

# JUNHE SPECIAL REPORT



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## Series: Foreign Capital Investment in Reorganization Enterprises

### The second in the series – Equity Acquisition Patterns of Foreign Capital Investment in Reorganization Enterprises

*This article is part of a series by the Bankruptcy and Reorganization Group of Junhe LLP on the subject of investment by foreign investors in domestic reorganization enterprises, and is based on our experience in dealing with similar cases.*

An Equity Acquisition Pattern occurs when foreign investors purchase shares in a domestic reorganization enterprise, thus becoming reorganization investors directly holding shares in the reorganization enterprise. During the reorganization process, the specific method of equity acquisition is as follows: the rights of original shareholders are adjusted and transferred to reorganization investors; meanwhile, these investors transmit funds to the reorganization enterprise in order to raise share capital so that the enterprise is able to pay off its debts and pursue other elements of the reorganization plan.

#### **I. Key stages of an Equity Acquisition Plan**

##### **1. The investor signs the investment agreement of the reorganization enterprise with the administrator**

According to the provisions of the Bankruptcy Law, in the take-over phase, during the period of reorganization, after taking over the reorganization enterprise the administrator shall be responsible for day-to-day business and

disposal of property. Therefore, the investor should sign a contractual agreement to invest in the reorganization enterprise with the administrator responsible for the reorganization phase, in order to clarify and define the rights and obligations of both parties during the process of reorganization.

In practice, before the two parties sign the agreement of investment in the reorganization enterprise, there will be several preparatory stages, which will most likely include: (a) the investor receives the preliminary recruitment notice from the administrator and communicates with the administrator; (b) the investor becomes acquainted with the preliminary information about the reorganization enterprise received from the administrator and other parties; (c) the investor signs a confidentiality agreement with the administrator of the reorganization enterprise, pays the deposit and conducts due diligence on the reorganization enterprise; (d) the investor signs a letter of intent to invest in the reorganization enterprise with the administrator and pays therefor; (e) the administrator selects a shortlist of investors in the reorganization enterprise; (f) shortlisted investors submit their investment plans and other bidding materials; (g) shortlisted investors discuss and negotiate with the administrator to refine the investment plan; (h) the administrator evaluates all investment plans

and selects the reorganization investor; (i) the administrator prepares a draft reorganization plan according to the contents of the investment plan and the draft is confirmed by investors; (j) the creditor and the investor vote on the draft reorganization plan; (k) the investor signs a formal agreement of investment in the reorganization enterprise with the administrator and implements the reorganization plan.

## **2. Approval or record-filing by commercial departments**

July 30, 2017, the Ministry of Commerce announced the revised "Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises" (hereinafter referred to as "Interim Measures"), which stipulates that where a non-foreign-invested enterprise changes into a foreign-invested enterprise due to acquisition, consolidation by merger or otherwise, which is subject to record-filing as stipulated in the Interim Measures, it shall complete the record-filing process in accordance with the Interim Measures,<sup>1</sup> without further approval.

With regard to the scope of the record-filing, the Interim Measures stipulate that if the incorporation and change of a foreign-invested enterprise does not involve the implementation of special access administrative measures prescribed by the State, these Measures shall apply. If investors purchase a reorganization enterprise involved in a restricted category, it will require approval by the relevant commercial department; if investors purchase a reorganization enterprise involved in an encouraged or otherwise permitted category, it will be subject to record-filing. When foreign investors invest in a reorganization enterprise,

they must first assess whether the industry of the reorganization enterprise is encouraged, permitted, restricted or prohibited, and, on that basis, determine whether the merger and acquisition process (M&A) will require approval or record-filing.

In practice, the relevant record-filing procedures can be completed by conducting newly established record-filing for an M&A (part of capital increase M&A) and by uploading the prescribed materials online after logging into the foreign investment comprehensive administration information system.

## **3. Industry entry restrictions and security review**

### **(a) Industry entry restrictions**

The entry restrictions on the industry of foreign investment are mainly governed by the regulations "Provisions for Guiding the Foreign Investment Direction" and "Catalogue for the Guidance of Foreign Investment in Industries". In addition, the "Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors" (hereinafter referred to as "Order No. 6") stipulates that equity M&A by foreign investors shall comply with the requirements stipulated by the laws, administrative regulations and rules of China, and policies concerning industry, land and environment.

