one hand, and a non-publicly listed company, on the other, enter into a merger, the companies must obtain an opinion of an independent valuation firm on the appropriateness of the merger ratio. Since this is a condition precedent to a merger between a KSE-listed company or a KOSDAQ-registered company and a non-publicly listed company, if the companies do not obtain the valuation, the merger will be void.

3.3 Shareholders’ Meeting to Approve the Merger

A constituent company to a merger must provide a notice to its shareholders regarding the shareholders’ meeting for approving the merger at least 2 weeks prior to such a meeting. In contrast with ordinary shareholders’ meetings, the notice for this shareholders’ meeting must state the main terms of the merger, the put rights of dissenting shareholders and the method for exercise of such put rights.

In the case of a KSE-listed company or a KOSDAQ-registered company, in addition to the information mentioned above, the company must include in the notice of shareholders’ meeting information regarding the purpose of the merger, method of merger, evidence on merger ratio and its calculation, summary of the valuation opinion of an outside valuation firm, other information required for the protection of investors, and whether the company has filed the merger report with the FSC, along with the date of such filing. Under the Securities Transaction Law, a KSE-listed company or a KOSDAQ-registered company that intends to merge must file a report in advance to the FSC and the KSE or KOSDAQ.

The merger must be approved by a special resolution at the shareholders’ meeting. This means the resolution must be adopted by the affirmative vote of 2/3 or more of the shares present at a meeting, provided that such affirmative votes constitute at least 1/3 of the total issued shares. If a company has issued different classes of shares, the company must obtain a separate resolution from each class of shareholders who will be adversely affected by the merger.
3.4 Public Notice and Individual Notice to Creditors

Within 2 weeks after the shareholders’ resolution approving the merger, a constituent company to a merger must provide public notice to creditors that the creditors must submit their objections to the merger during a fixed period (which must be 1 month or more), and the company must give individual notices to each of the known creditors of the company. If a creditor submits an objection to the merger, the company must pay off the debt, provide sufficient security, or deposit sufficient property to a trust company for the benefit of such creditor.

3.5 Put Rights of Shareholders

Dissenting shareholders who object to the proposed merger and who provide notice of such objection to the company prior to the shareholders’ meeting for approving the merger may, within 20 days after the shareholders’ resolution approving the merger, exercise their put rights by requesting that the company purchase such shareholders’ shares. In such case, the company must purchase such shares within 2 months from the date of the request. A KSE-listed company or a KOSDAQ-registered company, however, must acquire the shares within 1 month after the end of the period for the exercise of the put rights.

If the company purchases the shares, the company and the shareholder may agree to the price for the shares. If the parties cannot agree on the price, the parties must follow the price determined by an accounting firm. If such price is objected by 30% or more of the shares held by the shareholders exercising their put rights, a court will determine the price.

In the case of a KSE-listed company or a KOSDAQ-registered company, if the company and the dissenting shareholders exercising their put rights cannot agree on the price, the price will be determined based on the price in the stock market one day prior to the date of the resolution of the board of directors approving the merger. If such price is objected by 30% or more of the shares held by the shareholders exercising their put rights, the FSC will determine the price. But the price determined by the FSC is not binding, and if 30% or more of held by the shareholders exercising their put rights object to the price determined by the FSC, the court will make the final determination of the price.
3.6 Business Combination Report

If a company (along with its affiliated companies) with combined total assets or total sales of 100 billion won or more enters into a merger, such company must file a business combination report with the Fair Trade Commission (the “FTC”) within 30 days after the merger registration date. If the combined total assets or total sales of a constituent company (along with its affiliated companies) is two trillion won or more, such company must file a business combination report with the FTC within 30 days of the execution of the merger agreement and must wait until the expiration of such 30-day period before registering the merger.

4. Business Transfer

4.1 Definition and Procedure of Business Transfer

A business transfer refers to the transfer of the whole or a substantial part of the assets organized for business purposes, functioning as a single unit.

In contrast to a merger, a business transfer requires the separate transfer of each of the assets and liabilities subject to transfer. Furthermore, for assets that need to be transferred through registration such as real property and automobiles, such assets must be registered in the name of the company acquiring the assets, and if a transferor intends to transfer a contract with a third party, the transferor must obtain the consent of such third party.

A typical procedure of a business transfer under the Commercial Code is as follows (the steps with asterisk ( *) are required for KSE-listed or a KOSDAQ-registered company only) and important issues relating to business transfer will be explained separately in the following sections:

- Resolution of board of directors on business transfer
- Execution of business transfer agreement
- Report to FSC and KSE or KOSDAQ and public notice of resolution of board of directors *
- Submission of business transfer report to FSC and KSE or KOSDAQ *
- Resolution of board of directors meeting for convening of shareholders’ meeting
- Public notice of closing of shareholders registry and record date
- Public notice and individual notice of convening of shareholders’ meeting
4.2 Shareholders’ Meeting to Approve the Business Transfer

As a general rule, in a business transfer, the transferor and transferee are not required to obtain a resolution of the general shareholders’ meeting, but are required to obtain only a resolution of the board of directors. If, however, the business to be transferred constitutes all or significant part of the overall business of the transferor, the transferor must obtain a special resolution at a shareholders’ meeting. This means the resolution must be adopted by the affirmative vote of 2/3 or more of the shares present at a meeting, provided that such affirmative votes constitute at least 1/3 of the total issued shares. In addition, if the transferee acquires all of the overall business of the transferor or a part of the overall business of the transferor that has a significant impact on the business of the transferee, the transferee must also obtain a special resolution at a shareholders’ meeting.

Under the Securities Transaction Law, a KSE-listed company or a KOSDAQ-registered company that intends to transfer a significant part of its business must file a report in advance to the FSC and the KSE or KOSDAQ, and the transfer of a significant business will include circumstances where (i) the assets of the business to be transferred are 10% or more of the total assets of the transferring company for the most recent fiscal year, (ii) the sales of the business to be transferred are 10% or more of the total sales of the transferring company for the most recent fiscal year, (iii) the liabilities of the business to be transferred are 10% or more of the total liabilities of the transferee for the most recent fiscal year, or (iv) the entire business of the transferring company is transferred.

4.3 Put Rights of Shareholders

Shareholders dissenting to the transfer of a significant business of the company are provided with put rights (analogous to the put rights in the merger context).
4.4 Joint and Several Liability

As a general rule, a transferee does not assume the liabilities of a transferor that is not a part of the business transfer. If, however, a transferee acquires the trade name of the transferor and uses such trade name, the transferee may be liable to third parties for the liabilities relating to the operation of the transferor.

4.5 Tax Benefits on Business Transfer by Foreign Investor

With respect to the foreign investments qualifying as industrial support services and high technology businesses that promote the international competitiveness of the domestic industry, foreign investors acquiring either the whole or part of such businesses are entitled to certain tax benefits.

