

ClientAlert

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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 law. They cover everything from new food safety rules to requirements for foreign investment in educational institutions to construction permits.

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

Sincerely,

Dang The Duc
Managing Partner

Executive Summary

A new circular issued by the Ministry of Health adds insight into the current food handling regulations. The circular offers guidance on safety and hygiene precautions for the production, processing, storage and transportation of food goods and containers. **SEE NEW RULES FOR FOOD SAFETY.**

The State Bank of Vietnam promulgated new rules for joint stock credit institutions wishing to list on a securities exchange. The new rules require stricter corporate governance and risk management procedures, but ease restrictions on performance and operations. **SEE RISK CONTROL AND CORPORATE GOVERNANCE FOR PUBLIC JOINT STOCK CREDIT INSTITUTIONS.**

Education comes in for an injection of foreign cash as a new decree outlines the proper procedures and percentages for foreign invested education ventures. The new decree specifies the forms of investment and outlines the purpose of and number of students who may attend—both national and expat—for schools utilizing a foreign curriculum. **SEE NEW DECREE ON FOREIGN INVESTMENT IN THE EDUCATION SECTOR.**

Annoying ads on your phone take a hit in a new decree issued by the Government. The decree changes the notorious opt-out provision and requires advertisers to obtain prior consent before sending advertising to phones or emails. **SEE TIGHTENING CONDITIONS FOR ADS VIA EMAIL AND SMS.**

Finally, we take a look at new rules governing construction permits. The rules modify existing codes and provide for a staged permit process. Changes in rules for amendments to permits and temporary permits are also outlined. **SEE NEW REGULATIONS FOR CONSTRUCTION PERMITS** |

Briefs

New Rules For Food Safety

The Law on Food Safety, No. 55/2010/QH12 (the “Law”), was approved by the National Assembly on 17 June 2010 and replaced Ordinance No. 12/2003/PL-UBTVQH11 on food safety and hygiene. Accordingly, implementing and guiding legislation was subsequently replaced to reflect the changes brought by the Law.

Circular No. 16/2012/TT-BYT (“Circular 16”) was issued on 22 October 2012 and provides detailed regulations on food safety conditions in production and trade facilities of (i) food, and (ii) equipment, packaging material, and food containers (“food production and trade facilities”). Circular 16 summarizes and clarifies relevant issues, takes the place of similar contents stipulated pre-Law legislation¹ and specifies specialized competencies and management functions of the Ministry of Health (“MOH”) for food safety and hygiene².

Prior to the issuance of Circular 16, Circular 15/2012/TT-BYT, dated 12 September 2012, was issued by the MOH and provided general requirements and conditions on technical infrastructure for food production and trade facilities (“Circular 15”). Accordingly, Circular 16

¹ Including:

- Decision No. 39/2005/QD-BYT
- Decision No. 01/2005/QD-BYT
- Decision No. 02/2005/QD-BYT

² Decision No. 63/2012/ND-CP

is controlled by the general regulations under Circular 15, and provides specific conditions for food production and trade facilities under the management scope and competence of the MOH.

Circular 16 does not provide guidance relating to licensing procedures and processes for obtaining specialized certificates for food production and trade facilities (e.g. Investment Certificate; Certificate on Food Safety and Hygiene, etc.). Licensing projects, including food production and trade facilities, fall under the ambit of the MOH, the Ministry of Commerce and Trade (“the MCT”) or the Ministry of Agriculture and Rural Development (the “MARD”).

Subject-matter and governing scope

Circular 16 provides specialized conditions on food safety and hygiene for four types of food production and trade facilities:

- i. Production and trade facilities of functional food, fortified food with micronutrients, food additives or supporting agents for food processing;
- ii. Production and trade facilities of natural mineral water and bottled water;
- iii. Production and trade facilities of equipment, packaging material and food containers; and
- iv. Small scale food production and trade facilities (in the scale of household or individuals with or without certificates of food trade registration).

Specialized Conditions

Circular 16 provides conditions on food safety and hygiene for all steps of production, storage and transportation for all projects falling under the scope of the MOH’s governance. Enterprises involved in at least one aspect of food handling must comply as follows:

Production: General conditions on technical infrastructure must be in accordance with provisions of Circular 15. Materials, additives or containers must guarantee evident origin in accordance with the National technical regulations and the list as permitted by the MOH and must not cause harm to customers’ health. Water resources used in production must satisfy the National technical regulations on drinking water quality.