According to the Catalogue on the Guidance for Foreign Investment in Industries, for an industry that is not allowed to be wholly operated by foreign investors, its M&A shall not result in foreign investors holding the enterprise's entire equity. For an industry that requires a Chinese party to have holdings or relative holdings, the Chinese party shall continue to maintain its holdings or relative holdings in the enterprise after the enterprise in that industry is merged and acquired. For an industry that is forbidden to be

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<sup>1</sup> See Article 5 Section 2, Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises.

operated by foreign investors, the foreign investors shall not merge or acquire any enterprise in that industry.<sup>2</sup>

#### **(b) Security review**

In addition to industry entry restrictions, equity M&A by foreign investors may also involve a national security review, well-known trademark protection and other requirements. If the reorganization enterprise falls within the scope of the M&A security review<sup>3</sup>, as determined by the "Circular of the General Office of State Council on Establishing the Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors", the investors shall file an application for an M&A security review with the Ministry of Commerce. In addition, if the M&A results in the transfer of the actual rights of ownership of a domestic well-known trademark or a name with a long history, the person concerned shall submit a report thereof to the Ministry of Commerce<sup>4</sup>.

#### **4. Vote by the creditors' meeting**

The rights and obligations of the parties in the reorganization process are mainly defined by the reorganization plan. The draft reorganization plan becomes effective when it has been passed by the creditors' meeting and approved by the Court.

According to the Bankruptcy Law, the People's Court shall convene the creditors' meeting within

30 days of receiving the draft reorganization plan for the purpose of voting by dividing on the reorganization plan. Where more than half of the creditors present at the meeting within the same voting group agree with the draft reorganization plan and their claims amount to more than two-thirds of the sum of group claims, the draft reorganization plan shall be deemed as being adopted by this group.<sup>5</sup> The reorganization plan is deemed as being adopted provided each voting group adopts the draft reorganization plan.

#### **5. Approval by the court**

According to the provisions of the Bankruptcy Law, the debtor or the Administrator shall petition the People's Court to approve the reorganization plan within 10 days after the adoption of reorganization plan. The People's Court shall rule to approve the reorganization plan and terminate the reorganization proceeding within 30 days since receiving the application and ascertaining that the plan meets the requirements stated in this law and make announcement accordingly.<sup>6</sup>

Where the draft reorganization plan fails to be adopted by some of the voting groups, the debtor or the administrator may negotiate with the voting group that does not adopt the draft reorganization plan. This voting group may vote again after negotiation. Where the draft reorganization plan fails to be adopted on the revote, the debtor or the administrator may petition the People's Court for approval of the draft reorganization plan so long as the draft conforms with certain conditions.<sup>7</sup> In accordance with judicial practice, courts at all levels tend to take a cautious approach to mandating draft reorganization plans, being wary to avoid conflicts with creditors, investors and employees. If the draft reorganization plan is

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<sup>2</sup> See Article 4, Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors.

<sup>3</sup> "Circular of the General Office of State Council on Establishing the Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors" stipulates that the scope of M&A Security Review is as follows: foreign investors' M&A of domestic military industry enterprises and military industry support enterprises, enterprises around key and sensitive military facilities, and other units which have impact on national defense security; and foreign investors' M&A of domestic enterprises, which have impact on the national security, in fields of important agricultural products, important energy and resources, important infrastructure, important transport service, key technology and major equipment manufacturing, etc and such M&A may result in foreign investors' acquirement of actual control over the enterprises.

<sup>4</sup> See Article 12, Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors.

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<sup>5</sup> See Article 12, Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors.

<sup>6</sup> See Article 86, Section 2, Enterprise Bankruptcy Law of the People's Republic of China

<sup>7</sup> See Article 87, Section 1 and Section 2, Enterprise Bankruptcy Law of the People's Republic of China.

adopted by all creditor groups, with the exception of the investor group, the court is more likely to mandate the draft reorganization plan since the original investors' rights have already been annulled. However, if the draft reorganization plan is not adopted by creditor groups, the court will be more inclined to increase the compensation ratio through further adjusting the investment plan, in order to gain greater support from creditors, rather than enforcing the original draft plan.

