

## CLIENT UPDATE 2015 SEPTEMBER

# Recent Legal Developments in Vietnam

### 1. Decree No. 78/2015/ND-CP on enterprise registration

On 14 September 2015, the Government issued Decree No. 78/2015/ND-CP (“**Decree 78**”) to importantly guide the new Law on Enterprise (2014) on enterprise registration. Accordingly, Decree 78 has some significant new regulations below:

- (a) Compared to the previous regulations, the time limit for processing applications for enterprise registration has been reduced from 05 working days to 03 working days, from the receipt of valid documents.<sup>1</sup> The time limit reduction is made thanks to a mechanism for automatic inter-network coordination between the Business Registration Offices and Tax Agencies through the creation and use of enterprise identification numbers.

Accordingly, each enterprise will be given one identification number, which will also be regarded as its tax identification number.<sup>2</sup> The number is created, transmitted and received automatically through the national information system on both the enterprise registration and the tax registration information systems. This identification number will be stated in the enterprise registration certificate and serve the management and exchange of information about the enterprise by state agencies throughout its operation.

In order to further facilitate the founding of enterprises, Decree 78 allows Business Registration Offices to organize different places in their respective provinces to receive enterprise registration dossiers and notify applicants of the results.<sup>3</sup> Each enterprise or its founder shall only submit 01 application dossier, instead of submitting multiple as practiced previously, for enterprise registration.<sup>4</sup>

- (b) Organizations, individuals can submit enterprise registration online. The online enterprise registration dossiers must be authenticated by a public digital signature or an enterprise registration account held by an enterprise’s legal representative.<sup>5</sup>
- (c) Enterprises are now allowed to have multiple legal representatives, and their signatures in the application for enterprise registration will have equal value.<sup>6</sup>
- (d) Every enterprise has the right to decide the design, content and number of seals of the enterprise, its branches, representative offices; an enterprise can have multiple seals with the same design and content.<sup>7</sup>
- (e) Where founding shareholders have not paid or have only partly paid for the shares they register, the enterprise must send a notification to Business Registration Offices. Accordingly now, these founding shareholders will no longer be considered shareholders of the enterprise and be removed from the list of founding shareholders.<sup>8</sup>

<sup>1</sup> Article 28.1, Decree 78

<sup>2</sup> Article 8.1, Decree 78

<sup>3</sup> Article 13.1, Decree 78

<sup>4</sup> Article 9.1, Decree 78

<sup>5</sup> Articles 35 and 36, Decree 78

<sup>6</sup> Article 4.1, Decree 78

<sup>7</sup> Article 34.1, Decree 78

<sup>8</sup> Article 51.2, Decree 78

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## CLIENT UPDATE 2015 SEPTEMBER

In case of foreign shareholders of an unlisted joint-stock company are changed, a notification submitted to Business Registration Offices is also required.<sup>9</sup>

- (f) Decree 78 takes effect from 01 November 2015.

### 2. Circular No. 123/2015/TT-BTC on foreign ownership limit ("FOL") in public companies

An exciting change in the law recently enabled foreign investors to own up to 100% of a public company, unless otherwise stated in the company's charter, and subject to clarifications and exceptions (*i.e., international treaty exceptions, conditional sectors, and the most restrictive FOL applies as regulated in Decree No. 60/2015/ND-CP*). Accordingly, on 19 August 2015, the Ministry of Finance ("MOF") issued Circular No. 123/2015/TT-BTC ("**Circular 123**") in order to guide these new regulations on FOL. Some points in Circular 123 that deserve to be highlighted are as follows:

- (a) Public companies are themselves responsible for determining the applicable FOL.<sup>10</sup> Those companies which are not subject to FOL yet and wish to maintain an FOL cap, must amend their charter to specify such cap.<sup>11</sup> If the foreign ownership in a public company already exceeds the limit, it must not be increased any further.<sup>12</sup>
- (b) Public companies making changes to the existing rate of foreign ownership shall be obliged to carry out the notification procedures on FOL,<sup>13</sup> in particular:
- (i) Companies which are not subject to FOL are required to file a notification dossier with the State Securities Commission ("SSC"). The dossier must include (1) extracted information on business lines as uploaded on the National Business Registration Portal and the electronic address linking to such information, and (2) minutes of meeting and the resolution of the board of director approving the unrestricted FOL (if the company does not wish to maintain a FOL) or minutes of meeting and the resolution of the general shareholders' meeting approving and the charter providing for the specific FOL (if the company wishes to maintain FOL); and
- (ii) Companies which are subject to FOL will file a notification dossier with the SSC comprising the extracted information on business lines as uploaded on the National Business Registration Portal, and the electronic address linking to such information.<sup>14</sup>