4.6 Distinction from Asset Transfer

Unlike the business transfer, which requires the comprehensive transfer of the assets of a business that have been organized and function as a single integrated unit, a simple sale of the assets of a company does not generally require the special resolution of the shareholders’ meeting. However, Korean court cases suggest that if the assets to be transferred are important enough to be considered the foundation for the continuing existence of the company and the transfer of such assets is likely to cause suspension or closing of the company, the transfer of such assets should be considered the same as a business transfer. In such case, therefore, the company will need a special resolution of a shareholders’ meeting. Since a transfer of business and transfer of assets are difficult to distinguish, the cautious approach would be to obtain a special resolution of a general shareholders’ meeting even for an asset transfer.
5. Limitations on M&A Under the Monopoly Regulation and Fair Trade Law (the “Monopoly Law”)

5.1 Introduction

If a foreign company intends to acquire the shares of, merge with or acquire a business of a Korean company, such merger or acquisition could have an anticompetitive effect within the Korean market, so such merger or acquisition may be subject to regulation by the FTC as a restricted anticompetitive business combination pursuant to the Monopoly Law.

5.2 Presumption of Anticompetitive Business Combination

If the aggregate market share of the combined business (including the market share of affiliated companies) is (i) the dominant market share in the relevant market, (ii) the highest market share in the relevant market, and (iii) the difference between the aggregate market share of the combined company and the market share of the company with the second highest market share (the company with the largest market share after excluding the combined company) is 25% or more of the aggregate market share of the combined company, the combined business is presumed to have an anticompetitive effect within the relevant market.

In addition, if a “large company” (meaning a company that has, together with its affiliated companies including foreign companies, total assets or total sales of 2 trillion won or more, either directly or through a specially-related party) enters into a business combination, and (i) the business combination is in a market where the market share of the small-medium sized companies is 2/3 or more, and (ii) the combined business will have a 5% or more market share in the relevant market, then such business combination is presumed to have an anticompetitive effect within the relevant market.

5.3 Permission of Business Combinations With Anticompetitive Effect

The Monopoly Law, in principle, will prohibit business combinations with anticompetitive effects within a relevant market. Nonetheless, the FTC will approve a business combination as an exception to the general prohibition, if the FTC determines that (i) the business combination will produce greater efficiency than anticompetitive effects, or (ii) if a business combination is with a company whose continued survival is not possible, making it
unlikely that its production facilities will continue to be used in the relevant market, and if it
would be difficult to effect another business combination having less anticompetitive effects
within the relevant market than the business combination concerned. In such case, the company
entering into the business combination must provide evidence of satisfying the required
conditions for the exception.

5.4 Business Combination Report

5.4.1 Parties Subject to Reporting

The Monopoly Law requires certain business combinations to be reported to the FTC in
order to determine whether the business combination would have an anticompetitive effect
within the relevant market. If a company subject to the business combination reporting
requirements (a company, together with its affiliated companies, that has total assets or total
sales of 100 billion won or more) or its specially-related party (i) acquires 20% or more (for
publicly-listed companies, 15%) of the total issued and outstanding shares of another company,
(ii) merges with another company or acquires the business of another company, or (iii) acquires
20% or more of the shares of a newly-established company, the company must file the business
combination report with the FTC along with appropriate supporting documentation. Even if a
company is not otherwise subject to the business combination reporting requirements, it must
nevertheless file the report if it enters into a business combination with a company subject to
business combination reporting.

5.4.2 Timing of Report

The business combination report must be filed, in principle, within 30 days after the
date of the business combination. Such date is one day after the issuance date of the stock
certificates, date for completion of payment for business transfer, merger registration date,
or date for payment of shares.

If, however, more than one of the companies which is a party to the business
combination through merger, business transfer, or establishment of a new entity is a large
company (as described in Section 5.2 above), the business combination report must be filed
within 30 days after the date of the merger agreement, date of the business transfer agreement,
or the date of the shareholders’ resolution approving the establishment of the new entity. In
such case, the company filing the business combination report may not register the merger,
implement the business transfer agreement or subscribe for any shares until the lapse of 30 days from the date it files the business combination report.

Even prior to the due dates for filing the business combination report, a company that intends to enter into a business combination may request the FTC to review whether the proposed business combination would, in practical terms, be deemed an anticompetitive business combination, and the FTC must render a decision within 30 days of receipt of the request for review. If the FTC deems it necessary, however, it may extend such period for up to 60 days after the original 30 day period for review.

5.5 Sanctions

5.5.1 Administrative Measures

In the event of a violation or expected violation of the business combination reporting requirements, the FTC can order the suspension of the violating act, disposal of all or a part of the acquired shares, transfer of business, or publication of violation, or prescribe other measures necessary to minimize the anticompetitive effects resulting from the business combination. Further, a company receiving an order from the FTC to dispose of shares may not exercise voting rights with respect to such shares from the date of receipt of the FTC order.

In addition, the FTC may file a suit for voiding a merger or establishment of a new company in relation to an anticompetitive business combination or a business combination effected through unfair methods.

5.5.2 Monetary Fine

The FTC may levy a monetary fine within a certain specified limit on a company that effected an anticompetitive or unfair business combination and that failed to carry out the administrative measures ordered by the FTC within a specified period of time.

5.5.3 Criminal Penalties

A party entering into a business combination in violation of relevant restrictions is subject to imprisonment of 3 years or less or a fine of 200 million won or less, and a fine of 100 million won or less for violating the business combination reporting requirement, false reporting or entering into a business combination in violation of a prohibition against such combination.
Chapter IV

Operation of Business in Korea

1. Corporate Governance
   1.1 Shareholders’ Meeting
   1.2 Directors and the Board of Directors
   39

2. Personnel Management
   2.1 Applicable Rules on Labor Relations
   2.2 Limitation on Dismissal
   2.3 Severance Pay System
   2.4 Labor Union
   2.5 Transfer of Labor Relations
   42

3. Real Property System
   3.1 Transfer of Ownership Rights of Real Property and Registration System
   3.2 Duty to Register under Owner’s Name
   3.3 Restrictions on the Use and Transactions of Real Property
   3.4 Restrictions on Acquisition of Real Property by Foreigners
   49

4. Intellectual Property Rights
   4.1 Introduction
   4.2 Types of Intellectual Property Rights Protected in Korea
   4.3 Registration of Intellectual Property Rights and Period of Protection
   4.4 Means of Protecting Intellectual Property Rights
   4.5 Registration and Protection of Intellectual Property Rights of Foreigners
   53
1. Corporate Governance

1.1 Shareholders’ Meeting

1.1.1 Power

Shareholders exercise their rights at a duly convened shareholders’ meeting, which constitutes the corporation’s highest decision-making body. The agenda at a shareholders’ meeting, however, is limited to matters specified in the provisions of the Commercial Code or the articles of incorporation of the company. Under the Commercial Code, the corporate actions requiring a resolution of the shareholders’ meeting include:

- Appointment of a director or auditor
- Approval of annual financial statements
- Approval of compensation of a director
- Transfer, takeover or lease of business
- Amendment to the articles of incorporation
- Reduction of paid-in-capital
- Merger with another company
- Dissolution or continuation of the company

The agenda to be considered at a shareholders’ meeting as specified in the provisions of the Commercial Code or the articles of incorporation must be submitted to the vote of the shareholders, and any such matters may not be delegated to board of directors, another committee or an individual.

