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New Decree Providing Guidelines for the Implementation of the Law on Investment

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## → Guidelines for implementing the Law on Investment

Following the change of the new Law on Investment no. 61/2020/QH14 dated 17 June 2020 (the “LOI”) which became effective as of 1 January 2021, on 26 March 2021, the Government enacted Decree 31/2021/NĐ-CP (the “DECREE 31”) which became effective on the same date, to provide detailed regulations and guidelines for the implementation of a number of articles of the LOI. Decree 31 is reputed as a notifiable stride to foster the investment into Vietnam.

### KEY ISSUES

#### Investment conditions to be applied by investors and foreign investors

As a general rule, the LOI allows for the investors (including domestic investors, foreign investors and foreign invested enterprises – FIE) to conduct any business investment activities which are not prohibited by the LOI. Accordingly, the LOI provides the mechanism on conditions for investors when investing in doing business in Vietnam, including the following:

#### Business lines banned from business investment (“Banned Business List”):

The investors, irrespective of their nationality, are banned from doing business in the lines listed in Annex I (kinds of drugs), Annex II (kinds of chemicals) and Annex III (kinds of agriculture/animals) and the other kinds of 5 business lines listed in the LOI.

#### Business lines which are conditional to the investors (“Conditional Business List”):

The investors, irrespective of their nationality, are subject to satisfaction of conditions when conducting business in lines which are conditional, and need to have these applied prior to the commencement of businesses, as regulated in the LOI under Annex IV. There are 227 conditional businesses in total, including the trading business, e-commerce, vocational education, real estate business, etc. The conditional business investment are applied in the following forms: license/certificate/confirmation/approval. Conditional business and the related conditions are publicly published in the NBRP.

#### Business lines subject to restriction on market access (“Restricted Market Access List”):

For the first time, the Government, through its enacted Decree 31, provided the list of business lines (Annex I of Decree 31) which are subject to restriction on market access for foreign investors. This list includes (i) list of market inaccessible businesses and (ii) list of conditional market accessible businesses.

Therefore, in addition to the Banned Business List and Conditional Business List, the foreign investors shall be subject to the Restricted Market Access List. There are 25 business lines are inaccessible for the foreign investors and 58 business lines are conditional accessed by the foreign investors. This list also comprises the business similarly to the Conditional Business List such as trading business, logistic, e-commerce, education services, real estate business, etc.

Accordingly, market access conditions to be applied by foreign investors include: (i) ratio of foreign investors’ ownership in charter capital, (ii) forms of investment (which we will further discuss in the following section), (iii) scope of investment activities, and (iv) capacity of foreign investors, (v) other conditions which are required by the Government specifically with regard to applicable laws, decrees, regulations.

#### Forms of investment

The LOI and Decree 31 set forth the forms of investment allowed for foreign investors to invest into a business in Vietnam, and their correspondent investment procedure requirements, including the following basic four forms:

1. Investment through establishment of a business entity;
2. Investment in the form of capital contribution or purchase of shares or stakes;

3. Execution of an investment project (by a foreign invested enterprise – FIE);
4. Investment in the form of a business cooperation contract (BCC);
5. New forms of investment and types of business entities prescribed by the Government's regulations.

In general, when the foreign investors invest in Vietnam following model (i), the conditions as mentioned in the List of Restricted Market Access must be followed and satisfied. Further, prior to the establishment of an economic organization (FIE), the foreign investor must obtain an investment project and needs to carry out the procedures for the issuance of an Investment Registration Certificate (IRC). It is noted that all the conditions required for the foreign investors in the List of Restricted Market Access Sectors shall be carefully evaluated by the investment licensing authorities.

After the issuance of an IRC, the foreign investors shall go through the enterprise registration procedure to have the Enterprise Registration Certificate (ERC) issued. From the date of issuance of the ERC, the economic organization established by the foreign investor (FIE) is the investor implementing the investment project as prescribed in the IRC.

