

## LEGAL UPDATE - NEW SECURITIES LEGISLATION

### January 2021

The first Law on Securities of Vietnam was passed by the National Assembly in 2006 and was amended in 2010 (together with its guiding decrees, *the Old Law*) when the securities market in Vietnam had just been established. After more than a decade of growth, the activities, transactions and relationships in the securities market have become more extensive and sophisticated which requires a more robust legal framework for regulation and administration of the rising securities market. By that virtue, the National Assembly passed a new law on securities on 26 November 2019 and the Government issued an implementing decree in respect of the new law on 31 December 2020 (collectively, *the New Law*) which both came into effect as from 1 January 2021.

This Legal Update discusses a number of noteworthy points of the New Law.

#### 1. Public companies

##### (a) New criteria to qualify public companies

A joint stock company will become a public company if (i) it has a paid-up charter capital from VND30 billion (as opposed to VND10 billion under the Old Law) and at least 10% of the total voting shares held by at least 100 non-majority shareholders (i.e. shareholders holding five per cent or more of total voting shares in such company), or (ii) it has made a successful initial public offer of shares (*IPO*) as registered with the State Securities Commission of Vietnam (*SSC*).

##### (b) Foreign ownership limitations in public companies

Public companies that register their business activities as provided in the list of sectors subject to market access restrictions for foreign investors (*Market Access Restriction List*)<sup>1</sup> shall comply with the foreign ownership limitations provided in the Market Access Restriction List. In case there is no specific foreign ownership limitation in the Market Access Restriction List, the ownership ratio of foreign investors shall be capped at 50% of the charter capital of the public company (as opposed to 49% of the total voting shares in a public company under the Old Law).<sup>2</sup>

<sup>1</sup> According to the Law on Investment 2020, the Government will issue this Market Access Restriction List in the form of a decree. Up to the date of this Legal Update, the Government has not issued this decree.

<sup>2</sup> The term of foreign ownership ratio under the New Law has been 'redefined' to the extent that the ratio is computed on the basis of the charter capital of a public company instead of the total voting share capital of a public company as previously defined under the Old Law.

## 2. Offering

### (a) Initial public offering (IPO)

The New Law has tightened the conditions for a company to perform an IPO, for example:

- (i) the company has a paid-up charter capital of at least VND30 billion (as opposed to VND 10 billion under the Old Law);
- (ii) the operation of the company has been profitable for two consecutive years (as opposed to one year under the Old Law) preceding the year of the IPO;
- (iii) at least 15%, or 10% in case the company has a charter capital of VND1,000 billion or more, of the voting shares of the company must be offered to at least 100 investors who are not major shareholders;
- (iv) shareholders who are classified as major shareholders of the company before the IPO must undertake to collectively hold at least 20% of the company's charter capital for at least one year after the completion of the IPO; and
- (v) the company is not criminally prosecuted and does not have an un-expunged criminal record on violations of economic management orders.

### (b) Subsequent public offering of shares

The New Law clearly sets out a number of requirements for a subsequent public offering of shares, for example:

- (i) the company has paid-up charter capital of at least VND30 billion (as opposed to VND10 billion under the Old Law);
- (ii) the operation of the company has been profitable for the year preceding the year of the subsequent public offering;
- (iii) the total value of the shares issued at par value must not be greater than the total value of the outstanding shares in circulation at par value, unless the company issue shares (i) using the owner's capital, (ii) for the conversion, consolidation or merger of companies, or (iii) having an underwriter that undertakes to purchase all shares of the company for resale, or to purchase the shares of the company that have not been allotted;
- (iv) if the public offering is for the purpose of raising capital for a project of a public company, at least 70% of the total offered shares must be subscribed by the investors; in addition, a plan should be prepared by the issuing organisation to fill the shortfall of capital expected from the public offering; and
- (v) the company has not been criminally prosecuted and does not have an un-expunged criminal record on violations of economic management orders.

### (c) Registration for trading and listing

The New Law further requires that the issuing organisation upon an IPO or a subsequent public offering must register its newly issued shares for listing on the stock exchange, or trading in UPCoM if the shares have not been listed, within 30 days of completion of the public offering.

If the securities have been deregistered for listing, whether on a mandatory or voluntary basis, the public companies may only re-register the securities for listing after a period of at least two years of trading in UPCoM (as opposed to 12 months of trading in UPCoM under the Old Law).