Trade: General conditions on technical infrastructures must be in accordance with provisions of Circular 15. Book records, contracts, bills, receipts relating to the sale and purchase of food must be kept. Water resources for trade must be checked at least once per year for quality and compliance with the National technical regulations on domestic water.

Storage: Conditions on facilities and equipment as well as chemical agents used in food storage are provided in Circular 15.

Transportation: Containers must meet satisfactory hygiene requirements and be dedicated transporting equipment. Food safety conditions controlling equipment and directing staff who touch food during transport are required to comply with provisions on general hygiene under Circular 15.

Periodic Inspection

Food production and trade facilities are subject to periodic and surprise inspection by the

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competent authorities under the general management of the MOH. Such inspections are not to occur more than three times annually at facilities granted Qualified Certificate for Food Safety; no more than twice annually for facilities with further GMP, HACCP, ISO 22000 or equivalent; and no more than four times annually for facilities not subject to qualification. An surprise inspection shall be implemented if food safety infringement occurs, a relevant food safety incident arises, or inspection is under the higher level authorities.

Circular 16 takes effect on 5 December 2012. |

On 13 September 2012 the State Bank of Vietnam ("SBV") issued Circular No. 26/2012/TT-NHNN ("Circular 26") to replace Decision 787/2004/QĐ-NHNN ("Decision 787") dated 24 June 2004 and guiding approval procedures for listing shares of joint-stock credit institutions ("JSCI") on domestic and foreign securities markets.

According to Circular 26, JSCIs, including joint-stock banks, joint-stock financial companies and joint-stock financial leasing companies, will be required to meet nine conditions for obtaining permission from the SBV to list shares on the stock market. Specifically, Circular 26 introduces increased requirements on risk control and corporate governance. Major changes require JSCIs to:

- comply with the restrictions for ensuring the security of the operation of credit institutions under the Law on Credit Institutions for six consecutive months prior to an application for listing;
- implement loan classification and make provision against credit risks as regulated by the SBV at the end of the quarter preceding the quarter of application for listing;
- (at the time of the application) be consistent with the applicable laws on members and the organization of the Board of Management and the Inspection Committee; and
- (at the time of the application) have an internal audit department and an internal control system in compliance with the Law on Credit Institutions and other relevant laws.

In addition to strengthening the regulatory regime for JSCIs, Circular 26 introduces certain slackened conditions in comparison with Decision 787. For example, to list shares on stock markets a JSCI must now have a history of operations only two years long as compared to the previous five years requirement; and a JSCI must have maintained the ratio of non-performing loans of no more than 3% of the total loans outstanding during the two quarters preceding the quarter of application (under Decision 787 this requirement stretched for the two years preceding application). Also under Circular 26, for the period of twelve months prior to the application for listing shares, a JSCI must not have been subject to an accumulative administration fine of VND30 million or more (previously VND1 million). Circular 26 also abolishes the requirement that the JSCI must have obtained the SBV's "A" grade rating for the two years immediately prior to application.

The competent authority to receive application files is now the SBV's banking inspection and supervision department (instead of the SBV's provincial branches). Within 40 days of receiving a complete application file, the SBV will give a written approval or refusal of listing. In the case of refusal, the SBV is required to provide its reasons.

Circular 26 took effect on 29 October 2012. |

New Decree On Foreign Investment In The Education Sector

On 26 September 2012 the Government issued Decree No. 73/2012/ND-CP providing regulations on foreign investment and cooperation in the field of education ("Decree 73"). Decree 73 takes effect on 15 November 2012 and replaces regulations on education and training in: (i) Decree No. 18/2001/ND-CP dated 4 May 2001 stipulating establishment and operation of Vietnam-based foreign cultural and/or educational establishments; and (ii) Decree No. 06/2000/ND-CP dated 6 March 2000 on investment cooperation with foreign countries in the domains of medical examination and treatment, education and training, and scientific research ("Decree 06").

Decree 73 regulates foreign investment and cooperation in the field of education and vocational training, including educational associations (joint training programs), establishment of foreign-invested educational establishments, and representative offices of foreign educational establishments in Vietnam.

In this article, we will focus on the forms of joint training programs and foreign invested education establishments.