Investment form (i) would be time consuming, since the foreign investors need to satisfy the required investment conditions (or in form (ii), go through investment procedures by obtaining an M&A approval in certain cases as required by law), especially in specific investment sectors such as trading business or real estate business (which are required to comply with legal capital and land conditions (in case of acquisition of land located in areas deemed vital to national security, e.g. islands and in border and coastal communes, wards and towns)).

Due to such the investment conditions, the foreign investors would prefer to invest in Vietnam under other forms such as form (iii) – Execution of an investment project (by a foreign invested enterprise – FIE) – with the effect of being treated as domestic investors, so they might avoid having to go through lengthy investment procedures.

#### Foreign ownership threshold to enjoy treatment of a domestic investor

Through the form of investment (iii), the LOI regulates investments with an FIE being the executor of an investment project in Vietnam. Accordingly, such an economic organization or in this case, an FIE, must satisfy the conditions and carry out the relevant investment procedures in accordance

with the regulations applicable to foreign investors, when the investment through establishment of another economic organization or the investment in capital contribution/purchase of shares or contributed capital in another economic organization (M&A), meets one of the criteria below:

- a. More than 50 percent of the charter capital are being held by a foreign investor (s) [F1];
- b. More than 50 percent of the charter capital are being held by F1 [F2];
- c. More than 50 percent of the charter capital are being held by (a) foreign investor(s) and F1.

Accordingly, the economic organizations (or in this case, an FIE) not falling into the categories specified in a., b. and c. above, shall comply with the investment conditions and procedures applicable for domestic investors upon investing in establishing organizations or M&A activities in other economic organizations.

In other words, the FIE could be seen and treated as “foreign enterprise” unless it meets the requirements to be treated as a domestic investor.

This is an important principle because foreign investors may participate in numerous industries that were only reserved for domestic companies by having the correct structure and investment layer in relation to foreign ownership in an economic organization.

In practice we have witnessed many foreign investors acting directly through the wholly owned subsidiary of F2 (called F3) engaging in certain industries, and be treated as domestic companies. On the other hand, there remains a theoretical risk that the authorities may challenge the structure because of the foreign investor still being the owner of the subsidiaries through multi-layers. The interpretation of laws could differ between the provincial authorities.

#### Investment incentives

There are two remarkable changes in the investment incentives under the new investment regulations: (i) Additional form of incentive and (ii) changes in the list of incentivized entities.

In addition to the previous three incentive forms under the **previous investment law, which are incentivized corporate income tax (“CIT”) rates, CIT holiday, CIT reduction; exemption from import tax as well as exemption and reduction of land levy and rent, accelerated depreciation** and increasing the **deductible expenses** upon calculation of taxable income have been added as a new form

of investment incentives. The new forms of investment incentive allowing for accelerated depreciation and increase of deductible expenses for CIT calculation allow to defer the CIT in first years of operation. The accelerated depreciation will also aid the change of technology. Detailed guidance in this regards is expected to be issued by the Ministry of Finance.

New entities which are eligible to investment incentives under the current investment regulations include:

- Start-up projects, national innovation centers as well as research and development centers;
- Business investment in small and medium-sized enterprises' product distribution chain; business investment in technical establishments supporting small and medium-sized enterprises, small and medium-sized enterprise incubators; business investment in co-working spaces serving small and medium-sized enterprises and startups prescribed by the Law on Small and Medium-Sized Enterprises.

In addition, the new investment regulations set out more conditions for special incentivized projects of which the capital is at least VND 6,000 billion. Specifically, in addition to the previous condition of capital disbursement of at least VND 6,000 bil-

lion within three years, the project must have a total revenue of at least VND 10,000 billion per year within three years from the year in which the revenue is earned, or the project must employ more than 3,000 employees in order to be eligible for investment incentives under the current investment regulations.

## To conclude

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It is to say that the new provisions of the Lol and Decree 31 represent the efforts of the Vietnamese Government in building a more transparent and consistent legal framework for foreign investment into Vietnam. Since the new regulations have just recently come into effect, the interpretation of these regulations may vary by the individual Authorities' point of view.

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