



*This article is based on information available as of November 16th, 2020.

Vietnam: Private Placements Under The New Securities Law (as of 16 November 2020)

Mai Thi Ngoc Anh

Vietnam's new securities law (the "New Law") will come into effect on 1 January 2021. Among the many changes to current securities law, the New Law includes notable changes to the regulations on the private placement of shares by public companies ("Private Placements"), the aim of which changes is to, among other things, enhance investor protection, improve market fairness and expand investment opportunities and access to capital markets.

Under the New Law, a Private Placement entails an offering to (i) less than 100 investors who are not professional securities investors or (ii) any number of professional securities investors on an exclusive basis, in each case, without any communication or promotion of the offering by means of mass media.

This article introduces some of the key points of the new regulations on Private Placements and our analysis of their potential impact.

1. Scope of Private Placement: Restricting Investor Eligibility

Under current securities law, any investor may participate in a Private Placement. However, under the New Law, the investors eligible to participate in a Private Placement will be limited to *professional securities investors* and *strategic investors*. The New Law is expected to establish a clearer and bolder line between public offerings and Private Placements thereby preventing the circumvention of the strict requirements applicable to public offerings and improving investor protection in the relevant market.

The limited scope of eligible investors, however, gives rise to the following issues: (i) whether an offer for a share swap¹ or an

¹ An offer for a share swap discussed herein means a transaction involving an issuance of new shares followed by an exchange of such shares for shares or capital contributions in another enterprise or for the issuer's debt.

employee stock option plan (ESOP) to less than 100 investors will constitute a Private Placement and (ii), if it does, whether the investors will be deemed strategic shareholders or professional securities investors, the answer to which will trigger different lock-up requirements, as discussed below.

In the draft guidance documentation for implementation of the New Law recently submitted by the State Securities Commission (“SSC”) to the Department of Justice² (the “**Draft Decree**”), a hybrid scheme has been proposed to deal with the aforesaid share swap and ESOP. In particular, while the share swap and ESOP would be deemed to be Private Placements, they would also be subject to different rules on lock-up (a one-year lock-up for share swaps, but no lock-up for ESOPs) and registration (there will be different registration procedures for share swaps and ESOPs).³

2. Expanding the Scope of Professional Securities Investors

Although the scope of the investors eligible to participate in Private Placements under the New Law has been narrowed, the term “professional securities investors” has been redefined by creating new categories of qualifying investors, which may help the expansion of investment opportunities and access to capital markets while maintaining an appropriate level of investor protection.

Specifically, in addition to commercial banks, financial institutions, and insurance business organizations that qualify as professional securities investors under the current law, the scope of professional securities investors under the New Law is expanded to include: (i) foreign bank branches; (ii) securities companies, securities investment fund management companies, securities investment companies and securities investment funds; (iii) international financial institutions, off-budget state financial funds and state financial institutions permitted to purchase securities in accordance with relevant law; (iv) companies with paid-up charter capital of VND 100 billion (about US\$ 4.3 million) or more; (v) listed companies and UPCoM-traded companies; (vi) persons having a securities business practicing certificate; (vii) any person holding a portfolio of listed and UPCoM-traded securities with a value of at least VND 2 billion (about US\$ 86,000) (supported by documentary evidence); and (viii) any person having taxable income of at least VND 1 billion (about US\$ 43,000) in the most recent tax year (supported by documentary evidence). The entities mentioned in item (ii) are not completely new but rather a clarification of “securities business entities” referred to under current law.

Issuers will be responsible for assessing and verifying the status of professional securities investors participating in a given Private Placement.⁴

3. Definition of Strategic Investor

Current securities law does not contain the concept of “strategic investor”, so there are no associated definition or eligibility criteria. The New Law, in contrast, limits the investors eligible to participate in a Private Placement to professional securities investors and strategic investors, as stated in section 1, and defines strategic investors as those investors selected by the general meeting of shareholders (“GMS”) of the issuer based on the criteria of financial capability, technological expertise and their commitment to cooperate with the issuer for at least three years.⁵

This definition of “strategic investor”, however, raises the question as to whether or not the strict wording will diminish efficiency and flexibility in the selection of strategic investors by issuers. For example, a Vietnamese issuer may be unable to enter into a Private Placement with a prospective investor notwithstanding such investor fitting the issuer’s operational strategies and meeting the

² The SSC has submitted the third draft of the Draft Decree to the Department of Justice for appraisal. The Draft Decree can be found at http://law.concetti.vn/draft-document/du-thao-3-nghi-dinh-quy-dinh-chi-tiet-thi-hanh-mot-so-dieu-cua-luat-chung-khoan-kem-tai-lieu?_sm_au_#iHVWFQ0nZrZMq5MqpCstsK0psTLfq.

