



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 concerning information disclosure for corporate bond issuers, tender bidding under the CPTPP, electricity operation licenses, and tax management of foreign e-commerce providers.

As always, we hope you find this month's Client Alert helpful. We look forward to working with you.

Kind regards,
Indochine Counsel

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Information disclosure and reporting for corporate bonds issuance

Following the issuance of Decree No. 153/2020/ND-CP dated 31 December 2020, regulating the offering and trading of privately placed corporate bonds in the domestic market, and the offering of corporate bonds to the international market (“**Decree 153**”), the Ministry of Finance issued Circular No. 122/2020/TT-BTC, dated 31 December 2020, guiding, amongst others, the information disclosure and reporting regimes applicable to the issuers of corporate bonds (“**Circular 122**”).

Applicable issuers

The information disclosure regimes apply to joint stock companies (JSCs) and limited liability companies (LLCs) established and operating under the laws of Vietnam (the “**Issuers**”). Issuers that are public companies, securities companies, or securities investment fund management companies must comply with information disclosure and reporting regimes set out in both Circular 122 and the securities laws.

Specific disclosure procedures

If offering corporate bonds in the domestic market, the Issuers must conduct specific procedures of information disclosure, comprising: (a) disclosure of information prior to the issue tranche to investors registered to purchase the bonds; (b) disclosure of the results of a bond issuance and periodic disclosure of information to bondholders and the Stock Exchange; and (c) disclosure of information about convertible bonds, bonds with warrants, early redemption of bonds, and bond swaps (if any).

If issuing and offering corporate bonds to the international market, the Issuers must comply with information disclosure regimes of the market in which the issuance occurs, and must conduct specific procedures of information disclosure as set out in Circular 122 and to the Stock Exchange in Vietnam, comprising: (a) disclosure of information prior to the issue tranche; (b) disclosure of the results of a bond issuance; and (c) periodic disclosure of information.

Specific forms of information disclosure

Depending on the specific information disclosure procedures set out above, and whether the offering is in the domestic market or an international market, the Issuers must conduct disclosure of information in one, several, or all, of the following forms:

- (a) Written documents;
- (b) Electronic documents;
- (c) Publication on the website of the Issuer;
- (d) Publication of information on the corporate bond information website of the Hanoi Stock Exchange; and

- (e) (where required, in addition to the above) the Issuer must send the information disclosed to the Hanoi Stock Exchange in the form of electronic documents via the corporate bond information website of the Hanoi Stock Exchange.

No transition for information disclosure and reporting regimes

Any issuance of corporate bonds before the effective date of Decree 153, or 1 January 2021, must be implemented in accordance with the provisions of Decree 163 and Decree 81 until the date of maturity. However, the information disclosure and reporting regimes for such bond issuance must be in accordance with Decree 153 and Circular 122 until the date of maturity of the bonds.

Circular 122 replaces Circular No. 77/2020/TT-BTC of the Ministry of Finance dated 14 August 2020, guiding a number of articles of Decree No. 81/2020/ND-CP of the Government (“**Decree 81**”) dated 9 July 2020, amending and supplementing a number of articles of Decree No. 163/2018/ND-CP (“**Decree 163**”) dated 4 December 2018, on issuance of corporate bonds.

Circular 122 took effect from 15 February 2021.

Procurement Bidding under the CPTPP

After the ratification of the Comprehensive and Progressive Agreement for Trans-pacific Partnership (CPTPP) on 24 August 2020, the Government of Vietnam promulgated Decree No. 95/2020/ND-CP providing guidelines on procurement bidding under CPTPP (“**Decree 95**”) with immediate effect.

Governing scope

Decree 95 prescribes the selection of contractors to perform tender packages for consultancy services, non-consulting services, construction services and goods supply as specified in Appendices IV, V and VI under the procurement projects of the purchasing agencies. Details of which (together with the estimates of procurement) are listed in Appendix II and Appendix III, attached thereto. Such prescription applies when the package price of the tender is equal to or exceeds the price threshold specified in the attached Appendix I.

