

FRASERS NEWSLETTER

In this edition of our newsletter we report on:

- (i) new temporary guidelines to the Law on Investment and the Law on Enterprises;
- (ii) new law on labour safety and hygiene;
- (iii) a short note following up regulations in relation to retirement insurance; and
- (iv) a summary of an interesting draft decree in relation to offshore indirect investment.

We trust that you find this edition of our newsletter an interesting read and welcome any feedback or comments you may have on any of our topics. Our address for comments is newsletter@frasersvn.com.

Whilst we aim to provide a useful update on new legislation, Frasers' Newsletter does not constitute formal legal advice. Should you feel that you require further information on any of the issues in this edition of the Newsletter, please contact us at the address above or via your usual Frasers' legal adviser.

PROVISIONAL GUIDELINES IN IMPLEMENTING THE NEW LAW ON ENTERPRISE AND LAW ON INVESTMENT

Avid readers of Frasers newsletters and Legal Updates will be well aware that as from 1 July 2015, the new Law on Enterprise (**New LOE**) and Law on Investment (**New LOI**) came into force and have led to numerous changes to the requirements and procedures in relation to the registration of investment projects and enterprises with the licensing authorities in Vietnam. However, for the time being, the relevant implementing legislation of the New LOE and New LOI (together, **the New Laws**) has not been promulgated as expected. In this transitional period, on 26 June 2015, 30 June 2015 and 24 July 2015, the Ministry of Planning and Investment (**MPI**) issued a series of important official letters providing provisional guidelines on implementing the New Laws, comprising:

- Official Letter No. 4211/BKHDT-DKKD dated 26 June 2015 on enterprise registration (**OL 4211**);
- Official Letter No. 4326/BKHDT-DTNN dated 30 June 2015 on procedures for receiving applications and forms for investment activities in accordance with the LOI (**OL 4326**);
- Official Letter No. 4333/BKHDT-PC dated 30 June 2015 on implementing a number of contents of the LOI (**OL 4333**);
- Official Letter 4366/BKHDT-PC dated 30 June 2015 on implementing the LOI (**OL 4366**);
- Official Letter 5122/BKHDT-PC dated 24 July 2015 on implementing the LOI (**OL 5122**); and

- Official Letter No. 4332/BKHDT-DTNN dated 30 June 2015 on provisional procedural forms for offshore investment activities in accordance with the LOI (**OL 4332**).

In this article, we would like to highlight significant issues provided in the above mentioned official letters referred to above.

Enterprise registration procedures

With respect to an enterprise currently operating under a sole Investment Certificate (or an Investment Licence) (**IC**) in accordance with the old laws, if there is any change to the enterprise registration contents of the IC, the enterprise will apply for the issuance of an Enterprise Registration Certificate (**ERC**). The ERC will replace the enterprise registration contents of the IC of such enterprise.

It is noted that according to OL 4211, with respect to the changes subject to notification procedures, comprising changes to managers, information on foreign shareholders, notice on private offer of shares or notice on lease of private enterprises, the MPI guides provincial/municipal Departments of Planning and Investment (**DPI**) that, upon receiving a relevant notification, the DPI will issue a receipt and a Written Confirmation on the changes to business registration contents upon the completion of its assessment, or on its opinion regarding a private offer of shares.

OL 4211 provides that a new established enterprise or enterprises which would like to change its sample of seal or make more than one seal can notify to the local DPI its sample of seal, attached with the Decision or Resolutions and copy of Minutes of the owner, the Members' Council or the Board of Management (as the case maybe) regarding the form, contents and quantity of its seal(s).

Investment registration procedures

OL 4326 provides a series of standard forms which would be temporarily used for investment procedures. According to OL 4326, before an enterprise is set up, the founding members/shareholders will sign an investment application as the investors of the project. Subsequent to the establishment of the enterprise, such enterprise will be regarded as the investor for signing the relevant application forms, documents and investment reports relating to the project in Vietnam. As indicated in the template of the IRC under OL 4326, with respect to an investment project, there would be just one IRC issued to all of the foreign investors of such project, and each investor would be issued with a copy of the IRC.

With respect to investment applications which have been prepared in accordance with the old regulations and submitted to the licensing authority prior to 1 July 2015, OL 4333 provides that:

- Where the deadline for the licensing authority to consider and provide their feedback to the applicant of such application dossier is prior to 1 July 2015 (**Case 1**), the licensing authority will issue the IRC for the investors in accordance with the New LOI and is not entitled to request further documents as required by the New LOI.

