



ClientAlert

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Introduction

Dear Reader,

This month saw a handful of new regulations that affect business in Vietnam. We've briefed them and outlined the most important changes from each new regulation. They cover topics ranging from the advertising of pharmaceuticals to derivatives trading and from calculating construction survey costs to clarifications of the Investment Law and the Enterprise Law.

As always we hope you find this Client Alert helpful and wish you prosperity in the coming month. We look forward to working with you.

Kind regards,
Indochine Counsel

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Investment and Enterprise Registration Procedures for Foreign Investors

On 18 April 2017 the Ministry of Planning and Investment issued Circular No. 02/2017/TT-BKHDT (“**Circular 02**”) on the manner for integration of investment registration procedures with enterprise registration procedures applicable for foreign investors (the “**Integration Manner**”), effective from 15 June 2017.

Circular 02 offers practical deployment for the Integration Manner already stated in Article 24 of Decree No. 118/2015/ND-CP dated 12 November 2015, of the Government, detailing a number of articles of the Law on Investment. Accordingly, this Integration Manner is applicable to foreign investor(s) / existing foreign-invested company(ies) in Vietnam (the “**Investor**”) in the following circumstances:

- (i) The Investor carries out investment activities by establishment of a new company / enterprise in Vietnam;
- (ii) The Investor carries out investment activities by capital contribution / shares acquisition / equity acquisition in an existing company / enterprise in Vietnam; or
- (iii) The Investor concurrently amends the enterprise registration contents and investment registration contents under the prevailing laws of Vietnam.

Under the Integration Manner, instead of separately submitting the application dossiers for enterprise-related issues and investment-related issues to the Enterprise Registration Division (the “**ERD**”) or Investment Registration Division (the “**IRD**”), the Investor will submit such application dossiers to *only* the IRD.

Accordingly, the ERD and IRD are responsible for maintaining the integrity of the application dossiers submitted by the Investor and to co-operate with each other to handle such application dossiers. After submission of the application dossiers, the Investor will obtain the results (i.e. Investment Registration Certificate, Enterprise Registration Certificate, a written confirmation or approval, etc.) from only the IRD.

Determination and Management of Construction Survey Costs

On 6 February 2017, the Ministry of Construction issued Circular No. 01/2017/TT-BXD on guiding the determination and management of construction survey costs (“**Circular 01**”).

According to Circular 01, sections in estimated construction survey costs have been changed. Particularly, the sections of construction survey costs include:

- (i) Direct cost means materials/fuel costs; employee costs, survey equipment costs;
- (ii) General cost means management cost of enterprise conducting construction survey, operation cost for manufacture at construction site, cost of serving employee and conducting construction survey at construction site, and other relevant costs;
- (iii) Advanced taxable income means the profit of the enterprise regarding construction survey in the estimated construction survey costs;
- (iv) Other costs serving survey means expenses for elaboration of construction survey techniques on the basis of approved construction survey tasks, making reports on construction survey results and general construction expenses;
- (v) Value added tax means the payable taxes as required by regulations; and
- (vi) Contingency cost.

In addition, estimated construction survey costs and construction survey tasks, as per Circular 01, must be appraised and approved by the investor, the head of the assigned competent authority to prepare the project. Estimated construction survey costs should be adjusted in cases where the construction survey tasks are adjusted.

Organizations and individuals determine and manage construction survey expenses based on the construction survey quotas announced by the Ministry of Construction according to the provisions of Decree No. 32/2015/ND-CP issued by the Government on 25 March 2015 regarding construction cost management.

Circular 01 shall come to effect from 1 April 2017 and replace Circular No. 17/2013/TT-BXD dated of 30 October 2013 of the Ministry of Construction.

Derivative Securities and Derivative Securities Market

Circular No. 23/2017/TT-BTC dated 16 March 2017 of the Ministry of Finance, effective from 1 May 2017, revises and supplements a number of articles of Circular No. 11/2016/TT-BTC dated 19 January 2016 on guiding a number of articles of Decree No. 42/2015/ND-CP of the Government dated 5 May 2015 on derivative securities and derivative securities market (“**Circular 23**”).