## **6. Implementation of the reorganization plan**

According to the provisions of the Bankruptcy Law, the debtor shall implement the agreed reorganization plan. After the People's Court has ruled to approve the reorganization plan, the administrator shall transfer the property and business to the debtor.<sup>8</sup>

According to the reorganization plan, the reorganization enterprise should first adjust the rights of shareholders, that is by adjusting the rights of original shareholders and transferring them free-of-charge to the new investors, thereby making the foreign investors shareholders in the reorganization enterprise. In addition, foreign investors shall transmit funds to the account of reorganization enterprise as share capital in accordance with the reorganization plan, and the enterprise shall pay off its debts as per the reorganization plan having received the capital injection funds.

## **7. Registration for business alteration**

According to the provisions of Order No. 6, where a foreign investor merges and acquires equities, the merged or acquired domestic company shall apply to the original registration administration to modify its registration and to acquire a business license for foreign-invested enterprises.

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<sup>8</sup> See Article 89, Enterprise Bankruptcy Law of the People's Republic of China.

The relevant procedures for alteration of the business registration shall be handled in accordance with the specific provisions stipulated by regional industry and commerce departments. According to the provisions stipulated by the Shanghai Administration for Industry and Commerce, alteration of registration for a change from a domestic to foreign-invested enterprise requires submission of the "foreign company registration (filing) application" and other materials. Specific materials and processes can be found on website of the Shanghai Administration for Industry and Commerce (<http://www.sgs.gov.cn/shaic/>).

## **8. Foreign exchange registration and foreign exchange purchase**

According to "the Administrative Provisions on Foreign Exchange in Domestic Direct Investment by Foreign Investors", domestic direct investment by foreign investors is administered by registration, and banks shall handle businesses related to domestic direct investment in accordance with information registered with foreign exchange bureaus.<sup>9</sup> In practice, the authority for foreign exchange registration has been delegated to banks, and investors can contact their deposit bank to handle any relevant issues.

If the foreign party is responsible for paying the cost of equity transfer or capital injection, the registration procedures for foreign exchange receipts of equity transfer only require completion of capital entry record-filing for the converting-assets-into-cash account, after which the State Administration of Foreign Exchange will automatically complete the capital verification registration through its business system relating to foreign investors' acquiring Chinese investors' equity interests. If the foreign party covers the costs of equity transfer or capital injection in the

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<sup>9</sup> See Article 3, the Administrative Provisions on Foreign Exchange in Domestic Direct Investment by Foreign Investors.

form of a non-spot exchange (such as cross-border RMB, lawful RMB income, physical goods and/or intangible assets), the foreign-invested enterprises undertaking the equity transfer shall apply to the administration of foreign exchange in order to complete the confirmation and registration of the capital contributions made by foreign investors to acquire the equity of the Chinese party.

## **9. Registration for taxation alteration**

Along with the "Five-in-One" registration system reform, if a reorganization enterprise changes from domestic to foreign-invested ownership, its registration for taxation alteration will be undertaken by the industry and commerce departments, and taxation departments will only be responsible for maintaining information.

Due to the varying rates of progress in the introduction of these reforms, there are differences in the specific provisions by region. Practical experience indicates that where there are changes to a taxpayer's 'one code for one license' industrial and commercial registration information (excluding changes relating to business premises, person in charge of finance and accounting policies), the enterprise shall apply for the amended registration with the industrial and commercial departments. Having received approval from the industrial and commercial departments, the amended information will be immediately shared to the data exchange platform. Having received the taxpayer's in-person or online application, the taxation authorities shall update the taxpayer's respective information in the taxation system according to the amended information provided by the industrial and commercial department and the taxpayer.

It should be noted that the "Five-in-One" registration system reform is still in a period of transition. If the reorganization enterprise is not

subject to the "Five(three)-in-One" registration system, its registration for taxation alteration should still be in accordance with the provision of "the Administrative Measures for Tax Registration", under which the enterprise shall first apply for an amended registration with the industrial and commercial departments. Following that, the amended registration with the industry and commerce departments should be undertaken within 30 days.