1.1.2 Voting Rights

Each shareholder is entitled to one vote per share under the principle of equal and fair voting rights. Nonetheless, preferred stock with dividend rights may be issued without voting rights if such class of stock is provided for in the articles of incorporation.

In electing directors, the number of votes to be cast by each shareholder may be determined by multiplying the number of shares a shareholder owns by the number of directors to be elected. This cumulative voting system, however, may be prohibited by the articles of incorporation.

Further, a shareholder with more than 3% of the total outstanding shares of the
company is limited to votes for the shares owned up to 3% when electing the company’s statutory auditor.

In addition, any shareholder having a special relationship in connection with any matter which is the subject of resolution at a shareholders’ meeting is not entitled to any voting rights in relation to such matters. If the company holds its own shares, it also is not entitled to any voting rights with respect to such shares.

An ordinary resolution requires the affirmative votes of a simple majority of the shares present or represented at a shareholders’ meeting, provided that such affirmative votes constitute at least 25% of the total outstanding voting shares of the company. Such voting requirement may be increased, but not reduced, by the articles of incorporation.

A special resolution is adopted by the affirmative votes of at least 2/3 of the shares present or represented at a shareholders’ meeting, provided that such affirmative votes constitute at least 1/3 of the total outstanding voting shares of the company. The following is a list of actions requiring a special resolution of the shareholders under the Commercial Code:

- Amendment to the articles of incorporation
- Stock splits
- Retirement of shares
- Transfer of all or significant part of the business
- Acquisition of all of the business of another company
- Profit sharing agreement with a third party
- Termination of a director or a statutory auditor
- Issuance of shares below par value
- Reduction of paid-in capital
- Merger with another company
- Dissolution of the company

On the other hand, a unanimous consent of all shareholders is required to waive the liabilities of the promoter in connection with the incorporation of the company and liabilities of directors, auditors and liquidators.
1.1.3 Limitation of Shareholders’ Liability

A company incorporated as a *chusik hoesa* provides limited liability for its shareholders. As a separate legal entity, a corporation is responsible for its own debts, and shareholders are only responsible for the purchase price of the shares owned. This concept of limited liability of shareholders may not be excluded by the articles of incorporation or by resolution of a shareholders’ meeting. The shareholders may, however, become liable for the debts of the corporation where the court imposes “alter-ego liability,” where the shareholders have neglected corporate formalities, such as corporate meetings and required filings, or when the shareholders have ignored the legal separateness of the corporation by treating the corporation as extensions of the individual shareholder. Shareholders may also become liable for the corporation’s debt where the tax laws impose tax liability of the corporation on the individual shareholders in certain extraordinary circumstances.

1.2 Directors and the Board of Directors

1.2.1 Directors

A director may be elected or dismissed by a resolution of the shareholders’ meeting. A corporation with paid-in capital of 500 million won or more must have at least three directors and a corporation with paid-in capital of less than 500 million won may have one or more directors.

1.2.2 Board of Directors

The board of directors has the authority to decide on the business and affairs of the corporation, monitor the corporation’s activities and supervise performance of a director’s duties. In addition, the board of directors is authorized to sell and lend any assets, to appoint and dismiss managers and to establish and move or close any branch office. A resolution of the board of directors is adopted by the affirmative vote of a majority of directors present at the meeting of the board of directors, where a majority of all directors are present. Such requirement may be increased, but not reduced, by the articles of incorporation.
**1.2.3 Representative Director**

A representative director is a director authorized to represent the company in connection with the operations of the company, and the representative director is appointed by a resolution of the board of directors. The representative director, however, may be elected at a shareholders’ meeting if this is provided for in the articles of incorporation.

**1.2.4 Responsibilities of Directors**

A director has a duty of loyalty to the company. More specifically, the director has a duty to attend the meeting of the board of directors, monitor other directors’ performance of their duties, maintain trade secrets of the company, not to compete with the company, and not to effect a transaction for his/her own benefit. Directors are jointly and severally liable to the company for any acts of negligence or violation of the laws or the articles of incorporation. In addition, if such acts or violation were approved by a resolution of the meeting of the board of directors, directors who approved such acts are also jointly and severally liable for damages to the company, and directors who are not recorded as objecting to such resolution are presumed to have given their consent. Finally, a director is also liable to third parties for willful misconduct or gross negligence in the performance of his duties.

**2. Personnel Management**

**2.1 Applicable Rules on Labor Relations**

**2.1.1 Labor Standards Law**

The Labor Standards Law regulates the relationship between employer and employee, providing the minimum employment standards designed to protect the rights of employees. Any provision in an employment contract in violation of the Labor Standards Law may be deemed invalid.

The Labor Standards Law applies to an employer with five or more employees, although several provisions of the Labor Standards Law, such as annual and monthly leave allowances, paid holidays, menstruation leave allowance and notice of termination of employment, also apply to employers with less than five employees.
2.1.2 Employment Rules

Employment rules refer to detailed policies designed by the employer to be followed by the employees relating to the rules and policies concerning the workplace, wages, working hours and other working conditions. Pursuant to the Labor Standards Law, an employer who ordinarily employs 10 or more employees must prepare the employment rules on matters pertaining to: (1) the method for determining, calculating and paying wages and promotions; (2) the starting and ending time for work, holidays, paid leave allowances, multiple shifts, break time; (3) retirement, severance pay and minimum wage; (4) meals and other work facilities; (5) educational assistance and facilities for employees; (6) safety and health related matters, assistance in case of casualty outside work; (7) rewards or restrictions; and (8) other matters pertaining to business operations or matters applicable to all employees of the company. Such employment rules and any subsequent modifications need to be submitted to the Ministry of Labor.

In addition, adopting the employment rules or modification of the employment rules favorable to the employees requires the hearing from the labor union representing a majority of the total number of employees, or in the absence of a labor union, a majority of all employees. However, any modification of the employment rules adverse to the employees requires the approval in the same manner.

2.1.3 Collective Bargaining Agreement

If a labor union exists, the labor union has the authority to negotiate the terms and conditions of employment with the employer. The employer may not reject such negotiations initiated by the labor union without justifiable cause. Further, the labor union may engage in strikes and similar activities as a means to enhance its position in the collective bargaining process, without being subjected to civil and criminal penalties, so long as illegal acts are not committed by the labor union.

