



Special Alert

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Guiding Rules Issued for the Investment Activities in Vietnam

The Government has recently released Decree No. 31/2021/ND-CP dated 26 March 2021, providing the detailed regulations and guidelines for implementation of a number of articles of Law No. 61/2020/QH14 on Investment (the “**2020 Investment Law**”), which came into effect on 26 March 2021 (“**Decree 31**”), and replaces Decree No. 118/2015/ND-CP dated 12 November 2015 (as amended) (“**Decree 118**”). Decree 31 provides for the guidelines for the investment activities in Vietnam, of which the key points are summarized below:

List of Restricted Sectors

In addition to being allowed limited investments in sectors on the list of prohibited business lines and conditional business lines generally applied to all investors, Foreign Investors (as defined below) are additionally limited by:

- ✓ the list of industries and trades for which there has not yet been market approach (the “**List of Unapproachable Sectors**”); and
- ✓ the list of industries and trades for which market approach is conditional (the “**List of Approachable Sectors**”).

(Collectively, the “**List of Restricted Sectors**”)

The specific List of Restricted Sectors is provided under Annex I attached to Decree 31, as list at the end of this special alert.

The applicable entities of the List of Restricted Sectors

- ✓ Foreign investors including individuals holding foreign nationality or organizations established under foreign laws conducting business investment activities in Vietnam; and
- ✓ Foreign-invested economic organizations stipulated under Article 23.1 of the 2020 Investment Law when implementing investment for (i) establishment of an economic organization; (ii) investment in the form of capital contribution or purchase of shares or purchase of capital contribution portions in other economic organizations (the “**Capital Acquisition**”); or (iii) investment on the basis of a business cooperation contract.

(Collectively, the “**Foreign Investors**”).

Vietnamese citizens concurrently holding a foreign nationality have the right to choose to apply investment conditions and investment procedures as applicable to Foreign Investors.

Main principles

Main principles for applying market approach restriction for Foreign Investors are:

- (a) Except for business lines on the List of Restricted Sectors, Foreign Investors are entitled to market access with the same treatment as that of domestic investors.
- (b) Foreign Investors are not allowed to invest in business lines on the List of Unapproachable Sectors.
- (c) In order to invest in a sector on the List of Approachable Sectors, Foreign Investors must satisfy the market access conditions regarding that sector. In case of investment in multiple sectors, the conditions for investment of all sectors must be obeyed. The details of market access conditions for sectors on the List of Approachable Sectors will be reviewed summarized by the Ministry of Planning and Investment and publicly promulgated on National Portal on Foreign Investment (the “**NPFI**”).
- (d) For business lines that Vietnam has not yet made a commitment regarding market access or has reserved the right to adopt measures inconsistent with the obligation of market access:
 - ✓ if there are no restrictive provisions regarding market access applicable to Foreign Investors in the Vietnamese laws, a Foreign Investor may receive treatment identical to Vietnamese nationals; or
 - ✓ if there are restrictive provisions regarding market access applicable to Foreign Investors in the Vietnamese laws, a Foreign Investor must comply with such restriction.
- (e) If new provisions restricting market access are to be adopted in the Vietnamese laws, Foreign Investors must comply with such new restrictions from the effective date of such new

regulations if Foreign Investors (i) establish a new economic organization; (ii) execute a new investment project; (iii) assign an investment project; (iv) invest in the form of Capital Acquisition; (v) invest on the basis of a business cooperation contract; or (vi) amend, supplement the business lines of an existing investment project.

- (f) If a Foreign Investor is subject to an international investment treaty that has more favorable terms than Vietnam's existing market access restrictions, that Foreign Investor will be treated under the applicable international investment treaty.
- (g) If a Foreign Investor is subject to multiple investment treaties, they may choose which treaty will apply but must continue to abide by the regulations of that treaty. Foreign Investors can not pick and choose different provisions from different treaties to apply to their investment in Vietnam.

