

Client Alert

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New Draft Law on Securities proposing important changes to various provisions including foreign ownership limitation, IPO and tender offer

The Ministry of Finance (the "**MOF**") has recently released the second draft of the new Law on Securities (the "**Draft Law**") with a view to improving the current legal framework for the securities market by further aligning it with the overall development scheme of the Vietnamese financial sector. The Draft Law together with MOF's Explanatory Statement for the Draft Law (the "**MOF Explanatory Statement**") have been published on the official websites of the MOF and the State Securities Commission (the "**SSC**") for public consultation until 2 December 2018.¹

We have highlighted the key points of the Draft Law below.

1. Lifting foreign ownership limitation in public companies

Under the current regulations, if a public company conducts business within certain business lines that are subject to conditions imposed on foreign investors and in which there is no specific provision on the foreign ownership limitation (the "**Undetermined Conditional Sectors**"), the foreign ownership limitation will be capped at 49% of the voting capital. If a public company wishes to lift its foreign ownership ratio above 49%, it has to prove that none of its business lines falls under the Undetermined Conditional Sectors, which is not always straightforward.

In an effort to attract more foreign capital to the securities market, according to Article 32 of the Draft Law:

- (a) there will be no foreign ownership limitation applicable to public companies in Vietnam, unless the limitation is specifically provided under (i) international treaties to which Vietnam is a member or (ii) Vietnamese legislation;
- (b) the definition of "foreign ownership ratio" is aligned with the Enterprise Law, which will only be calculated on a voting shares basis; and
- (c) foreign investors are free to invest in non-voting shares of a public company unless the charter of such public company provides otherwise.

¹ **MOF:**

http://www.mof.gov.vn/webcenter/portal/btc/r/cd/dtvtb/ctdtvtb?id=13939&_afLoop=15366361344457076#!%40%40%3F_afLoop%3D15366361344457076%26centerWidth%3D0%2525%26id%3D13939%26leftWidth%3D100%2525%26rightWidth%3D0%2525%26showFooter%3Dfalse%26showHeader%3Dfalse%26_adf.ctrl-state%3Dv155lhc8z_142

SSC:

http://www.ssc.gov.vn/ubck/faces/vi/vilinks/videtail/vichitietintuc/vidstincongbo/vichitiet102?dDocName=APPSSCGOVVN162122118&_afLoop=14898851886000&_afWindowMode=0&_afWindowId=null



From a plain reading of the above provisions, we understand that permitted foreign shareholding in public companies will be 100%, except in cases where a specific limitation is provided under international treaties or Vietnamese legislation. In addition, foreign investors will not be subject to any shareholding limitation if they invest in non-voting shares (such as dividend preference shares or redeemable preference shares) of a public company, unless a specific restriction is provided under such company's charter.

2. New conditions for public company status

Currently, a private joint stock company will have to register public company status with the SSC if it falls into one of the following circumstances:

- (a) it has conducted a public offering;
- (b) it has shares listed on a stock exchange or a securities trading center; or
- (c) it has 100 shareholders, excluding professional securities investors, and a charter capital of VND10 billion or more.

Under Article 30.1 of the Draft Law, the criteria are amended such that a private joint stock company will become a public company if it falls into one of the following cases:

- (a) Case 1: The company has:
 - (i) a charter capital of VND30 billion or more (as compared to VND10 billion under the current law), and
 - (ii) "at least 20% of its charter capital is owned by 100 or more investors who are not shareholder owning 1% or more of the voting shares in such company".

With respect to the second condition, the current language of the Draft Law is not clear. We interpret this to mean that at least 20% of the company's charter capital is owned by 100 or more investors and none of such investors owns 1% or more of the voting shares in the company.

- (b) Case 2: The company has conducted a public offering in accordance with the law.

In essence, the Draft Law seeks to introduce new conditions on capital size and the shareholding structure in order for a company to be regarded as a public company. As such, compared with the current law, companies with smaller size of charter capital or simple shareholding structure will not qualify for and be required to register as a public company (except in the case where the company has conducted a public offering).

3. New conditions for public offering

The Draft Law clarifies that an initial public offering ("**IPO**") and a subsequent public offering will be subject to different conditions.



With respect to an IPO, the Draft Law imposes new conditions as follows:²

- (a) The company has at least VND30 billion of charter capital (as compared to VND10 billion under the current law);
- (b) The company must be profitable for the two years preceding the year that the company registers the IPO (as compared to one year under the current law);
- (c) *"At least 20% of the company's charter capital must be [sold/offered] to 100 or more investors who are not shareholders owning 1% or more of the company's charter capital; if the company's charter capital is VND100 billion or more, the minimum threshold is 15% of the company's charter capital; if the company's charter capital is VND1,000 billion or more, the minimum threshold is 10% of the company's charter capital".*

With respect to this condition, the current language of the Draft Law is not clear. We interpret this to mean that the company will be required to offer at least 20% (or 15% or 10%, as the case may be) of its charter capital to 100 or more investors and none of such investors will acquire 1% or more of the charter capital.

