

## Client Alert

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### New Enterprise Law Decree impacts Market Access for Foreign Firms

Decree No. 102/2010/ND-CP was issued on 01 October 2010 by the Government to provide detailed guidelines for the implementation of the Enterprise Law ("**Decree No. 102**"). Decree No. 102 will take effect on 15 November 2010, and replace Decree No. 139/2007/ND-CP of the Government ("**Decree No. 139**"). It is clear that the Decree will impact market access for foreign firms, but exactly how remains to be seen.

Decree No. 102 maintains the majority of the provisions of Decree No. 139, and amends and supplements only a number of articles. However, these amendments and supplements have a potentially significant impact on the way foreign-invested companies do business in Vietnam. Among other things, Decree No. 102 may help to clarify the much debated Article 29.4 of the Investment Law regarding the conditions under which foreign-invested entities may be subject to the same investment conditions applicable to domestic companies.

However, it remains to be seen how the Government authorities will interpret and apply these new regulations. It is also worth noting that a new decree that will implement the Investment Law and replace the current Decree No. 108/2006/ND-CP. The pending investment decree, once passed, will work in tandem with Decree No. 102 and should provide a more comprehensive basis to understand the policy and design of the investment regulatory framework of the Ministry of Planning and Investment, the authority that has drafted these two decrees.

The important amendments and supplements introduced by Decree No. 102 are as below.

### Conduct of business activities of foreign-invested companies that have been established in Vietnam

On its face, Decree No. 102 seems to make a significant advancement in guiding the implementation of Article 29.4 of the Investment Law.

Article 11 of Decree No. 102 provides that, unless a treaty or specific law provides otherwise, an enterprise that has been established in Vietnam and is up to 49% foreign-owned will be subject to investment and business conditions applicable to domestic investors. On the other hand, an enterprise that has been established in Vietnam and which more than 49% of the chartered capital of which is owned by foreign investors will be subject to investment conditions and conditions applicable to foreign

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investors. These conditions on investment and business apply throughout the conduct of investment and business of the enterprise.

In substance, however, these new regulations will not be easy to interpret. Specific laws shall take priority in application to these regulations. Under such specific laws, foreign invested companies, including those that are owned up to 49% by foreign investors, may still be subject to separate regulations that are different from (and in all such cases, stricter than) the regulations applicable to domestic companies. An implementing Circular may help to clarify this.

## Establishment procedures of foreign-invested companies

Decree No. 102 has tightened the “loop-hole” of Decree No. 139 in one important respect.

Decree No. 139 provides that foreign investors that establish companies with up to 49% foreign capital investment will be subject to business registration conditions applicable to domestic investors, and other foreign investors (i.e., investors that establish companies with more than 49% foreign capital investment) will be subject to investment procedures applicable for foreign investors. Despite its 3-year existence, this regulation appears to have been hardly applied in practice, if at all.

Decree No. 102 changes the above regulation to make it applicable to only foreign-invested companies that have been established in Vietnam for their next onshore investment enterprises.

Under Article 12 of Decree No. 102, foreign investors that establish a new entity in Vietnam regardless of their foreign capital ratio will have to follow the investment procedures applicable to foreign investors and be issued an Investment Certificate. A foreign-invested company that has been established in Vietnam with up to 49% foreign capital shall follow the regulations on business registration applicable to domestic investors for its next onshore entity. A foreign-invested company that has been established in Vietnam with more than 49% foreign capital shall follow the regulations on investment procedures applicable to foreign investors for its next onshore entity,.

## Acquisition of charter capital of an existing company

Decree No. 102 provides general guidelines on procedures for registering an acquisition transaction.

With respect to a limited liability company that has an Investment Certificate, the transfer of charter capital (i.e., change of members) shall be registered at the investment management authority. This means that the company shall be issued an amended Investment Certificate to reflect the acquisition (i.e., the transfer of charter capital).

With respect to a limited liability company that has a Business Registration Certificate, the transfer of charter capital (i.e., change of

members) shall be registered at the business registration authority. This means that the company shall be issued an amended Business Registration Certificate.

## **New requirements on charter capital contribution of a limited liability company**

Decree No. 102 provides specific regulations for the licensing authorities to measure the capital contribution progress of investors. This is aimed to address the Government's current concern of under-contribution of chartered capital by foreign investors.

Article 6 of Decree No. 102 requires that members of a limited liability company fully contribute their committed charter capital within 36 months after the date of issuance of an investment certificate or a business registration certificate.

Within 15 days after each committed capital contribution period, the limited liability company must send a notice on contribution results to the business registration agency. Failure to fully contribute the committed charter capital shall make the members jointly liable for any financial obligations of the company equivalent to the unpaid amount until the company adjusts its charter capital to reflect the contributed capital.

The business registration agency has the right to check on the progress of capital contribution of a company at the request of any member who owns at least 25% of charter capital of said company.

## **New regulations on joint stock companies**

Article 6 of Decree No. 102 provides clearer definitions on charter capital, outstanding shares and authorized shares of a joint stock company.

Specifically, the charter capital of a joint stock company is the total par value of the outstanding shares. Outstanding shares are shares for which the shareholders have fully paid for.

At the time of business registration, the charter capital is the total par value of the shares that are subscribed by the founding shareholders and other shareholders as stated in the company charter.

Authorized shares of a joint stock company is the amount of shares that the General Shareholder Meeting has decided to issue for raising additional capital. At the time of business registration, the authorized shares include the shares that are subscribed by the founding shareholders and other shareholders and the shares that shall be additionally issued within 3 years from the date of issuance of the business registration certificate, as stated in the company charter.

Article 23 of Decree No. 102 requires that both the founding shareholders (who must together subscribe for at least 20% of the authorized shares at the time of registration of the company) and common shareholders of a company fully pay for their subscribed shares within 90 days from the date the company is issued with a business registration certificate. Within 15

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days from the last day of such 90-day period, the company must report on the contribution result to the business registration authority.

Article 23 also provides for a mechanism on how to handle the shares that are not fully paid within the above prescribed time. It further provides that the business registration authority has the right to check on contribution results at the request of a shareholder or group of shareholders that own at least 10% charter capital. Article 23 specifically provides that the company must adjust the authorized capital to the level of outstanding capital after 3 years from the date of issuance of the original business registration certificate. The company is restricted from increasing its authorized capital unless it has sold all its existing shares.

Another interesting point of Article 23 of Decree No. 102 is that the restriction on the transfer of shares of the founding shareholders within 3 years after the issuance of the business registration certificate applies only to shares that are subscribed by the founding shareholders at the time of the very first business registration and are fully paid within the 90 day period. This helps to clarify the question of which shares of the founding shareholders are subject to this lock-up period.

Article 24 of Decree No. 102 provides basic guidance on the forms of offering shares. It requires that at the completion of the offering of shares, the issuing company register its charter capital with the competent licensing authorities, .

## Chairman of the Board of Members, members of the Board of Management, and the General Director may be sued

Last but not least, Articles 19 and 25 of Decree No. 102 should compel the above management personnel to exercise more care in fulfilling their fiduciary duties.

Article 19 provides that a member on its behalf or on behalf of the company can bring a Chairman of the Board of Members or the General Director of a limited liability company to court for civil liabilities pertaining to their position.

Article 25 allows a shareholder or a group of shareholders that own at least 1% common shares for 6 consecutive months to bring members of the Board of Management and General Director of a joint stock company to court for civil liabilities in certain situations.

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