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## I. Notable Changes to Law on Investment

### Ha Hoang Loc and Cao Tran Nghia

On 17 June 2020, the National Assembly of Vietnam officially adopted the new Law on Investment (the “New LOI”), which will take effect from 1 January 2021.

The New LOI entails a number of changes that are expected to have a noticeable impact on foreign investment in Vietnam.

### Changes to Circumstances That Necessitate M&A Approval under New LOI

#### 1. Clearer Conditional Sectors

Under the New LOI, the requirement that foreign investors obtain state approval before making capital contributions to, or acquiring capital contributions or shares in, a Vietnamese entity operating in certain conditional sectors (commonly referred to as “M&A approval”) has been clarified. Specifically, the M&A approval requirement will be triggered only if the target company operates in a sector in which investment by foreign investors is expressly designated as conditional. The government will be tasked with issuing a list of pertinent conditions (to be formulated upon reviewing international treaties and domestic laws) under a governmental decree.<sup>1</sup> This change is expected to clarify the applicability of the M&A approval process by removing the discretion of local authorities.

#### 2. Lower Shareholding Threshold

The New LOI changes the threshold at which foreign investors must obtain M&A approval before making capital contributions to, or acquiring capital contributions or shares in, a Vietnamese entity from 51% to more than 50%. As such, any Vietnamese

<sup>1</sup> Article 9 of the New LOI.

entity in which more than 50% of the equity is held by foreigners will be treated as a “foreign investor” under the New LOI (as opposed to 51% or more under the current LOI). Consequently, foreign investors will not be able to acquire majority control (i.e., more than 50%) of a Vietnamese entity without M&A approval.

### 3. Restrictions on Certain Land Use Projects

Under the New LOI, M&A approval becomes mandatory in cases where the target company has any land use rights with respect to areas of land that have any impact on the national defense and security of Vietnam, irrespective of any equity threshold.<sup>2</sup> A list of such areas, however, is unlikely to become available in the near future, which will create uncertainty among investors as to whether their investments will require M&A approval.

## Harmonization of Legal Procedures for Land Use Projects

Under current regulations with respect to land use projects (e.g., commercial and residential real estate development projects), project approval procedures, including approval of the status of investors and investment in-principle approval (“IPA”), are fragmented under different bodies of law, which has hindered both foreign and domestic investment in land use projects.

In an effort to simplify and unify the procedures, the New LOI provides that investors for land use projects will be selected through only one of the following three methods:<sup>3</sup> (a) land use right auctions in accordance with applicable land laws, (b) bidding for selection of investors in accordance with applicable bidding laws and (c) investor approvals (i.e., direct appointment of investors without bidding/auction). In addition, the New LOI specifies that if an IPA is required for a particular project, methods (a) and (b) would only be carried out after the authority’s issuance of the IPA, while method (c) would be conducted at the time of issuance of the IPA. Of note, method (c) will only be applicable if the investor already has the land use right, acquires such right via transfer or capital contribution, plans to conduct its project in an industrial/hi-tech park, or is otherwise not subject to compulsory bidding or auction under Vietnamese law.<sup>4</sup> It is expected that these revisions will significantly reduce the complexity of project approval procedures and increase the speed at which the necessary approval can be obtained.

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## II. Notable Changes to Law on Enterprises

### Ha Hoang Loc and Mai Thi Ngoc Anh

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On 1 January 2021, the new Law on Enterprises (the “**New LOE**”) will come into effect, bringing with it a number of changes that are expected to improve corporate governance and enhance minority shareholder protection in joint stock companies (“**JSCs**”). In addition, the New LOE introduces the new concept of non-voting depositary receipts and puts forth new requirements with respect to subscribers to corporate bonds issued by non-public companies.

### Improvement of Corporate Governance for JSCs

1. The New LOE introduces additional requirements that will better protect the independence of independent board members of JSCs and general directors of public companies:
  - At the time of appointment and throughout the term of office, a general director of a public company must not be in a

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<sup>2</sup> Article 26.2(c) of the New LOI.

<sup>3</sup> Article 29 of the New LOI.

<sup>4</sup> Article 29.4 of the New LOI.

familial relationship with a manager or inspector of the JSC or its parent company<sup>5</sup> and must not be a representative of any state-owned capital or other institutional shareholder of a public company or its parent company.

- An independent board member of a JSC must not currently work, or have worked during the preceding three years, for the JSC's parent company, but the New LOE does not restrict independent board members from being otherwise affiliated with or being nominated by a JSC's parent company or controlling shareholders, which weakens the independent board member's role in guarding against corporate malfeasance.

In order to mitigate the impact of these new requirements on public companies, the New LOE allows an incumbent general director who will no longer be qualified to hold his position once the New LOE comes into effect to continue serving until the end of his term. However, such grace period will not be extended to incumbent independent board members who will no longer be qualified to hold their positions under the New LOE. Thus, such independent board members must resign as soon as the New LOE comes into effect.

