

## CLIENT UPDATE

### 2015 JULY

# Recent Legal Developments in Vietnam

## 1. Decree No. 60/2015/ND-CP providing amendments regarding the Law on Securities

On 26 June 2015, the Government issued Decree No. 60/2015/ND-CP (“**Decree 60**”) to amend and supplement certain provisions of Decree No. 58/2012/ND-CP to lift the 49% foreign limit on ownership of equity in public companies, amongst others. Some points in Decree 60 that deserve to be highlighted are as follows:

- (a) Foreign investors can now own up to 100% of a public company, unless otherwise stated in the charter of the public company, and subject to the following clarifications and exceptions:
  - (i) For public companies operating in sectors and/or business lines subject to foreign ownership limitations in international treaties, the maximum ratio of foreign ownership must be at the ratio stipulated in such international treaties;
  - (ii) For public companies operating in sectors and/or business lines subject to specific foreign ownership limitations in Vietnamese law, the maximum ratio of foreign ownership shall be as stipulated in such laws; but where no specific ratio on foreign ownership limitation has yet been issued, the maximum ratio of foreign ownership will remain 49%; and
  - (iii) For public companies operating across various different sectors, where the maximum foreign ownership cap may vary according to each different activity under Vietnamese laws, the maximum ratio of foreign ownership cannot exceed the lowest ratio permitted for any one of the activities (unless otherwise provided in an international treaty).

Only shares with voting rights are counted towards the applicable foreign ownership limits; accordingly, foreign investors may hold unlimited non-voting shares unless otherwise provided in the charter of the public company. Decree 60 also allows foreign investors to make unlimited investment in Government bonds, bonds guaranteed by the Government, bonds of the provincial authority or enterprises; as well as investment in securities investment fund certificates, shares of securities investment companies, derivative securities, and depository receipts without limit.<sup>1</sup>

- (b) Decree 60 provides for more requirements on conversion of debts to shares as follows:<sup>2</sup>
  - (i) Regardless of whether the issuer is a public or non-public company, the offering plan submitted to shareholders for approval must provide (amongst other things) a list of debtors, value of their debts being converted, and the method and rate of conversion. A third party expert entity must be engaged to opine on the method and conversion rate. If their opinions are inconsistent with the intended conversion rate, the board of directors must submit an explanatory presentation to the shareholders; and
  - (ii) If the issuer is a public company, the above third party expert entity must be an unrelated auditing firm or securities company with the appropriate license.

<sup>1</sup> Article 1.2, Decree 60

<sup>2</sup> Article 1.3, Decree 60

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- (c) If the listing company does not meet the listing requirements after its offer for sale, issues 50% or over of its existing shares in exchange for shares or contribution part in another company, the delisting of securities is compulsory.

The company may also voluntarily delist their securities with the condition that there is approval of at least 51% of the voting shares of all shareholders (not including major shareholders) instead of 50% in the previous requirement. The delisting can only be conducted after at least two years from the listing date on the stock exchange.<sup>3</sup>

- (d) Decree 60 takes effect from 01 September 2015.

### 2. Official Letter No. 4366/BKHDT-PC on temporary guiding the Law on Investment (2014)

On 30 June 2015, the Ministry of Planning and Investment issued Official Letter No. 4366/BKHDT-PC (“**Official Letter 4366**”) to temporarily guide the Law on Investment (2014) (“**LOI 2014**”) pending a decree to guide the LOI officially. Some points in Official Letter 4366 deserve to be highlighted as follows:

- (a) Procedures for decisions on investment policy: The Prime Minister and provincial people’s committees are conducted according to LOI 2014, in which dossier for applying, timeline to being granted and contents of investment policy decisions are detailed in LOI 2014.<sup>4</sup>
- (b) Procedures for receiving the application dossier of investment registration certificate, granting and amending investment registration certificate are implemented under relevant provisions of LOI 2014.<sup>5</sup>
- (c) In cases where a foreign investor invests in Vietnam by establishing a company, they must apply for an enterprise registration certificate. The procedures for this are detailed under the Law on Enterprise (2014). An enterprise registration certificate may be applied for only after obtaining an investment registration certificate through the procedures stipulated in LOI 2014. After being granted the enterprise registration certificate, the investors can conduct the investment project through the established company.<sup>6</sup>
- (d) Procedures for investment of foreign investors by way of capital contribution and buying contributed capital are implemented from the guidance of LOI 2014. Similar to these, applying conditions and investment procedures of foreign-invested organisation is done by provisions of LOI 2014.<sup>7</sup>
- (e) If Vietnamese investors have already been granted an investment certificate under the former Law on Investment (2005), the investors shall continue to conduct the investment project according to the granted investment certificate. If they wish to obtain a new investment registration certificate under the current law, the licensing authority will guide the investor to apply for the investment registration certificate and use the National Information System to create an investment project code and grant the investment registration certificate to the investor.<sup>8</sup>
- (f) A dossier that has been received by the licensing authorities before the LOI 2014 takes effect (on 1 July 2015) will be dealt with through the following:<sup>9</sup>

