



# ClientAlert

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## Introduction

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 regulation. They cover numerous topics from incentives and reduction processes for SMEs, business registration fees, and certain social insurance payments as well as examining some new export/import/transshipment restrictions to new guidelines for organizations promoting Vietnamese guest workers in foreign countries and administrative fines for violations of the laws regarding exploitation of water and mineral resources.

As always, we hope you find this month's Client Alert helpful and wish you a rapid economic recovery from the ravages of Covid-19. At the time of publication it's looking like Vietnam may just have conquered the second wave. We hope it's so. Good luck and we look forward to working with you.

Kind regards,  
Indochine Counsel

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## Additional incentive industries and trades

On 30 March 2020, the Government promulgated Decree No. 37/2020/ND-CP ("**Decree 37**") supplementing the list of incentive industries and trades issued in Decree No. 118/2015/ND-CP ("**Decree 118**") dated 12 November 2015 detailing and guiding the implementation of the 2014 Investment Law. Decree 37 came into force on 15 May 2020.

1. Decree 37 supplements the list of incentivized industries and trades. Additional incentive industries and trades now include the business investment activities prescribed in the Law on Support of Small and Medium-sized Enterprises as follows:
  - (a) Business investment in product distribution chains of small and medium-sized enterprises ("**SMEs**");
  - (b) Business investment in SMEs' incubation facilities;
  - (c) Business investment in technical facilities supporting SMEs; and
  - (d) Business investment in joint-work areas supporting innovative start-up SMEs.
2. Under the 2014 Investment Law, enterprises investing in the incentivized industries and trades may be entitled to the following incentives:
  - (a) Application of a lower rate of corporate income tax than the normal tax rate for a limited period or for the whole duration of implementation of the project; reduction or exemption from corporate income tax;
  - (b) Exemption from import duties in respect of goods imported to form fixed assets; raw materials, supplies, and components for the implementation of an investment project; and
  - (c) Exemption from and reduction of land rents, land use fees, and land use taxes.

## Payment and Money Transfer related to Transshipment of Goods

On 30 March 2020, the State Bank of Vietnam promulgated Circular No. 02/2020/TT-NHNN ("**Circular 02**") providing guidelines for the payment and money transfer related to transshipment goods (the "**Payment and Money Transfer**"), which took effect on 15 May 2020. Circular 02 applies to: (i) banks and foreign banks' branches licensed to operate and provide foreign exchange (a "**Licensed Bank**"); (ii) Vietnamese traders participating in transshipment business (the "**Traders**"); and (iii) other agencies, organizations, and individuals related to Payment and Money Transfer.

1. Principles of Payment and Money Transfer include:
  - (a) Payment and Money Transfer must be conducted on the basis of two separate payment transactions, one between the seller and the Traders through goods purchase contracts, and one between the Traders and the buyer from goods sales contracts. The payment transaction between the Traders and the seller may be conducted before or after the transaction of receipt of money from the buyer;
  - (b) The Payment and Money Transfer must be conducted via a Licensed Bank;
  - (c) Traders are only permitted to make payment and transfer money for a transshipment under the purchase sales contracts for such goods at a single Licensed Bank; and
  - (d) Traders are allowed to use foreign currency in their foreign currency account or a purchased from the Licensed Bank to make offshore payment for procurement contracts.
  
2. Responsibilities of Traders:
  - (a) To present documents requested by the Licensed Bank for the purpose of conducting Payment and Money Transfers and to be responsible before the law for the accuracy and honesty of such documents;
  - (b) To provide information regarding the source of money received from the relevant sales contract; and
  - (c) To not use documents regarding a transshipment to buy foreign currency, make payment and transfer money in more than one Licensed Bank.
  
3. For contracts regarding transshipment which were signed before 15 May 2020, Traders may continue to make payment and transfer money according to signed contracts. However, if the contracts are revised or extended after 15 May 2020, the Payment and Money Transfer for such contracts must comply with Circular 02.

## Guidelines for implementation of the Law on Vietnamese Guest Workers

On 3 April 2020, the Government issued Decree No. 38/2020/ND-CP ("**Decree 38**") on replacement of Decree No. 126/2007/ND-CP ("**Decree 126**") providing guidelines for implementation of some articles of the Law on Vietnamese Guest Workers, which took effect on 20 May 2020.

