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Newsletter

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VIETNAM LEGAL UPDATE DECREE 155 GUIDING SECURITIES LAW 2019

On 31 December 2020, the Government issued Decree No. 155/2020/ND-CP ("**Decree 155**"), which replaces Decree No. 58/2012/ND-CP (as amended) ("**Decree 58**") and Decree No. 71/2017/ND-CP. Taking effect on 1 January 2021, Decree 155 introduces a number of changes to the regulations on tender offers, foreign investment control, and corporate governance requirements applicable to public companies. These changes may have a significant impact on M&A transactions involving public companies in Vietnam.

We describe below some notable features of Decree 155 in this update.

1. Tender Offer Requirements

(a) *Waiver by the General Meeting of Shareholders ("GMS") of tender offer requirements*

Generally, pursuant to the Securities Law 2019, a tender offer may be required if a person acquires voting shares in a public company and such acquisition results in the acquirer and their related persons holding 25% or more of the total voting shares in such company. A tender offer may also be required where an additional acquisition by an acquirer, who together with their related persons already holds 25% or more of the total voting shares in a public company, reaches certain thresholds.

The Securities Law 2019 provides for certain circumstances where the tender offer requirement is exempted. Decree 155 clarifies one such exemption, being where the GMS adopts an approval to waive the tender offer requirement in relation to a proposed acquisition of existing voting shares. Decree 155 clarifies the threshold required for the GMS approval in such a case, providing that the approval must be passed by more than 50% of the total voting shares of the shareholders who are



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entitled to vote (or by any higher threshold stipulated under the company's charter). Interested shareholders involved in a proposed transfer (including the transferor(s), the transferee(s) and their related persons¹) are not entitled to vote.

(b) Requirement on inclusion of economic concentration clearance in the application dossier for registration of the tender offer

Another key change relating to tender offer regulations under Decree 155 is that the economic concentration clearance (i.e., merger clearance) must be enclosed in the application dossier for registration of the tender offer with the State Securities Commission ("**SSC**"). That is, in case economic concentration clearance is required for a proposed tender offer (i.e., such proposed tender offer meets any of the thresholds required by law to be reported to and cleared by the National Competition Committee), it must be completed before registration of the tender offer with the SSC.

2. Foreign Ownership Limits applicable to Public Companies

(a) Determination of "foreign ownership ratio"

Pursuant to Decree 155, in the context of a public company, "foreign ownership ratio" is now defined as the total ownership ratio of shares of all foreign investors and foreign-invested enterprises in the public company over the total amount of the charter capital of such company. In other words, the foreign ownership limit ("**FOL**") cannot be determined by only considering shares with voting rights (as previously prescribed under Decree 58). This change is believed to be aimed at preventing the circumvention of statutory FOLs by public companies by issuing non-voting shares to foreign investors and foreign-invested enterprises.

On a related note, pursuant to Decree 155, for the purposes of determining FOLs as described above, foreign-invested enterprises include *entities with more than 50% of their charter capital held by foreign investors*. This threshold is lower than that previously provided for under Decree 58 (being 51% or more) and in line with the new approach to foreign investment control under the Investment Law 2020.

(b) Rules to determine applicable FOLs in public companies

Decree 155 sets out certain rules for determining the FOL, consistently with the principles of the Investment Law 2020 and its guidance:

¹ According to Article 4.46 of the Securities Law 2019, "related person" means an individual or organization with interactive relations in any the following circumstances:

(a) an enterprise and its insiders; a public fund or public securities investment company and its insiders;

(b) an enterprise and any organization or individual owing more than 10% of the number of voting shares or capital contribution of such enterprise;

- (i) if the FOL for a business sector has been set out under an international treaty to which Vietnam is a party, such FOL will apply;
- (ii) if the FOL for a business sector is provided for under Vietnamese law, such FOL will apply;
- (iii) if a public company operates in a business sector that falls within the lists of sectors subject to foreign market access restrictions, such market access restrictions will apply. However, if such market access restrictions do not detail any applicable FOLs for such sector, then pursuant to Decree 155, foreign ownership will be capped at 50% of such company's charter capital. This threshold is higher than the previous threshold of 49% under Decree 58;
- (iv) for circumstances other than those described above, no statutory FOL will apply; and
- (v) if a public company operates in multiple business sectors with different FOLs, the most restrictive FOL applicable to any of those business sectors will apply.

Notably, Decree 155 also clarifies that a public company may apply a different FOL (provided that such FOL is lower than the statutorily applicable FOL described above) by obtaining the approval of its GMS and specifying such FOL in its charter.

3. Offering of Shares at a Price Lower than Par Value

Public companies' ability to offer shares at a price lower than par value is officially recognized by the Securities Law 2019 and is further described under Decree 155.