## **II. Guarantee of Equity Acquisition Pattern**

### **1. Guaranteeing the safety of investment funds**

Firstly, the reorganization investment agreement between the investor and the administrator of the reorganization enterprise is likely to stipulate a clear plan for the use of the funds. The reorganization plan and the agreement of investment in reorganization enterprises will likely stipulate that the total price paid by investors should be used for paying off debts, for the payment of expenses for bankruptcy proceedings and debts of common benefits, and that any remaining funds be used as the working capital required for ongoing production and operation and/or for the purchase of high quality assets.

Second, in general, those funds paid by the investor for paying off creditors shall be transferred into the specified account of the administrator, and the settlement of creditors by the administrator shall be made under the supervision of the court as well, in order to prevent misappropriation of those investment funds.

Finally, as is generally the case for equity acquisition, once investors' rights have been adjusted, the new investor is likely to have control of the enterprise through ownership of the shares and capitalization of capital reserve, and thus will be able to supervise the use of investment funds.

## 2. Guaranteeing the efficiency of investment activity

According to the Bankruptcy Law, the debtor or the administrator shall submit the reorganization plan to the People's Court and to a creditors' meeting within 6 months of the People's Court making the ruling to reorganize. The People's Court may rule to extend by a further 3 months upon the expiration of the initial 6 months prescribed in preceding paragraph on the basis of a request made by the debtor or the

Administrator.<sup>10</sup>

Thus, the longest period that a legal reorganization can take is nine months. In summary, the administrator is required to specify the key components of a reorganization plan within nine months. Having a legal period within which the reorganization must occur ensures a predictable and efficient process for investment in reorganization enterprises.

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<sup>10</sup>See Article 79, Enterprise Bankruptcy Law of the People's Republic of China.

## 境外资金投资重整企业系列：

### 系列之二——境外资金投资重整企业之股权收购模式

君合企业破产重组业务组根据处理类似案件的实务经验，就境外资金投资国内重整企业继续撰写系列文章。

股权收购模式是指境外投资者直接收购境内重整企业股权，从而作为重整投资者直接持有重整企业股权的模式。在重整程序中，股权收购的具体方式是：调整原股东权益并无偿让渡予重整投资者，同时投资者以增资方式将投资款项汇入重整企业，用于企业依重整计划进行的债权清偿及其他安排。

#### 一、 股权收购模式的主要程序

##### （一） 与管理人签订《重整投资协议》

根据《破产法》的规定，接管模式下，在重整期间，管理人接管企业后负责日常经营及财产处分，因此投资者在重整阶段需与管理人签订《重整投资协议》，以合同形式明确双方在重整程序中的权利和义务。

实践中，双方签署《重整投资协议》前，存在大量前期工作，主要如下：（1）投资者获知管理人公布的招募公告并与管理人初步沟通；（2）投资者从管理人处等了解重整企业的初步信息；（3）投资

者与管理人签订《保密协议》，并缴纳保证金，然后对重整企业进行尽职调查；（4）投资者与管理人签署《重整投资协议意向书》并向管理人缴纳意向金；（5）管理人经初审后确定入围名单；（6）入围投资者向管理人提交《投资方案》等投标材料；（7）入围投资者与管理人进行协商或谈判，对投资方案进行细化修正；（8）管理人等对全部《投资方案》进行评审选择，并确定最终重整投资者；（9）管理人根据《投资方案》所确定的内容制作《重整计划草案》，并由重整投资者进行确认；（10）债权人、出资人表决《重整计划草案》；（11）投资者与管理人签署正式《重整投资协议》并履行重整计划。

##### （二） 商务部门审批或备案

2017年7月30日，商务部公布了修订版《外商投资企业设立及变更备案管理暂行办法》（下称“《暂行办法》”），规定非外商投资企业通过被并购、吸收合并等方式转变为外商投资企业，属于《暂行办法》的备案范围的，应当按照《暂行办法》进行备案<sup>1</sup>，无需再进行审批。