Firstly, Circular 23 provides the definition of a general trading account. General trading account means a trading account of an investor through which buy and sell positions of the same futures contract (having the same underlying assets and the same maturity month) are opened and maintained until a clearing member (a securities company / commercial bank / foreign bank branch)

requests set-off on the basis of agreement or at the request of the investor. Following that, some investors are enabled to open general trading accounts, including fund management companies that can open one general trading account for domestic entrusting investors and another for foreign entrusting investors. A securities company established in a foreign country can open one general trading account to conduct derivatives brokerage activities for foreign investors.

Secondly, Circular 23 allows the opening of escrow monetary deposit accounts for investors in the name of the clearing members. The clearing members can use the escrow monetary deposit accounts for their trading activities.

Thirdly, Circular 23 requires the investor to ensure that the position on the trading account falls within the position limit in accordance with regulations of the VSD (Vietnam Securities Depository Center). In the case of excess of the position limit, the investor must conduct reciprocal transactions to reduce the position or supplement the escrow deposit (if necessary) within the time-limit stipulated in the regulations of the VSD. If upon expiry of the stipulated time-limit, the investor fails to complete the reduction of the position, the clearing member or the VSD (in case the clearing member does not conduct) may implement a reciprocal trading order to close partially or entirely the position of the investor.

Fourthly, in relation to the payment of position profits and losses, Circular 23 provides the specific determinations of the amount of payment of position profits and losses on (i) the trading day preceding the last trading day and (ii) the last trading day.

Moreover, with regards to the payment made when implementing a contract, it is stipulated in Circular 23 that the payment of the contract which is made in cash shall be completed when the payment of position profits and losses of the last trading day is completed.

If the payment of the contract is made in the form of transfer of underlying assets, the seller investor must transfer underlying assets and the buyer investor must make monetary payment in accordance with the terms of the contract and the regulations of the VSD. In such case, the clearing member of the seller must transfer underlying assets of sufficient quantity and correct type in accordance with the derivatives contract to the member's escrow securities deposit account at the request of the VSD. The clearing member can use securities borrowed from the securities borrowing and lending system of the VSD to make payment in accordance with the regulations of the VSD.

The clearing member of the purchaser is only permitted to receive transferred assets after it has made full payment at the request of the VSD, and then shall immediately conduct distribution to the purchaser investor.

Regulations on Drug Advertising

Under the Law on Advertising No. 16/2012/QH13, dated 21 June 2012 ("**Law on Advertising**"), the

advertising of prescription drugs, non-prescription drugs recommended by competent State agencies for restricted use or under the doctor's supervision are strictly prohibited, and the advertising of other drugs shall be subject to prescribed conditions, i.e. having valid Vietnam registration number ("**Product Visa**") and the approved medicine instruction sheet.

In order to manage and supervise the drugs advertising activities, Law on Pharmacy No. 105/2016/QH13, dated 6 April 2016 ("**Law on Pharmacy**"), provides that drugs advertising contents shall be approved in advance by the Ministry of Health ("**MOH**"). Acts of advertising drugs without the MOH's approval for the advertising contents, as well as advertisements with improper contents in comparison with the MOH's approved ones shall be strictly prohibited. In addition, the prohibition is applied for acts of using certificates, clinical study results, pre-clinical study results, test results, bioequivalence test results, which have not yet been approved by the MOH, or using material benefits or abusing capacity of other entities, thanking letters, reputation certification symbols, for advertising drugs, etc.

As provided in Decree No. 54/2017/ND-CP, dated 8 May 2017, detailing a number of articles and approaches for the implementation of the Law on Pharmacy, effective on 1 July 2017 ("**Decree 54**"), the following entities can apply for the MOH's approval for drug advertising contents: (i) a Vietnamese establishment having its name on the Product Visa; (ii) the representative office in Vietnam of a foreign establishment having its name on the Product Visa, with relevant authorization from such foreign establishment; and (iii) a Vietnamese pharmaceutical trading establishment with authorization from the Vietnamese establishment having its name on the Product Visa.

