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高伟凯 著

THE THEORETICAL ANALYSIS AND  
RESEARCH OF REGULATIONS AND  
SYSTEMS OF MBO

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## 摘 要

管理层收购 (Management Buy-out) 又称 MBO, 是指目标公司的管理层利用自有资金或从外部杠杆融资等方式去购买目标公司的股份, 从而达到改变目标公司的所有权结构、控制权结构和资产结构, 进而达到重组目标公司、对目标公司实行所有权控制或实质性控制决策权和经营权 (如果是上市公司, 要退市转为私人公司)、注重通过目标公司的价值提升来获得预期收益的一种收购行为。MBO 作为资本市场中比较成熟的杠杆收购方式进一步完善了公司治理结构, 同时也为我国目前国有股减持与退出、国有资产重组提供了一条可行的运行途径。

MBO 在我国产业结构升级过程中, 国有企业本着“抓大放小”的原则, 对于竞争行业的小规模资产和非主业资产应该也可以采用 MBO 的形式予以实施, 但不仅仅局限于国有企业。MBO 并不是很多人认为的旨在国有企业改制中出现并造成大量国有资产流失现象, MBO 是指公司管理层收购其所在公司、关联公司和其他公司以达到全资拥有 (如是上市公司, 要退市转为私有化公司)、绝对控股或者实质性控制公司的行为。MBO 是我国进行产权改革的一种有效手段, 目前我国国有企业产权的不合理已成为企业发展的严重制约因素。国有资产的所有者缺位, 致使企业经营缺乏长期战略。对经营者激励机制不足, 甚至成为

某些违法犯罪行为的潜在根源。

中国国有企业改革自始至终要解决的就是“效率”问题。国有企业存在的“效率”问题是：管理层拥有很大的控制权但没有相应的剩余索取权。所以，经济学是研究政府如何用经济制度、市场结构和经济政策达到资源的最优化配置，从而追求社会利益最大化；经济学家着眼于从社会资源的稀缺性与社会需求的无限性角度论证管理层拥有所有权的产权制度改革的经济合理性；而管理学则研究在给定的经济环境、经济政策和行业竞争状况下如何取得竞争优势，从而追求自身利润最大化；管理学家则侧重于从提高效率与企业发展角度论证管理层拥有所有权的绩效目标可行性。我国国有企业在经济发展中居于重要地位，尤其是促进劳动力就业方面发挥着巨大的作用。目前尽管国有企业经济效益不太理想，降低了国有经济整体竞争能力，加剧了失业问题、债务问题和亏损问题的压力，制约着整个国有经济改革发展的步伐。但是，通过 MBO 来进一步搞好国有企业产权改革对于优化国有经济的配置效果，增强国有经济活力，加快国有企业市场化进程，尤其是减轻社会就业压力，具有十分重要的现实意义。

客观说来，MBO 完成后，国有股权实现了部分或全部套现，从不必要的行业、领域退出，让符合市场条件的非公有制资产进入，而退出的国有资产可以充实到国家急需的领域，诸如社会保障基金以及需要国家垄断和重点扶持的行业，以实现国有资产的合理布局。虽然，MBO 行为可能给国有资产流失提供了可能，但是，我们不能因此就认为企业并购是国有资产流失的原因，并进而否定 MBO。国有资产即使不通过 MBO，也会发生流失，关键在于我们推进 MBO 时，要明确企业产权归属，健全相关法律法规，努力减少国有资产流失程度。由于我国相关法律制度和外在环境的缺陷，在 MBO 实践中，出现了许多问题。因此，以中

国国情为出发点, 研究分析我国当前 MBO 的可行性和内在环境缺陷、MBO 与公司治理结构的关系以及 MBO 有关的法律制度和我国现有法律的缺陷与完善等, 具有极其重要的理论意义和现实意义。

论文通过对国内外 MBO 理论及其实践进展的分析与判断, 研究我国企业家价值与企业绩效的关系、MBO 与公司治理结构的关系、MBO 规制和政策等相关问题, 通过对我国 MBO 的可行性和环境缺陷的深入分析, 继而为完善我国 MBO 制度和法规提出相关的政策建议。论文解决的问题主要有: 阐明 MBO 的理论及其在我国获得应用的基础与要点, 深入分析我国 MBO 的内在动因和对经济效益的影响, 从国际 MBO 的有关规制出发, 分析判断如何完善我国 MBO 制度并提出相关的政策建议。

与同类理论研究相比, 本论文可能作出的创新在于以下几点:

第一, 论文较早地将新古典经济学与新制度经济学的理论方法结合起来, 主要依据产权理论和激励理论, 并吸纳公共选择理论、信息经济学、法经济学以及产业组织理论的有关成果, 构建了 MBO 全新的理论分析框架, 从而丰富了学术界对 MBO 的理论研究, 这是论文最主要的理论尝试。