- (d) Major shareholders (i.e. any shareholder directly or indirectly owning 5% of total voting shares in the company, but the indirect shareholding remains undefined in the Draft Law) must commit to together holding at least 20% of the company's charter capital within one year from the completion date of the IPO; and
- (e) As of the date the company submits its IPO application dossier to the SSC, the company is not being criminally prosecuted and does not have an un-expunged criminal record.

With respect to a subsequent public offering, the public company must meet the following new conditions:³

- (a) The company has least VND30 billion of charter capital (as compared to VND10 billion under the current law);
- (b) The company must be profitable for the two years preceding the year that the company registers the subsequent public offering (as compared to one year under the current law);
- (c) The total value of the shares issued at par value must not be greater than total value of outstanding shares at par value, unless the company has an issuance guarantee with strong commitment;
- (d) The subsequent public offering must take place at least one year after the latest offering;

² Article 12.1, Draft Law.

³ Article 12.2, Draft Law.



- (e) If the public offering is for the purpose of raising capital for a project of the public company, at least 70% of the total offered shares must be purchased;
- (f) As of the date the company submits its application dossier to the SSC, the company is not being criminally prosecuted and does not have an un-expunged criminal record; and
- (g) The company is not subject to any administrative penalty for the wrong use of proceeds from an offering or inaccurate information disclosure within one year preceding the date of submission of the application dossier to the SSC.

4. New conditions for private placement

From the new definition of "private placement" under Article 4.17 of the Draft Law and based on MOF Explanatory Statement, the types of investors that can participate in a private placement of a public company will only include professional investors and strategic investors. However, strategic investors are not yet defined in the Draft Law.

Furthermore, the transfer restriction period will be at least 3 years for strategic investors and at least one year for professional investors (except in some stipulated cases).⁴ Under the current law, all shares issued through a private placement by a public company are subject to a one-year lockup (except in some stipulated cases), regardless of the type of the subscriber.

5. New triggering events of public offer to purchase

The Draft Law provides for new circumstances which will trigger a public offer to purchase by a purchaser (a "PPO"):⁵

Triggering event	Key change (as compared to the current law)
(a) an organization or an individual, and their related persons, intend to acquire voting shares to directly or indirectly hold 25% or more of the total voting shares in a public company;	To calculate this 25% threshold, shareholding of related persons will also be taken into account.
(b) an organization or an individual, and their related persons that [in the aggregate] hold 25% or more of the total voting shares in a public company, intend to acquire more shares in such company which will result in their direct or indirect shareholding reaching or exceeding each threshold of 35%, 45%, 55%, 65%, 75% of the total voting shares in such public company;	This triggering event will be based on each threshold of 35%, 45%, 55%, 65%, 75% and not based on the number of shares or by timeline as provided under the current law.

⁴ Article 28.1(b), Draft Law.

⁵ Article 34.1, Draft Law.



or	
(c) an organization or an individual, and their related persons that [in the aggregate] hold 75% or more of the total voting shares in a public company must continue to acquire the same class of shares from the remaining shareholders within 30 days with the disclosed purchase price, if the [remaining] shareholders request.	<p>This is a new triggering event. However, there is a similar requirement under the current law.</p> <p>Under the current law, after an PPO, if the purchaser holds 80% or more of the total outstanding shares of a public company, the purchaser must offer to purchase the remaining shares within 30 days with the same price and payment method as in the previous PPO.</p>

Based on the above new PPO triggering events, the acquisition threshold that triggers a PPO is only tied to the voting shares of a public company. However, the Draft Law makes clear that indirect shareholding will also be taken into account, but does not yet clarify further details on how indirect shareholding will be determined.

With respect to the exceptions of PPO, the Draft Law clarifies that the above triggering events for PPOs do not apply to the transfer of State capital or capital owned by State-owned enterprises in another enterprise.⁶

6. New conditions for public companies to redeem shares

Currently, public companies are free to redeem shares (subject to certain conditions) and keep them as treasury shares. However, the Draft Law now requires the public company to cancel its redeemed shares and decrease its charter capital accordingly, except for a few specific cases stipulated in the Draft Law.⁷ This means that treasury shares in public companies will only be allowed in limited cases.

7. Expanded scope of "related person"

The Draft Law provides for a broader definition of "related person" as compared to the current law.⁸ For example, business partners or key clients of a company may also be deemed a related person to such company. This expanded definition will also expand the applicability of other provisions under the Draft Law, such as PPOs, prevention of conflicts, obligations to disclose information, etc.

⁶ Article 34.2(d), Draft Law.

⁷ Article 35.5, Draft Law.

⁸ Article 4.39, Draft Law.



8. License of securities companies and fund management companies

Currently, the establishment and operation license of securities companies and fund management companies, which is issued by the SSC, also serves as their enterprise registration certificate.

Under the Draft Law, this provision will no longer apply. Instead, a security company/fund management company will first obtain an operation license issued by the SSC, and then obtain an enterprise registration certificate in accordance with the Law on Enterprises.⁹ Existing securities companies and fund management companies will have one year from the effective date of the new law to make the enterprise registration with the local Department of Planning and Investment.¹⁰

⁹ Article 81, Draft Law.

¹⁰ Article 135.3, Draft Law.

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