The SSC will have 10 working days to acknowledge in writing the notification on FOL. Within one working day of the receipt of SSC's acknowledgment on the applicable FOL, public companies are required to publish this information on their website, which gives effect to the published FOL.<sup>15</sup>

- (c) Circular 123 clearly provides that foreign ownership in securities companies is unlimited. However, only qualified investors (which must, among other conditions, be organizations operating in banking, securities, insurance area with 02 years of operation at least) may own

<sup>9</sup> Article 52.1, Decree 78

<sup>10</sup> Article 11.2, Circular 123

<sup>11</sup> Article 11.3, Circular 123

<sup>12</sup> Article 11.4, Circular 123

<sup>13</sup> Article 12.1, Circular 123

<sup>14</sup> Article 13.1(b), Circular 123

<sup>15</sup> Articles 13.2 and 13.4, Circular 123

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## CLIENT UPDATE 2015 SEPTEMBER

more than 51% in a securities company. Investors that do not meet the criteria for being a qualified investor may only own less than 51% in a securities company.<sup>16</sup>

A qualified foreign investor who wishes to own more than 51% in a securities company must obtain the SSC's prior approval. This approval may be issued within 15 days from the date when the SSC receives the application, and the transaction resulting in the change of ownership must occur within six months from the date of SSC approval. Otherwise the SSC approval will be automatically revoked.<sup>17</sup>

- (d) Circular 123 takes effect from 01 October 2015.

### 3. Decree No. 76/2015/ND-CP detailing the Law on Real Estate Business

On 10 September 2015, the Government issued Decree No. 76/2015/ND-CP ("**Decree 76**") to detail the implementation of some articles of the Law on Real Estate Business, especially the conditions to transfer a lease contract of an existing building, transfer sale or transfer lease contract of an off-the-plan house and templates for real estate business. Some points in Decree 76 that deserve to be highlighted are as follows:

- (a) Conditions of an organization or individual practicing real estate business: organizations or individuals practicing real estate business must establish an enterprise/co-operative and have legal capital of no less than 20 billion VND, except for organization, household, individual who sells, transfers, leases, purchases real estate irregularly on a small-scale and organizations or individual practicing real estate service businesses.<sup>18</sup>
- (b) Conditions to transfer lease purchase contract of an existing building and sale or lease purchase contract of an off-the-plan house:
  - (i) The lessee in a lease purchase contract of an existing building and the purchaser/lessee of a sale/ lease purchase contract of an off-the-plan house may transfer such contract if the application for issuance of certificate of land use rights, ownership of houses and property on land (the "**Certificate**") has not been submitted to competent authority;<sup>19</sup>
  - (ii) The transferee of the lease purchase contract of an existing building or of the sale/ lease purchase contract of an off-the-plan house is entitled to transfer such contract if the application for issuance of the Certificate has not been submitted to competent authority;<sup>20</sup>
  - (iii) The whole lease purchase contract concluded with the lessor must be transferred. Regarding lease purchase contracts of a single detached house or apartment, each detached house or apartment shall be transferred separately; regarding lease purchase contracts of multiple detached houses or apartments, all houses apartments shall be transferred;<sup>21</sup> and
  - (iv) Regarding sales contracts or lease purchase contracts of a single detached house or apartment (off-the-plan house), each detached house or apartment shall be transferred separately; regarding sales contracts or lease purchase contracts of multiple detached houses or apartments, all houses apartments shall be transferred.<sup>22</sup>

<sup>16</sup> Article 11.5, Circular 123

<sup>17</sup> Article 14, Circular 123

<sup>18</sup> Article 3, Decree 76

<sup>19</sup> Articles 8.1 and 10.1, Decree 76

<sup>20</sup> Articles 8.2 and 10.2, Decree 76

<sup>21</sup> Article 8.3, Decree 76

<sup>22</sup> Article 10.3, Decree 76

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## CLIENT UPDATE 2015 SEPTEMBER

