

## Client Alert

August 2010

### New Draft Decree on Conversion of Enterprises with 100% State-owned Capital into Shareholding Companies

The Draft Decree on conversion of enterprises with 100% State-owned capital into shareholding companies (the “**Draft Decree**”) provides regulations on the procedures of conversion of 100% State-owned capital enterprises into joint stock companies (i.e., equitisation). The equitisation process under this Draft Decree applies to parent companies of economic groups, State-owned corporations (including State-owned commercial banks); parent companies in parent subsidiary company groups; independent cost-accounting member companies of corporations for which the State made the decision on investment and establishment; dependent accounting affiliates of groups, State-owned corporations, parent companies and independent cost accounting member companies of corporations; and limited liability companies in which the State holds 100% of the charter capital.

The Draft Decree is proposed to replace current Decree No. 109/2007/ND-CP dated 26 June 2007 on conversion of 100% State-owned capital enterprises into joint stock companies (“**Decree No. 109**”).

#### 1. Eligible investors

This Draft Decree provides more detail on the range of foreign investors permitted to buy shares at equitisation as compared to Decree No. 109. While Decree No. 109 only defines that foreign investors means foreign organizations and individuals who spend capital to conduct investment activities in Vietnam, the Draft Decree defines foreign investors specifically to include:

- Organizations established and operated under foreign laws and branches of such organizations inside and outside Vietnam;
- Organizations established and operated in Vietnam with a capital contribution rate of the foreign parties beyond 49%;
- Investment fund, security-investment companies with a capital contribution rate of the foreign parties beyond 49%; and
- Foreign individuals without Vietnamese citizenship residing outside or inside Vietnam.

The Draft Decree retains the requirement that foreign investors wishing to purchase shares must open a deposit account at an organization providing

Baker & McKenzie (Vietnam) Ltd.  
12th Floor, Saigon Tower  
29 Le Duan Blvd  
District 1  
Ho Chi Minh City  
Socialist Republic of Vietnam  
Tel: +84 8 3829 5585  
Fax: +84 8 3829 5618

Baker & McKenzie (Vietnam) Ltd.  
Hanoi Branch Office  
13th Floor, Vietcombank Tower  
198 Tran Quang Khai Street  
Hoan Kiem District, Hanoi  
Socialist Republic of Vietnam  
Tel: +84 4 3825 1428  
Fax: +84 4 3825 1432

payment services which is currently operating in the territory of Vietnam, and the payment for purchase and sale of shares, the receipt and use of dividends, and other receipts and expenditures from investment in the purchase of shares must be conducted through this account.

## 2. Strategic investors

There are several significant developments in this new Draft Decree related to strategic investors. One of the most important is in relation to the price of shares. Under the Draft Decree, the price of shares sold to strategic investors is determined according to the principles:

- In case of selling shares to strategic investors after the public auction, the Steering Committee for Equitisation negotiates the price directly with strategic investors with the condition that the price must not be less than the lowest successful price at the public auction.
- In case of a restricted tender, the price is determined according to the result of restricted tender between strategic investors with the condition that the price must not be less than the initial price of the auction decided by the competent authority.
- In case of direct negotiation prior to the public auction, the price is negotiated between parties with the condition that the price must not be less than the initial price decided by the competent authority.

These changes represent a welcome improvement in the previous restriction that the price must not be lower than the average successful price at the public auction, but it remains to be seen if they go far enough.

The Draft Decree also introduces a new requirement that for large enterprises with the State capital over VND500 billion (approximately US\$26 million) operating in specific industries or fields (insurance, banking, telecommunications, aviation, mineral exploitation) and parent companies of groups or State corporations, the equitisation decision-making body must report to the Prime Minister for the decision of criteria for strategic investors, selling method and quantity of sale shares where it is necessary to choose the strategic investors in advance.

The Draft Decree extends the lock-up applicable to strategic investors, stating that strategic investors may not transfer their shares within a period of at least five years from the date the joint stock company is granted its business registration certificate (up from three under the Decree No. 109). In special cases where it is necessary to transfer the shares before the expiry of this time limit, an approval from the General Meeting of Shareholders is required.

If a strategic investor violates the commitments they have made as a strategic investor, or the above transfer restriction, they must compensate for the damage caused.

The Draft Decree retains the existing rule that the strategic investors must deposit 10% of the value of the shares registered to purchase according to initial price determined by the Steering Committee for Equitisation. The investor will not be able to receive the deposit back if they waive their purchase right.