Requirements for eligible bidders

To be an eligible bidder, the bidding contractor must satisfy the following requirements, including:

- (a) In case of an organizational bidding contractor:
- ✓ Have the establishment decision or enterprise registration certificate or certificate of a household business or any equivalent documents;
 - ✓ Be an independent financial accounting organization;

- ✓ Not be bankrupt or insolvent or have its enterprise registration certificate revoked;
 - ✓ Have registered its name on the National Bidding Network of Vietnam before winning the bid;
 - ✓ Ensure compliance with applicable regulations on competition in bidding;
 - ✓ Not be prohibited to bid in any country, territory; and
 - ✓ Not be in serious or regular breach of one or more previous contracts.
- (b) In case of an individual bidding contractor:
- ✓ Have full capacity for civil acts pursuant to and in accordance with the civil laws of such jurisdiction where he/she is a citizen;
 - ✓ Be registered for legitimate (business) operation in such jurisdiction where he/she is a citizen;
 - ✓ Not be a person currently subject to criminal prosecution; and
 - ✓ Not be prohibited to bid in any country, territory.

Publication on the National Bidding Network of Vietnam

The following bidding information / documents must be publicized on the National Bidding Network of Vietnam:

- (a) Plans to select the (eligible) bidders;
- (b) Notice of invitation of interest, notice of invitation for prequalification, the request for expression of interest, the request for prequalification;
- (c) Notice of invitation for the tender and bidding documents;
- (d) A shortlist of the bidders;
- (e) Bidding result;
- (f) Legal documents on bidding;
- (g) Information handling of violations of bidding law;
- (h) Database on the contractors; and
- (i) Relevant documents and information (if any).

Domestic preferences in bidding

The procurement agency shall determine the subjects eligible for domestic preferences as follows:

- (a) For procurement of tender packages regarding purchase of goods, contractors are entitled to preferences when participating in intra-regional bidding or international bidding (for tender packages to which the procurement agency may apply domestic preferences in accordance with a roadmap stipulated under Article 15 of Decree 95) to supply goods that have domestic production costs accounting for 25% or more of the total.
- (b) For other tender packages for consultancy services, non-consultancy services, construction

services or a combination, contractors are also entitled to preferences when participating in intra-regional and international bidding (to which the procurement agency may apply domestic preferences in accordance with a roadmap stipulated under Article 15 of Decree 95) including the cases of (i) domestic contractors participating in bidding independently or in partnership with other domestic contractors, and (ii) foreign contractors in partnership with domestic contractors or employing domestic contractors (as subcontractors) which undertake 25% or more of the total work value of the tender package.

Amendment to Decree 95

Recently, the Ministry of Planning and Investment has submitted a draft that supplements some articles of Decree 95, under which the Ministry of Planning and Investment has asked the Government to either implement the international treaties on bidding or to execute the bid for public procurement of goods under CPTPP, EVFTA (EU-Vietnam Free Trade Agreement) and UKFTA (UK-Vietnam FTA).

For the purpose of boosting competitiveness, bidders from member countries of the CPTPP would only be entitled to bid on tender packages specified in Appendix I and Appendix II. Bidders from member countries of the EVFTA and UKFTA would only be entitled to bid on tender packages specified in attached Appendix I and Appendix III.

New circular on electricity operation license requirement

On 9 September 2020, the Ministry of Industry and Trade issued Circular No. 21/2020/TT-BCT (“**Circular 21**”) on providing regulations on procedures for issuance of electricity operation licenses (“**EOL**”).

Cases of exemption from the EOL requirement

As compared to Circular 36, Circular 21 exempts all power projects with an installed capacity of up to one MW of electricity for sale to other entities from the EOL requirement. In addition, electricity generation for “self-consumption” purposes and not for the purpose of sale to other organizations and individuals is also exempted.

EOL application procedure for all power projects with an installed capacity of over one MW

The Ministry of Industry and Trade (the “**MOIT**”) issues EOLs for large power plants of particular socio-economic importance or significance in terms of defense and security in the list approved by the Prime Minister. For power plants with an installed capacity of 3 MW or more, the project developer is required to apply for its EOL from the Electricity Regulatory Authority of Vietnam (ERAV), an agency under the MOIT.

Otherwise, for power plants with an installed capacity of less than 3 MW in one province or city, the Provincial People's Committee may issue or authorize the Department of Industry and Trade (the "DOIT") of the relevant province or city where the project is located to issue the EOL.