1. Conditions on forms of enterprise and legal capital,

Enterprises permitted to organize guest worker programs are limited liability companies, joint stock companies, and partnerships which are established and operating under the 2014 Enterprise Law (the “**Service Providers**”) and that satisfy the following capital requirements:

- (a) Legal capital must not be lower than VND5,000,000,000; and
  - (b) Owners, members, and shareholders must be domestic investors under the Investment Law.
2. Specialized departments to provide employees with necessary knowledge prior to work abroad and to organize guest worker programs (the “**Specialized Departments**”) include:
- (a) Centers providing employees with necessary knowledge prior to work abroad including training departments and learner management departments; and
  - (b) Professional departments organizing guest worker programs that are responsible for exploiting foreign markets, recruiting employees, managing guest workers and assisting employees in their return to Vietnam and with financial aspects.

Service Providers possessing a license for conducting guest worker programs issued for the first time must prepare Specialized Departments within 90 days from the issuance of such license.

3. Facilities for organizing courses providing necessary knowledge for employees, which are owned or hired by Service Providers must satisfy the following requirements:
- (a) Have adequate rooms for study and accommodation for 100 employees at any given time; and
  - (b) Have an average area of rooms for learning and accommodation of at least 1.4 m<sup>2</sup>/learner and 3.5 m<sup>2</sup>/learner respectively. These rooms must have basic equipment for study and accommodation.
4. Specialized employees working for Specialized Departments must:
- (a) Sign indefinite term or definite term labor contracts with Service Providers;
  - (b) Not be subject to criminal prosecution, enforcement of criminal judgment, or prohibition from holding positions or working; and
  - (c) Have a college education or higher; specialized employees who are responsible for exploiting foreign markets, recruiting employees, managing guest workers and

providing necessary knowledge must have obtained one of the following majors: law, economics, business administration, or foreign language and have at least one-year's experience in organizing guest worker programs.

5. Service Providers must now make surety deposits in a commercial bank permitted to operate in Vietnam. Previously, Decree 126 required that such deposits must be made in commercial banks in the same location as the Service Provider's headquarters.
6. Decree 38 also supplements conditions and application requirements and procedures for sending Vietnamese employees to work in Taiwan, Japan and Middle Eastern countries.

## Administrative penalties in Water Resources and Minerals Sectors

On 24 March 2020, the Government promulgated Decree No. 36/2020/ND-CP ("**Decree 36**") replacing Decree No. 33/2017/ND-CP ("**Decree 33**") regulating administrative penalties for acts in violation of regulations in the water resources and minerals sector, which took effect on 10 May 2020. Decree 36 contains several changes which should help to overcome the shortcomings of Decree 33. Key changes provided under Decree 36 are summarized below.

### Scope of applicable entities clarified

Decree 36 seems to resolve the ambiguity of Decree 33's silence on this issue by clearly providing that its scope of application covers domestic and foreign organizations and individuals; officials that have the authority to record violations by minutes and the competent individuals to impose administrative penalties for acts in violation against regulations in the water resources and minerals sector; and relevant entities.

Organizations subject to administrative penalties under Decree 36 are:

- (a) Private enterprises, shareholding companies, limited liability companies, partnerships and their affiliates (including branches and representative offices), co-operatives, co-operative unions;
- (b) Foreign investors; foreign-invested economic organizations; representative offices and branches of foreign traders in Vietnam; representative offices of foreign trade promotion organizations in Vietnam;
- (c) Regulatory authorities committing violations which are not within their assigned scope of management;
- (d) Socio-political organizations, professional & socio-political organizations, social

organizations, and socio-professional organizations; and

- (e) Public professional entities and other organizations established as per the law.

## Increase of the Maximum Term for License Revocation

Under Decree 36, license revocation—which is the main form of penalty—is subject to a maximum term of 24 months, instead of the 12 months provided under Decree 33. Furthermore, Decree 36 expands the scope of licenses / permits that may be revoked, including: license for exploration and mining of minerals; license for exploration, exploitation, or use of water resources, permit for the discharge of wastewater into a water source, the practicing license for groundwater drilling (as compared to license for exploration and mining of minerals as provided in Decree 33).

## Amendment and Supplementation of Applicable Administrative Remedies

The forced return of illegal benefits obtained from violations is an administrative remedy under the old decree that, under Decree 36, generally remains unchanged. However, a formula to calculate illegal benefits has been introduced and supplemented. The illegal benefits to be returned must not include the direct cost of illegally exploiting resources. Additionally, the cost of payments to the state budget of the licensing fees for water resources exploitation / mineral exploitation, natural resources tax, environmental protection fees, and other fees and charges in accordance with the applicable laws due to the commitment of violations will be deducted when calculating the amount of illegal benefits.

Decree 36 also introduces two new applicable administrative remedies, as follows:

- (a) Compulsory payment of the fees for expert examination, inspection, and measurement if any violation is committed; and
- (b) Compulsory conduct of measures to improve and remediate the environment of the mined area, and measures to bring mining areas to a safe state.