The employer and the labor union may enter into a collective bargaining agreement through such negotiations, and the rights and obligations of the employer and the labor union as set forth in the collective bargaining agreement are binding on the parties. Further, the rights and obligations of an employee who is a member of a labor union are directly affected by the terms and conditions in the relevant collective bargaining agreement. In addition, when the collective bargaining agreement applies to a majority of employees engaged in the
same kind of job, the collective bargaining agreement will apply to other employees of the same kind of job employed in the same business or workplace.

2.1.4 Employment Contract

An employer is required to enter into a written employment contract which specifies the wages, working hours, place and duties. Further, the employer is required to keep the employment contract for at least three years after the expiration of the contract.

2.1.5 Relations between the Labor Standards Law, Employment Rules, Collective Bargaining Agreement and Employment Contract

In general, any inconsistencies between the provisions of the Labor Standards Law, employment rules, collective bargaining agreements and employment contracts are to be resolved by applying the most favorable provision from the standpoint of the employee.

2.2 Limitation on Dismissal

The term “dismissal” refers to the legal act of terminating the employment relationship or the employment contract, regardless of the employee’s will.

Dismissal of an employee may be classified into the following three categories depending on the reason for dismissal: (1) ordinary dismissal due to incomplete performance of the employee; (2) disciplinary dismissal due to considerable hindrance to the business caused by the employee; and (3) restructuring dismissal. For dismissal in each of these three categories, the employer must have just cause.

In addition, the employer has to give the employee an advance notice of at least 30 days. If the employer fails to give such notice, the employer must pay the employee at least 30 days’ ordinary wages.

2.2.1 Ordinary Dismissal

An employer may dismiss an employee if the employment relationship is impossible to maintain in light of generally accepted social norms. For example, the employer may dismiss the employee if the employee is unable to perform his duties as a result of injury or physical or mental disability resulting from an accident.
2.2.2 Disciplinary Dismissal

Disciplinary dismissal refers to the dismissal of an employee as a means of imposing disciplinary sanctions on an employee for the employee causing substantial hindrance to the employer’s business. The disciplinary measures available to an employer include warning, reprimand, reduction of wages, restriction on promotion, suspension, transfer, or disciplinary dismissal. The dismissal of an employee, however, is considered the harshest form of discipline, and therefore is the most drastic measure available to an employer for the purpose of ensuring that the company’s rules and policies are adhered to.

In order for such disciplinary dismissal to be justified, the employer has to establish a just cause as provided in the employment contract, employment rules or the collective bargaining agreement. Further, the just cause threshold for dismissal is quite high: the employment relationship would be impossible to maintain in light of the generally accepted social norms. Finally, if the employer does not follow the dismissal procedure designated by the employment contract, employment rules or the collective bargaining agreement, such dismissal may be null and void even if the dismissal was for just cause.

2.2.3 Restructuring Dismissal

According to the Labor Standards Law, a restructuring dismissal (also referred to as a dismissal for business reasons) is a dismissal due to causes attributable to the employer. (In contrast, a “dismissal for cause” is a dismissal due to causes attributable to the employee.) A restructuring dismissal would be permitted only if all of the following factors exist:

(1) An urgent business necessity is required to dismiss employees due to business reasons. Previous court precedents interpreted this requirement narrowly so that basically the company’s survival must have been at stake. Recently, however, the courts have been more liberal in recognizing urgent business necessity to include improvement in productivity, corporate reorganization, technological innovation, etc. under certain circumstances.

(2) The employer must have made all reasonable attempts to avoid the dismissal. Such attempts would include transfer to another place of business and assistance in seeking new employment.
(3) The employer must set rational and fair standards for the dismissal and adhere to such standards in dismissing employees. Such standards could include age, health, family situation, probability of finding new employment, job performance, length of employment period, and skillfulness, etc.

(4) The employer must give a 60 days’ advance notice of dismissal to employees’ representative who represents a majority of the employees or to the labor union to which a majority of the employees belong, if any, and the employer must faithfully consult with him (or it) as to the measures to avoid dismissals and the selection criteria for such dismissal.

(5) The employer must report to the Ministry of Labor at least 30 days before the first dismissal if the employer will dismiss the following number of employees within a one-month period: (i) if the employer has less than 100 employees and will dismiss 10 or more employees; (ii) if the employer has between 100 and 999 employees and will dismiss 10% or more employees; or (iii) if the employer has 1,000 or more employees and will dismiss 100 or more employees.

(6) If an employer decides to hire new employees within two years after the dismissal, it must use best efforts to rehire previously dismissed employees.

(7) If there are employment rules or collective bargaining agreement, the employer must comply with such rules or agreement.

2.3 Severance Pay System

Under the Labor Standard Law, if an employer employs five or more employees, the employer is required to establish a severance pay system under which, upon termination of employment of an employee, the employer must pay the employee a severance pay equal to not less than 30 days’ worth of “average wage” for each year the employee has worked for the employer. Nonetheless, such severance pay is not required if the employee has been employed for less than one year. The “average wage” is generally determined by dividing the total amount of wages paid to the employee during the last three months of employment by the number of days in such three months.
2.4 Labor Union

Employees are free to organize a labor union to maintain and improve their own working conditions and to improve their social and economic status. In addition, there are no statutory restrictions on the type of labor unions, and the employees may decide to organize a union in various forms, depending on the type of business, industry or occupation.

2.4.1 Requirements for the Formation of Labor Unions

Employees who intend to organize a labor union need to submit an application, along with the labor union rules, to the appropriate government authority. Unless the application contains a legal issue, the government authority will normally issue a certificate of registration within 3 days. After obtaining the certificate of registration, the labor union will be protected from civil and criminal liability with respect to its lawful activities. Also, since the labor union will have the right to request the adjudication of industrial disputes, it becomes eligible for seeking remedy on the grounds that the rights of union members have been infringed upon by unfair labor practices.

2.4.2 Unfair Labor Practice

In order to secure basic labor rights of employees as provided under the Constitution, provisions related to “unfair labor practice” are established under the Labor Union and Labor Relations Adjustment Law. Employers are prohibited from any of the following conduct:

(1) Dismissal or unfavorable treatment of an employee on the grounds that the employee has joined or intends to join a labor union, has attempted to organize a labor union, or has performed any other lawful act for the operation of a labor union;

(2) Employment of an employee on the condition that he will not join, or will withdraw from, a labor union or on the condition that he should join a particular labor union;

(3) Refusal to execute or delay in executing a collective bargaining agreement with the representative of a labor union or a person authorized by the labor union without just cause;

(4) Control of or interference with the organization or operation of a labor union, payment of wages to a full-time union official, or payment of operating expenses of a labor union. (However, payment of wages to a full-time union official is permitted until December 31, 2006); and
(5) Dismissing employees or taking actions against the employees’ interests on the grounds that they have participated in justifiable collective activities.

With respect to such unfair labor practices by employers, an employee or labor union may seek remedy from the Labor Relations Commission on the basis that the employee’s or labor union’s rights have been infringed upon.