The Draft Decree retains the current rule that the shareholding for sale to strategic investors and other investors must not be less than twenty-five (25) per cent of the charter capital of the equitising enterprise. Additionally, the shares sold to “other investors” must make up at least 50% of this amount.

### 3. Share purchase rights of employees

Employees named on the list of regular employees of the enterprise as at the time of the announcement of the value of the equitised enterprise are entitled to purchase up to a maximum of one hundred (100) shares for each year of actual employment in the State sector with the selling price equal to 60% of average successful auction price or of lowest successful auction price of strategic investors (in case of sale with pre-negotiation).

Employees named on the list of regular employees of the enterprise as at the time of the announcement of the value of the equitised enterprise who commit to work for that enterprise for at least three years may purchase additional incentive shares at the rate of 200 shares/year. These extra shares are restricted from transfer for three years, and will be transformed into common shares when the three years are over.

The Draft Decree retains the existing rule that in case the enterprise is in the category of those in which the State holds controlling shares, the body making the equitization decision shall consider and make a decision on adjusting the charter capital in order to reasonably increase the number of shares for sale at incentive rates to employees in the enterprise or to reduce the number for sale to strategic investors and normal investors, but ensuring that shares for sale to strategic investors and normal investors are not less than twenty (20) per cent of the charter capital.

### 4. Financial settlement upon equitisation

Prior to conducting the valuation exercise, equitising enterprise must submit documents to ask the relevant tax authority to check and finalise all due amounts. Within 30 days from the date of receiving the documents of the equitising enterprise, the tax authority must process the finalisation.

Due to the fluctuation of the financial market, the Draft Decree requires that at the time equitisation enterprises are granted the first Business Registration Certificates and make the report of financial status for the hand-over from State-owned enterprise to joint stock company, such enterprises must re-evaluate the securities investments (if any) specified in the value of the enterprises.

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

**Hoang Kim Oanh Nguyen**  
+ 84 8 3520 2629  
hoangkimoanh.nguyen@  
bakermckenzie.com

**Simon Taylor**  
+ 84 4 3936 9404  
simon.taylor@bakermckenzie.com

## 5. Enterprise valuation

The Draft Decree provides for a new role of the State Audit Authority in the equitisation process. Accordingly, the State Audit Authority will audit and monitor the process of equitisation, check the valuation results and deal with the financial issues of large enterprises with the State capital over VND500 billion operating in specific industries or fields (insurance, banking, telecommunications, aviation, mineral exploitation).

On the valuation of land in the enterprise value, the Draft Decree provides some more detail over Decree No. 109, including:

- Equitising enterprises must make a land use plan and submit it to the People's Committees of the province or city under the Central Authority where the land is located before evaluating the enterprise.
- Within 30 days, provincial authorities must express official opinions on the plots that the enterprises continue to use after equitisation for the enterprises to finalise the land use plan after equitisation, evaluate the land of the enterprise and complete relevant procedures prior to the officially transforming into a joint stock company.

On the determination of charter capital, the Draft Decree newly requires that in case the actual value of State capital in enterprises approved by competent authorities is larger than required charter capital for the operation of enterprises, the charter capital will be determined in accordance with actual demand. The difference between the actual value of State capital in enterprises and charter capital is paid to Reward Funds and Welfare Funds.

## 6. Method of selling the shares

The Draft Decree has amended some rules relating to the requirement for public auctions at the Stock Exchange, requiring that if the total value of stocks sold out is at least VND20 billion (approximately, US\$ 1.1 million), up from VND10 billion under Decree No. 109, the enterprise must carry out a public auction at the Stock Exchange. Simultaneously, the Draft removes the requirement to register the auction with the Ministry of Finance.

This client alert provided by Baker & McKenzie (Vietnam) Ltd. is intended to provide our clients, and other interested parties, with an overview of the recent legal changes in the relevant area for information purposes only. The information contained in this client alert does not constitute legal advice or legal opinion, and should not be regarded as a substitute for detailed advice in individual cases. The information, as referred to in this client alert, is based on the laws, regulations, notifications, practice and policy at the time of its production. The laws, regulations, notifications, practice and policy may change from time-to-time and, therefore, the use of this client alert must be taken with due care. You are strongly advised that no use should be made of the information in this client alert without prior consultation with Baker & McKenzie (Vietnam) Ltd.. No portion hereof may be reproduced or transmitted, by any means, without the prior written permission from Baker & McKenzie (Vietnam) Ltd.. All rights reserved.

Baker & McKenzie (Vietnam) Ltd. is a member of Baker & McKenzie International, a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

©2010 Baker & McKenzie (Vietnam) Ltd. All rights reserved.

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.