<sup>3</sup> Article 1.20, Decree 60

<sup>4</sup> Clause 1, Official Letter 4366

<sup>5</sup> Clause 2, Official Letter 4366

<sup>6</sup> Clause 3, Official Letter 4366

<sup>7</sup> Clauses 4 and 5, Official Letter 4366

<sup>8</sup> Clause 6, Official Letter 4366

<sup>9</sup> Clause 8, Official Letter 4366

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- (i) If the investor applied an application dossier before 1 July 2015, but until 1 July 2015 the timeline for granting an investment certificate has not expired and the investment certificate is not issued, the investor must amend the application dossier and implement investment procedure as guided by LOI 2014;
- (ii) If the investor applied the application dossier before 1 July 2015, but until 1 July 2015 the timeline for granting an investment certificate expires and the investment certificate is not issued, the investor is encouraged to comply with LOI 2014. In case they still want to apply the former Law on Investment (2005), the licensing authority should report to Ministry of Planning and Investment for their guidance;
- (iii) If a project has obtained investment policy approval from the competent authority under the former Law on Investment (2005), the project will not need to obtain the same according to LOI 2014; and
- (iv) In the procedure of the decision of investment policy and granting investment registration certificate, the competent authorities have no right to review, expertise and re-approve reviewed, expertise and re-approved contents.

### 3. Official Letter No. 4211/BKHDT-DKKD on temporary guiding enterprise registration

On 26 June 2015, the Ministry of Planning and Investment issued Official Letter No. 4211/BKHDT-DKKD (“**Official Letter 4211**”) on enterprise registration to implement the Law on Enterprise (2014) (“**LOE 2014**”). Some notable provisions of Official Letter 4211 are:

- (a) An enterprise shall register for change in the following contents of the Enterprise Registration Certificate (“**ERC**”):<sup>10</sup>
  - (i) Its name;
  - (ii) Its head office address;
  - (iii) Its member (in a partnership or limited liability company); its owner (in a one member limited liability company or a private enterprise);
  - (iv) Its charter capital; or
  - (v) Its legal representative (in a limited liability company or a joint stock company).
- (b) An enterprise shall notify for change in the following registered contents:<sup>11</sup>
  - (i) Its business line;
  - (ii) Its investment capital (applicable only to private enterprise);
  - (iii) Its founding shareholder or foreign shareholder (applicable only to private joint stock company); or
  - (iv) Tax registration information.

The enterprise registration authority shall issue a confirmation on change of enterprise registration content within three (03) business days from the date of receipt of the valid dossier.

<sup>10</sup> Clause 2, Official Letter 4211

<sup>11</sup> Clause 3, Official Letter 4211

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- (c) An enterprise may suspend its business as long as a written notification of the time and duration of suspension and time of resumption is sent to the enterprise registration authority at least 15 days before the date of suspension or resumption. This regulation still applies in case the enterprise resumes its business before the notified date.<sup>12</sup>
- (d) An enterprise may decide the form, quantity, and contents of its seal. Before using the seal, it must send a notice to the enterprise registration authority for posting it on the National Business Registration Portal.<sup>13</sup>
- (e) Dissolution process is simplified as follows:<sup>14</sup>
  - (i) Within two (02) business days from the receipt of the petition for dissolution, the enterprise registration authority shall send the notice of application for dissolution of enterprise to the tax authority; and
  - (ii) Within five (05) business days from the receipt of the petition for dissolution, if there is no objection or feedback from the tax authority, the enterprise registration authority shall update the enterprise's legal status on National Enterprise Registration Database and issue the Notice of enterprise's dissolution.
- (f) An enterprise operating under the Investment Certificate (concurrently the Enterprise Registration Certificate) or Investment License must separate its investment project and enterprise information upon making any change to its registered contents. The application for separation is similar to that when applying for a new ERC.<sup>15</sup>