### (d) Offering by public companies after corporate reorganisation

Under the New Law, public companies which are formed as a result of a corporate reorganisation (i.e. merger, consolidation, splitting, separation) will not be required to wait for a period of at least one year (as required under the Old Law) to carry out a public offering provided that the business operations of such companies preceding the year of public offering are profitable and at the same time there are no accumulated losses up until the time of public offering.

**(e) Offering shares below the par value**

The New Law allows public companies to issue additional shares below the par value of VND10,000 if the following conditions are satisfied:

For public offerings:

- (i) the average reference price of shares in the securities trading system within 60 consecutive days preceding the date of finalising the list of shareholders for collecting opinions of the shareholders or holding General Meetings of Shareholders to approve for the issuance plan is lower than the par value;
- (ii) the public company has a capital surplus according to the latest audited financial statements to compensate the capital deficit caused by the issuance of additional shares below the par value; and
- (iii) such other conditions as applicable to any subsequent public offering of public companies according to the New Law,

For private placements:

- (i) the private placement exclusively calls for strategic investors and the lock-up period for share transfer is three years as from the completion of the private placement;
- (ii) the private placement would not result in any cross-ownership according to the Law on Enterprises;<sup>3</sup>
- (iii) the conditions in items (i) and (ii) above for public offering below the par value are satisfied;
- (iv) other conditions as applicable to a private placement for public companies.

**(f) New circumstances for mandatory public offering (MPO)**

Under the Old Law, an MPO (also known as a tender offer or a public offer to acquire) is triggered by: (i) an acquisition of shares resulting in the holding of 25% or more of the voting shares; (ii) an acquisition of a further 10% or more of the voting shares of a public company by a shareholder and its related persons together holding 25% or more of the voting shares in that public company; or (iii) an acquisition of a further 5% up to below 10% of the voting shares of a public company by a shareholder and its related persons together holding 25% or more of the voting shares in that public company within one year as from the completion of the previous MPO.

Under the New Law, the circumstances under which an MPO is triggered are extended to cover **related persons**<sup>4</sup> and **indirect shareholding** as follows:

- (i) an investor and its **related persons** intend to acquire voting shares to, **directly or indirectly**, hold in aggregate 25% or more of the total voting shares in a public company; and
- (ii) a shareholder and its related persons holding in aggregate 25% or more of the total voting shares in a public company, intend to acquire more shares and such acquisition will result in their direct or indirect shareholding reaching or exceeding each threshold of 35%, 45%, 55%, 65% and 75% of the total voting shares in such public company.

In addition, if a shareholder and its related persons collectively hold 80% or more of the total voting shares in a public company after an MPO, they must continue to offer to acquire the remaining shares within 30 days on the same price and conditions as those of the previous MPO.

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<sup>3</sup> According to the Law on Enterprises 2020, a subsidiary company must not contribute capital to or purchase shares of the parent company; subsidiary companies of the same parent company must not contribute capital to or purchase shares of each other to establish cross ownership.

<sup>4</sup> Under the New Law, the definition of **related persons** has been extended to include the company secretary, the person in charge of corporate governance and anyone authorised to disclosed information of a public company, all persons as regarded as "related persons" under the Law on Enterprises.

### g. Share redemption

Prior to 1 January 2021, public companies were allowed to redeem their own shares for trading as treasury shares provided that they satisfied a number of conditions as stipulated under the regulations of the Ministry of Finance. The New Law has codified the conditions for redemption of shares by public companies under such regulations, but at the same time tightened the conditions for the trading of those redeemed shares.

Accordingly, a public company may only resell its shares in any of the following scenarios:

- (i) it redeems odd shares issued according to a dividend payment plan;
- (ii) it redeems odd shares issued according to a fundraising of the existing shareholders; or
- (iii) it redeems odd lots of shares as requested by its shareholders.

Otherwise, a public company will be obliged to reduce its charter capital within 10 days as from the completion of such redemption.

## 3. Private placement

The scope of a private placement under the New Law has been narrowed down and the restrictions on transfer are tightened as compared to those under the Old Law.

Although a private placement of securities is generally defined as an offer for sale to (i) less than 100 investors excluding professional securities investors,<sup>5</sup> or (ii) professional securities investors only, the New Law further provides that a private placement of shares, convertible bonds and warrant-linked bonds by public companies may only be offered to strategic investors<sup>6</sup> and PSIs and a private placement of bonds by public companies may only be offered to strategic investors. This means that individuals and organisations not being professional securities investors or strategic investors will no longer be allowed to participate in a private placement of public companies.