³ Article 47 of the Draft Decree.

⁴ Article 47 of the Draft Decree.

⁵ Article 4.17 of the New Law

issuer's business needs, if such prospective investor does not fall within the strategic investor criteria of the New Law. Or an investor who wishes to invest in such issuer by way of a Private Placement through a special-purpose entity ("SPE") may not qualify as a strategic investor if a lack of operational history makes substantiation of the SPE's financial capability and technological expertise impossible. It remains unclear how flexible the SSC will be in its interpretation of the New Law in practice.⁶

4. Tightening Lock-up Requirements

Under current law, shares privately placed are generally subject to a one-year lock-up requirement.⁷ Although such requirement remains the same under the New Law in respect of professional securities investors, the New Law imposes a stricter three-year minimum lock-up requirement on strategic investors.⁸

The stricter lock-up requirement will only be applicable to shares placed privately with strategic investors from the effective date of the New Law, not to any Private Placements completed before the effective date; but no ongoing lock-up period as of the effective date of the New Law will be prolonged.

5. Remaining Issue: Tender Offer Laws

It remains somewhat unclear how the New Law will mesh with existing tender offer laws.

For example, although under the New Law a subscription for newly issued shares pursuant to a plan on issuance passed by a GMS resolution (i.e., through a Private Placement) is exempted from the tender offer rules, it is not clear whether or not such GMS resolution to pass a Private Placement will be required to identify the eligible investors if the issuer contemplates offering an investor (or any group of investors and their related persons) a number of shares that will result in the investor's ownership ratio exceeding the tender offer/takeover bid thresholds (i.e., 25%, 35%, 45%, 55%, 65% or 75% of the total voting shares).

Please contact us for questions on the New Law or the Private Placement rules.

⁶ In certain sectors, however, the financial capability of a strategic investor is clear. For example, a minimum total asset value of US\$20 billion is required of any strategic investor in a commercial bank in Vietnam.

⁷ Article 10a.2.(b) of the current Securities Law

⁸ Article 31.1(c) of the New Law

Contacts: na_vnnl@eml.jurists.co.jp



[Vu Le Bang](#)

Vietnam Partner,* Ho Chi Minh City Office

Mr. Bang is a Vietnam partner specializing in inbound investments, corporate and commercial matters, M&A, banking and finance, real estate and construction, and labor. Mr. Bang is a 2001 graduate of the Hanoi University of Law (LL.B.) and received an LL.M. from the Transnational Law & Business University in Seoul, Korea in 2006. He is a member of the Ho Chi Minh Bar Association and the Vietnam Bar Federation and is fluent in both English and Vietnamese.



[Ha Hoang Loc](#)

Vietnam Partner,* Ho Chi Minh City Office

Ha Hoang Loc is a Vietnam partner with more than 12 years of post qualification experience in M&A, real estate, labor, banking and finance, antitrust, general corporate and all aspects of investment and licensing in Vietnam. Mr. Loc is a 2001 graduate of the Ho Chi Minh City University of Law (LL.B.) and received an LL.M. (with Merit) from Southampton Solent University (England) in 2008. He has been a member of the Ho Chi Minh City Bar Association since 2008 and the Vietnam Bar Federation since 2009. He is fluent in both English and Vietnamese.



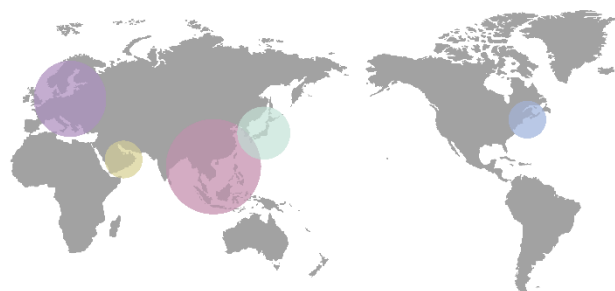
[Akira Hiramatsu](#)

Counsel, Ho Chi Minh City Office

Mr. Hiramatsu has extensive experience in M&A transactions in Japan and provides legal assistance in a wide range of areas in Vietnam. He was admitted to practice law in Japan in 2006 and registered as a foreign attorney in Vietnam in 2014. Mr. Hiramatsu also has experience in the Disclosure Statements Inspection Division of the Securities and Exchange Surveillance Commission of Japan from 2010 to 2012, and the Inspection Bureau of the Financial Services Agency of Japan from 2012 to 2013. He graduated from Tokyo University (LL.B., 2004) and the University of Virginia School of Law (LL.M., 2014).

