



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 gaming and racing regulations to tobacco import quotas and automobile importation and bidding process for major contracts.

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

Kind regards,
Indochine Counsel

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Foreign exchange management at casino enterprises

The State Bank of Vietnam (the “**SBV**”) issued Circular No. 10/2017/TT-NHNN on foreign exchange management for casino business on 30 August 2017 (“**Circular 10**”) regulating the notable points as follows:

1. In addition to the certificate of eligibility for the casino business line, casino enterprises must obtain a license for foreign currency collection and payments, and other foreign exchange transactions (the “**License**”) from the SBV in order to conduct the following activities:
 - To receive foreign currency cash from the sale of its tokens;
 - To receive foreign currency cash from electronic gaming machines with prizes which have the function of directly receiving foreign currency cash from foreign players;
 - To receive foreign currency remittances/transfers;
 - To pay out winnings to winning foreign players and to refund money to them when they do not use up all their tokens;
 - To make foreign currency remittances/transfers;
 - Other foreign exchange activities comprising opening and using foreign currency specialized accounts and foreign currency cash balance funds; certifying winnings of players, paying prizes, and converting tokens for players.

2. Casino enterprises licensed to receive and disburse foreign currency and to conduct other foreign exchange activities must open foreign currency specialized accounts to serve its casino business operation. An enterprise is only permitted to open one specialized account for each foreign currency at one permitted bank. An enterprise licensed by the State Bank for receipt and disbursement in currencies of countries with common borders must also, in addition to opening foreign currency specialized accounts, open one specialized account in the currency of the country with the common border in order to serve its casino business operation.

3. Furthermore, Circular 10 provides that only foreign gamblers are allowed to **receive their winnings in foreign currency** or VND while Vietnamese gamblers may only receive winnings in Vietnamese Dong (by cash or by bank transfer).

Circular 10 took effect on 15 October 2017.

Selection of contractors via national bidding process

1. The Normal process of selecting contractors for bidding packages providing non-consulting services, purchasing goods, or construction should be organized in public, competitive offerings in relation to a single-stage one-envelope bidding process. The following steps are required for the normal process:

- Process of preparation: (i) to prepare electronic bidding documents for submission online (“**E-BD**”); (ii) to appraise and approve the E-BD;
 - Process of selecting contractor: (i) to upload online bidding announcement (“**E-BA**”) and issue E-BD; (ii) to modify and clarify the E-BD; (iii) to submit online bidding proposal documents (“**E-BP**”); (iv) to open bid;
 - Evaluation of the E-BP and ranking contractors;
 - Negotiation, submission, appraisal, approval and public announcement of selection results; and
 - Finalization and execution of the contracts.
2. The competitive offering under shortening process is new to the process.
- To prepare and approve E-BD;
 - To announce and issue E-BD;
 - To modify and clarify E-BD, to submit E-BP and open bid;
 - To evaluate E-BP, negotiate, appraise, approve and publicly announce the selection results; and
 - To finalize and execute the contracts.
3. The process of selecting contractors for bidding packages providing consulting service, non-consulting services, purchasing goods or construction are organized in public under single-stage two-envelope bidding process
- Process of preparation: (i) to prepare the E-BD; (ii) to appraise and approve the E-BD;
 - Process of selecting contractor: (i) to upload the E-BA and issue E-BD; (ii) to modify and clarify the E-BD; (iii) to submit the E-BP; (iv) to open online the proposal dossier on technology (“**E-PDT**”);
 - Evaluation of the E-PDT, submission, appraisal, approval of the list of contractors who meet the technique requirements;
 - Opening online the proposal dossier on finance (“**E-PDF**”);
 - Evaluation of the E-PDF and ranking the contractors;
 - Negotiation, submission, appraisal, approval and public announcement of selection results; and
 - Finalization and execution of the contracts.

In addition, the file submitted online to the National Bidding Networks must be in the form of word, excel, PDF, CAD, image formats and Unicode fonts. The file must not be infected by virus, must not be corrupted, and have no password.

This Circular was issued on 15 November 2017 and takes effect from 01 March 2018.

