

# 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 anti-money laundering to e-commerce to private share placements.

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

The Government has issued new guidance for the prevention of money laundering. The new law expands the definition of money laundering while at the same time increasing reporting requirements of banks and financial institutions. SEE ANTI-MONEY LAUNDERING.

A new circular updates the requirements for foreign insurance companies doing business in Vietnam. The new circular outlines minimum capital levels and details the financial reporting regime to ensure such capital levels remain at legislated levels. SEE NEW FINANCIAL REGIME FOR FOREIGN NON-LIFE INSURERS.

The Government has issued a new decree that creates sweeping changes in the realm of securities and stocks. This new decree covers a lot of ground. We've selected two topics that we think are the most relevant for our clients and briefed them. SEE DECREE 58: REAL ESTATE INVESTMENT FUNDS and DECREE 58: PRIVATE SHARE PLACEMENTS.

A new draft decree governing e-commerce is making the rounds. It confirms that e-documents do indeed have the same validity as hardcopy documents, and classifies various individuals and organizations that need to register their e-commerce activities with the government. SEE DRAFT DECREE ON E-COMMERCE.

Finally, we look at an important issue for companies, the issue of legal representatives. Particularly, we examine what happens when a legal representative is replaced and exactly when a new legal representative is deemed to have the authority to act on behalf of the company. SEE REPLACING LEGAL REPRESENTATIVES - WHEN APPOINTMENTS TAKE EFFECT. |

## Briefs

### Anti - Money Laundering

On 18 June 2012 the National Assembly adopted the Law on Anti-Money Laundering (the "AML Law"), which along with the existing Criminal Code is intended to improve the effectiveness of anti-money laundering activities in Vietnam.

#### *Money laundering*

According to the AML Law, money laundering is an act of an organization or individual seeking a way to legalize the origin of assets which have been obtained as a result of crime. Money laundering comprises (i) activities stipulated under Article 251 of the Criminal Code; (ii) the provision of assistance to any organization or individual involved in the crime and assistance to evade legal responsibilities by way of legalizing the sources of assets obtained as a result of the crime; and (iii) possession of assets if at the time of receipt of such assets it was known that the assets were obtained as a result of the crime and in order to legalize the origin of the assets.

The AML Law provides a broader definition of money laundering than has previously been applied by not only referring to the activities specified in the Criminal Code but also providing two additional activities classified as money laundering.  
Applicable entities

The AML Law applies to financial entities and any organization or individual conducting

non-financial related business activities, among others.

Non-financial related business activities include (i) prize gaming and casino business; (ii) business of real estate management services and real estate brokerage and real estate trading floor; (iii) precious metal and gems business; (iv) provision of notarization, accounting and legal services; and (v) investment entrustment services, services for the establishment, management and operation of an enterprise, and managerial and secretarial services for third parties.

### *Reporting obligations*

Financial entities, organizations or individuals conducting non-financial related business activities are required to report on the following matters:

- ***High value transactions:***

A high value transaction means a transaction in cash, gold or in foreign currency with a total value equal to or greater than the value stipulated by the competent State administrative body, which is conducted one or more times a day.

A high value transaction must be reported to the State Bank of Vietnam (SBV) within 24 hours of such transaction occurring. The report should be in the form of an electronic data file. If in written or other form, the report is due within two working days from the date of such transaction. The Government will specify the thresholds for high value transactions which are subject to the reporting requirement.

- ***Suspicious transactions:***

A suspicious transaction is a transaction which is extraordinary or in which there is a reasonable basis for suspecting that the assets in the transaction originate from a crime or are related to money laundering. The AML Law also provides detailed guidance for identifying a suspicious transaction in sectors including banking, insurance, securities, real estate and businesses that host prize-winning games. Suspicious transactions must be reported to the SBV within 48 hours from the time the transaction occurs. If any transaction shows signs of being related to a crime, such transaction must be immediately reported to the SBV and competent State bodies.

The AML Law takes effect from 1 January 2013 |

## New Financial Regime For Foreign Non - Life Insurers

The Ministry of Finance issued Circular No. 125/2012/TT-BTC ("Circular 125"), dated 30 July 2012, providing detailed guidelines on the financial regime applicable to insurers, re-insurers, insurance brokers and branches of foreign non-life insurers ("FBNI") established and operating in Vietnam.

Within the territory of Vietnam, if the charter capital corresponds with the legal capital, an insurance business may open up to 20 branches and representative offices. For each office beyond 20, an amount of at least 10 billion Vietnam dong must be added to the registered charter capital.