2.4.3 Current Statistics on Labor Unions

As of the end of 2002, the total number of labor unions in Korea is 6,506 with 1,606,000 union members, which accounts for 11.6% of the total number of people in the labor force. There are two trade unions in Korea, the Federation of Korean Trade Unions and the Korean Confederation of Trade Unions. The Federation of Korean Trade Union’s membership consists of 4,063 labor unions, or 62.5% of the total number of labor unions, for a total of 876,889 union members or 54.6% of total union membership. The Korean Confederation of Trade Unions consists of 1,529 labor unions or 23.5% of the total number of the labor unions, for a total of 685,147 union members or 42.7% of total union membership. Labor unions not under the umbrella of either of the two trade unions mentioned above total 914 labor unions or 14% of the total number of labor unions, for a total of 43,936 union members or 2.7% of total union membership.

The statistics on organized labor unions according to size are as follows: (1) 500 or more members: 425 labor unions with 1,165,000 union membership; (2) less than 50 members: 3,079 labor unions with 52,000 union membership.

In addition, most labor unions are presently organized within individual companies in order to primarily engage in collective bargaining with a company’s management. However, in order to overcome the bargaining limitations posed by this fundamental structure and to increase the number of labor unions, in recent years, the labor force has been promoting the formation of labor unions on an industry-wide basis. Since 2000, industry-wide labor unions have been organized within particular industries, such as the Korea Financial Industry Union (organized in March 2000), the National Union of Media Workers (organized November 2000), and the Korea Metal Workers’ Federation (organized February 2001), and as of December 31, 2002, 34 industry-wide labor unions within the various industries have been organized and are currently in operation.
2.5 Transfer of Labor Relations

2.5.1 Merger

In a merger, the surviving company assumes all rights and obligations of the merged company, including labor relations. Consequently, the surviving company assumes the labor obligations of the merged company. In addition, the surviving company will be bound by any employment contracts, collective bargaining agreement and employment rules of the merged company.

2.5.2 Business transfer

In a business transfer, the Supreme Court has ruled that the new employer must take over the existing labor relations, unless specified otherwise by the parties to the business transfer. Therefore, there is in fact no significant distinction between a merger and a business transfer as far as the transfer of labor relations is concerned. Nevertheless, existing labor relations will not be transferred to the new employer if the transferor and transferee of the business make special arrangements to exclude particular employees from the transfer, provided that such exclusion must be based on just cause, since such exclusion of particular employees will be deemed a dismissal of such employees.

3. Real Property System

3.1 Transfer of Ownership Rights of Real Property and Registration System

The acquisition or disposition or any changes to the rights to real property (land and building) must be registered with the appropriate authority in order to take legal effect. Even if parties execute a purchase and sale contract for real property and the acquisition price is paid in full, the ownership rights to the real property will remain with the seller until the transfer of ownership is properly registered.

A public official at the relevant registry office will register the real property. Both parties to a transaction must jointly apply for registration with the court registry, and upon such application, the court registry will examine the application in order to determine whether the application and its supporting documents satisfy the registration requirements. A registry is then prepared in writing in order to substantiate the ownership rights to the real property, and each
Page of the registry will contain information concerning one unit of land or building. In other words, a registry is prepared for each unit of real property concerned, which makes it possible for an owner of real property to have multiple registries for multiple units of real property.

Nonetheless, the real estate registry does not have officially binding effect. Hence, if a person purchases real property from the registered holder who is not the true owner, such buyer cannot validly hold or subsequently transfer the title to the real property, and the rights of the true owner prevails over the rights of such buyer even if such buyer took all necessary steps to register the real property as a bona-fide purchaser. Since the court registry office handles all matters pertaining to the registration of real property, such conflicts will rarely occur in practice.

3.2 Duty to Register under Owner’s Name

One who purchases real property has a duty to register the acquisition under one’s own name. Any purchase and sale contract calling for the registration under a third party’s name or the registration under a third party’s name is void.

Further, an administrative penalty of up to 30% of the value of real property is imposed on the true owner who registers real property under a third party’s name. Moreover, the true owner who registers real property under a third party’s name may be subject to imprisonment of up to 5 years or a fine of up to 200 million won.

3.3 Restrictions on the Use and Transactions of Real Property

3.3.1 City planning - Restrictions on Use

Land in Korea is divided into urban zones, controlled zones, agricultural zones and natural ecosystem preservation zones based on such factors as their particular use and characteristics.

Urban zones are further subdivided for administrative purposes into residential zones, commercial zones and industrial zones. Construction of buildings and installation of equipment (including the type and size of equipment to be installed) are specified in the relevant zoning regulations. In addition, the Ministry of Construction and Transportation is authorized to designate green belts to prevent uncontrolled expansion of urban areas and to preserve the natural environment surrounding urban areas. In areas designated for a green belt, the regulations permit
implementation of public facilities, management of agricultural trade and maintenance or repair of existing living habitats while strictly prohibiting any development activities.

3.3.2 Approval on Sale of Land - Restrictions on Sale and Purchase

The Ministry of Construction and Transportation (the “MOCT”) is authorized to designate certain areas where speculative investment in real estate is particularly acute, and the MOCT is authorized to restrict the sale and purchase of land within such designated areas for a period of up to 5 years. In order to purchase land in a restricted zone, one must obtain advance approval from the relevant local government authority. Without such approval, any sale and purchase agreement for land within the restricted zone will be void.

However, if a foreigner files a report or obtains approval for the acquisition of land in a restricted zone pursuant to the Alien Land Law, such foreigner will not need advance approval on the purchase or sale of land within the restricted zone.

3.4 Restrictions on Acquisition of Real Property by Foreigners

3.4.1 Restrictions under the Alien Land Law

A foreigner who purchases land in Korea is required to file a report of the acquisition with the relevant local government office within 60 days from the execution of the purchase contract, although such foreigner must obtain prior approval for acquisition of land designated as military facility protection areas, cultural relics protection areas and natural ecology protection areas. Acquisition of a building (as opposed to land) is not subject to restrictions under the Alien Land Law. A sale and purchase contract for the purchase of land would still be legally binding without filing a report, but such sale and purchase contract is deemed void if the required prior approval has not been received.

If a foreigner purchases land and fails to file a report on the acquisition, the relevant government authority may impose a fine in the amount of 3 million won or less. If the foreigner fails to obtain prior approval for the acquisition of land in certain designated areas where such approval is required, the relevant government authority may impose a fine of up to 20 million won or imprisonment of up to 2 years.
3.4.2 Restrictions under the Foreign Exchange Transactions Law

3.4.2.1 Restrictions on Acquisition of Real Property

As a general rule, when a non-resident (the term “non-resident” refers to an individual without a residence or an address in Korea or a company that does not have its main office in Korea, and a branch office or a representative office of a non-resident company is considered a resident for purposes of the Foreign Exchange Transactions Law) acquires real estate in Korea, one of the following rules would apply:

(1) If a non-resident acquires ownership rights to real property, other than land, from another non-resident, the non-resident is not required to file a report with regard to the acquisition under the Foreign Exchange Transaction Law;

(2) A report needs to be filed with a foreign exchange bank if a non-resident (i) purchases real property with funds wired from a foreign country including funds deposited in a foreign currency account, (ii) purchases real property from another non-resident who acquired the real property concerned with funds wired from a foreign country, or (iii) acquires real property by exercising foreclosure rights against the collateral provided by a resident; or

(3) If a non-resident purchases real property in Korea by means other than those set out in (1) or (2) above, the non-resident must file a report for the acquisition with the Bank of Korea.