New tariff rate quotas for importing raw tobacco

On 29 November 2017 the Ministry of Industry and Trade enacted Circular No. 25/2017/TT-BCT stipulating the import of unmanufactured tobacco into Vietnam under the 2018 tariff-rate quota (“**Circular 25**”). According to Circular 25, the number of unmanufactured tobacco with HS code 2401 to be imported into Vietnam under the tariff-rate quotas increases from 51,051 tons in 2017 to 53,604 tons in 2018.

The time for considering allocation of tariff-rate quotas to traders must be agreed by the Ministry of Industry and Trade and other relevant line Ministries. The license for import under the tariff-rate quota should be announced to the trader within 10 working days upon the time of allocation as agreed by the relevant Ministries. If the application is rejected, the Ministry of Industry and Trade will send a written response providing an explanation to the trader.

Under Circular 25, the tariff-rate quota for importing unmanufactured tobacco into Vietnam shall be allocated to the traders **(i)** having the cigarette manufacture certificate issued by the Ministry of Industry and Trade and **(ii)** having demand of using the specified proportion of unmanufactured tobacco confirmed by the Ministry of Industry and Trade to manufacture cigarettes.

Circular 25 is effective from 1 January 2018 to 31 December 2018.

Betting on horse racing, greyhound racing and international soccer

On 4 October 2017 the Ministry of Finance issued Circular No. 101/2017/TT-BTC (“**Circular 101**”) on guiding Decree 06/2017/ND-CP dated 24 January 2017 (“**Decree 6**”) on the betting business for horse and greyhound racing and on international soccer. The key points of Circular 101 are as follows:

First, before any enterprise wishing to conduct betting business on horse and greyhound racing (“**Racing**”) must establish the Race Supervisory Committee (the “**Committee**”) by sending documents to the Department of Finance in the location of the Racing to request the establishment.

According to Article 4.3 of Circular 101, the membership of the Committee shall comprise: (i) the Chairman who is the representative of the Department of Finance; (ii) other members shall be representatives of the Department of Culture, Sports and Tourism, the Department of Justice, the provincial police, and the Department of Agriculture and Rural Development; and (iii) the Secretary who is a representative of the betting business enterprise concurrently the member of the Committee.

The Committee shall have the duty to supervise Racing by checking on the conditions and the process of the Racing; supervision of the compliance with the provisions on the frequency of

conducting betting and the regulations on the times for commencing and finishing as regulated by Decree 6.

For the purpose of implementation of its duties, the Committee shall have specific rights to request and appoint an investigation into any horse or greyhound participating in a race if considered necessary or on discovery of any indications of fraud; decision on removing from the list of participants in a race any horse, greyhound or jockey when there is sufficient, accurate information confirming that such horse, greyhound or jockey fails to satisfy all the conditions stipulated by law and in the Race Rules; etc.

Second, Circular 101 provides the regulations on financial management and accounting, auditing for betting business enterprise. As prescribed by Article 9, it must conduct separate cost accounting for its revenue, expenses and profit relevant to its betting business and must separately monitor these items in its accounting book system and financial statements.

Third, the betting business enterprise is obliged to prepare and send its financial statement to the local tax authority at the end of an accounting quarter. Moreover, every six (6) months and at the end of the year, the report on the status of business operations must be prepared and sent to the Ministry of Finance and the local Department of Finance.

In addition, Circular 101 regulates the responsibilities of organizations (i.e. Department of Finance, local tax authority, etc.) and provides standard form applications for betting business operations.

Circular 101 took effect from 1 December 2017.

New requirements for auto manufacture, assembly, and warranty

On 17 October 2017 the Government issued Decree No.116/2017/ND-CP on requirements for automobile manufacture, assembly and import and for warranty and maintenance services (“**Decree 116**”). The key points of Decree 116 are as follows:

First, the Decree provides regulations on major responsibilities of the enterprise manufacturing, assembling automobiles (“**Manufacturer / Assembler**”) and the enterprise importing automobiles (“**Importer**”) including (i) warranty and maintenance; (ii) recall and discarded automobile recovery; and (iii) assurance of technical and environmental safety quality.