Under the Old Law, all shares issued under a private placement will be subject to a one year lock-up period. The transfer restriction period under the New Law will be at least three years for strategic investors and one year for professional securities investors.

## 4. Restructuring of key bodies

The New Law restructures the Ho Chi Minh Stock Exchange and Hanoi Stock Exchange to form one single Vietnam Stock Exchange (**VSE**). In addition, the current Vietnam Securities Depository Centre will be restructured to form Vietnam Securities Depository and Clearing Corporation (**VSDCC**). Both VSE and VSDCC are to be established and operating under this New Law and the Law on Enterprises with over 50% of the total voting shares or charter capital of such companies to be owned by the State authorities.

## 5. Secured transactions

As from 1 January 2021 when the New Law takes effect, VSDCC will be responsible for taking registration of secured transactions in respect of securities which have been registered for trading with VSDCC. The National Registration Authority for Secured Transactions (**NRAST**) will be responsible for taking registration of secured transactions in respect of other types of securities.

All secured transactions using the securities that have been registered for trading with VSDCC as collateral assets and having been registered with NRAST prior to 1 January 2021 will not be required for re-registration with VSDCC. Any amendment, correction or de-registration of such security transactions shall be carried out by NRAST.

<sup>5</sup> Under the New Law, **professional securities investors (PSIs)** do not only refer to financial institutions (such as commercial banks, financing companies, finance-leasing companies, insurance business companies, securities trading companies) as defined under the Old Law, but also extend to cover branches of foreign banks, fund management companies, securities investment companies, securities investment funds, international financial institutions, State financial funds, enterprises with contributed charter capital of over VND100 billion (approx. US\$4.3 million), listed enterprises or enterprises with registered transactions in the Vietnam Stock Exchange, individuals having securities practising certificates, individuals holding a portfolio worth at least VND2 billion (approx. US\$86,000), individuals with taxable income in the latest year of at least VND1 billion (approx. US\$43,000).

<sup>6</sup> **Strategic investors** is a new defined term under the New Law, which means investors with financial capacity, technology, a long term cooperation with the relevant enterprise and selected according to the approved criteria of the General Meeting of Shareholders. These two concepts are primarily used for private placement by public companies, securities companies, securities fund management companies.



## 6. Securities companies and fund management companies

### (a) Expanded scope of activities

Securities companies, subject to an approval by the SSC, may provide financing to their customers for the purchase of securities, advance the proceeds of sale, lend securities or collaborate with credit institutions to provide financing or advance to customers to purchase or sell securities respectively, subject to an approval by the SSC, provided that they meet the requirements set out under the New Law with regard to, for example, the gearing ratio, available funding ratio, management and monitoring system.

### (b) Foreign ownership limitations

As a matter of principle, foreign investors and their related persons may, subject to an approval by the SSC, acquire or contribute up to 100% of the charter capital in securities companies and fund management companies provided that they satisfy the following conditions:

- (i) the foreign investor has been licensed and operating in the sectors of banking, securities, insurance for a period of two years preceding the acquisition or contribution;
- (ii) the licensing authority of the country where the foreign investor was incorporated and the SSC entered into a bilateral or multi-lateral agreement on information exchange, cooperation in the management, inspection, surveillance of securities transactions and stock exchange markets;
- (iii) the business operations of the foreign investor have been profitable for a period of at least two years preceding the acquisition or contribution according to its audited financial statements.

Otherwise, foreign investors may only acquire or contribute up to 49% of the charter capital in securities companies and fund management companies (as opposed to less than 51% according to the Old Law).

The acquisition or contribution in securities companies or fund management companies by foreign investors must be completed within six months as from the effective date of the SSC approval.

### (c) Licensing procedure

Prior to the effective date of the New Law, the establishment and operation of securities companies and fund management companies are confined to one single license which is issued by the SSC. As from 1 January 2021, the licensing procedure is a two-step process namely obtaining an establishment and operation license from the SSC and an enterprise registration certificate (**ERC**) from the local Department of Planning and Investment. Existing securities companies and fund management companies will have a grace period of two years to obtain ERCs.

Please contact us if you have any questions relating to this Legal Update.

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