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Vietnam's Updated Law on Investment and Law on Enterprises: Impact on Foreign Investors

On June 17, 2020, the National Assembly of Vietnam passed the Law on Investment 2020 (LOI) and Law on Enterprises 2020 (LOE). The new laws will take effect on January 1, 2021, replacing their predecessors from 2014. These are two of the main sources of corporate law in Vietnam, applicable to both domestic and foreign companies. Some key changes for foreign investors are listed below.

Law on Investment 2020

The 2020 LOI adds a few investment projects that are eligible for investment incentives, particularly creative startup projects, research and development institutions, manufacturing of medical devices, and projects providing auxiliary services to small and medium-sized enterprises. The incentives include corporate income tax exemption or reduction for a limited duration, exemption from import tax for equipment imported to form fixed assets, and accelerated depreciation and an increase in deductible expenses in the calculation of taxable income.

The updated LOI upholds the previous requirement of paying a deposit or providing a bank guarantee for investment projects involving land use, but provides some exceptions. Accordingly, investors are no longer subject to this deposit obligation if they win the land use rights via auction, are awarded a bid to implement a project using land, take over a project via project assignment for which the deposit or capital mobilization was already completed, or acquire project land via transfer of land use rights from another land user.

One of the most notable additions in the new law is the introduction of investment policies relating to national defense and security. Accordingly, any business investment activity will be suspended, stopped, or terminated if that activity causes or threatens harm to Vietnam's national defense or security. In addition, a new pre-approval requirement will apply for M&A transactions involving local entities with the right to use land plots located on islands, border or coastal areas, or other areas affecting national defense and security.

These new provisions echo the direction of Vietnam's Politburo in Resolution No. 50-NQ/TW of 2019 regarding the enhancement of investment quality toward 2030, which mandates the formulation of relevant provisions on "national defense and security requirements" during the process of considering issuance of an investment registration certificate or approval for a private equity purchase by foreign investors.

For the first time, Vietnam provides for the consequences of a sham transaction (i.e., nominee structure), with the updated LOI enabling the licensing authority to terminate part or all of a project if an investment is made through a sham transaction as defined by civil law, which also holds that a sham transaction may be held void *ab initio*.

The 2020 LOI also updates the list of conditional business lines by removing 22 business lines (including

commercial arbitration, franchising, and logistics services), amending 14 business lines, and introducing 8 new business lines (including architectural services, data center services, electronic identification and authentication services, clean water business, fishing vessel registry, and training crew members of fishing ships).

A new provision has been added whereby foreign investors are subject to the same market access conditions applicable to domestic investors, unless the investment is in a business line whose market access is restricted or conditional for foreign investors. The list of business lines open to foreign investors, which will be announced by the government, includes conditions such as ownership restrictions, type and scope of investment, and financial capacity.

Law on Enterprises 2020

Under the 2020 LOE, companies are no longer obliged to notify the relevant licensing authority of their seal samples. Additionally, electronic signatures can be used instead of seal samples.

The law also makes changes regarding the organizational structure of limited liability companies (LLCs). Under the new provisions, multiple-member LLCs (other than state-owned enterprises) are no longer required to have a Board of Inspection to be in charge of supervising and ensuring the compliance of functional bodies of the company. Similarly, a single-member limited liability company owned by an organization that is not a state-owned enterprise is not required to have an inspector.

Some changes will also affect shareholders of joint-stock companies, with the 2020 LOE's introduction of "base ordinary shares," which are ordinary shares used as the base asset for issuing non-voting depository receipts. This new category of shares is in addition to the ordinary and preferred shares in joint-stock companies that have been regulated since the 2014 version of the LOE. Non-voting depository receipts have equivalent economic rights and obligations to base ordinary shares, except for the voting rights. This is expected to offer more diversified securities products for investors.

Under the previous LOE, a shareholder or a group of shareholders in a joint-stock company holding at least 10% of the total ordinary shares (or a smaller percentage if stipulated in the company's charter) had the right to request a general meeting of shareholders and to ask the Board of Inspection to investigate issues relating to the management and administration of the company. However, to protect minority shareholders, the updated LOE reduces this to 5%. The new law also abolishes the requirement on the duration of holding shares applicable to minority shareholders (or groups of shareholders) in exercising their rights, which was six consecutive months under the 2014 LOE.

Ease of Doing Business

While the changes in the LOI and LOE are relatively minor, they bring Vietnam's corporate laws further in line with the country's international commitments, reducing barriers to entry and facilitating business activities for foreign as well as domestic companies. The updated laws are a positive indication of Vietnam's commitment to encouraging companies to do business in the country. 🚀