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VIETNAM ISSUES NEW GUIDANCE ON THE LAW ON ENTERPRISES

Vietnam's business environment has quickly evolved since its early overhaul or "Doi Moi" process in 1986. Vietnam's Law on Enterprises and its guiding regulations, the main laws governing the establishment and operation of corporate entities in Vietnam, has been updated frequently to keep pace with changes in business practices and the evolving legal framework.

Setting forth several key clarifications on the law governing corporate entities, Decree No. 102/2010/ND-CP on guiding the implementation of the Law on Enterprises 2005 (Decree 102) entered into effect on November 15, 2010. Decree 102 replaces Decree 139, which was issued in 2007. This article highlights a number of the key improvements to Vietnam's corporate law regime under Decree 102.

Requirement of Actual Issuance and Payment of Subscribed Shares

Under Vietnamese law, "charter capital" means the amount of capital contributed or undertaken to be contributed by members or shareholders in a certain period of time, as prescribed in the charter and the Incorporation Certificate of the company. Decree 102 (Article 6) clarifies that shares in a shareholding company constitute part of charter capital when they are actually issued and paid up.

Deadline for Contribution of Capital

Decree 102 ties up an old loophole by prescribing a clear deadline by which a member of an LLC is required to contribute capital. Decree 102 (Article 18) stipulates that charter capital must be contributed within 36 months after the corporate establishment of an LLC and within 90 days for a shareholding company.

Decree 102 affirms that any member of an LLC who has not actually contributed his or her committed capital amount when due will "automatically" not be considered a member of the company. Such member is also prohibited from transferring his or her registered capital, per Decree 102 (Article 18).

The Law on Enterprises 2005 also required a company to issue a Certificate of Capital Contribution to paid-up members. In fact, many companies did not issue this type of certificate. Under Decree 102, this type of certificate is likely to be issued more frequently. The foregoing changes protect the interests of prospective purchasers of shares in companies in Vietnam.

Intellectual Property Affirmed as a Type of Capital

Importantly, Decree 102 affirms that intellectual prop-

erty rights can be considered as part of a company's capital. This provision resolves the previous ambiguity and the inconsistent interpretations of authorities and practitioners. Decree 102 will be very beneficial to companies that invest in sectors that rely heavily on intellectual property rights, such as pharmaceutical companies, computer software companies, and popular consumer brands. The Ministry of Finance has been instructed to draft guiding legislation on the process of evaluating intellectual property rights to be contributed to the company.

More Protection for Minority Shareholders

Decree 102 grants additional protection to shareholders by establishing the grounds for a shareholder suit. Per Decree 102 (Articles 19.1 and 25.1), shareholder suits may be brought by a shareholder or group of shareholders who continuously hold at least 1 percent of the charter capital for a period of six months. Such shareholders have the right to request the company's Controlling Board to institute legal proceedings against the board of direc-

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tors and/or the director or general director when such managers: (1) fail to properly exercise assigned rights and duties or (2) use the company's information or business opportunities or abuse the company's assets for their own benefit. This regulation also vests courts and relevant authorities with the authority to handle shareholder suits.

Disclosure of Related Persons and Transactions

The Law on Enterprises 2005 (Article 17) defines "related persons" as organizations or persons related directly or indirectly to an enterprise, such as: (1) a parent company; (2) the managers of the parent company; or (3) the spouse, parents, or children of any manager of an enterprise, of any member, or of any shareholder holding a share of capital or holding controlling shares. Under Vietnamese law, company transactions with such related persons must be approved by the members' council (Law on Enterprises 2005, Article 59).

Decree 102 grants an affirmative right to receive disclosure of related persons and transactions with the company. Decree 102 specifically requires a company to collate, update, and maintain a list of related persons at the head office of the company. All shareholders, managers, members of the inspection committee of company, and their authorized representatives shall be entitled to view and obtain a copy of the list.

In enacting Decree 102, Vietnam continues its quest to attract foreign direct investment by increasing its competitiveness vis-à-vis its neighbors. The provisions on charter capital, shareholder suits, and disclosure of related persons and transactions benefit investors and strengthen Vietnam's commercial regime. 🏛️