Joint Training Program

The subjects entitled to cooperate to carry out joint training programs include vocational education establishments and higher education establishments (i) lawfully established and operating in Vietnam and (ii) those lawfully established and operated overseas, of which the quality is certified by foreign quality assessment organizations or competent agencies, and accredited by competent agencies of Vietnam.

According to Decree 73, a joint training program may be solely designed by the foreign education establishment or jointly designed by a Vietnamese and a foreign education establishment. The program can be partially or fully implemented in Vietnam. Diplomas can be jointly issued or by either party individually and must comply with the statutory regulations of Vietnam and the country where the foreign education establishment is set up.

Decree 73 also specifies the required conditions for a joint training program including conditions on teachers, facilities and equipment, teaching programs, scale and language and subjects of enrollment. The duration for a joint training program is 5 years and can be renewed.

Establishment of a foreign invested education venture

Pursuant to Decree 73, there are two forms for a direct foreign investment in education, including (i) a 100% foreign-owned company and (ii) a joint venture company. Accordingly, educational institutions and establishments with foreign investment capital are recognized as Vietnamese legal entities from the date of issuance of a decision on establishment and operation. The operation duration of a foreign invested education establishment is not to exceed 50 years from the date of official establishment (the date of obtainment of the Investment Certificate). This period, in some special cases, may be extended up to 70 years as per the decision of the Government.

A foreign invested education establishment is allowed to be set up in the following forms:

- (i) Short-term training institution;
- (ii) Preschool educational establishments (preschool or kindergarten) to follow foreign curriculum and serve foreign pupils;
- (iii) General (universal) educational establishments (primary schools, secondary schools, high schools and multi-level schools) to follow foreign curriculum, issue foreign diplomas and serve foreign pupils and *a portion of Vietnamese pupils according to demand*.
- (iv) Vocational education institution; and
- (v) University education institution.

The requirements on minimum investment rates and total investment capital are based on the time required to complete the highest level of training offered by the foreign invested education establishment. For example, investment in a preschool educational establishment requires that the investment capital for each pupil be at least **VND30 million** (not including costs for land use) while investments in primary schools, secondary schools, high schools, and multi-level schools must be at least **VND50 million** per pupil (not including costs for land use).

Decree 73 states that the number of Vietnamese pupils of primary school and secondary school levels must not exceed 10% of the total number of pupils. The number of Vietnamese pupils at the high school level must not exceed 20% of the total number of pupils. Vietnamese pupils younger than five years old may not be enrolled to study foreign curriculum.

Based on Decree 73, a foreign invested education establishment is required to obtain three licenses in order to legally operate in Vietnam:

- (i) An Investment Certificate;
- (ii) An Establishment Decision issued by the competent authority to set up an education establishment; and
- (iii) An Educational Operation License.

The application documents and procedure for obtaining the required licenses are also specified in Decree 73.

Projects obtaining the necessary licenses prior to Decree 73 must complete additional licensing procedures required under Decree 73 within six months of the effective date of Decree 73.

It is expected that the Ministry of Education and Training and possibly other ministries will issue guiding circulars for implementation of Decree 73. |

Tightening Conditions For Ads via Email

Although Decree No. 90/2008/ND-CP, dated 13 August 2008 (“Decree 90”), on anti-spam and Circular No. 12/2008/TT-BTTTT, dated 30 December 2008, guiding the implementation of Decree 90 have come into effect, an epidemic of emails and SMSs have continued to plague users of telecommunications in Vietnam. In an attempt to prevent this rain of spam, the Government issued Decree No. 77/2012/NĐ-CP (“Decree 77”) on 5 December 2012 amending and supplementing a number of Articles of Decree 90. In general, Decree 77 provides stricter conditions for sending advertising emails and SMS and supplements

and SMS

respective fines.

Under Decree 90 advertising service providers were allowed to send emails and SMSs to consumers until such time as the consumer proactively “opted out” of the advertising. Decree 77 changes this requirement and allows advertising service providers to send advertising emails and SMSs only after having express consent from recipients. Acts of sending advertising emails or SMS without the prior consent of the recipient will be subject to a fine of between VND20 million and VND40 million.