It seems that OL 4333 does not require the applicant to revise its application dossier in line with the New Laws. However, in another official letter, being OL 4366, the MPI sent to all DPIs a message that, in relation to Case 1, the licensing authority should encourage an investor to adjust its investment application dossier in line with the New LOI, and if the investors refuse such encouragement, the licensing authority should report to the MPI for further instruction.

- Where the deadline for the licensing authority to consider and provide their feedback to the applicant of such application dossier is subsequent to 1 July 2015 (**Case 2**), the licensing authority would advise the investors to revise the application dossier in accordance with the New Laws and will issue the IRC for the investors in accordance with the New Laws.

Consequences of registration procedures for adjustments to the IC

Under OL 5122, if the adjustments to the IC influence only the business registration part of the IC, the enterprise shall be issued with a new ERC. Moreover, if the adjustments to the IC influence only the investment project registration part of the IC, the enterprise/investor shall be issued with a new IRC. Only in the event that the adjustments to the IC influence both of the business registration and investment project registration parts of the IC, the relevant enterprise registration procedures shall be conducted prior to the relevant investment registration procedures.

Further, in the circumstance that there is a change to the business registration contents due to the participation/change of ownership of foreign investors of the enterprise, the procedures for obtaining

an M&A Approval shall be implemented before the relevant procedures of business registration.

In addition, if an enterprise wishes to convert its IC to an ERC and an IRC, the enterprise and investors shall apply for the issuance of the ERC, and then apply for the issuance of the IRC at a later stage.

NEW LAW ON LABOUR SAFETY AND HYGIENE

With the aim of protecting employees from labour accidents and diseases, on 25 June 2015, the National Assembly issued an important new piece of legislation namely Law No. 84/2015/QH13 on Labour Safety and Hygiene (**New LSH Law**). Currently, labour safety and hygiene are stipulated in Chapter IX of the Labour Code. With the issuance of the New Law, these matters are separated into an independent legislation and providing more regulations.

Below are the highlights introduced under the New Law.

Broader scope of application

The New Law provides a new concept of “individuals working not under a labour contract”. This is the first time this concept is referred to in the legislation of Vietnam. It is stated that the New LSH Law would be applicable to not only employees under labour contracts, foreign employees, but also “individuals working other than under labour contracts”.

However, the New LSH Law is silent on the definition of “individuals working other than under a labour contract”. According to a report on the evaluation of the impact of the New LSH Law prepared by the Ministry of Labour, Invalids and Social Affairs (**MOLISA**) dated 29 August 2014 in the process of issuing the New LSH Law, “individuals working other than under labour contracts” comprises self-employed individuals; individuals working in agricultural, forestry, fishing or salt production sectors; and individuals working at home.

Furthermore, the New LSH Law provides regulations on labour safety and health applicable to certain special classes of employees, such as female employees, senior employees, outsourced employees, Vietnamese employees working overseas and employees working at home as agreed with their employers.

Periodical health check-up

The New LSH Law expressly repeats again a provision of the Labour Code, that an employer must arrange a periodical health check-up for its employees at least once per year. This is a compulsory obligation of the employer, and we understand that the employer must do it regardless as to whether or not such employer has provided other benefits on healthcare to its employees, such as additional medical insurance, etc. The New LSH Law provides that all expenses for the above periodical health check-up would be considered as deductible expenses for the purposes of calculating corporate income tax of an employer.

It is noted that where an employer fails to comply with its compulsory obligations in relation to periodical health check-ups, an administrative penalty of up to VND15 million may be imposed on the employer.

Labour accidents and occupational diseases

Similar to the Law on Social Insurance 2006 and the Law on Social Insurance 2014, the New LSH Law provides that an employee suffering a working capacity decrease of at least 5% as a result of a labour accident shall be entitled to the benefits under the labour accident insurance scheme. However, a broader definition of a labour accident is provided. According to the New LSH Law, a labour accident is an accident which occurs in one of the following circumstances:

- (i) Labour accidents occurring at the workplace and during working hours.

As compared to the Law on Social Insurance, the New LSH Law further clarifies that such provision also includes the time during which employees conduct necessary activities at the workplace such as break, mid-shift meal, menstrual hygiene, bathing, breastfeeding, etc. as provided in the Labour Code and the Internal Labour Rules.