Regarding the application dossier for obtaining the MOH's approval for the advertising contents, in addition to the entity administration documents, the application form shall be accompanied by the proposed advertising contents/ advertising sample designs/ advertising demos, approved product label and medicine instruction sheet, valid Product Visa, and reference documents relating to the advertising contents, if any.

Under Decree 54, drug advertising contents shall be consistent with ones presented in the approved product label and medicine instruction sheet, and certain specialized documents, and shall include the following information, among other information, drug name, active ingredient, indications, usage, dose, contraindication and special precautions, side effects, name and address of the manufacturer, and the phrase "Đọc kỹ hướng dẫn sử dụng trước khi dùng" (*Please follow the instruction before using*). In addition, advertising shall provide only information/images relating to the drug, and shall not include information/ images which may cause misleading impressions as to the drug ingredients, indications, usages, origin, etc.

The time limit for the MOH to examine an application dossier for obtaining approval for drug advertising contents is 15 working days as from the receiving date thereof, and the time limit for the applicant to remedy shortages, if any is 90 days as from the date of the MOH's relating request. No duration is mentioned in any MOH's approval for drug advertising contents, but it will expire in the following circumstances: (i) the validity of the Product Visa expires; (ii) the Product Visa is revoked;

(iii) there is any change in drug information which requires the re-obtaining of drug advertising contents; (iv) there is relevant recommendation on the strict use or use under the doctor's supervision for the drug; and (v) the active ingredient contained in the drug is removed from the list of non-prescribed drugs by the MOH.

And the Bottle is Full

There are a couple of points I want to touch on this month. First, the hierarchy of laws in Vietnam - and other surrounding countries - and the Assumption of law principles.

First, the central government in Hanoi, issues many different levels of laws. A law is a legislative document passed by the National Assembly and promulgated by the head of state. This is a law. The National Assembly can also issue Decrees which act to clarify or instruct on the interpretation of laws. Circulars and letters can also issue from various combinations of the central government.

There is a metaphor first popularized by Stephen Covey. Take a glass bottle. Beside this bottle are rocks, gravel, sand and water. The challenge is to fill the glass bottle with as much of these materials as possible. The wise challenger first places the rocks in the bottle until there is no more room. Then he pours the gravel in and sifts it through the rocks, filling the bottle even more. Then the sand, and finally the water until the bottle is completely filled. Covey uses this metaphor to explain how to schedule time and priorities. I use this metaphor to illustrate that the contents of the bottle are like the laws of Vietnam.

First the laws and decrees are issued to fill the mass of the bottle, appearing like the rocks. Then the gravel is poured in, often by ministries and sometimes even by the head of state himself. Lower down is the sand and water. These are filled with provincial law makers all the way down to city and district levels. Each new contribution to the bottle is more explanation of the law as first explicated by the National Assembly.

Now, if that is confusing enough, there's one more point I want to make this month ... and it's a point of similar importance.

In Vietnam, as in Cambodia and Laos, there is a bias in the law depending on who you might be. If you're a citizen and aren't beholden to getting approval, then there is an assumption that you can act so long as the act is not forbidden. For government investigators, dossier filers, and other officials, if it's not forbidden, then there is a need to get approval.

We run into this all the time, as often there is confusion about the intent of the lawmakers and thus a need for clarification. Sometimes this comes into play through the lower jurisdictions, but often the request has to go all the way up to the central government. When that happens expect delays.

About Indochine Counsel

Established in October 2006, Indochine Counsel is one of the leading business law firms in Vietnam. The firm provides professional legal services for corporate clients making investments and doing business in Vietnam. The legal practitioners at Indochine Counsel are well qualified and possess substantial experience from both international law firms and domestic law firms. The firm boasts more than 35 legal professionals working at the main office in Ho Chi Minh City and a branch office in Hanoi.

Indochine Counsel's objective is to provide quality legal services and add value to clients through effective customized legal solutions that work specifically for the client. The firm represents local, regional and international clients in a broad range of matters including transactional work and cross-border transactions. The firm's clients are diverse, ranging from multinational corporations, foreign investors, banks and financial institutions, securities firms, funds and asset management companies, international organizations, law firms to private companies, SMEs and start-up firms in Vietnam.

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