2. The New LOE makes a number of regulatory changes that are designed to enhance the oversight and accountability of the board and top executives of JSCs:
  - The New LOE enables a wider pool of shareholders to participate in monitoring the operation of the board and the inspection committee by reducing from 10% to 5% the total ordinary shares of a JSC that must be held by shareholders (or a group of shareholders) before they may avail themselves of certain rights to (a), among other things, review, inspect and copy (a part or all of) any meeting records and resolutions of the board, contracts for transactions that must be approved by the board and reports of the inspection committee and (b) request the inspection committee to examine issues related to corporate management and operations.
  - In addition, the New LOE removes the six-month shareholding period that must be satisfied before shareholders may exercise important rights, including, among other things: (a) initiating legal action (on their own behalf or on behalf of the company) against board members and the general director to obtain a monetary remedy for the benefit of the company or third parties; (b) nominating board members and inspection committee members, (c) convening a general meeting of shareholders to deal with material breaches by the board or the corporate management, and (d) monitoring the operation of the board and the inspection committee as discussed above. Such amendment enables shareholders who satisfy the minimum shareholding requirements to take prompt action to stop any breaches of the existing board members or executives.
3. The New LOE presents significant measures that help prevent controlling shareholders of JSCs from taking unfair advantage of corporate property via related party transactions ("RPTs"):
  - The New LOE reduces the value that a transaction between the JSC and a shareholder owning 51% or more of the total voting shares of such JSC must have before it is deemed to be a material RPT from 35% to 10% of the total value of assets recorded in the most recent financial statements of the JSC and therefore subject to the approval of the general meeting of shareholders (excluding votes of interested shareholders).
  - The inspection committee of a JSC has the explicit right under the New LOE to review any RPT and to recommend that

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<sup>5</sup> A company is considered to be a "parent" company of another company if the former company (a) owns more than 50% of the charter capital or total ordinary shares of the other company; (b) is entitled to directly or indirectly designate a majority or all of the members of the board or the general director of the other company; or (c) is entitled to decide on amendments to the latter charter.

such RPT be approved by the board or the general meeting of shareholders. In addition, eligible shareholders are entitled to review, inspect and copy (a part or all of) any RPT approved by the board. Strengthening the oversight of RPTs is intended to reduce the risk that controlling shareholders and corporate management will abuse their power and authority in identifying and engaging in transactions with the JSC.

### **New Concept: Non-voting Depositary Receipts (NVDRs)**

The New LOE introduces the concept of non-voting depositary receipts (NVDRs) for JSCs only, which is aimed at attracting more foreign investment capital in conditional sectors. In general, NVDR holders will enjoy economic rights and obligations similar to those of ordinary shareholders, except that NVDR holders will not have the right to vote on any resolutions of the general meeting of shareholders.

### **Narrower Scope of Eligible Subscribers to Corporate Bonds Issued by Non-public JSCs and LLCs in Private Placements**

The New LOE allows only professional securities investors and strategic investors to subscribe for corporate bonds via private placements, and such corporate bonds will be subsequently transferable only among professional securities investors and strategic investors. This change reflects an effort on the part of the legislature to minimize the financial risks to which non-professional investors are normally exposed in this market due to their limited capacity to access information on issuances and to assess credit risks. Legislators assessed that such change of law would have little negative impact on both issuers and non-professional investors given that funding from retail investors/ordinary investors would still be available to issuers through public issuances (which is generally subject to stricter monitoring by the State Securities Commission of Vietnam) and that non-professional investors could still engage in this market through professional securities investors.

### **Simple Majority Quorum for Shareholders Meetings of JSCs**

The new statutory quorum for holding general meetings of shareholders and for passing ordinary shareholders resolutions is reduced slightly to a simple majority (i.e., more than half) of the shareholders. In comparison, the current law requires a quorum of at least 51%.

### **Significant Change to Legal Definition of State-owned Enterprises**

The New LOE modifies the legal definition of state-owned enterprises, which is expected to have a significant effect on those doing (or contemplating doing) business with state-owned enterprises. For a further analysis on this matter, please see our newsletter issued on 23 June 2020.

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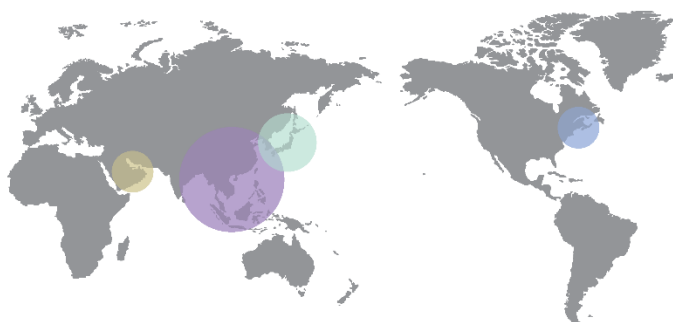


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\* Please note that we are not engaged in a Gaikokuho Kyodo Jigyo (the operation of a foreign law joint enterprise).



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