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

Nishimura & Asahi has 18 offices throughout Japan and in the markets that matter, with Asia as the starting point.



New York

Nishimura & Asahi NY LLP

Tel +1-212-830-1600

E-mail info_ny@jurists.co.jp

Managing Partner Katsuyuki Yamaguchi

Vice Managing Partner Megumi Shimizu

Dubai

Tel +971-4-386-3456

E-mail info_dubai@jurists.jp

Masao Morishita

Tokyo

Otemon Tower, 1-1-2 Otemachi, Chiyoda-ku, Tokyo 100-8124 Japan

Tel +81-3-6250-6200 +81-3-6250-7210 (Nishimura & Asahi LPC Principal Office)

Nagoya

Tel +81-52-533-2590

LPC Partner Hiroki Fujii

Osaka

Tel +81-6-6366-3013

LPC Partners Hiromune Usuki

Taisuke Igaki

Yuichiro Hirota

Masanori Ban

Fukuoka

Tel +81-92-717-7300

LPC Partners Tsuneyasu Ozaki

Kengo Takaki

Yasuko Maita

Frankfurt (main office)

**Nishimura & Asahi Europe
Rechtsanwaltsgesellschaft mbH**

Tel +49-(0)69-870-077-620

Düsseldorf (branch office)

**Nishimura & Asahi Europe
Rechtsanwaltsgesellschaft mbH**

Tel +49-(0)211-5403-9512

E-mail info_europe@eml.jurists.co.jp

Co-representatives Noriya Ishikawa

Dominik Kruse

Bangkok

Tel +66-2-168-8228

E-mail info_bangkok@jurists.jp

Partner for Hideshi Obara

Thailand Partners* Chavalit Uttasart

(SCL Nishimura)

Jirapong Sriwat

Beijing

Tel +86-10-8588-8600

E-mail info_beijing@jurists.jp

Chief Representative Azusa Nakashima

Representative Masashi Shiga

Shanghai

Tel +86-21-6171-3748

E-mail info_shanghai@jurists.jp

Chief Representative Toshihiro Maeda

Representative Takashi Nomura

Hanoi

Tel +84-24-3946-0870

E-mail info_hanoi@jurists.jp

Partner for Hikaru Oguchi

Vietnam offices

Representative Taro Hirose

Ho Chi Minh City

Tel +84-28-3821-4432

E-mail info_hcmc@jurists.jp

Partner for Hikaru Oguchi

Vietnam offices

Representative Kazuhide Ohya

Vietnam Partners* Vu Le Bang

Ha Hoang Loc

Jakarta*¹

Walalangi & Partners

Tel +62-21-5080-8600

E-mail info@wplaws.com

Representative Luky Walalangi

Rosetini & Partners Law Firm

Tel +62-21-2933-3617

E-mail info_jakarta@jurists.jp

Counsel Noriaki Machida

Singapore

Tel +65-6922-7670

E-mail info_singapore@jurists.jp

Co-representatives Masato Yamanaka

Shintaro Uno

Partner Masataka Sato

* We also provide legal services relating to Singapore law through Bayfront Law LLC, which operates the Nishimura & Asahi-Bayfront Law Alliance.

Taipei

Nishimura & Asahi Taiwan

Tel +886-2-8729-7900

E-mail info_taipei@jurists.jp

Co-Representatives Ing-Chian Sun

Sheng-Chieh Chang

Yangon

Tel +95-1-8382632

E-mail info_yangon@jurists.jp

Representative Yusuke Yukawa

Vice Representative Isamu Imaizumi

Okada Law Firm (Hong Kong)*²

Tel +852-2336-8586

E-mail s_okada@jurists.co.jp

Representative Saori Okada

*1 Associate office *2 Affiliate office

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

Public Relations Section, Nishimura & Asahi

Otemon Tower, 1-1-2 Otemachi, Chiyoda-ku, Tokyo 100-8124, JAPAN

Tel: +81-3-6250-6202 Fax: +81-3-6250-7200 E-mail: na_vnnl@eml.jurists.co.jp URL: <https://www.jurists.co.jp/en>

© Nishimura & Asahi 2020