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New Regulations on Foreign Investment in Goods Trading

Goods trading and activities directly related to goods trading are considered a “conditional” business for foreign investment in Vietnam, meaning the market is open to foreign investors provided they meet certain conditions. This area was governed for more than 10 years by Decree No. 23/2007/ND-CP (Decree 23), which was in line with the old 2005 Investment Law and gradually became out-of-date, especially when the new 2014 Investment Law took effect on July 1, 2015. Given this fact, on January 15, 2018, Decree No. 09/2018/ND-CP (Decree 9) was issued and took immediate effect, replacing Decree 23 as the primary legal basis for foreign investment in goods trading in Vietnam. Decree 9 provides many significant changes in line with the 2014 Investment Law for foreign investors and their wholly set-up foreign invested enterprises (FIEs). Some of the key changes are summarized below.

Single authority for licensing. Under Decree 9, the local Department of Industry and Trade (DOIT) has become the sole licensing authority for licensing matters in goods trading. The DOIT is also responsible for liaising with and seeking consultations from the Ministry of Industry and Trade (MOIT) in any application dossiers required in-principle approvals from the MOIT. Though this is an internal working process between the DOIT and the MOIT, the relevant foreign investor or FIEs will be kept updated.

Some sub-license requirements removed. Under Decree 23, to engage in import, export and wholesale of goods, FIEs were required to have such activities with specific HS codes of the traded goods recorded in the Investment Registration Certificate, or separately in a sub-license called a Trading License (a.k.a. Business License). Furthermore, Decree 23 regulated that the in-principle approval from the MOIT was a must in case of granting wholesale rights to FIEs. Decree 9 relaxes these requirements. Accordingly, specific HS codes of traded goods are no longer recorded in the Investment Certificate and provided that the FIEs have rights to conduct import, export and wholesale of goods recorded in their Investment Registration Certificates as the enterprises’ business lines, they are entitled to legally do such activities without a Trading License, for any kinds of goods that are not in the list of products/goods prohibited from being imported and distributed in Vietnam. Decree 9 reserves the Trading License requirement for the import and wholesale of oil and lubricants only.

Retail sub-license easier to secure. Under Decree 9, there is a significant change in the procedure for an FIE to obtain a Trading License for retailing. The local DOIT no longer needs to seek consultation from the MOIT as an

in-principle approval to grant the license, which will help shorten the timeline for obtaining the license. However, in-principle approval from the MOIT is still needed for retailing rice, sugar, video records, books, newspapers and magazines.

Retail outlet and the “economic needs test” requirement. Similar to Decree 23, Decree 9 allows FIEs with a Trading License for retailing to set up a first retail outlet; however, to set up subsequent retail outlets, a vaguely defined “economic needs test” (ENT) may be required to prove the viability of the additional outlet. Under Decree 9, FIEs can be exempt from an ENT if the subsequent outlet satisfies the following conditions: (1) it has an area of less than 500 sqm; (2) it is located in a shopping mall; and (3) such retail outlet is not classified as a convenience store or mini supermarket. Decree 9 also provides much clearer criteria for the ENT. These improvements should allow FIEs to more easily set up their own retail outlets for distributing their products to end-users, and make the retail market in Vietnam more welcoming to foreign investment.

Clarification of “related activities.” Decree 23 and the 2005 Commercial Law were unclear as to which business activities were considered “activities directly related to goods trading,” which caused difficulties for both foreign investors/FIEs and licensing authorities in applying the conditions/procedures in practice. To solve this gap, Decree 9 clearly lists out the activities directly related to goods trading, including: (1) commercial assessment services; (2) logistics services; (3) goods leasing services (exclusive of finance leasing); (4) enhancement services (exclusive of advertising); (5) commercial intermediary services; (6) e-commerce services; and (7) goods tender organizing services. A Trading License is required for FIEs to conduct these activities, except for certain logistics services included in Vietnam’s WTO Commitments in Services. The procedure for obtaining a Trading License in these cases requires an in-principle approval from the MOIT.

Post-M&A requirements in goods trading. One of the important changes under the 2014 Investment Law is to provide a legal regime for mergers and acquisitions. Before Decree 9, there remained many gaps and inconsistencies in mergers and acquisitions in the goods trading field. In fact, when foreign investors acquired shares in a local trading enterprise to make it an FIE, Decree 23 did not have specific provisions as to what the FIEs had to do to continue trading legally. Decree 9 fills these gaps, providing a clear legal framework for trading FIEs formed via share acquisitions or capital purchases by foreign investors. In particular, Decree 9 introduces a specific procedure for such trading FIEs that have retail outlet(s) to maintain and continue running such retail outlets.

Outlook. The changes in Decree 9 show that Vietnam is still trying to shield local retailers from foreign investors with greater financial capacity and retail experience. However, by minimizing the administrative procedures and broadening opportunities for foreign investors/FIEs to engage in goods trading, Decree 9 also demonstrates the government’s intent to attract foreign investment. With an increase of competition in the Vietnam retail market, Vietnamese consumers may also benefit when more imported products can be sold at an affordable price. However, Decree 9 is still very new, and there are bound to be conflicts among the authorities in terms of understanding and application. It is hoped that the MOIT will issue additional guidance on Decree 9 soon. 🍷