Registration of new investment projects not requiring an investment policy approval

Conditions for approval of new investment projects by issuing a new Investment Registration Certificate ("IRC")

One of the most notable updates in the 2020 Investment Law is the supplementation of conditions for approval of new investment projects by issuing the IRC. Per Decree 31, investors must:

- ✓ clearly provide documents to demonstrate that their investment project has a location for implementation;
- ✓ clearly stipulate the assessment of the conformity of the investment project with planning (Article 31.7 of Decree 31); and
- ✓ abide by the decision of the provincial People's Committee on the investment rate per unit of land area based on local conditions and approved by the Permanent People's Council of such province.

Procedure for issuance of an IRC

Under Decree 31, the investor have the right to submit either hard copies of applications or online applications on the NPFI in one of two forms: using a digital signature or not using a digital signature.

If the investor chooses not to use a digital signature, the investors shall declare, upload the scanned copies of their application on the NPFI. After receiving the notice on valid application from the investment registration agency¹ (the "IRA"), the investors shall submit hard copies of their application

¹ Under the 2020 Investment Law, the investment registration agency means the competent/authorized State agency to issue, amend and revoke IRC which includes the management board of an industrial zone, export processing zone, high-tech zone or economic Zone, or the Departments of Planning and Investment.

to the IRA. If they choose to use a digital signature, the investor only needs to declare, upload the scanned copies which are signed by digital signature on the NPFI and are not required to submit hard copies of documents after the online application is approved.

As of the date of writing, the NPFI is not available for the investor to submit online applications.

This procedure is only available for investment projects not requiring an investment policy approval. If the project is subject to investment policy approval, investors must submit hard copies of applications according to the provisions of Articles 35, 44, 45 and 46 of Decree 31.

Amendment to an existing investment project

Extension of an existing investment project

Decree 31 stipulates that the extension of the operation term of an investment project (the “**Operation Term**”), except for cases not permitted of extension of the Operation Term as per Article 44.4 of the 2020 Investment Law, may be approved upon application to the competent authority, if the following conditions are met:

- (a) The extension conforms to national planning, regional planning, provincial planning, urban planning and special administrative - economic unit planning (if any); conforms to development and orientations objectives in urban, residential housing development planning programs (for residential housing construction investment projects and urban areas investment projects); and
- (b) Conditions for land allocation or land lease are satisfied in accordance with the law on land (in case of land use extension).

If an investment project satisfies the conditions as mentioned in Item (b) above but does not satisfy those in Item (a) above, the competent authority may extend the Operation Term on an annual basis until an annual land use plan at the district-level is issued in accordance with the law on land. The investor must only implement the procedure to extend its Operation Term for the first year of extension.

Decree 31 also clarifies specific cases where extension of the Operation Term is not permitted as per the 2020 Investment Law including investment projects using outdated technology or potentially causing environmental pollution, or resource-intensive projects (the “**List of Extension-prohibited Projects**”). However, Decree 31 also gives an additional procedure to identify whether or not an existing investment project, when applying for extension, is subject to the List of Extension-prohibited Projects, to which the competent authority specialized in science and technology will take a role and collaborate with relevant agencies to proceed with an appraisal procedure.

It should be noted that the duration of an investment project, after being extended, cannot exceed the

period specified in Clauses 1 and 2, Article 44 of the 2020 Investment Law. Accordingly, the operation duration of an investment project outside an economic zone may not exceed 50 years. Investment projects implemented in geographical areas with difficult socio-economic conditions, areas with extremely difficult socio-economic conditions or investment projects with large investment capital but slow capital recovery Investment project duration may be longer but not exceed 70 years.

Transfer of investment project

In addition to the Transfer of all or a part of an investment project as provided in Decree 118, Decree 31 adds provisions on the Transfer of an investment project being a security asset, specifically, credit institutions or organizations, individuals receiving investment projects as property security (the “**Secured Parties**”) are entitled to assign such investment project or receive and execute such investment project.

In case Secured Parties assign such investment project, Secured Parties or an investor receiving the assignment must execute the procedures as per Article 49 of Decree 31. Otherwise, if the Secured Parties choose to receive and execute such investment project, they must file a dossier and carry out procedures for amendment of the investment project in accordance with Articles 44, 45, 46, 47, 49.6 of Decree 31.

Division, consolidation and merger of investment projects

An investor has the right to:

- ✓ divide or separate one investment project implemented by such investor into a number of projects; or
- ✓ merge investment project(s) implemented by the investor into a single investment project implemented by such investor.