- (ii) Labour accidents occurring outside the workplace or outside of working hours but while on an assignment from the employer.

It is noted that such assignment is required to be made by the employer or the authorised representative of the employer who is authorised to directly manage the relevant employees.

- (iii) Travelling between the employee's residence and workplace within a reasonable period of time and on a reasonable route.

It should be noted that an exemption for an employer from the obligation to compensate an employee suffering the consequences of a labour accident and disease can arise when the labour accidents are due to:

- (i) differences between a victim and a person who causes the accident, which is not related to the working tasks;
- (ii) an employee intentionally harming his health; or
- (iii) illegal drug use.

With respect to occupational diseases, the New LSH Law expressly states that when an employee retires, then his occupational disease is detected, he may be still entitled benefits on insurance scheme for occupational diseases in accordance with the implementation regulations of the Government.

The New LSH Law will take effect as from 1 July 2016. With the stricter requirements, the New LSH Law will likely have a marked impact on greater compliance by organisations and individuals.

FOLLOW UP REGULATIONS ON RETIREMENT INSURANCE

The constant debate surrounding the new retirement regime under Law No. 58/2014/QH13 of the National Assembly, dated 20 November 2014, on social insurance (**2014 LSI**) has been finally resolved. On 22 June 2015, the National Assembly has passed Resolution No. 93/2015/QH13 (**Resolution**) on this matter which comes into force with full effect as from 1 January 2016, the same date the 2014 LSI comes into effect. Accordingly, from 1 January 2016, when an employee resigns from his/her job and the period of having paid social insurance is less than 20 years, such employee still has the right to choose to either:

- (i) reserve the period he/she has paid social insurance with respect to the previous job and add this to the period of paying social insurance with respect to the new job; or
- (ii) receive the lump sum payment in accordance with the number of years the employee has contributed to social insurance in the previous job.

OFFSHORE INDIRECT INVESTMENT

Recently, the State Bank of Vietnam (**SBV**) has submitted to the Government for its consideration and issuance, a draft decree on guidelines for offshore investment by means of purchase or sale of securities or other valuable papers or investment via securities investment funds or other intermediate financial institutions in a foreign country (**the Draft**). The Draft has referred to all activities in respect of "*purchase or sale of securities or other valuable papers or investment via securities investment funds or other intermediate financial institutions in a foreign country*" as "*offshore indirect investment*".

The statutory right of Vietnam-based investors to make offshore indirect investment had been officially recognised for a long time in the former Law on Investment of 2005. Accordingly, indirect investment means a form of investment through the purchase of shares, share certificates, bonds, other valuable papers or investment through a securities investment fund and through other intermediary financial institutions and whereby the investor does not participate directly in the management of the investment activity.

Pursuant to the current Law on Investment¹, there is no classification of direct and indirect investment as per the former Law on Investment. However, Article 52.1(d) still provides that the investors shall be entitled to invest offshore by means of purchase or sale of securities or other valuable papers or

¹ Law No. 67/2014/QH13 on Investment passed by the Legislature XIII of the National Assembly of the Socialist Republic of Vietnam at its 8th session on 26 November 2014 (**Law on Investment**).

investment via securities investment funds or other intermediate financial institutions in a foreign country. Such activities are now referred to as “*offshore indirect investment*”, and provided in detail, by the Draft.

Since there have been no official procedures and guidelines in respect of the implementation of offshore indirect investment issued by the relevant governmental authorities, it has been preventing local investors from duly and lawfully exercising their statutory rights in practice until now. The Draft indeed gives a positive signal of a potential forthcoming removal of the current hindrance under the laws of Vietnam to offshore investment activities by Vietnam-domiciled investors.

Limited Group of Onshore Investors

We observe that the SBV has to date adopted a very prudent and selective approach in terms of setting forth a legal framework for controlling offshore indirect investment activities. According to the SBV’s opinion, the offshore indirect investment activities themselves entail significant risks to not only investors themselves, but also the international balance of payments, the foreign currency market and the macroeconomics of Vietnam. As a result, the Draft is not going to pave a way for every onshore investor to conduct offshore indirect investment, but for a much selected group of investors who have developed professional competence and experience in financial and securities investments, or who at least have sound financial standing.

According to Article 14 of the Draft, the following economic organisations established and operating in accordance with the laws of Vietnam (***Eligible Economic Organisations***) shall be permitted to make offshore indirect investment for themselves:

- (i) securities company;
- (ii) fund management company;
- (iii) insurance business company (excluding reinsurance company and insurance brokerage company);
- (iv) commercial bank;
- (v) general finance company; and
- (vi) state capital and investment corporation.

