

Client Alert

December 2017

Draft Law Amending the Law on Investment and the Law on Enterprises

The first draft ("**Draft**") of the Law on Amendment of some articles of the Law on Investment ("**IL**") and the Law on Enterprises ("**EL**") has recently been published for public comments.

Below are some notable changes being proposed under the Draft.

1. Proposed Amendments to the IL

1.1. New grandfathering clause is introduced

Protection of previously approved investments where a change in law or policy occurs is consistently a matter of great concern for investors. The current IL does provide a legal basis for such protection; however it is limited to such changes in law and policy that adversely affect the *investment incentives* (i.e., tax incentives, land use right incentives) which existing investment projects are entitled to and are stated in their investment registration certificates.

The Draft proposes to expand the scope of such protection, guaranteeing that any changes in law and policy would not adversely impact *investment conditions* which have been granted and stipulated in the investment registration certificates issued before such changes. This expansion aims to ensure that Vietnam fully implements its WTO commitments, including not retroactively altering investment conditions (e.g., scope of operations and foreign investor ownership).

1.2. Further clarification on capital contribution, share purchase and capital contribution proportion acquisition registration cases

Under the current IL, a foreign investor is required to obtain approval from a relevant local licensing authority before it can contribute capital to or acquire shares/capital contribution proportions in a company in Vietnam ("**M&A Approval**") in the two following cases:

- The target company engages in business lines conditional to foreign investors; or
- The capital contribution/shares or capital contribution proportion acquisition results in the foreign ownership of 51% or more of the charter capital of said target company.

In practice, the M&A approval requirement is interpreted inconsistently by the licensing authorities in different provinces when implementing the above regulation.

To ensure consistency in implementing the IL across the country, the Draft proposes to clarify the limited instances where M&A Approval is required, in particular where the capital contribution/shares or capital contribution proportion acquisition results in:

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- an increase of foreign ownership in a target company engaging in business lines conditional to foreign investors;
- an increase of foreign ownership in such target company from less than 51% to 51% or more; or
- an increase of foreign ownership in the target company where foreign investors already hold 51% or more.

Notably, under the Draft, M&A Approval will also be required for capital contribution/shares or capital contribution proportion acquisition of foreign investors if the target company engages in the distribution business, or if the target company owns important infrastructure, or if such target company uses land in areas relating to national security.

1.3. Elimination of the outbound investment certificate

Under the Draft, the outbound investment certificate currently mandatory for outbound investment projects will no longer be required.

Instead, the Draft proposes an alternative solution to control outbound investments, namely requiring the registration of outbound investment capital transfers with a relevant forex control authority.

1.4. Updated list of conditional business sectors

Pursuant to the Draft, 21 conditional business sectors currently included in the IL will be removed, including: "logistics," "commercial franchising," "travelling services" and "commercial arbitration," among others.

The Draft also proposes to add two (2) more sectors to the list of conditional business sectors: fishing vessel registration and forestry planning consultancy.

2. Proposed Amendments to the EL

2.1 Changes to the content of the enterprise registration certificate

Under the current EL, the enterprise registration certificate ("**ERC**") includes personal details of the legal representative, including his/her nationality, permanent residential address and details of his/her personal identification document. As a consequence, any changes to such information would require the company to obtain an amended ERC.

Under the Draft, the ERC will no longer contain the personal details of the legal representative. This change would help to reduce the procedural burdens on both companies and licensing authorities.



Should you wish to obtain further information or want to discuss any issues raised in this alert with us, please contact:

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2.2 New timeline for capital contribution

Amongst the proposed changes to the EL, the most prominent change would be in relation to the timeline for capital contribution.

Under the current EL, the timeline is 90 days from the date of issuance of the ERC. However, in practice, a 90-day period is relatively short, especially with respect to companies having registered a large amount of charter capital or foreign-invested companies which normally need to comply with numerous time-consuming banking requirements to open bank accounts in Vietnam.

The Draft now proposes to increase the timeline from 90 days to 36 months (3 years), aiming to provide a more reasonable timeline for the investors to contribute capital.

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The Ministry of Planning and Investment is planning to submit the Draft to the National Assembly for their review and adoption in May 2018.

The Draft, if adopted in its current state, would take effect from 1 January 2019, while the regulations on conditional sectors would take effect from 1 July 2018.

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Should you have any questions on the above, please do not hesitate to contact us.