第二, 论文详细地论述了企业家价值的概念、特征、构成基础, 以及企业家价值与企业绩效之间的互动关系; 论文构建了“企业家能力—资源配置—公司绩效”的 MBO 理论依据的分析框架, 指出企业家价值是企业生产要素进一步细分的情况下使其人力资本要素得以有效配置的保障, 而只有企业人力资本得到有效合理的配置, 才能保证企业整体绩效的提升和持续发展。

第三, 论文将产业组织理论中的“结构—行为—绩效”的分析框架, 转化为 MBO 的制度分析框架, 从而为不同类型企业

组织的 MBO 提供了有效的分析工具。论文进一步解析了 MBO 采用不同的结构安排、同一结构安排在不同经济行为下,其经济绩效存在差异的根源所在。论文对 MBO 行为中的管理者诚信机制和激励约束机制与其经济绩效的关系问题进行了探索性的研究,将委托—代理理论与博弈理论分析框架引入到 MBO 运作机制的研究中去,这也是论文的主要理论尝试。

第四,论文探索性地提出了 MBO 是从现代企业制度“两权分离”走向“多权合一”的变迁。论文对 MBO 制度安排与完善予以高度关注,指出政府、市场、企业等社会经济组织存在经济性“自利行为”,从而为 MBO 行为摆脱政府的过度干预而进行自组织发展找到理论根据。

第五,论文首次系统地从法理上论述了诚信义务包括注意义务、勤勉义务、忠实义务和披露义务。论文同时首次系统地从学理上剖析了 MBO 与原罪及新原罪的逻辑关系。

市场经济条件下的资本市场、资本经营,从宏观本质上优化地区与产业经济结构、实现资源的优化配置,到微观上促进企业改善产品结构、提高市场占有率和自身竞争能力、实现企业的规模经营。我们的制度设计能否引导 MBO 由行政性购并向市场性购并转变,事实证明行政性购并代替不了市场性购并,凡管理者非自愿、通过行政捏合“拉郎配”式的购并已经遭到失败并将继续失败,从某种意义上说,这种 MBO 行为实际上透支着社会和企业的未来资源。MBO 虽然由于各种原因导致了部分国有资产流失,但比起制度性造成的国有资产流失来说显得微不足道,如何使 MBO 这一购并方式在国有企业改革中起到积极良性的作用也显得至为重要。因此,当务之急,是着力培育市场机制,维护市场秩序,健全政策法规,大力支持和推动市场性 MBO 行为的可持续发展。

## ABSTRACT

MBO or Management Buy-out is the term used for a kind of purchase, the targeted company's management purchases its stock utilizing own or outside funds, thus reaching the objective of changing the ownership structure, control power structure and assets structure of the targeted company, and then recombining own company and obtaining the prospective earnings. MBO, as a quite mature lever purchase in capital market, can improve company's administration structure; provide a feasible method for the reduction and withdrawal of state-owned stocks; and for state-run rearrangement of present assets of our country too.

The problem is that the reforms of Chinese state-owned enterprises should solve along the way is efficiency, for example the management has a very great controlling power but does not have corresponding surplus obtaining right. Therefore, economics studies how the government uses the economic system, the market mechanism and economic policy to achieve the optional distribution of resources, thus maximizing benefit to society. The economist focuses on proving the economic rationality of the property right system reform of the management with ownership in terms of the scarcity of social resources and the



infinite social demand. But the management studies how to achieve the competitive advantage thus to pursue one's own maximum benefit in the assigned economic environment, economic policy and professional competition. So the management scientists stress to prove the feasibility of target achievements of the management, having the property rights of enterprises from the angle of enhancing efficiency and developing enterprises. In our country state-owned enterprises have been playing an important role in economic development, particularly in the promotion of labor employment. At present state-owned enterprises do not have very ideal economic performance and have reduced the whole competitive power of state-owned economy, aggravated the pressure of unemployment, debt and deficit, and have restricted the pace of the whole state-owned economy reform and development. However, improving the property right reform of state-owned enterprises by MBO has very important realistic meanings to optimize the allocation of state-owned economy, strengthen the vigor of the state-owned economy, accelerate the market-based process of state-owned enterprises, and especially lighten the social pressure on employment.

In the process of industrial structure promotion of our country, in line with the principle "invigorates large enterprises while relaxing control over small ones", MBO should also be allowed to be used in those state-owned enterprises regarding small scale property and the non-principal property of the competition profession, but not merely limited to state-owned enterprises. MBO certainly is not like what many people think that is only the state-owned property reform will create a massive drain on state assets. MBO refers to the corporate management level purchasing the company they are working for, the

connection company and other companies to hold the entire capital of the target company ( if it is going on the market it has to withdraw to undergo privatization ) , absolutely hold or have the substantive control of the company. MBO is one effective method in our country to carry on the property right reform. At present the unreasonable property rights in our country state-owned enterprises have become a serious restricting factor for enterprises development. The state asset owner vacancy causes the enterprise to lacks a long-term strategy. The driving mechanism to the operator is insufficient , which even becomes the latent root of some criminality.