The other types of Eligible Economic Organisations shall be allowed to entrust other authorised organisations to conduct offshore indirect investment activities, provided that the former satisfies a number of conditions in relation to its financial standing and compliance with the laws of Vietnam. The economic organisations authorised to act as trustees in respect of offshore indirect investment only comprise fund management companies and commercial banks.

In light of the above provisions, it can be seen that the Eligible Economic Organisations shall carry out their indirect investment project overseas by two methods specified in the Draft, including (i) self-investing and (ii) entrusting.

With respect to individual investors, in general, they are not welcome to engage in offshore indirect investment activities because of their risky nature. However, there is one exception where the Draft allows them to participate in offshore share bonus plans. Such exception is as a result of a practice implemented by a number of multinational companies having a commercial presence in Vietnam of providing the opportunity to join their global employee share bonus plan, to employees in Vietnam. Such employees are entitled to enjoy benefits from being granted shares issued by offshore parent companies. More than that, the SBV to date has also developed certain de-facto guidelines for such activities, or even, approved certain cashless share option plans. It is contemplated that procedures for participation into a share bonus plan, as well as for money remittance overseas will be issued by the SBV in the future.

Limited Types of Investment Tools

The selected group of authorised investors is only allowed to invest into certain types of investment tools, which shall be specifically identified by the SBV in each period of time, and shall be in accordance with their business lines. Self-investing organisations and entrusted organisations being commercial banks, or general finance companies shall be entitled to self-invest into, and be entrusted to invest into, investment tools being bonds and investment products on the currency market, and shall not be entitled to invest into shares and other types of investment tools.

Fund for Offshore Indirect Investment

Currency used for offshore indirect investment by means of entrustment must be foreign currency.

The investors shall use foreign currency available in their accounts for the purpose of offshore indirect investment activities. In other words, it is impossible for investors to buy foreign currency for the same purpose. The commercial banks shall have to balance their foreign currency sources for offshore indirect investment in conformity with any applicable regulations on banking activities.

At some stage in the future, investors may obtain loans in foreign currency from credit institutions or foreign bank branches in Vietnam to make offshore indirect investment. This possibility is subject to the decision by the SBV in on an ad hoc basis.

Conditions and Procedures for Offshore Indirect Investment

First of all, a licence for offshore indirect investment by means of self-investing or a licence for offshore indirect investment by means of entrustment, issued by the Ministry of Finance (**MOF**) or the SBV, is compulsory for all investors. Relevant application dossiers and procedures, however, have not yet been specified in the Draft.

Secondly, any self-investing organisations and entrusted organisations shall open one (1) offshore indirect investment capital bank account, or offshore indirect investment entrusted capital bank account respectively, in foreign currency at authorised commercial banks in Vietnam for collections and disbursements in relation to offshore indirect investment. Please note that procedures for opening and use of the above bank accounts shall comply with specific procedures to be issued by the SBV. The entrusted organisations are required to segregate capital entrusted by each investor, and segregate capital entrusted by all investors and capital for self-investing by itself. The self-investing organisations and entrusted organisations shall be allowed to open a foreign currency account for collection and disbursement in relation to offshore indirect investment at the relevant foreign country.

Thirdly, the investors or entrusted investors must invest within the safe investment ratio² stipulated by the MOF or the SBV. Prior to remittance overseas, they shall also register with the SBV as to the self-investing limit or entrusted investment limit³, where applicable, and obtain a confirmation of the SBV on the same. The self-investing limit or entrusted investment limit must be within the total limit for offshore indirect investment approved by the Prime Minister.

Finally, self-investing organisations, who have been issued with a licence for offshore indirect investment by means of self-investing, shall be restricted in entrusting its offshore indirect investment to any entrusted organisations. The entrusting organisations shall be only permitted to entrust their offshore indirect investments to one (1) entrusted organisation. The entrusted organisations shall not be permitted to make any re-entrustment to any other local third party.

² Self-investing ratio means the maximum offshore indirect investment ratio calculated in proportion to paid-up charter capital or owner's equity or scale of assets of the self-investing organisations.

³ Limit for self-investing or limit for entrusted investment means the maximum amount in foreign currency which the self-investing organisations or entrusted organisation are annually permitted to conduct offshore indirect investment.

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