The division, consolidation and merger of investment projects must satisfy the following conditions:

- ✓ Land use conditions in accordance with the law on land, conditions for investment and business (if any) and other conditions as prescribed by law; and
- ✓ Not change the investor's conditions (if any) in the Decision of investment policy approval or the investment registration certificate before division, consolidation and merger.

The investor shall execute the procedure to amend the investment project as per Article 50.3 of Decree 31.

Obtaining an approval for Capital Acquisition

Foreign Investor does not need to obtain the approval for Capital Acquisition

There is an exception under Decree 31 that Foreign Investors who invest in the form of Capital Acquisition in, (a) a small and medium-sized startup innovative enterprise, or (b) an innovative startup investment fund will not need to obtain an approval for Capital Acquisition.

The conditions for Foreign Investors investing in the form of Capital Acquisition

The conditions for Foreign Investors investing in the form of Capital Acquisition are:

- (a) To satisfy the market approach conditions applicable to Foreign Investors investing in a sector on the List of Approachable Sectors;
- (b) To ensure national defense and security; and
- (c) To ensure land use conditions for Target Companies in which Foreign Investors contribute capital, purchase shares or purchase Capital Acquisition portions (the “**Target Companies**”) in case Target Companies have land use right certificates (the “**LURC**”) in islands, border and coastal communes, wards and towns; other areas affecting national defense and security (the “**Special Location**”).

Decree 31 stipulates that conditions as per Items (b) and (c) above do not apply for those Target Companies implementing investment projects in industrial parks, export processing zones, hi-tech zones or economic zones established under the Government's regulations. On the contrary, the IRA shall seek opinions from the Ministry of Public Security (“**MPS**”) and the Ministry of National Defense (“**MND**”) regarding the satisfaction of such conditions before approving Capital Acquisition.

List of Restricted Sectors

List of Unapproachable Sectors

- (1) Trading in goods and services on the list of goods and services exclusively implemented by the State in the field of commerce;
- (2) Press activities and information collecting activities in any form;
- (3) Catching or exploiting seafood;
- (4) Investigation and security services;
- (5) Judicial administrative services, including judicial verification service, bailiff service, property auction service, notary service, service of asset management officer;
- (6) Services of sending laborers to work abroad under contracts;
- (7) Investment on cemetery infrastructure construction to transfer the land use right and infrastructure attached to the land;
- (8) Refuse collection services directly from households;
- (9) Public opinion polling services (opinion polls);
- (10) Blasting service;
- (11) Manufacture and trade in weapons, explosives and supporting tools;
- (12) Importing and dismantling used ships;
- (13) Public postal services;

- (14) Trading in border-gate transfer of goods;
- (15) Trading in temporary import and re-export;
- (16) Exercise the right to export, import and distribution of goods which fall under the list of goods which foreign investors, Target Companies with foreign investment capital do not exercise the right to export, import and distribution;
- (17) Collection, purchase and handling of public property in units of the armed forces;
- (18) Manufacture of military materials or equipment; trading in military equipment, military goods for the armed forces, military weapons, equipment, techniques, military and police specialized vehicles, components, parts, spare parts, materials and special equipment and technologies for their manufacture;
- (19) Trading in industrial property representation services and assessment services regarding intellectual property;
- (20) Services of the establishment, operation, maintenance of aids to navigation, water zones, water areas, public marine fairway and maritime routes; service of surveying water zones, water areas, public marine fairway and maritime routes serving the announcement of Maritime Notices; Services of surveying, constructing and publishing nautical charts for water areas, seaports, marine fairway and maritime routes; development and distribution of marine safety documents, publications;
- (21) Regulatory services to ensure maritime safety in water zones, water areas and public marine fairway; marine electronic information service;
- (22) Testing services (inspection, experiment) and issuance of certification for means of transport (including systems, equipment, components of vehicles); Testing services and issuance of technical safety and environmental protection certificates for vehicles, specialized equipment, containers, and dangerous goods packaging equipment used in transportation; Testing services and issuance of technical safety and environmental protection certificates for means and equipment used for exploration, exploitation transportation of oil and gas at sea; testing services on technique, occupational safety for machines and equipment with strict requirements on occupational safety installed on means of transport and means, equipment used for exploration, exploitation transportation of oil and gas at sea; fishing vessel registry service;
- (23) Services of investigation, assessment and exploitation of natural forests (including logging and hunting, trapping of rare and precious wild animals, management of the genetic fund for plant, animal and microorganisms used in agriculture);
- (24) Research or use genetic resources of new animal breeds before being appraised and evaluated by the Ministry of Agriculture and Rural Development; and
- (25) Trading in travel services, excepting for international travel services for international tourists who go to Vietnam.