Objectively, after MBO is finished, the state-run stock rights have realized some or all arbitrage, withdrawn from unnecessary trade and fields, and let the non-public assets which accord with the market condition be entered. Those withdrawals of state-run assets can substantiate the field our country need badly, such as social security funds and the industries which need country monopolization or support especially, in order to realize the rational overall arrangement of state-run assets. Though it is possible for MBO to provide some possibilities for state-run loss of assets, we can't regard that enterprises merge is the cause of state-run loss of assets, and then deny MBO. Even when state-run assets are not purchased through the management level, loss also can take place. The key lies in should we define enterprise's property right ownership, perfect the relevant laws and regulations, make greater efforts to reduce the degree of state-run loss of assets when advancing MBO. Because the relevant defect of the legal system and external environment of our country, in practices of purchasing of management, a lot of questions have appeared. So, regard China's ac-

tual conditions as the starting point, research and analyze the feasibility of management purchase and inherent environmental defect at present of our country, management purchase the legal system related to the fact that the relation of company's administration structure and management purchase and our country's existing legal defect and perfecting, etc., have extremely important theory meaning and realistic meaning.

The thesis is through purchasing analysis and judgment that the theory and practice develop to domestic and international management, study the relation of entrepreneur's value of our country and enterprise's performance, management purchase the relation with company's administration structure, management and purchase structure and management and purchase relevant problems, such as policy, etc., through the in-depth analysis of the feasibility which the management of our country purchase and environmental defect, then perfect the management of our country and purchase the system and regulation and put forward the relevant policy recommendations. The problem that the thesis solves is: expounding theory and foundation and main point used in our country that is management purchase, analyze in-depth inherent reason and the impact on economic efficiency that the management of our country purchase, proceed from relevant structure that the management of world purchase, analyze and judge how to perfect the management of our country to purchase the system and put forward the relevant policy recommendations.

Compared with the similar research works, some parts of creations will be pointed out as following:

Firstly, this paper combined the theory of new classic economics

with the new institution economics, based on the property rights theory and theory of motivation in the main and admitted the achievements of public choice theory, information economics, legal economics and industrial organization theory to construct a whole new theory in analysis structure of MBO, which enriched the theory of MBO. It is the most important theoretical attempt.

Secondly, this paper characterizes the conception of entrepreneur value, and the interaction relationship between entrepreneur values and enterprise performance; this paper constructs the analysis structure of entrepreneur power-resource allocation-enterprise performance; this paper points out that entrepreneur power was the most important factor to support the efficient allocation of human resources under the situation of the production resources subdivision. Only when human resources can be allocated in an efficient way, the performance as a whole enterprise can be improved and sustainable development take place.

Thirdly, this paper turns the S-C-P analysis structure in industrial organization to the analysis structure of management level purchasing, this structure offer the theory for the analysis of different types of enterprise in management level purchasing. This paper analyzes reasons for the differences in economic performance in management level purchasing in different ownership or with the same ownership under the different economic movements. At the same time this paper analyzes the manager honesty system and incentive and leash system in management level purchasing and put the submit-agent theory and the game theory in the research of management level purchasing as the main exploration and experiment.

Fourthly, this paper path breaking puts forward that MBO is the transition from the "ownership power separated from operating power" of the modern enterprise system to "multi-power merged one-power". This paper pays close attention to the arrangement and perfection of MBO and pointed that some social economical organizations such as governments, markets, enterprises and so on had the "behavior benefiting to oneself", which found the theoretical basis for MBO's self-organization development for avoiding the over intervention of governments.

Fifthly, this paper firstly systematically discusses the duty of honesty and credit including duty of attention, duty of diligence, duty of loyalty and duty of announcement.

The capital market, the capital management under the market economy condition optimizes the area and the industry economy structure from macroscopic essentiality, and at the same time promote enterprises to improve the product structure, enhance the market share and own competitive ability for the realization enterprise's large-scale management from the microscopic angle. So the key is, whether our system design can guide MBO to transfer from the administrative behavior to the market. The fact proved that the administration can not replace the market. Every non-voluntary acquisition, kneaded together through the administration has encountered defeat and will continue to be defeated. Significantly, this kind of MBO will remove social and enterprises' future resources. Although some kind of reason caused the partial state asset drain, compared to the state asset loss due to the unreasonable system, it is not worth of mentioning. So it also appears vitally important for MBO how to play a positive benign role in the

state-owned enterprise reform . Therefore, the urgent matter is draw the strength to cultivate the market mechanism, maintain the market order, perfect policy, laws and regulations and vigorously support and impel the sustainable development of market natured MBO.

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