If a non-resident fails to file the required report with the appropriate authority, the non-resident may be subject to a fine of up to 100 million won or imprisonment of up to 2 years.

3.4.2.2 Restrictions on Disposition of Real Property

If a non-resident intends to sell real property which was previously acquired with the funds wired from a foreign country (including the funds deposited in a foreign currency account) where the acquisition was exempt from the reporting requirement or where the acquisition was reported to a foreign exchange bank or the Bank of Korea, and the non-resident intends to repatriate the sales proceeds to a foreign country, the non-resident should submit documents evidencing the acquisition and subsequent sale of the real property to a foreign exchange bank.
In other cases, if a non-resident sells real property and intends to repatriate the sales proceeds out of Korea, the non-resident must file a report to the Bank of Korea.

4. Intellectual Property Rights

4.1 Introduction

Intellectual property is protected under various laws including the Patent Law, the Utility Model Law, the Design Law, the Trademark Law, the Computer Programs Protection Law, the Unfair Competition Prevention and Trade Secret Protection Law, the Law on the Layout-Designs of Semiconductor Integrated Circuits, the Online Digital Contents Industry Development Law, the Invention Promotion Law and the Law on Internet Address Resources.

Further, Korea has acceded to industry-related treaties including the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”) and other various treaties, which the Korean courts regard as equivalent to the laws of Korea.

4.2 Types of Intellectual Property Rights Protected in Korea

Intellectual property rights given protection under Korean laws and regulations include patents, utility model rights, design rights, trademarks, copyrights, trade secrets, rights to layout designs of semiconductor integrated circuits, and online databases, among others. There are no specific laws for the protection of character rights, franchise rights or publicity rights, although such rights are given protection under relevant intellectual property laws or any other general laws and regulations.

4.3 Registration of Intellectual Property Rights and Period of Protection

Registration procedures for various intellectual property rights are specified in the relevant laws. The processing time for registration of an intellectual property right will depend upon the type of the intellectual property right at issue. In addition, for patents and trademarks, applications may also be filed in other countries according to the applicable treaties.

The particular requirements for registration and the period of protection for various intellectual property rights are as follows:
<table>
<thead>
<tr>
<th>Type</th>
<th>Requirements for Registration</th>
<th>Period of Protection</th>
</tr>
</thead>
<tbody>
<tr>
<td>Patents</td>
<td>Industrial applicability, novelty and inventive step</td>
<td>20 years</td>
</tr>
<tr>
<td>Utility model rights</td>
<td>Industrial applicability, novelty and inventive step</td>
<td>10 years</td>
</tr>
<tr>
<td>Trademarks</td>
<td>Distinctiveness, not identical or similar to another person’s trademark</td>
<td>10 years with possible extension</td>
</tr>
<tr>
<td>Design rights</td>
<td>Industrial applicability, novelty and creativity, except certain products not subject to review</td>
<td>15 years</td>
</tr>
<tr>
<td>Copyright</td>
<td>Registration is not required (but by registering the name, nickname and nationality of the creator or copyright holder, date of creation or publication, and other relevant information with the copyright Commission for Deliberation and Conciliation, the registrant can have priority rights against third parties)</td>
<td>50 years after the author’s death</td>
</tr>
<tr>
<td>Computer program copyright</td>
<td>Registration is not required (but by registering the name, address, nationality of the rights holder, program name, date of creation, and other relevant information with the Computer Program Deliberation and Mediation Committee, the registrant can have priority rights against third parties)</td>
<td>50 years from the year following the publication</td>
</tr>
<tr>
<td>Rights to layout design of semiconductor integrated circuits</td>
<td>Registration will be made upon application without any review</td>
<td>10 years</td>
</tr>
<tr>
<td>Online digital contents</td>
<td>Registration is not required, provided that the date of production, name, telephone number and address of the producer, and the access terms and conditions are displayed in an easy-to-see manner on the homepage or on the packing paper</td>
<td>5 years</td>
</tr>
</tbody>
</table>
4.4 Means of Protecting Intellectual Property Rights

For infringement of an intellectual property right, the owner of the right may file a claim for: (1) cessation of the infringing activity; (2) preventive measures where the risk of infringement exists although infringement has not occurred; (3) destruction or removal of articles produced by the infringing activity or equipment used in the infringing activity; (4) damages incurred to the owner of the intellectual property; or (5) such measures to be taken by the infringing party as necessary to restore the owner’s reputation. Further, the infringing party may be subject to certain criminal penalties.

4.5 Registration and Protection of Intellectual Property Rights of Foreigners

4.5.1 Foreigners’ Eligibility for Registering Intellectual Property Rights

4.5.1.1 Copyrights and Computer Program Copyrights

A foreigner’s copyrights and computer program copyrights (including computer program works) are given protection under the treaties to which Korea is a party. If the foreigner resides in Korea (or has the principal office in Korea), or if the foreigner’s work is first published in Korea, or published in Korea within 30 days of first being published elsewhere, such work is given protection in Korea regardless of the existence of any treaties, but subject to the limitation that the foreigner’s work will not be given protection under Korean laws if the foreigner’s country does not similarly protect the works of Korean nationals.

4.5.1.2 Rights to Layout Design of Semiconductor Integrated Circuits

Layout designs of foreigners or foreign companies which are registered in Korea are given protection pursuant to the Law on the Layout Designs of Semiconductor Integrated Circuits and treaties or conventions to which Korea is a party, but subject to the limitation that such layout designs will not be given protection under Korean laws if the foreigner’s country does not similarly protect the layout designs of Korean nationals.

4.5.1.3 Rights to Online Digital Contents

Online digital contents of a foreigner or a foreign company are given protection as provided to those of Korean nationals, but subject to the limitation that such online contents will
not be given protection under the Korean laws, if the foreigner’s country does not similarly protect the online contents of Korean nationals.

4.5.1.4 Patents, Utility Model Rights, Design Rights, Trademarks

A foreigner with an address or place of business in Korea may register and obtain patents, utility model rights, design rights or trademarks under Korean laws equivalent to those available to Korean nationals. However, a foreigner without an address or place of business in Korea may also register and obtain intellectual property rights in Korea under the following conditions:

1. where the foreigner’s country provides Korean nationals with intellectual property rights under the same conditions as those applied to its own nationals;

2. where the foreigner’s country provides Korean nationals with intellectual property rights under the same conditions as those applied to its own nationals on the condition that Korea reciprocally provides the foreign country’s nationals such rights; or

3. where the foreigner can have intellectual property rights in accordance with a treaty or an equivalent to a treaty.