## Increase of Level of certain Pecuniary Penalties

Pecuniary fines applicable to the organization carrying out mineral exploration without a mineral exploration license have changed under Decree 36. In case of mineral exploration subject to the licensing authority of the Ministry of Natural Resources and Environment, Decree 33 imposed fines from VND300,000,000 to VND500,000,000, except for the case of exploration of gold, silver, precious stone, platinum or toxic minerals by organizations, which would be imposed the fines from VND600,000,000 to VND1,000,000,000. Under Decree 36, in the case of mineral exploration subject to licensing authority of the Ministry of Natural Resources and Environment, depending on the number of exploitation boreholes, the level of fines has been raised to from VND400,000,000 to VND1,600,000,000.

# Self-Certification of Origin of Goods under EVFTA Circular

To help implement the EU - Vietnam Free Trade Agreement (“**EVFTA**”), on 15 June 2020, the Ministry of Industry and Trade (“**MOIT**”) issued Circular No. 11/2020/TT-BCT (“**Circular 11**”) adopting the rules of origin of goods in the EVFTA for application in Vietnam.

Under Circular 11, as from the effective date of the EVFTA (1 August 2020), a certificate of self-certification of EU origin is acceptable for the purpose of enjoying the EVFTA tariff preferences provided that such certificate complies with requirements as provided in Article 24 of Circular 11, and is issued by an exporter according to the provisions of the EU for a goods at any value or by any exporter for a goods with the value not exceeding six thousand Euro; or such certificate is issued by an exporter already registered in the electronic database in accordance with the regulations of the EU and notified to Vietnam.

For Vietnamese originated goods imported into the EU, a certificate of self-certification will be eligible for tariff preferences under the EVFTA when it complies with prescribed conditions as provided in Article 25 of Circular 11 and is issued by the exporter of goods with the value not exceeding six thousand Euro; or it is issued by an eligible exporter or an exporter already registered in the database in accordance with the regulations of the MOIT and notified to the EU.

Requirements under Articles 24 and 25 of Circular 11 for issuing certificates of self-certification of origin of goods are as follows:

- (a) Exporters can self-certify the origin of goods on: invoices, delivery notes or other commercial documents with sufficient information about their goods, by typing, stamping or printing the contents of the declaration of origin of goods on such documents;
- (b) The content of self-certification shall not be carried out on a separate form, but such is allowed to be presented on an integral page of commercial documents; and
- (c) Certificate of self-certification of origin of goods may be issued after exporting of goods, provided that such document shall be presented in the importing member country no later than two years as from the importation of goods or within the time limit as prescribed by the importing member country.

For Vietnamese exporters, Circular 11 requires that within three working days from the issuance date of the certificate of Vietnamese origin, the exporter in question must declare and post such certification and other required documents relating to the exported goods at the website:

[www.ecosys.gov.vn](http://www.ecosys.gov.vn).

Such certificate shall have a validity of 12 months from the issuance date in the exporting country,

and shall be submitted to the customs offices of the importing country within that period in order to enjoy the EVFTA tariff preferences, except for reasons of force majeure or other valid reasons beyond the control of the importer.

The self-certification mechanism under Circular 11 allows exporters and importers to enjoy the EVFTA tariff preference by simplifying the procedure of obtaining certificates of origin and, accordingly, they can save time and cost for paper works and relating transactions.

## Business registration fees exempted

On 24 February 2020, the Government promulgated Decree No. 22/2020/ND-CP (“**Decree 22**”) providing some amendments to Decree No. 139/2016/ND-CP (“**Decree 139**”) on the business registration fee (“**BRF**”), which took effect on 25 February 2020. Below are key amendments of Decree 22:

### Decree 22 adds three entities that may enjoy exemption from BRF

- (a) Those that are exempted BRF for the first year of establishment or commencement of production and business activities (from 1 January until the end of 31 December) are:
  - (i) Newly establish organizations (issued with a new tax code number and/or new enterprise code number);
  - (ii) Family households, individuals and groups of individuals investing for the first time in production and business activities; and
  - (iii) During exemption from BRF, an organization, family household, individual or group of individuals (subject) establishes a branch, representative office or business location, then such branch, representative office or business location is also exempt from BRF for the duration of exemption of such subject.
- (b) A small and medium-sized enterprise (“**SME**”) converted from a business household is exempt from BRF for a period of three (3) years from the date of issuance of their first enterprise registration certificate.
  - (i) If during exemption from BRF an SME establishes a branch, representative office or business location, then such branch, representative office or business location is also exempt from BRF for the duration of exemption of such SME;
  - (ii) If a branch, representative office or business location of an SME (which is exempt from BRF) was established prior to the effective date of Decree 22, then the duration of exemption from BRF of such branch, representative office or business location will

be calculated from the effective date of Decree 22 until the end of the duration of exemption from BRF of the SME; and

- (iii) An SME which converted from a business household prior to the effective date of Decree 22 is exempt from BRF pursuant to articles 16 and 35 of the Law on Supporting SMEs.
- (c) Public intermediate level education establishments and public pre-school educational establishments.