List of Approachable Sectors

- (1) Production and distribution of cultural products, including video records;
- (2) Production, distribution, projection of television programs and works of music, theater, and cinema;

- (3) Providing radio and television services;
- (4) Insurance, banking, brokerage, securities trading and other services related to insurance, banking, brokerage, securities trading;
- (5) Post and telecommunication services;
- (6) Advertising service;
- (7) Print service, publication distribution service;
- (8) Measurement and mapping service;
- (9) Photography service from above;
- (10) Educational services;
- (11) Exploration, exploitation and processing of natural resources, minerals, oil and gas;
- (12) Hydroelectricity, offshore wind power and nuclear energy;
- (13) Transport of goods and passengers by railroad, airway, road, river, sea, pipeline;
- (14) Aquaculture;
- (15) Forestry and hunting;
- (16) Business of betting, casino;
- (17) Security service;
- (18) Construction, operation and management of river ports, seaports and airports;
- (19) Real estate business;
- (20) Legal services;
- (21) Veterinary services;
- (22) Purchase and sale of goods and activities relating directly to the purchase and sale of goods of foreign service provider in Vietnam;
- (23) Technical inspection and analysis services;
- (24) Tourist services;
- (25) Health and social services;
- (26) Sports and entertainment services;
- (27) Manufacture of paper;
- (28) Manufacture of over 29-seat transport vehicles;
- (29) Development and operation of traditional markets;
- (30) Commodity Exchange operations;
- (31) Domestic retail collection services;
- (32) Auditing, accounting, bookkeeping and tax services;
- (33) Valuation services, consulting services of valuating enterprises for equitization;
- (34) Services related to agriculture, forestry and fishery;
- (35) Manufacture and fabrication of aircraft;
- (36) Manufacture and fabrication of locomotives and railroad carriages;
- (37) Manufacturing and trading in tobacco products, tobacco raw materials, machinery and equipment specialized in tobacco industry
- (38) Activities of publisher;
- (39) Building and repairing vessels;
- (40) Waste collection services, environmental monitoring services;
- (41) Commercial arbitration services, arbitration mediation;
- (42) Trading in logistics services;

- (43) Coastal sea transport;
- (44) Cultivation, production or processing of rare plants, breeding of rare wild animals and processing of these animals or plants, including live animals and preparations products from them;
- (45) Production of construction materials;
- (46) Construction, and related technical services;
- (47) Motorcycle assembly;
- (48) Service related to sport, performing arts, fashion shows, beauty and model competitions, and other entertainment activities;
- (49) Air transport support services; ground technical services at airports; catering services on the plane; navigation information services, aeronautical meteorological services.
- (50) Shipping agency services; shipping tugboat [ship towing] services;
- (51) Services related to cultural heritage, copyright and related rights, photography, video recording, recording, art exhibitions, festivals, libraries, museums;
- (52) Services related to tourism promotion;
- (53) Representation service, recruitment and booking agency, management for artists and athletes;
- (54) Family related services;
- (55) E-commerce activities;
- (56) Cemetery business, cemetery services and funeral services;
- (57) Seeding and chemical spraying services;
- (58) Maritime pilotage services; and
- (59) Investment industry or trade under the pilot mechanism of the National Assembly, the National Assembly Standing Committee, the Government, and the Prime Minister.

We anticipate that the new regulations will ease the path forward for investors, especially Foreign Investors, in Vietnam. If you have any questions regarding these new regulations, please feel free to get in touch with your contact here at Indochine Counsel or contact us through our website at <https://www.indochinecounsel.com>.

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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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