

Rödl & Partner

CLIENT ALERT VIETNAM

MANAGING CHANGE

Issue:

May 2020

Draft new Law on Investment and Law on Enterprises

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→ Draft new Law on Investment and Law on Enterprises

Five years after passing the Law on Investment 2014 and the Law on Enterprises 2014, Vietnamese legislative bodies are still in pursuit of legal reforms to accommodate an attractive business and investment environment in the emerging economy. Two key domestic legal instruments, new Law on Investment and new Law on Enterprises, are in draft law process with new proposed changes to surmount existing hurdles, overlaps and inconsistencies in application of these current laws. This update is to highlight significant changes related to the legal frameworks of these draft laws governing investment and business activities of foreign invested enterprises based in Vietnam.

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Key issues

DRAFT NEW LAW ON INVESTMENT (“LOI”)

CONDITIONS ON INVESTMENT AND BUSINESS APPLICABLE TO FOREIGN INVESTORS

The draft Loi provides further clarification regarding the distinction of two main conditions applicable to foreign investors upon conducting investment and business activities in Vietnam.

- The first are market access conditions imposed on sectors where market access is not yet allowed or sectors where market access is conditional to foreign investor, including (i) limitation on foreign ownership ratio, (ii) investment form, (iii) scope of investment activities, (iv) capacity of investor and Vietnamese partner, and (v) other conditions stipulated under Vietnamese laws and international treaties. A list of sectors having market access restrictions will be issued by the government.
- The second are business conditions imposed on certain sectors regulated by domestic specialized laws without discrimination between foreign investors and locals, including permits, eligibility certificates, practicing licenses, and confirmation letters that will be applied after foreign investors access the market.

Under the proposed new draft of the Loi, there are twelve business lines being removed from the list of conditional business, while six business lines are being added to the list:

1. Six additional conditional business lines:

- Data centre service business;
- Import press distribution service business;
- Fishing vessel registry;
- Electronic identification and authentication services;
- Training crew members of fishing ships;
- Providing architectural services.

2. Twelve business lines being abolished from the list of conditional business lines:

- Service activities of commercial arbitration organizations;
- Debt trading services (but added to the list of prohibited business lines);
- Manufacturing and repairing of liquefied petroleum gas bottles;
- Franchising;
- Logistics business;
- Urban planning consultancy services provided by foreign organizations and individuals;
- Specialized food business;
- Production of helmets for motorcyclists and mopeds;
- Providing advertising product introduction services to the public;
- Providing training and retraining in knowledge about real estate brokerage, operating real estate trading floors;
- Providing training and retraining in apartment building’s professional knowledge and skills;
- Cremation service management and operation of cremation facilities.

INVESTMENT INCENTIVES AND SUPPORT

In addition to the current list of sectors to which investment incentives shall be given, the draft Lol introduces new ones:

- Manufacturing of products as a result of research & development;
- College education;
- Distribution chains of products made by small-medium enterprises (SMEs), Technical supporting facilities for SMEs, Incubation establishments for SMEs, Co-working spaces for SMEs to serve innovations and start a business. (These sectors have recently been provided under Decree 37/2020/ND-CP as of 15 May 2020);
- Manufacturing of goods or services provision creating and participating in a value chain or sector clusters;
- Innovative startups.

Notably, the draft Lol also creates an exceptional incentive regime for two types of projects having huge socio-economic impact, namely:

- Establishment of new R&D or innovation centres or expansion of existing centres with an investment capital of at least VND 6 trillion;
- Business lines eligible for exceptional investment incentives with a total investment capital of at least VND 30 trillion and at least VND 10 trillion being disbursed within three years.

The government is vested with the authority to decide the type of investment, form of new economic organization and incentives policy applicable on the condition that such exceptional preferential rate must not exceed 50 percent of the highest preferential level, and the duration of the exceptional preferential treatment will not exceed twice the longest investment incentives duration.

The draft Lol proposes further changes as to foreign direct investment in form of establishment of SMEs in innovative start-up and innovative start-up investment fund, thereby foreign investors will not need to obtain an investment registration certificate.

INVESTMENT PROJECT RELATED TO LAND-USE

With respect to land-use investment projects, the draft Lol provides three methods for the selection of financiers:

- an auction of land use rights in accordance with land laws (applicable to land parcels eligible for auction under the land laws);
- an in-principle approval granted by the National Assembly, the government, or the provincial people's committee (contingent upon the scale and the sector of investment projects);
- a tendering process in accordance with bidding laws, if the project does not fall into any of the previous two circumstances.