With respect to the responsibility of warranty and maintenance, the Manufacturer / Assembler and Importer is obliged to warrant and maintain their products for a period of time or a number of kilometers whichever comes first and this responsibility shall depend on the condition of the automobile (whether used or not) and its type (passenger car, bus, etc.). In addition, those

enterprises must comply with the obligation to disclose information in accordance with Article 4.4 of Decree 116.

Manufactured or imported automobiles in Vietnam are required to ensure their manufacture or importation to Vietnam as prescribed by Article 6 of Decree 116. Especially, for the new (unused) imported automobile, the Importer must provide documents evidencing the quality of the automobile (i.e. copy quality certificate for the imported automobile model issued by the foreign authority; original ex-factory quality inspection slips issued by the foreign manufacturer, assembly, etc.) and the competent agency shall inspect each consignment of imported, unused automobiles.

Second, the enterprise must comply with and maintain the business conditions to conduct business as required by Decree 116.

The Manufacturer / Assembler must satisfy conditions of material facilities, personnel and safety regarding fire protection and firefighting to be granted the certificate of satisfaction of conditions for manufacture/assembly of automobiles issued by the Ministry of Industry and Trade (“**MOIT**”).

The automobile import business license issued by MOIT is a prerequisite for the Importer. For the purpose of obtaining such license, the Importer must own or lease an automobile warranty and maintenance facility or have such a facility belonging to the authorized dealer system of the Importer. Additionally, Decree 116 requires the Importer to provide a certificate or data proving that it has the right to represent a foreign automobile manufacturer, assembler or to recall the automobile.

Meanwhile, various conditions (i.e. garage, area, equipment, manpower, etc.) are also applied for the enterprise providing warranty and maintenance services. As a result, Vietnam Registry (under the Ministry of Transport) shall issue the certificate certifying an establishment as an automobile warranty and maintenance establishment.

Finally, Decree 116 takes effect as from the date of its issuance (“**Effective Date**”). As provided by Article 31 of this Decree, current Manufacturer / Assembler is permitted to continue its operation for 18 months from the Effective Date, after this period, all the conditions prescribed by Decree 116 shall be applied. With respect to the current Importer, it shall obtain the license under Decree 116 to import the automobile to Vietnam from 1 January 2018.

The nitty gritty of compliance

A month or so ago I wrote about high level corporate governance issues. I have recently attended a seminar that spoke of business incorporation and the importance of taking care of formalities. That’s what I want to chat about briefly this month.

While the larger questions of corporate governance address issues between ownership and management, there remain certain requirements to demonstrate the difference between the two.

These include corporate charter, bylaws, shareholder agreements, shareholder/director meetings, approvals according to the previously established criteria, etc.

The thing is, and the courts in Vietnam may not be quite sophisticated as yet to address this issue, in other countries, if the ownership is not separate on paper from the management, the courts may be able to hold ownership liable for more than their share of contributed capital. In the United States we call that piercing the veil. If the fiction of incorporation is unproved by formalities, it is easier for the courts to say, management was by ownership, the owners are essentially using this entity for their own means, rather than as a corporation, and thus the owners are liable for the full amount of liability, instead of the protected amount provided by corporations.

While this may not be a developed area of the law in Vietnam, it is important nonetheless as a major component of corporate governance. See, the formalities are the nuts and bolts of corporate governance.

Shareholder and director meetings must take place regularly depending on the requirements of law and the requirements of the corporate charter. If these meetings are not held, and proven by minutes, and other necessary documentation, it will be as if there is no shareholder/director input into the company. This means that management may be running amok and there is no check between the owners and the management. It also means that management is taking decisions without ownerships knowledge or consent, at least on paper.

And as I discussed a month or so ago, the importance of showing corporate governance on paper is vital if ownership wants to seek out new investors or to take the company public. That said, remember, corporate governance is all about the running of a company. Whether you abide by formalities or not, you will be in a much better position when the time to exit comes.

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.

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