A non-life insurer and its foreign branch may conduct business in primary insurance of all types of non-life and health insurance other than aviation insurance and satellite insurance. If the insurer wishes to offer these two restricted products, they must supplement their paid-up charter capital by at least 50 million Vietnam dong. Insurers offering these products must maintain their paid-up charter capital at a level not less than the legal capital level stipulated in Circular 125 and must develop and maintain plans to supplement its charter capital as necessary to ensure that it remains at the required levels. This provision is checked every fiscal year and based on audited financial statement reports.

Non-life insurers, health insurance businesses and FBNI's must set up various insurance reserves which must be certified as set by an appointed actuary and based on their reserves and solvency. Insurers shall be permitted to select the method and register such with the Ministry of Finance on an annual basis. The selected method must be applied throughout an entire fiscal year.

Insurers and FBNI's have the right to make outside investments based on the capital excess over minimum solvency margins. Accordingly, insurers can establish offices or branches in a foreign country in accordance with relevant prevailing laws.

Circular 125 takes effect and replaces Circular No. 156/2007/TT-BTC from 1 October 2012. |

## Real Estate Investment Funds

For the first time in Vietnam, real estate investment funds ("REIF"s) will be legally regulated. Among other things, Decree No. 58/2012/ND-CP ("**Decree 58**") dated 20 July 2012 of the Government offers rules for opening and operating REIFs. This long-awaited legislation is a major push by the Government to create a legal framework for an important form of fund investments.

### *Organization of real estate investment funds*

An REIF can be organized and operated in the form of a public securities investment fund or public securities investment company. Such fund shall be managed by a fund management company and supervised by a custodian bank. In addition, assets of a real estate investment fund must be deposited with the custodian bank and real estate investment fund certificates must be listed on the stock exchange.

### *Operation of real estate investment funds*

An REIF must use at least 65% of its net asset value for investment in real estate property in Vietnam. Subject property must be selected with the objective of lease or other commercial operations so that the fund can provide stable dividends. The investment term by an REIF in property must be at least two years from the date of investment, except in cases of unavoidable sale as defined by law or at the proper decision of the General Meeting of Investors or Committee of Representatives of the fund.

Decree 58 also provides that an REIF is not permitted to independently formulate, inaugurate or develop a real estate property. Investment targets of REIFs are limited to housing or building works which (i) are available for trading according to the law on real estate business and (ii) which have been completely constructed in accordance with the law on construction. Where the invested real estate property is in the process of construction, the following conditions must be satisfied: (i) the invested real estate property

## Private Share Placements

must be fully capable of sale, use or lease immediately on completion through signed contracts with potential clients; (ii) the construction project has remained on schedule up until the time when the fund begins participation in the project; (iii) the total value of all real estate projects in the course of construction in which the fund invests does not exceed 10% of the total net asset value of the fund; and (iv) the invested real estate property is not vacant land.

An REIF may use no more than 35% of the net asset value of the fund to invest in cash, equivalent monetary instruments, valuable papers, negotiable instruments, listed securities, securities registered for trading, and Government bonds or Government guaranteed bonds. Investment in these types of assets is subject to the following restrictions: (i) no more than 5% of the total net asset value of the fund is permitted to be invested in securities issued by any single organization; (ii) no more than 10% of the total net asset value of the fund is permitted to be invested in securities issued by any single group of companies; and (iii) the fund invests in no more than 10% of the total issued shares of an organization.

Capital mobilization and public offerings shall be implemented by the fund management company according to the provisions of the securities laws and must be registered with the State Securities Commission of Vietnam.

Decree 58 takes effect from 15 September 2012.

Over two years ago the Government issued Decree 01/2010/ND-CP (“Decree 01”). Decree 01 imposed a new level of restrictions on the private placement of shares by privately held companies. Decree 01 required that private companies establish and approve plans for the private share placement and the use of the funds that it obtained as a result of such placement. Before this private companies were able to privately place shares with limited State oversight, namely, the company was required to amend the share ownership in its share register and, if the placement changed the number of issued shares, the number of issued shares in its Charter and other corporate documents. So, needless to say, Decree 01 proved a major change in the way non-public companies did business.

Now, as part of a major overhaul of the securities regulations, the Government has issued a new decree that includes new rules for the private placement of shares by non-public companies. This new decree, Decree 58/2012/ND-CP (“Decree 58”) actually simplifies the legislation while at the same time turning what had been a notification into an application.

