Bloomberg BNA

TAX PLANNING INTERNATIONAL

ASIA-PACIFIC FOCUS

International Information for International Business

VOLUME 15, NUMBER 9 >>> September 2015

www.bna.com

Vietnam

New Guidance on Vietnam's Loosening of Foreign Ownership Limits in Public Companies

On August 19, 2015, the Ministry of Finance ("MOF") issued Circular No. 123/2015/TT-BTC ("Circular 123") guiding the implementation of new provisions of Vietnam's Securities Law on foreign ownership limits ("FOL") in public companies. It will take effect on October 1, 2015.

IFOL in Public Companies

Decree No. 60/2015/ND-CP dated June 26, 2015 ("Decree 60") previously introduced the groundbreaking concept that FOL in public companies is unlimited—foreigner investors may own up to 100% of voting shares in a public company unless otherwise provided in the charter of the public company. The regulations repealed by Decree 60 had capped foreign ownership in public companies at 49%. In our view, Decree 60 and Circular 123 will also spur private equity activity in Vietnam as the enhanced liquidity of the Vietnamese bourses will make exit strategies through listings more attractive. There may also be tax advantages for investors in exiting through public (as opposed to private) Vietnamese companies.

Despite the initial enthusiasm surrounding Decree 60, the decree left many questions unanswered as to how a public company would go about lifting FOLs and increasing foreign ownership above 49%. Circular 123 sheds some light on this process going forward.

The ability of foreign investors to own 100% of Vietnamese companies is subject to the following clarifications and exceptions.

International Treaty Exceptions

A public company operating in sectors subject to specific foreign ownership limits under an international treaty (such as Vietnam's WTO Commitments) is subject to the specific limits set out in that treaty. To date, almost all FOLs in service sectors specified under Vietnam's WTO Commitments have been abolished. Certain highly-specialized and sensitive sub-sectors such as banking, telecommunication, transportation, agriculture and audiovisual services still maintain FOL restrictions.

Conditional Sectors

A public company operating in sectors conditional to foreign investment in which the specific foreign ownership limit has not been set is subject to a FOL of 49%. Apart from Vietnam's WTO Commitments and commitments made under other free trade agreements, FOL restrictions are generally not provided for elsewhere under Vietnamese law. Arguably, public companies operating in service sectors which are not tabled under the relevant international treaties are subject to this 49% cap.

Most Restrictive FOL Applies

Foreign ownership in a public company operating in multiple sectors subject to different FOL cannot exceed the lowest limit applicable to any of such public company's business activities, unless an exception is specified in an applicable international treaty.

Any cap on FOL pursuant to sections A. to C. above will be determined based on the proportion of voting shares only. Consequently, to the extent a public company is subject to a FOL, this may result in creative financings with multiple classes of shares.

Notification Procedure on FOL

According to Circular 123, public companies are themselves responsible for determining the applicable FOL. Those companies which are not subject to FOL yet and wish to maintain an FOL cap, must amend their charter to specify such cap.

After having determined the FOL applicable to them, companies which are not subject to FOL are required to file a notification dossier with the State Securities Commission ("SSC"). The dossier includes:

(i) extracted information on business lines as uploaded on the National Business Registration Portal and the electronic address linking to such information;

(ii) Minutes of Meeting and the Resolution of the Board of Director approving the unrestricted FOL (if the company does not wish to maintain an FOL); or

(iii) Minutes of Meeting and the Resolution of the General Shareholders' Meeting approving and the charter providing for the specific FOL (if the company wishes to maintain FOL).

Companies which are subject to FOL will file a notification dossier with the SSC comprising the extracted information on business lines as uploaded on the National Business Registration Portal and the electronic address linking to such information.

The SSC will have 10 working days to acknowledge in writing the notification on FOL. Within one working day of the receipt of SSC's acknowledgment on the applicable FOL, public companies are required to publish this information on their website, which gives effect to the published FOL.

FOL in Securities Companies

Circular 123 clearly provides that foreign ownership in securities companies is unlimited. However, only "qualified investors"[1] may own more than 51% in a securities company. Investors that do not meet the criteria for being a qualified investor may only own less than 51% in a securities company.

A qualified foreign investor who wishes to own more than 51% in a securities company must obtain

TPAF ISSN 1478-5129

the SSC's prior approval, which may be issued within 15 days from the date when the SSC receives the application and the transaction resulting in the change of ownership must occur within six months from the date of SSC approval. Otherwise, SSC approval will be automatically revoked.

David Harrison, Partner
Van Hai Nguyen, Associate
Mayer Brown JSM, Vietnam

Notes

[1] Decree No. 58/2012/ND-CP provides a number of criteria to determine a qualified foreign investor. Such investor must be a foreign entity which is licensed to engage in the banking, securities or insurance sectors.