## BRF for the year of temporary cessation

Under Decree 22, any currently operating registered business taxpayer which sends to the relevant tax office notice of a temporary cessation of production and business activities in a calendar year, is not required to pay BRF for such year on condition that the written request to cease production and business activities is sent to the tax office prior to the deadline for payment of such BRF (usually 30 January) and on condition that such BRF has not been paid for the year of application. If the taxpayer fails to satisfy conditions as mentioned above, the BRF must be paid for the entire year.

## Deadline for payment of BRF

Under Decree 22, the deadline for payment of the BRF remains unchanged (no later than 30 January each year). However, additional element in determining the deadline have been supplemented, in particular:

- (a) For SMEs converted from a family household (including its branch, representative office and/or business location), at the end of the duration of its exemption from BRF (namely the fourth year after the establishment of such enterprise):
  - (i) If the duration of exemption of BRF ends in the first six months of the year, then the deadline for paying the BRF is 30 July in the year in which such exemption ended; and
  - (ii) If the duration of exemption of BRF ends in the last six months of the year, then the deadline for paying the BRF is 30 January of the year following the end of such duration.
- (b) For family household, individual or group of individuals engaged in production and business which dissolved but then recommences its production and business activities:
  - (i) If it recommences its operation in the first six months of the year then the deadline for paying the BRF is 30 July of the year of such operation; and

- (ii) If it recommences operation in the last six months of the year then the deadline for paying the BRF is 30 January of the year immediately following the year of recommencing operation.

## Compulsory insurance premium rates for labor accidents and occupational diseases

On 27 May 2020, the Government issued Decree No. 58/2020/ND-CP (“**Decree 58**”) replacing Decree No. 44/2017/ND-CP (“**Decree 47**”) on regulating compulsory insurance premium rates payable to the insurance fund for labor accidents and occupational diseases (the “**Fund**”), which came into effect on 15 July 2020. Decree 58 retained the premium rates as stipulated by Decree 47 but provided several supplementations as follow:

1. When a lower rate (0.3% of the salary fund) than the normal rate of 0.5% of the salary fund applies to premium payments, particularly enterprises operating in industries with high risks of labor accidents and occupational disease, the enterprise may apply the premium rate of 0.3% if they satisfy the following requirements:
  - (a) During the three years prior to the time of proposal, they were not subject to any administrative monetary fine or any criminal prosecution for a breach of Law on Occupational Safety and Hygiene or the Law on Social Insurance;
  - (b) Within three consecutive years prior to the year of proposal, they accurately, fully and timely submitted periodical reports on labor accidents and reports on occupational safety and hygiene; and
  - (c) The frequency of labor accidents in the year preceding the year of proposal was reduced by at least 15% as compared to the average frequency of labor accidents in three consecutive years prior to the year of proposed rate reduction, or there was no labor accident in the prior three years.
2. An employer wishing to apply for the reduced premium rate must lodge an application to the Ministry of Labor, Invalids and Social Affairs.
3. The duration of any premium rate reduction is 36 months from the month of the effective decision applying such rate. Sixty days prior to expiry of the application of the reduced premium rate, if the employer still wishes to continue to apply the lower rate, then he must prepare and submit a new application dossier.
4. The decision amending or applying the lower premium rate may be withdrawn or canceled in the following cases:

- (a) The employer was guilty of fraudulent conduct or made a false declaration in its application file;
- (b) The employer breached the provisions of the Law on Occupational Safety and Hygiene or the Law on Social Insurance at the level of a fine for an administrative offense or criminal prosecution during the period of application of the lower premium rate;
- (c) The employer failed to provide a report on labor accidents or a report on the work of occupational safety and hygiene during the period of application of the lower premium rate; or
- (d) The organization assessing occupational safety and hygiene was guilty of fraud which changed the conditions applicable as the basis of the proposal to reduce the premium rate prescribed.

## About Indochine Counsel

Established in October 2006, Indochine Counsel is one of the leading business 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 45 legal professionals working at the main office in Ho Chi Minh City and a branch office in Hanoi.

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