Primer on Vietnam’s New Enterprise Law

2014 was a busy year for lawmakers in Vietnam. The XIIIth National Assembly at its 8th session held in November 2014 passed as many as 18 new and amended laws. Several of these laws are of paramount importance to foreign investors and the business community, such as the Law on Enterprises, the Law on Investment, the Law on Real Estate Business and the Law on Housing. All of these laws shall take effect in July 2015 and promise to significantly change the investment and business landscape.

This briefing will discuss several of the notable changes ushered in by the 2014 Law on Enterprises with a particular focus on 1) Corporate Formation, 2) Corporate Governance, 3) Capital Structure, and other items of note, such as definitions of state-owned enterprises (“SOEs”).

While most of the changes are positive, investors will need to pay careful attention to the implication of certain provisions on their rights and protections, in particular reduced thresholds for corporate approvals at shareholder meetings.

Corporate Formation

Simplify Incorporation in Conditional Business Sectors

The 2014 Law on Enterprises appears to simplify the application dossier to incorporate entities that wish to engage in conditional business sectors. Under the 2005 Law on Enterprises, in order for the application dossier to be considered full and complete, the incorporators were required to provide evidence of legal capital being paid-up and/or fulfillment of the professional qualifications applicable to the relevant conditional business sector. Under the 2014 Law on Enterprises, while still required to fulfill the relevant conditions in order to operate, corporate entities in conditional business lines are no longer required to produce such evidence at the time the dossier is submitted.

Business Registration Certificates Will Be Required for All Corporate Entities

Under the 2005 Law on Enterprises, an investment certificate issued to a foreign-invested corporate entity in accordance with the Law on Investment functions concurrently as its business registration certificate. Under the 2014 Law on Enterprises, all Vietnamese corporate entities will require a business registration certificate. Foreign investors wishing to incorporate a company in Vietnam must first obtain an investment certificate, which will be included in the incorporation application dossier.

Relaxed Administration Related to Business Lines

Advocates of simplicity have emerged victorious from the long debate on the necessity of specific business lines. Under the 2014 Law on Enterprises, business lines are no longer stated on the business registration certificate. As a result, companies will no longer be required to amend their business registration certificates when there is a change in their business activities. Rather, the change will simply be reported to the licensing authority.

Corporate Seal

Current regulations require companies to apply for the seal with the competent public security authority. Although companies are currently allowed to have more than one seal, in practice, obtaining a second seal is very difficult and rare. The 2014 Law on Enterprises introduces a ground-breaking provision on this matter, providing that companies may themselves determine the form, quantity and content of their own seal and they are required simply to inform the licensing authority of the relevant details.
**Corporate Governance**

**MULTIPLE LEGAL REPRESENTATIVES**

Under the 2014 Law on Enterprises, a LLC (limited liability company) or a JSC (joint stock company) can now have more than one legal representative. The corporate charter will specify the number, position, powers and duties of each legal representative. We note that the relevant provisions under the Civil Code are considered to be amended in the same manner. This may streamline the need for legal representatives of larger Vietnamese companies to issue multiple powers of attorney to functional directors and managers, and may facilitate the ability of counterparties to commercial contracts to confirm the authority of a signatory.

**REDUCING QUORUMS**

With respect to LLCs, the quorum for convening a members’ council’s meeting is reduced from 75 percent to 65 percent under the 2014 Law on Enterprises. With respect to JSCs, the quorum for convening a general meeting of shareholders (GMS) for the first and second attempts is reduced from 65 percent and 51 percent to 51 percent and 33 percent respectively. This should facilitate the ability to hold meetings of the relevant corporate bodies without long delays resulting from failure to meet the quorum requirements.

**REDUCING VOTING THRESHOLDS**

With respect to LLCs, the voting threshold with respect to passing resolutions by way of written opinions is reduced from 75 percent to 65 percent under the 2014 Law on Enterprises. With respect to JSCs, at a GMS, the voting threshold is reduced to 51 percent of the voting shares from the current 65 percent for ordinary matters and to 65 percent from the current 75 percent for reserved matters. The voting threshold in case of passing a resolution by way of written opinions is significantly reduced from 75 percent to 51 percent.

There are several implications of these changes. As a positive change, lower thresholds will reduce deadlock in the corporate approval process and bring Vietnam’s corporate governance thresholds more in sync with those of other jurisdictions.

However, the lower thresholds may also result in reduced protections for minority shareholders assuming that new entities will simply mirror the provisions in the law (which is typically what is done). Investors -- in particular, foreign investors -- that obtain minority stakes in Vietnamese corporate entities may therefore need to more carefully consider clauses in shareholder agreements related to “reserved matters” that would require affirmative investor approval. One other way to address this is by drafting or amending the corporate charter in a manner that requires a higher threshold than provided under law.

**Capital Structure**

**SHORTENING THE PERIOD FOR EQUITY INJECTION**

Members of an LLC will be required under the 2014 Law on Enterprises to pay-in their equity portion in full within the period of 90 days from the date on which the business registration certificate is issued. This is considerably shorter than the current timeframe of three years. This may ultimately prove to be an unfriendly change for investors, as one of the appealing aspects of the LLC as a corporate structure is its flexibility.

**CAPITAL STRUCTURE OF A JSC**

The 2014 Law on Enterprises provides clear definitions of terminology related to the capital structure of JSCs which were never properly defined under current law, thereby resulting in confusion. The 2014 Law on Enterprises defines “paid-up shares”, “authorised shares” and “unsubscribed shares”. Accordingly, authorised shares mean all of the shares which may be offered for sale. Paid-up shares are the authorised shares which have been fully paid-up, and unsubscribed shares are authorised shares which have not been fully paid-up. The charter capital of a JSC is the aggregate par value of all fully paid-up shares of the JSC.

**Other Notable Changes**

**MERGERS AND ACQUISITIONS**

Currently, a merger or an acquisition is possible only among corporate entities of the same nature (i.e., among either LLCs or JSCs themselves). This means that if an LLC were to acquire or merge with a JSC, it must be first converted into a JSC or vice versa. The 2014 Law on Enterprises removes this requirement and allows M&A activity between distinct types of legal entities. This is a positive change that should reduce red-tape related to M&A in Vietnam.
STATE-OWNED ENTERPRISES

Under the 2014 Law on Enterprises, only entities with 100 percent capital owned by the State are considered as SOEs, and thus are subject to certain separate set of regulations on operation and management. This is a welcome clarification as partially equitized SOEs in which the State owned between 75 percent to 100 percent operated in a grey area. This change will reduce substantially the number of entities classified as SOEs and potentially contribute to a more equal playing field for all other companies.

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