Let me explain. Decree 01 required that a company wishing to make a private placement of shares notify the relevant authorities. The relevant authorities had so many days in which they could approve or deny the private share placement plan of the company. If, after the time period passed, the relevant authority remained silent, it was taken as an approval and the company was able to proceed with the private share placement. Decree 58, on the contrary, removes this “approval by default” and gives the relevant authority 15 days to approve or deny the placement plan.

Decree 58 does simplify the process, however. It has a basic requirement. The general meeting of shareholders must approve a “plan for a private placement of shares and the plan for utilization of proceeds earned from the offer tranche.” That’s it. Once that approval has been obtained the plan must be submitted to the relevant authority along with information on the offer tranche, information regarding the ratio of foreign shareholding,

and a complete application form. Once the relevant authority has received the application packet and approved the offer plan, the company may proceed with the private share placement. Once the offer tranche has been placed the company must also submit a report to the relevant state authority within 10 days. If there is a change in the plan for utilization of the funds raised by the private share placement the company must have approval of the board of directors for such change and submit information regarding such change to the next general meeting of shareholders. In addition, within 10 days of adopting the change the company must file a report to the relevant state authority.

Decree 58 takes effect on 15 September 2012 and replaces Decree 01

## Draft Decree On E- Commerce

With the establishment and operation of a large number of e-commerce websites in Vietnam, and the concomitant transactions carried out via emails and on websites, it is difficult to deny that Vietnam is become subject to the E-commerce craze.

Under the current laws, provisions on e-commerce are encompassed in the following legal documents: Civil Code, Law on Commerce, Law on E-commerce, Law on Information Technology, Law on Competition, and Law on Protection of Consumers' Rights. For guiding the implementation of these laws there have been two Decrees, namely Decree No. 57/2006/ND-CP on E-commerce, dated 9 June 2006 ("Decree 57"), relating to the use of data messages in e-commerce, and Decree No. 26/2007/ND-CP, dated 15 February 2007 ("Decree 26"), relating to digital signatures.

The lack of guidelines for the implementation of the relevant laws is barring the development of e-commerce in Vietnam. To respond to this problem, the Government has drafted a new Decree on E-commerce (the "Draft Decree") which is intended to replace Decree 57. The 2nd version of the Draft Decree has been published for public comments.

The Draft Decree confirms the legal validity of an e-document used in e-commerce transactions. Articles 8 and 9 of the Draft Decree state that an e-document is valid as a document if information contained therein can be stored and displayed on the e-device of the reader. An e-document shall be as valid as an original hardcopy if it satisfies both of the following conditions: (i) it is signed with a digital signature, or certified by a recognized e-contract certification organization, or it is secured intact as from the moment it is created by applying other technical measures; and (ii) information contained therein is accessible and usable in complete form when necessary.

Under Article 23 of the Draft Decree, entities participating in e-commerce activities comprise entities that establish e-commerce websites for their own business activities (owners of e-commerce sale websites); business entities that establish e-commerce websites serving as a venue for others to conduct business activities thereon (e-commerce service providers); entities that use websites of e-commerce service providers for their business activities (sellers); entities that buy goods or services from sellers on e-commerce websites (customers); and entities that provide technical infrastructure to e-commerce service providers (technical infrastructure providers).

E-commerce websites established by these entities that participate in e-commerce activities are classified into two groups: (i) e-commerce sale websites established by entities for the sale of their own products and services and promotional activities; and (ii) e-commerce service websites, including e-trading floors, online bidding websites, and

online promotion websites. One condition for the legal operation of an e-commerce sale website is that the owner of such website must notify the Ministry of Industry and Trade of the establishment thereof. E-commerce service websites must register their website establishment with the Vietnam E-commerce and Information Technology Agency belonging to the Ministry of Industry and Trade.

The Draft Decree is not yet perfect and needs further development. It would benefit from the clarification of parties' responsibility for participating in e-commerce transactions, providing requirements for separate technical mechanisms for customer confirmation of general transaction terms on e-commerce websites, enumerating procedures of notification and registration of e-commerce websites with the competent authorities.

It is expected that the Draft Decree will be promulgated soon.

## Replacing Legal Representatives When Appointment Take Effect

### *From a recent case*

During the recent debt restructuring at Binh An Seafood Joint Stock Company ("Bianfishco") it appeared that, until an authorization was given, a number of transactions and decision could not be concluded without the signature of the then company's legal representative who was in the United States for medical treatment. When it came to replacing the legal representative of Bianfishco it was further understood that the appointment of the new legal representative would not be effective until it had been recorded in the amended business registration certificate of Bianfishco.