- (c) Regarding the transitional implementation of Decree 76, any operating real estate enterprise failing to satisfy the legal capital requirement must satisfy such requirement within 01 year from 01 July 2015. Any real estate project which has received the investment decision, land allocation, land lease, or permit for project transfer and any contract for transfer, sale, lease, or lease purchase of real estate concluded before 01 July 2015 shall not be required to re-follow the procedures prescribed in the Law on Real Estate Business. The templates of contract and procedures provided by Decree 76 are also not required to apply to contract for sale, transfer, lease, lease purchase of real estate, transfer of project, and every transfer agreement concluded before the effective of Decree 76.<sup>23</sup>
- (d) Decree 76 takes effect from 01 November 2015.

#### 4. Circular No. 110/2015/TT-BTC on e-transaction in the field of taxation

On 28 July 2015, the Government issued Circular No. 110/2015/TT-BTC (“**Circular 110**”) to guide e-transactions in the field of taxation. Some points in Circular 110 that deserve to be highlighted are as follows:

- (a) Taxpayers and the tax authorities can implement the electronic tax procedures, including but not limited to:<sup>24</sup>
  - (i) Tax registration, tax filing, tax payment, and tax refund; and
  - (ii) Receiving the electronic documents and to provide the supportive services for the electronic taxpayers including access to information about the taxpayer, sending notifications of tax authorities to taxpayers.
- (b) The electronic tax transactions must be transparent, fair, truthful, safe, effective and conform with the Law on Electronic Transactions.<sup>25</sup>
- (c) Taxpayers who have declared tax electronically must also make other transactions electronically, except for the case with errors during electronic tax transactions.<sup>26</sup>
- (d) Conditions for electronic tax transactions:<sup>27</sup>
  - (i) Taxpayers have an effective digital certificate issued by a certificate authority or a competent authority and recognized by a competent authority, except where:
    - The taxpayers are individuals and they are yet to be issued the digital certificate;
    - The taxpayers apply for tax registration and taxpayer ID number; and
    - The taxpayers pay tax electronically through a bank payment method.
  - (ii) The taxpayers have registered an email address, mobile phone number with the tax authority; and
  - (iii) A taxpayers may apply for multiple digital certificates for one or multiple tax procedures, and they can use multiple bank accounts to pay tax electronically. In addition, the taxpayers may register an additional email address for each tax procedure.

<sup>23</sup> Article 16, Decree 76

<sup>24</sup> Article 1.1, Circular 110

<sup>25</sup> Article 4.1, Circular 110

<sup>26</sup> Article 4.2, Circular 110

<sup>27</sup> Article 5, Circular 110

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## CLIENT UPDATE 2015 SEPTEMBER

- (e) Circular 110 does not regulate electronic tax transactions for goods during export and import stage at customs authorities.<sup>28</sup>
- (f) Circular 110 takes effect from 10 September 2015.

### 5. **Circular No. 09/2015/TT-NHNN on debt purchase and sale of credit institutions and branches of foreign banks**

On 17 July 2015, the State Bank of Vietnam (“**SBV**”) released Circular No. 09/2015/TT-NHNN (“**Circular 09**”) regulating debt purchase and sale of credit institutions and branches of foreign banks. Some points in Circular 09 that deserve to be highlighted are as follows:

- (a) Debt purchasers that are detailed under Circular 09 include:<sup>29</sup>
  - (i) Credit institutions and branches of foreign banks are approved by SBV to implement debt purchase activities;
  - (ii) Organizations implement debt purchase activities (that is not credit institutions or branches of foreign banks) after they satisfy conditions of debt purchase activities;
  - (iii) Organizations who do not business debt purchase; and
  - (iv) Organizations and individuals that are non-residents.
- (b) Debts that are purchased and sold must meet the following conditions:<sup>30</sup>
  - (i) All documentation relating to the debts shall fully and accurately reflect the situation of the debts in compliance with the Vietnamese law;
  - (ii) There is no written agreement that prohibits the purchase and/or sale of the debts; and
  - (iii) The debts are not permitted to secure a civil obligation performance at the time of purchase and/or sale of debts unless otherwise secured parties agree in writing on the sale of the debts.
- (c) Credit institutions or branches of foreign banks may only purchase debts if:<sup>31</sup>
  - (i) Its bad debt ratio is below 3%, except for the case that the debt purchase is implemented under an approved restructuring plan and; and
  - (ii) The credit institutions or branches of foreign banks are accepted by SBV to implement debt purchase activities. The acceptance of SBV shall be detailed in establishment and operation licenses of the credit institutions or operation licenses of the branches of foreign banks.
- (d) The credit institutions or branches of foreign banks shall issue an internal rule on debts purchase and sale and establish a council for debts purchase and sale prior to purchase and/or sale of debts.<sup>32</sup> The internal rules shall include contents of responsible decentralizing between stages of appraisal and decision to buy and sell debts; method of purchase and sale of debts;