Under the draft Lol, in-principle approval shall be applied for selection of investors in the following cases:

- The investor already has a legitimate land use right (except where the state retrieves the land use right for auction purposes in accordance with land laws);
- The investor implements a manufacturing, innovative or research and development (R&D) project located in an industrial zone, functional area inside an economic zone, high-tech zone, or civil airport;
- When the auction/bidding period has expired, there is only one investor registering to participate in the auction/bidding; or the auction/bidding is not successful; or
- Other cases where the law does not require auction of land use rights or bidding process to select investors.

M&A APPROVAL

Under the current Law on Investment, a foreign investor is required to obtain merger and acquisition (M&A) approval from the relevant provincial Department of Planning and Investment if they intend to subscribe or acquire equity from an existing company if (i) the target engages in foreign investment-restricted sector, or (ii) the capital contribution or the equity acquisition results in 51 percent or more foreign ownership of the charter capital of the target company.

In this regard, such existing regulations are interpreted and implemented inconsistently by licensing authorities in different provinces. For example, in Ho Chi Minh City, M&A approval is applied even in case of additional capital disbursement by an existing foreign investor to its wholly foreign invested subsidiary which has been set up already in Vietnam and without change in foreign ownership ratio.

Under the draft Lol, the specific circumstances where M&A approval is required

include: (i) an increase of foreign ownership in a target company engaging in sectors with restricted foreign market access; (ii) an increase of foreign ownership in a target company from less than 51 percent to 51 percent or more of the charter capital; (iii) an increase of foreign ownership in a target company with foreign ownership of the charter capital already amounting to 51 percent or more; or (iv) the target company is utilizing land located within areas with an effect on national security, such as sea islands, borderlands, coastal areas etc.

MISCELLANEOUS CHANGES:

Further to the afore-analyzed substantial changes therein, draft LoE also addresses the following changes and improvements:

- Late period for commencement as reason for the termination of a land-use investment project will be expanded to 24 months (instead of 12 months), to ensure the consistency with relevant provisions in the land law;
- For the purpose of tax computation and determination of undercapitalization to terminate an investment project, the competent authorities are granted the power to conduct valuation on investment capital of investors;
- Reduced monthly investment reporting regimes.

DRAFT NEW LAW ON ENTERPRISES (“LOE”)

CORPORATE SEAL SPECIMEN

Draft LoE grants enterprises the autonomy to decide about corporate seal specimen based upon its charter or internal by-laws. Consequently, procedures on notification of seal specimen will be unnecessary.

LIMITED LIABILITY COMPANY (LLC)

The members’ council (of multi-member LLC) or the owner (of single-member LLC) will be granted the power to decide on the private bond placement in accordance with provisions applying to a non-public joint-stock company. Detailed regulations on this matter will be promulgated by the government.

JOINT STOCK COMPANY (JSC)

1. Non-voting depositary receipt (NVDR)

New provisions to encourage companies in Vietnam to raise capital from foreign investors in form of NVDR. The draft LoE provides that when ordinary shares are deposited to issue NVDR, owners of such NVDR shall have full rights and obligations with respect to such ordinary shares, except for voting rights. In other words, when investors invest in NVDR, they will receive the same financial benefits, including dividends, right issues or warrants, as ordinary shareholders, but without voting rights. In addition, voting for ordinary shares that are deposited to issue NVDR shall comply with the company’s charter and the provision under the Law on Securities, as applicable.

2. Protection of minor shareholders

Draft LoE provides a new regulation for the purpose of balance of interests between major shareholders and minor shareholders in a JSC. Shareholders and groups of shareholders owning at least 5 percent of the ordinary shares in a company shall have the right to:

- review and extract the minutes book and resolutions of the management board, and mid-year and annual financial reports in the form prescribed under the Vietnamese accounting system;
- request convention of the general meeting of shareholders in one of three circumstances, including when the board commits a serious breach of the rights of shareholders or the obligations of managers or makes a decision which falls outside its delegated authority; the term of the management board has expired for more than six months and a new board has not been elected to replace it and other cases as stipulated in the charter of the company;
- request the controllers’ board to inspect each issue related to the company’s administration where necessary and
- In addition to the right to initiate a legal action against members of the board or the directors in certain cases regulated in the existing LoE, shareholders and groups of shareholders owning at least 1 percent of the ordinary shares in a company shall have the right to: review, search, extract the necessary information to exercise their rights during the proceedings and by decisions of the court or the arbitration.

CONCLUSION

We are still avidly awaiting the update on draft new Lol and LoE from Vietnamese lawmakers. While these draft laws are under discussion prior to official enactment, proposals for aforementioned changes are bringing a positive development to investment and corporate regimes applicable to foreign investors. Due to the law not envisaging any flexible changes on short notice, Roedl & Partner are in the best effort to assist clients to gain new insights in any legal changes to facilitate

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