This scenario raises one major question, when a legal representative is replaced, when does the replacement take effect, between the date of appointment as approved by the company or the date of issuance of the business registration certificate amended to record the replacement of the legal representative?

### *A brief on legal representative*

Vietnam law, like other national laws, provides for a mechanism of representation through which a corporate entity being a company acts as a person. That is, a certain natural person, or persons, is vested with the authority to represent the company in enacting decisions on behalf of the company, in essence, a signatory power. In Vietnam, such person is called the company's legal representative. Peculiar to Vietnam, a given legal entity may only have one legal representative.

Because each Vietnam-based company has only one person who is the legal representative to act on behalf of the company, any transaction of the company with other parties cannot be concluded without the company's legal representative or an authorization by the company's legal representative. Accordingly, if that sole representative resigns, any delay in the procedures to bring in the replacing representative will delay the company's operations.

### *Replacement of a company's legal representative – legal vacuum on timing for an appointment to take effect?*

Currently, the laws of Vietnam do not stipulate the specific time when an appointment of a company's legal representative takes effect, and this silence causes difficulty to the management and operation of a company as well as to the business parties doing business with that company.

According to Article 141.4 of the Civil Code, the legal representative of a legal entity is the

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head of the legal entity as prescribed by the charter of the legal entity or as decided by competent state agencies. This provision of the Civil Code, like the respective provisions of the Law on Enterprises, is clear in that the legal representative must be recorded in a company's charter, but it is not clear regarding the timing when the appointment of a company's legal representative becomes effective.

In particular, it is not clear whether the appointment of a company's legal representative starts from date (1) being the date of the company's amended charter recording the replacement legal representative (in accordance with the internal approvals for such replacement), or date (2) being the date when the amended business registration certificate is issued reflecting the replacement. Of note, it is a requirement to obtain the amendment to the business registration with respect to the replacement; and according to Article 28.1 of Decree 43/2010/ND-CP, there is a gap of 5 working days between these two dates. During those 5 working days, who has the authority to act as the company's legal representative - the departing legal representative or the replacement appointment (though not yet recorded in the amended business registration certificate of the company)?

The licensing authority is of the view that their issuance of the amended business registration certificate is a required „endorsement' giving legal effect to the company's internal approval and appointment of the new legal representative. However, from the company's perspective, such view may not be appropriate. That is because in the practice of business there may be cases in which an immediate replacement is required (e.g. to prevent the outgoing legal representative from taking any further action binding upon the company), and accordingly immediate effect of the appointment of the new legal representative is required to maintain operations of the company.

From the perspective of a third party who does business with the company, the third party's interests should be protected. According to Article 145.1 of the Civil Code, a transaction entered into and performed by an unauthorized person shall not give rise to rights and obligations with respect to the principal. This means, if the third party enters into a transaction which is signed by the outgoing legal representative who is later not recognized by the company (even though his replacement has yet to be recorded at the licensing authority), then it is arguable whether such transaction is valid and binding upon the company.

#### *Recommendation for a change*

There are different requirements from different stakeholders in this situation. The licensing authority will go for the convenience of State management; the company will go for maintaining their on-going operation; and third parties for protecting their interests. Given the legal vacuum on timing for appointment to replace a company's legal representative, a new provision should be introduced to meet those requirements. This provision can be one stating that a replacement of a company's legal representative takes effect from the date of the appointment by the company, and during the time from the date of the company's appointment till the issuance date of the business registration certificate, anyone acting on behalf of the company must notify the third party about the legal representative change which is in progress.

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Draft Decree On E-Commerce  
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Replacing Legal Representatives- When Appointments Take Effect  
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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 30 legal professionals working at the main office in Ho Chi Minh City and an affiliated office in Hanoi (in strategic alliance with Leadco Legal Counsel).

Indochine Counsel's objective is to provide quality legal services and add value to clients through effective customised legal solutions that work specifically for the client. The firm represents local, regional and international clients in a broad range of matters including transactional work and cross-border transactions. The firm's clients are diverse, ranging from multinational corporations, foreign investors, banks and financial institutions, securities firms, funds and asset management companies, international organisations, law firms to private companies, SMEs and start-up firms in Vietnam.

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- ❖ Taxation
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- ❖ Technology & Media
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- ❖ Mining & Energy
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