关于备案范围，《暂行办法》规定：外商投资

<sup>1</sup>引自《外商投资企业设立及变更备案管理暂行办法》第五条第二款。

企业的设立及变更，不涉及国家规定实施准入特别管理措施的，适用本办法。因此，投资者股权收购限制类产业的重整企业时仍应向相关商务部门申报审批；股权收购鼓励、允许类产业的重整企业时则适用于备案。境外投资者在投资重整企业时，需首先判断该重整企业所处行业属于鼓励、允许、限制或者禁止中的何种类型，在此基础上判断确定收购适用审批还是备案。

实务中，相关备案程序可登录外商投资综合管理应用系统进行并购新设（属于增资并购）备案，并在线上规定的材料。

### （三） 行业准入与安全审查

#### （1） 行业准入

外资行业准入限制主要受到《指导外商投资方向规定》、《外商投资产业指导目录》等法规的规范。另外，《关于外国投资者并购境内企业的规定》（下称“6号令”）也规定外资股权并购应符合中国法律、行政法规和规章对投资者资格的要求及产业、土地、环保等政策。

依照《外商投资产业指导目录》，不允许外国投资者独资经营的产业，并购不得导致外国投资者持有企业的全部股权；需由中方控股或相对控股的产业，该产业的企业被并购后，仍应由中方在企业中占控股或相对控股地位；禁止外国投资者经营的产业，外国投资者不得并购从事该产业的企业<sup>2</sup>。

#### （2） 安全审查

外资股权并购除了行业准入限制往往还涉及到国家安全审查、驰名商标保护等相关事项。若重整企业属于《国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知》所明确的并购安

全审查范围<sup>3</sup>之内，则投资者应向商务部提出并购安全审查申请。另外，若并购涉及导致拥有驰名商标或中华老字号的境内企业实际控制权转移的，当事人应就此向商务部进行申报<sup>4</sup>。

### （四） 债权人会议表决

重整程序中各主体的权利和义务主要是通过重整计划予以明确，而重整计划草案需经债权人会议表决通过并经法院裁定认可后方可生效。

《破产法》规定，法院应当自收到重整计划草案之日起三十日内召开债权人会议对重整计划草案进行分组表决。出席会议的同一表决组的债权人过半数同意重整计划草案，并且其所代表的债权额占该组债权总额的三分之二以上的，即为该组通过重整计划草案<sup>5</sup>。各表决组均通过重整计划草案时，重整计划即为通过。

### （五） 法院裁定

根据《破产法》的规定，自重整计划通过之日起十日内，管理人应当向人民法院提出批准重整计划的申请。人民法院经审查认为符合《破产法》规定的，应当自收到申请之日起三十日内裁定批准，终止重整程序，并予以公告<sup>6</sup>。

若部分表决组未通过重整计划草案，债务人或管理人可以同未通过重整计划草案的表决组协商。该表决组可以在协商后再表决一次。若仍未通过重整计划草案，但草案符合一定条件的，管理人可以

<sup>2</sup>引自《关于外国投资者并购境内企业的规定》第四条。

<sup>3</sup>《国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知》规定：并购安全审查的范围为：外国投资者并购境内军工及军工配套企业，重点、敏感军事设施周边企业，以及关系国防安全的其他单位；外国投资者并购境内关系国家安全的重要农产品、重要能源和资源、重要基础设施、重要运输服务、关键技术、重大装备制造等企业，且实际控制权可能被外国投资者取得。

<sup>4</sup>引自《关于外国投资者并购境内企业的规定》第十二条。

<sup>5</sup>引自《破产法》第八十四条第一款、第二款。

<sup>6</sup>引自《破产法》第八十六条第二款。



申请法院强行裁定批准草案<sup>7</sup>。根据司法实践，各级法院对强行裁定批准重整计划草案倾向于审慎态度，以避免与债权人、出资人以及员工等的冲突。若各债权人组表决通过了重整计划草案，仅出资人组未表决通过，基于重整程序下原出资人权益已为零，法院强裁的可能性较大。但若各债权人组未表决通过，法院更倾向于进一步调整投资方案，以提升清偿率来获得更多债权人的支持，而非直接强裁。