4.5.2 Foreigners’ Application for Registration of Intellectual Property Rights

4.5.2.1 Foreigners with an Address or Place of Business in Korea

A foreigner may file an application and register with the Korean Intellectual Property Office for a patent, utility model right, design right, trademark, and right to layout design of semiconductor integrated circuits.

4.5.2.2 Foreigners without an Address or Place of Business in Korea

Unless the foreigner resides in Korea, the foreigner must designate an agent with an address or place of business in Korea to undertake the necessary steps for filing the application and registering the patent, utility model right, design right, trademark, or right to layout design of semiconductor integrated circuits.
Chapter V

Repatriation of Capital

1. Introduction ............................................................................................................. 59

2. Dividends ............................................................................................................... 59
   2.1 Requirements for Dividend .................................................................................. 59
   2.2 Dividend Procedures ......................................................................................... 59
   2.3 Interim Dividend .............................................................................................. 60

3. Capital Reduction ................................................................................................... 60
1. Introduction

If the foreign investor complied with applicable reporting and approval requirements for foreign investment and used the investment in accordance with such reporting and approval, the Foreign Investment Promotion Law guarantees the foreign investor’s repatriation of income (e.g., dividends) earned on ownership of shares or equity interest, proceeds on disposal of such shares or equity interests, principal and interest earned on long-term loan agreements, and payments received pursuant to technology licensing agreements.

Repatriation methods include the sale of shares, receipt of dividends and other distributions, or a capital reduction. As share transfers were already discussed above, we will now discuss the requirements and procedures related to dividend distributions and capital reductions.

2. Dividends

2.1 Requirements for Dividend

A company must have distributable earnings in order for its shareholders to receive dividends. Distributable earnings mean the amount determined upon subtracting from net assets on its balance sheet, (i) the stated capital, (ii) both capital surplus and legal reserve reserved until the accounting period in which the dividend distribution is made, and (iii) legal reserve to be reserved in such accounting period.

In addition, a company may distribute as dividends up to 50% of the distribution amount in the form of new shares, and any legal reserve need not be set aside for stock dividend. However, a foreign-invested company may distribute the entire earnings with stocks.

2.2 Dividend Procedures

The representative director must prepare and obtain the approval of the board of directors regarding the financial statements of the company and submit the same to the auditor 6 weeks prior to the general shareholders’ meeting. The auditor must then prepare an audit report and submit the same to the board of directors within 4 weeks of receipt of the financial statements. The representative director must submit the financial statements approved by the
board of directors to the general shareholders’ meeting for an ordinary resolution. The dividend amount is determined by an ordinary resolution of the general shareholders’ meeting.

2.3 Interim Dividend

An interim dividend refers to the distribution of dividends made during a fiscal year with unappropriated earnings of immediately prior fiscal year. An interim dividend can only be made by a company that has an interim dividend provision in its articles of incorporation. An interim dividend is only possible upon the resolution of the board of directors, and it does not require the resolution of the general shareholders’ meeting. An interim dividend can only be through a cash dividend, and a stock dividend is not possible.

3. Capital Reduction

A company may effect a capital reduction through either a reduction in the par value of stock or through a reduction in the number of shares (either consolidation or retirement of shares).

A capital reduction is only possible upon obtaining a special resolution of the shareholders’ meeting. In the event of a capital reduction, within two weeks of the special resolution of the shareholders’ meeting, the company must provide a public notice for at least one month during which creditors may object to the capital reduction. Further, the company must provide separate notices to specific creditors known to the company. If creditors do not object within the specified periods, the company may proceed with the capital reduction procedures. But if creditors to the company object during such period, the company must pay off such creditor, provide sufficient security, or deposit sufficient property to a trust company for the benefit of such creditor.

A corporation may purchase its own shares by a special resolution of the shareholders, up to the amount of earnings available for dividends, and then cancel such shares. In the case of unlisted companies, such special resolution can be adopted only at an annual shareholders’ meeting. In the case of listed companies, the articles of incorporation must have express provisions allowing such purchase and cancellation. Moreover, if the shares so purchased and cancelled exceed the amount of earnings available for dividends, the directors and the company are jointly and severally liable for the difference.
Invest KOREA Overview

Our Vision & Mandate

Invest KOREA is the Korean national investment promotion agency (IPA), established with the sole purpose of facilitating the entry and successful establishment of foreign business into Korea. Nor does our involvement halt there, since our agency delivers an extensive post-establishment service designed to promote the rapid settlement of foreign corporates in Korea and ensure they maximize the benefits of the Korean investment environment to the fullest extent.

The scope of our activities on behalf of foreign business ranges from business consultation, market research and partner searches to accessing grants, administrative processing and resolving difficulties with government and mediating in labor disputes.

Invest KOREA is dedicating to providing the kind of comprehensive, seamless, one-stop service that allows foreign investors to put roots in Korea and join the thousands of others who are operating successfully and profitably here.

Who & What We Are

Invest KOREA is the new name of the Korea InvestmentService Center (Invest KOREA), which was established in 1998 as part of a radical liberalization of the Korea investment regime under the Foreign Investment Promotion Act of the same year. Major recent revisions to the Act empower Invest KOREA to act as far a more efficient, practical and integrated investor service.

Who Makes Our Agency Work

Invest KOREA is staffed with KOTRA employees who have extensive expertise and experience in supporting inbound foreign direct investment (FDI), public servants from other related government
agencies, and experts from the private sector in fields such as accounting, law (including tax and labor law), as well as mergers and acquisitions (M&A). Invest KOREA personnel have become progressively more specialized to meet the increasingly more particular needs of our clients. Accordingly, the agency’s staff will be bolstered by specialists from specific industrial sectors to provide faster and accurate investment-related services to foreign investors as determined by need.

**Comprehensive service**

Invest KOREA, as a one-stop window, provides a comprehensive service to meet the foreign investor’s every need through an integrated package of professional services.

**Investment Planning with Invest KOREA**

- Provision of Market Information: For the purpose of determining the feasibility of a proposed investment, Invest KOREA undertakes research and provides information on Korean markets and industries.
- Investment Opportunity Search: Through our exclusive database, Invest KOREA helps investors locate potential partners and high-potential greenfield, M&A and joint venture investment opportunities in areas such as SOC, real estate, etc.
- Investment Regime Consultation: To enable foreign investors to gain a better understanding of the Korean foreign investment regime, Invest KOREA provides consultations on its major characteristics including investment procedures, tax incentives, Foreign Investment Zones (FIZs), and industrial complexes exclusively for foreign investors.

**Ongoing Project Support**

- Administrative Support: Assistance is provided for all procedures pertaining to the investment process in Korea.
- Plant Site Location: Invest KOREA helps investors find the optimal location in Korea for projected foreign-invested facilities, and provides support on all procedures necessary for their establishment.
- Cooperation with Investment-related Bodies: Invest KOREA liaises between foreign investors and relevant government bodies, institutions and local companies, and arranges meetings between them as necessary.