In addition, advertisers and advertising service providers are required to (i) save information about recipients’ registration to receive advertisements, opt-out preferences, and confirmation of the recipient’s opt-out notification, and to keep the advertisement itself for 60 days; (ii) stop sending advertising messages to a recipient immediately (instead of within 24 hours as required by Decree 90) after receiving an opt-out notification from the recipient; (iii) send simultaneously a copy of advertising emails or messages to the technical system of the Ministry of Information and Communications; (iv) not send more than one advertisement having the same content to one e-address or telephone number within 24 hours, except as otherwise agreed with the recipients; and (v) only send advertising SMSs within the timeframe from 7:00 to 22:00, except as otherwise agreed with the recipients. Fines that may be applied for acts in violation are between VND5 million and VND10 million; between VND2 million and VND5 million; between VND20 million and VND40 million, and between VND10 million and VND20 million, respectively.

Regarding the provision of content service via SMS, the supplemented Article 23a provides that the content service provider is required to (i) have a website using the national code domain name “.vn”, and provide such site with functions allowing users to search information about services, services fees, how to use the services, how to refuse to use the services; and (ii) have a system for registering the use of services by users and for receiving opt-out notifications from users. A service provider providing content via SMS without said systems may be imposed a fine of between VND60 million and VND80 million.

A service provider must send advertising SMSs from qualified technical systems placed in Vietnam, and must also keep the advertising SMS for 60 days. A service provider who provides SMS services via the internet must (i) have a website using the National code domain name “.vn” and place the server for sending SMSs within the territory of Vietnam, and (ii) institute measures for verifying the source of sending SMSs via the internet, and obtain a management code by the MOIC. Failure to take measures for verifying the source of sending SMS via the internet will be subject to a fine of between VND60 million and VND80 million.

Decree 77 takes effect on 1 January 2013. |

New Regulations for Construction Permits

On 4 September 2012 the Government issued Decree No. 64/2012/ND-CP on construction permits (“Decree 64”). Compared with the previous provisions on the issuance of construction permits, Decree 64 provides some new features.

Decree 64 applies to domestic and foreign organizations and individuals investing in construction works; organizations and individuals concerned in the grant of construction permits and supervision of construction under construction permits in the territory of Vietnam.

Decree 64 prescribes the conditions, order, procedures, and competence to grant

construction permits; supervision of construction under the construction permits; rights and responsibilities of organizations and individuals involved in construction permit issuance and construction management under construction permits.

Under Decree 64, for special-level and level-I projects, investors may request the grant of construction permit by stages. Projects not following these lines may only break the grant of construction permits into two stages: construction of the foundation and basement (if any) and construction of the body of work. For projects involving many buildings, the investors may request to be considered for the grant of construction permits for one, more, or all of the buildings in the project.

Amendment of construction permits

Previously, if the project had already been granted a construction permit and the investors wished to adjust the designs for the building they were required to submit applications for amendment of the construction permits. Now, according to Decree 64, in case of adjustments to the design affecting the plan, exterior architecture, the location, base, building area, scale, building height, number of floors and other factors affecting the main load-bearing structure as well as function, fire prevention and environmental effects the investors must submit applications for amendment of the construction permits. Amendment of any construction permit will be limited to one time. Additional amendments require the application for a new permit.

Temporary construction permits

Under Decree 64, projects granted temporary construction permits must ensure the safety of structural works and follow other regulations (fire fighting, environment, safety corridors, etc.) during construction. The investor must demolish the project when the temporary construction permit expires and without compensation. Such temporary construction permits will only be granted for individual structures and will not apply for stages or the entirety of a project.

Management and obligations of construction permit licensing authorities

Decree 64 provides the direction of administrative reform and relies on the One Stop Shop ("OSS") mechanism. Construction permit licensing authorities receive the dossiers of organizations and individuals applying for construction permits; review, evaluate and grant permits and are responsible for their issuance. During the licensing review process, the construction licensing authority is entitled to consult other relevant authorities for information or instruction but must do so within the allotted time limit for review: ten business days for urban projects and housing and seven business days for individual houses in rural areas.

Decree 64 took effect on 20 October 2012 and replaces the construction permit regulations in Decree No.12/2009/ND-CP dated 12 February 2009, Decree No.83/2009/ND-CP dated 15 October 2009 of the Government on management of work construction investment projects and regulations on underground work construction permits specified in Decree No.39/2010/ND-CP dated 07 April 2010 of the Government on management of underground work construction space. |

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About Indochine Counsel

Established in October 2006, Indochine Counsel is one of the leading commercial 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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