Pursuant to Decree 155, a public company may offer shares at a price lower than the par value of the shares (i.e., VND 10,000), either through a public offering or a private placement, subject to certain conditions, including:

- (i) With respect to a public offering: a public company may offer shares through a public offering at a price lower than their par value if, among other conditions, its trading share price on the securities trading system is lower than the par value of its shares. The trading share price on the securities trading system will be calculated based on the average reference price across the 60 consecutive trading days immediately preceding the date of determining the list of eligible shareholders for obtaining

(c) an organization or individual who, in a relationship with another organization or individual, directly or indirectly controls or is jointly controlled by such other organization or individual, or is subject to the same control with such other organization or individual;

(d) an individual and his/her biological parents, adoptive parents, parents-in-law, spouse, offspring, adopted children, daughter-in-law, son-in-law, siblings, brother-in-law or sister-in-law;

(e) a securities investment fund management company and securities investment funds or securities investment companies managed by such securities investment fund management company;

(f) a contractual relationship in which one organization or individual is the representative of the other; or

(g) any other organization or individual being an affiliated person as stipulated in the Law on Enterprises.

approval of the GMS on the share issuance plan for the public offering. In addition, the public company must have sufficient share capital surplus pursuant to its latest audited annual financial statements to cover the negative surplus arising from the public offering.

- (ii) With respect to a private placement: a public company may offer shares through a private placement at a price lower than their par value if, among other conditions, the proposed buyers are limited to strategic investors only. In addition, the shares subscribed by such strategic investors will be subject to a 3-year lock-up period (except for certain cases prescribed by law).

To evidence the satisfaction of the prescribed conditions, the public company must enclose certain additional documents in the application dossier for registration of its share issuance with the SSC, such as a statistical list showing the reference price of its shares across the 60 consecutive trading days immediately preceding the date of determining the list of eligible shareholders for obtaining the GMS approval on the share issuance plan.

4. Registration of Encumbrances over Securities in Public Companies with the Vietnam Securities Depository and Clearing Corporation (“VSDC”)

Decree 155 introduces a new mechanism for registration of encumbrances over securities (including shares) of public companies. Under this mechanism, encumbrances over securities centrally registered at VSDC must be registered with VSDC. Transactions involving the encumbered securities will then be blocked by VSDC during the period they are encumbered for perfection purpose. In other words, parties no longer need to register encumbrances over securities in public companies with the National Registration Agency for Secured Transactions (“**NRAST**”) first, then requesting the Vietnam Securities Depository to block the pledged securities for enforcement, as previously applied under the Securities Law 2006.

As for securities which have not already been centrally deposited at VSDC, encumbrances over such securities will continue to be registered with NRAST.

5. Corporate Governance of Public Companies

Decree 155 sets forth certain changes to corporate governance of a public company, including:

- (a) Members of the board of management ("Board") and the inspection committee must attend the annual GMS to answer questions raised by shareholders.
- (b) If the audited financial statements of the company contain any material qualified opinions of auditors, a representative of the auditor must also attend the annual GMS.
- (c) The number of independent Board members will be determined as follow:
 - (i) if the Board has three to five members, at least one of them must be an independent Board member;
 - (ii) if the Board has six to eight members, at least two of them must be independent Board members; or
 - (iii) if the Board has nine to 11 members, at least three of them must be independent Board members.
- (d) Decree 155 provides more guidance on the composition, qualifications and authorities of the internal audit committee, being a corporate body under the auspices of the Board required under previous laws but in relation to which little guidance had been provided. For instance, in terms of composition, the internal audit committee must have at least two members, and its chairperson must be an independent Board member, with the other member(s) being non-executive Board member(s).

As defined under Decree 155, "non-executive Board members" include the members of the Board other than the general director/director, vice-general director/vice-director, chief accountant and other executive personnel in accordance with the company's charter.

- (e) Decree 155 no longer requires the head of the inspection committee to be a professional accountant or auditor, or to work full-time at the company. Under Decree 155, the head of the inspection committee must hold a bachelor's degree in economics, finance, accounting, auditing, law, business management or any other major related to business activities of the company, unless the company's charter provides for a higher standard of qualifications.
- (f) In addition to those stipulated under the Enterprises Law 2020, Decree 155 requires GMS approval of a public company for the following related party transactions:

- (i) loans or guarantees granted to members of the Board, members of the inspection committee, the general director/director, other managers who are not shareholders, or their related persons; or
- (ii) related party transaction which results the total value of series of transactions over a period of 12 months from the date of the first transaction valued at 35% or more (or a smaller threshold provided for under the company's charter) of the total assets of the public company as recorded in its latest financial statements.

PUBLICATIONS

- Article "Practices and Key Points Regarding Multinational Carve-Out M&A in Asia"
Publication Commercial Law Review No.2275
Author Takeshi Komatsu, Norihito Sato, Reiji Hosokawa, Satoshi Yuda
- Article "Asian Real Estate Development - Legal Precautions of Investment for Industrial Assets"
Publication ASSOCIATION FOR REAL ESTATE SECURITIZATION Vol.59
Author Ryutaro Kawamura, Susumu Hanawa

NEWS

- **Novel Coronavirus (COVID-19) - Links to related articles and web pages**
Please click [here](#) to find links to all major Japanese government office websites regarding measures taken in relation to COVID-19.
Additional updates will be provided as new information becomes available. We hope you will find this information helpful.
- **MHM MY PAGE is now open**
On Friday, September 10, 2021, MHM launched "MHM MY PAGE," a portal site for the centralized collection and viewing of information on seminars, newsletters, books and articles, and public announcements from government agencies.
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