**Follow-up Service**

- Investment “Home Doctor” Service: Designed to help foreign investors resolve difficulties experienced while doing business in Korea, the Office of the Investment Ombudsman (OIO)
within Invest KOREA designates a specialist to provide one-on-one grievance resolution service.

- VISA Extensions: Sojourn period extensions of foreign corporate personnel can be handled directly through Invest KOREA.

**Invest KOREA One-Stop Service**

The Project Manager - the key figure in the delivery of our one-stop service.

Following initial contact between a foreign investor and Invest KOREA or a Korea Trade Center concerning a proposed investment in Korea, a staff member will be designated as a project manager to handle further inquiries and lend assistance on all matters and procedures relating to the eventual establishment of the project.

The project manager will undertake a range of services on behalf of foreign investors including airport reception, local schedule management and M&A/joint venture partner searches. Under the 1998 Foreign Investment Promotion Act, Invest KOREA has assumed a leading position in fulfilling KOTRA’s mandated role as Korea’s official investment promotion agency.

**The Invest KOREA step-by-step approach to total investor care**

<table>
<thead>
<tr>
<th>An investor visits an overseas Korea Trade Center</th>
</tr>
</thead>
<tbody>
<tr>
<td>The center forwards the investor’s inquiry to Invest KOREA</td>
</tr>
<tr>
<td>The center encourages the investor to make a fact-finding visit to Korea to ascertain first-hand the investment climate</td>
</tr>
<tr>
<td>On arrival, Invest KOREA designates a Project Manager to work with the investor until investment notification is made</td>
</tr>
<tr>
<td>After notification, the project manager and the Invest KOREA Investment Consulting Office jointly assist the investor through the process of factory setup and establishment as a legal entity</td>
</tr>
<tr>
<td>A “Home Doctor” address any grievances encountered by the foreign-invested company once it is established in Korea</td>
</tr>
</tbody>
</table>
**Organization of Invest KOREA**

- **President KOTRA**
  - Executive Vice President
    - **Invest KOREA**
      - Investment Planning Team
      - Main Industry Investment Promotion Team
      - Service Industry Investment Promotion Team
      - New Industry Investment Promotion Team
    - Investment Support Office
      - Administrative Support Team
      - Investment Aftercare Team
    - Investment Service Team
      - Investment Consulting Team
      - Investment Aftercare Team
- **Investment Ombudsman**

**Investment Promotion Office**

<table>
<thead>
<tr>
<th>Team</th>
<th>Principal Duties</th>
<th>Contact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investment Planning Team</td>
<td>• Establish Invest KOREA’s FDI strategy</td>
<td>Tel: 82-2-3460-7511/7518</td>
</tr>
<tr>
<td></td>
<td>• Cooperate with overseas investment promotion agencies</td>
<td>Fax: 82-2-3460-7940</td>
</tr>
<tr>
<td></td>
<td>• Manage investment-related committees such as the Foreign Investment Committee</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Investigate and analyze investment trends</td>
<td></td>
</tr>
<tr>
<td>Main Industry Investment Team</td>
<td>• Promote investment for automobile and parts &amp; materials industries</td>
<td>Tel: 82-2-3460-7611/7618</td>
</tr>
<tr>
<td>Promotion Team</td>
<td>• Promote inbound investment of parts &amp; materials from Japan</td>
<td>Fax: 82-2-3460-7943</td>
</tr>
<tr>
<td></td>
<td>• Promote inbound investment of influential companies</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Dispatch investment promotion task force teams according to type of industry</td>
<td></td>
</tr>
<tr>
<td>Service Industry Investment Team</td>
<td>• Promote inbound investment in the areas of logistics, distribution, construction, real estate and finance</td>
<td>Tel: 82-2-3460-7522/7528</td>
</tr>
<tr>
<td>Promotion Team</td>
<td>• Promote inbound investment of regional offices of multinational corporations</td>
<td>Fax: 82-2-3460-7943</td>
</tr>
<tr>
<td>New Industry Investment Team</td>
<td>• Promote inbound investment in the areas of IT, BT, NT, ET and other hi-tech industries</td>
<td>Tel: 82-2-3460-7591/7596</td>
</tr>
<tr>
<td>Promotion Team</td>
<td>• Promote inbound investment of R&amp;D centers from multinational and hi-tech corporations</td>
<td>Fax: 82-2-3460-7941</td>
</tr>
</tbody>
</table>
# Investment Support Office

<table>
<thead>
<tr>
<th>Team</th>
<th>Principal Duties</th>
<th>Contact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative Support Team</td>
<td>• Execute procedures such as investment notification and business registration, sojourn</td>
<td>Tel: 82-2-3460-7560/7570</td>
</tr>
<tr>
<td></td>
<td>• Permission/extension for foreign investors, registration of incorporation in Korea by proxy and other investment-related civil affairs</td>
<td>Fax: 82-2-3460-7946</td>
</tr>
<tr>
<td>Investment Consulting Team</td>
<td>• Provide consultations on investment procedures, financing, taxation, customs, legal matters, real estate acquisition, plant site selection and labor issues</td>
<td>Tel: 82-2-3460-7550/7555</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Fax: 82-2-3460-7947</td>
</tr>
<tr>
<td>Office of the Investment Ombudsman</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Investment Aftercare Team</td>
<td>• Address difficulties experienced by foreign-invested companies based on international standards</td>
<td>Tel: 82-2-3460-7633/7634</td>
</tr>
<tr>
<td></td>
<td>• Recommend regulatory reforms to the government</td>
<td>7635/7636</td>
</tr>
<tr>
<td></td>
<td>• Assist foreign-invested companies in solving labor disputes</td>
<td>Fax: 82-2-3460-7949</td>
</tr>
<tr>
<td>Investment Service Team</td>
<td>• Organize seminars, conferences that address management and daily life issues of foreign-invested companies and their staff</td>
<td>Tel: 82-2-3460-7639/7645</td>
</tr>
<tr>
<td></td>
<td>• Publish materials aimed at improving the foreign investment environment in Korea</td>
<td>7659/7949</td>
</tr>
<tr>
<td></td>
<td>• Conduct all public relations activities for the Foreign Investment Ombudsman</td>
<td>Fax: 82-2-3460-7949/7944</td>
</tr>
<tr>
<td></td>
<td>• Update department website content (<a href="http://www.i-ombudsman.or.kr">http://www.i-ombudsman.or.kr</a>)</td>
<td></td>
</tr>
</tbody>
</table>

## Location

Address: KOTRA Bldg. 300-9, Yeomgok-dong, Seocho-gu, Seoul 137-170, Korea
URL: [www.investkorea.org](http://www.investkorea.org)  
Tel. 82-2-3460-7114  
Fax. 82-2-3460-7777