<sup>28</sup> Article 1.2, Circular 110

<sup>29</sup> Article 3.4, Circular 09

<sup>30</sup> Article 4, Circular 09

<sup>31</sup> Article 5.3, Circular 09

<sup>32</sup> Article 5.4 and Article 11, Circular 09

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## CLIENT UPDATE 2015 SEPTEMBER

process of debts sale and purchase; debts valuation process; risk management of sale and purchase of debts and process of debts auction in the event that debts are auctioned by the credit institutions and branches of foreign banks.<sup>33</sup>

- (e) A credit institution is not permitted to sell a debt to its subsidiary. The credit institution is only allowed to sell a debt to its subsidiary if the subsidiary is a debt and asset management company and the sale of the debt is under an approved restructuring plan. In addition, the debt and asset management company being the subsidiary of a credit institution is only permitted to purchase debts of other credit institutions and branches of foreign banks if its parent company has a bad debt ratio below 3%, except for the event that the purchase of debts is under an approved restructuring plan.<sup>34</sup>
- (f) The debt sellers are not permitted to buy back a sold debt.<sup>35</sup>
- (g) Circular 09 takes effect from 01 September 2015.

### 6. Circular No. 127/2015/TT-BTC on enterprise code and assignment of tax agency

To facilitate the establishment of new enterprises and re-organization of enterprises, on 21 August 2015, the Ministry of Finance issued Circular No. 127/2015/TT-BTC ("**Circular 127**") guiding the grant of enterprise codes and assignment of tax agency to manage enterprises. Some points in Circular 127 that deserve to be highlighted are as follows:

- (a) Circular 127 provides the following procedure for granting enterprise code electronically:<sup>36</sup>
  - (i) Upon receiving information transmitted from the National Business Registration Portal, the Tax Registration System shall check on the sufficiency, accuracy, and legality of such information;
  - (ii) If the information satisfies the requirements, an enterprise code shall be generated, and a tax agency shall be automatically assigned to manage the enterprise. Such information shall then be transmitted to the National Business Registration Portal. The whole procedure takes at most one day;
  - (iii) If the information does not satisfy the requirements, a notification shall be sent back to the National Business Registration Portal for amendment/supplement; and
  - (iv) After receiving the result from the Tax Registration System, the Business Registration Agency shall issue the Enterprise Registration Certificate and a notification on tax management agency to the enterprise.
- (b) Circular 127 also provides that a violation in tax law shall be warned and published on National Business Registration Portal, including:<sup>37</sup>
  - (i) Managers of enterprises having criminal offense signals and being investigated by authorities;

<sup>33</sup> Article 5.4, Circular 09

<sup>34</sup> Article 5.7 and Article 5.8, Circular 09

<sup>35</sup> Article 5.6, Circular 09

<sup>36</sup> Article 2.2, Circular 127

<sup>37</sup> Article 4.1, Circular 127

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## CLIENT UPDATE 2015 SEPTEMBER

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- (ii) Enterprises which were established not complying with the Law on Enterprise; and
- (iii) An individual who is the "manager" in an enterprise or a member of Members' Council, Board of Directors or members of the partnership that such individual was a former Owner; Chairman of the Board members, Chairman of the Board of Directors, director, general director; partnership member and legal representative of the enterprise has been notified by tax authorities that the enterprise no longer conducts business activities at the registered address.
- (c) Circular 127 takes effect from 10 October 2015.

## CLIENT UPDATE 2015 SEPTEMBER

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## CLIENT UPDATE 2015 SEPTEMBER

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