#### 4. Official Letter No. 4326/BKHDT-DTNN on receiving procedures and application forms for investment activities

On 30 June 2015, the Ministry of Planning and Investment issued Official Letter No. 4326/BKHDT-DTNN ("Official Letter 4326") guiding the temporary receiving procedures and application forms for investment activities which outlines the investment processes and procedures under the Law on Investment (2014). Some points in Official Letter 4326 deserved to be highlighted as follows:

- (a) Procedure for issuance, amendment of Investment Registration Certificate:<sup>16</sup>
  - (i) The investor submits the application to the licensing authority (Provincial-level Department of Planning and Investment or Industrial Park Authority);  
  
The State encourages the investor to provide information regarding their investment project on [dautunuocngoai.gov.vn](http://dautunuocngoai.gov.vn) or [fdi.gov.vn](http://fdi.gov.vn) before their application submission;
  - (ii) The licensing authority provides the investor with a receipt of documents and a temporary account to follow up with the status of their application;
  - (iii) Should the application dossier be insufficient, the licensing authority shall give notice to the inventor within three (03) working days from the date of the receipt; and
  - (iv) The investor shall be granted an Investment Registration Certificate within 15 days for investment projects that do not require approval from other authorities.

<sup>12</sup> Clause 5, Official Letter 4211

<sup>13</sup> Clause 4, Official Letter 4211

<sup>14</sup> Clause 6, Official Letter 4211

<sup>15</sup> Clause 8, Official Letter 4211

<sup>16</sup> Clause 1.2, Official Letter 4326

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- (b) The Official Letter also provides several templates for investment registration procedure such as Application on Investment Registration Certificate, Investment Project proposal, Explanation on the technique to conduct the investment project, Decision on Investment Policies from provincial People's Committee.

#### 5. Official Letter 4332/BKHDT-DTNN on temporary guiding outward investment

On 30 June 2015, the Ministry of Planning and Investment ("MPI") issued Official Letter No. 4332/BKHDT-DTNN on temporary application of procedures, forms to conduct outward investment ("Official Letter 4332"). Some points in Official Letter 4332 that deserve to be highlighted as follows:

- (a) For an outward investment project that requires approval from the Prime Minister:
- (i) Application dossiers shall be in accordance with the Law on Investment (2014);
  - (ii) An equivalent paper that certifies the legal status of the investor is one of the following: Investment License or Investment Certificate; or Investment Registration Certificate for the investor being foreign invested enterprise in Vietnam; or Enterprise Registration Certificate or incorporation decision;<sup>17</sup>
  - (iii) Document identifying the project location is applied for the following projects: energy project, cultivation, fishing, processing of agriculture products, forestry products, aquaculture products project; mineral prospecting, exploration, extraction and processing investment project; construction of production, processing and fabrication investment project; construction and construction and infrastructure business involving land use investment project;<sup>18</sup>
  - (iv) The written confirmation from the tax authority;
  - (v) For outward investment by a 100% state-owned enterprise, the decision on outward investment shall be replaced by the following documents:<sup>19</sup>
    - The written approval from the representation body of the owner for the investor to register to invest abroad to implement the project; and
    - Internal evaluation report on the proposed outward investment project to serve as a basis for the approval from the representation body of the owner as specified above.
  - (vi) The investor submits eight (08) application dossiers (one (01) original copy) for the issuance/amendment of the Certificate of registration of outward investment to MPI.
- (b) For the outward investment project that is not required the decision from the Prime Minister:
- (i) Application dossiers shall be in accordance with the Law on Investment (2014);<sup>20</sup>
  - (ii) The investor submits three (03) application dossiers (one (01) original copy) for issuance/amendment of the Certificate of registration of outward investment to the MPI.

<sup>17</sup> Clause A.I.2, Official Letter 4332

<sup>18</sup> Clause A.I.3, Official Letter 4332

<sup>19</sup> Clause A.I.5, Official Letter 4332

<sup>20</sup> Clause B.1.1, Official Letter 4332

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