## （六） 执行重整计划

根据《破产法》的规定，重整计划由债务人负责执行。人民法院裁定批准重整计划后，管理人应向债务人移交财产和营业事务<sup>8</sup>。

依据重整计划，重整企业首先应对股东权益进行调整，即调整原股东权益并无偿让渡予重整投资者，使得境外投资者变更为重整企业的股东。其次，境外投资者应依重整计划对重整企业进行增资并将资金汇入企业账户。企业收到增资款后按照重整计划向债权人进行清偿。

## （七） 工商变更登记

根据 6 号令的规定，外国投资者股权并购的，被并购境内公司应向原登记管理机关申请变更登记，领取外商投资企业营业执照。

相关工商变更登记的程序应按照各地工商部门的具体规定办理。根据上海市工商局的规定，内资企业转为外商投资企业变更登记需提交《外资公司登记（备案）申请书》等材料，具体材料及流程详见于上海市工商局网站。

## （八） 外汇登记及购付汇

根据《外国投资者境内直接投资外汇管理规

定》，外国投资者境内直接投资实行登记管理，银行应依据外汇管理局登记信息办理境内直接投资相关业务<sup>9</sup>。实务中，目前外汇登记事宜已下放，投资者可联系开户银行办理相关业务。

如果外方以现汇方式支付全部的股权转让或增资价款，转股收汇的外资外汇登记手续仅需在银行办理资产变现账户资金入账备案，其后外汇管理局将通过相关业务系统自动完成外国投资者收购中方股权出资确认登记。如果外方以非现汇（例如跨境人民币、境内合法所得、实物、无形资产）形式支付股权转让或增资价款的，发生股权变更的外商投资企业应到外汇管理局申请办理外国投资者收购中方股权出资确认登记。

## （九） 税务变更

随着“五证合一”登记制度改革的推进，重整企业由内资转为外商投资，其税务变更登记将由工商部门统一办理，税务部门将只进行信息维护。

由于各地改革进度不一，相关具体规定亦不同。根据实务经验，上海地区“一照一码”纳税人工商登记信息发生变更（除生产经营地、财务负责人、核算方式等信息外），向工商机关办理变更登记，工商机关核准后将变更信息即时共享至信息交换平台。经纳税人申请（窗口或网厅）后，税务机关根据工商传递的变更信息和纳税人填报的变更信息，更新税务系统内纳税人对应信息。

须注意，目前“五证合一”改革仍处于过渡期，若重整企业属于非五（三）证合一企业，其税务变更登记则仍应按照《税务登记管理办法》的规定进行，即先至工商部门办理变更登记，再于工商变更登记起 30 日内向原税务登记机关申报办理变更税

<sup>7</sup>引自《破产法》第八十七条第一款、第二款。

<sup>8</sup>引自《破产法》第八十九条。

<sup>9</sup>引自《外国投资者境内直接投资外汇管理规定》第三条。

务登记。

## 二、 股权投资模式的投资保障

### (一) 保障投资资金的安全

首先，投资者与管理人签订的《重整投资协议》明确约定资金的用途。《重整计划草案》和《重整投资协议》均会约定：投资者支付的全部价款主要用于向债权人清偿，部分用于支付破产费用和共益债务，剩余部分留在重整企业以作为生产经营所需流动资金或用于购买优质资产等。

其次，一般而言，投资者支付的用于清偿债权人的相应款项汇入管理人银行专户，并在法院监督下由管理人向债权人进行清偿，从而防止资金遭乱用。

另外，在股权收购模式中，经出资人权益调整

后，新投资方往往能通过无偿受让出资人现持股份及资本公积转增股份而取得公司实际控制权，从而更好监督自投资金的安全。

### (二) 保障投资效率

《破产法》规定债务人或者管理人应当自人民法院裁定债务人重整之日起六个月内，同时向人民法院和债权人会议提交重整计划草案。期限届满后，经债务人或者管理人请求，有正当理由的，人民法院可以裁定延期三个月<sup>10</sup>。

由此可见，重整期间最长可达九个月，即管理人须在九个月内确定投资方案等重整计划的核心内容。重整程序的法定期限保证了投资者投资重整企业具有效率上的优势和时间上的可预测性。

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10.引自《破产法》第七十九条