The application dossier for the EOL must include the following documents:

- ✓ copies of licenses / certificates / decisions relating to the project developer and power project (e.g. enterprise registration certificate, in-principle investment decision, environmental impact assessment report);
- ✓ list of technician managers and shift leaders of the power plant;
- ✓ copies of documents indicating the main specifications of the power plant; and
- ✓ copies of testing minutes of installation of equipment and facilities of the power plant.

Under Circular 21, a project developer must, no later than 15 working days prior to the expected official commercial operation date ("COD"), submit the complete application dossier for an EOL to the competent licensing authority either online method, in person or by post.

The procedure for EOL issuance in person or by post is implemented as follows:

- ✓ The licensing agency is responsible, within three working days after receipt of an application dossier, to provide written notice to the applicant if such a dossier is incomplete or invalid, specifying the reasons and requesting an amend or supplement to the application dossier and other information to complete the application dossier;
- ✓ The applicant must, within 60 working days after receipt of a request to amend the dossier, reply in writing with such amendments. If the applicant fails to provide a written response and/or amend or supplement the dossier within the time limit, then the licensing agency has the right to return the application dossier to the applicant; and
- ✓ Within 15 working days after receipt of the complete and valid application dossier by the competent licensing authority, the EOL shall be issued to the applicant.

The responsibilities of project developers receiving EOL

Prior to the COD, the project developer has the responsibility to complete the following:

- ✓ execution of a power purchase agreement (PPA) in accordance with the current regulations;
- ✓ implement the SCADA system serving operation of the power system and the power market in accordance with regulations;
- ✓ put in place the IT and telecom infrastructure systems serving operation of the power market (applicable to the power plants participating in the power market); and
- ✓ other items pursuant to regulations regarding management and operation of the power plants.

Under Circular 21, project developers are obliged to commence project operation within six months

from the issuance of the EOL. In addition, prior to 1 March each year, the project developer must report to both the licensing agency and the local Department of Industry and Trade on the status of the power operation in the previous year in person or by post or email.

Circular 21 supersedes Circular No. 36/2018/TT-BCT (“**Circular 36**”) dated 16 October 2018 on providing procedures for issuance and withdrawal of EOL, as amended by Circular No. 15/2019/TT-BCT dated 26 August 2019.

Circular 21 came into effect on 26 October 2020.

Managing tax in respect of e-commerce of foreign entities

The Law on Tax Management No. 38/2019/QH14 dated 13 June 2019 (the “**2019 Tax Management Law**”) taking effect in July 2020, followed by the promulgation of the guideline for its implementation - Decree No. 126/2020/ND-CP (“**Decree 126**”), have paved the way for the Government’s management of the tax sector in respect of e-commerce and digital platform-based business (the “**E-Business**”). Recently, a draft circular by the Ministry of Finance (the “**MOF**”) guiding the 2019 Tax Management Law and Decree 126 (the “**Draft**”) was just published to collect public opinion.

This article will focus on the tax management regulations in respect of the E-Business of foreign providers without a permanent presence in Vietnam (the “**Foreign Providers**”) provided in Chapter IX of the Draft, which, once adopted, will become regulatory compliance requirements for Foreign Providers.

Foreign Providers subject to the Draft

As per Article 84 of the Draft, Foreign Providers doing E-Business *with organizations, individuals in Vietnam* are considered as having a permanent establishment in Vietnam, and shall therefore be obliged to register, declare and pay taxes in respect of their E-Business.

Register to conduct electronic tax transactions

This registration can be conducted via the portal of the General Department of Taxation (the “**GDT**”), provided Foreign Providers ensure their ability to access the internet, and have one email address for transacting with the GDT (i.e., the direct tax managing authority of Foreign Providers as per Article 85 of the Draft) and for receiving log-in credentials as well as transaction verification code (“**TVC**”) subsequently used in their tax declaration and payment on the GDT’s Portal.

While Foreign Providers may register more than one bank account for paying taxes, they are only allowed to have one official email address in transactions with the GDT.

Tax registration, declaration and payment

Per the Draft, Foreign Providers can either directly register, declare and pay tax (the “**Tax Obligations**”), or authorize an organization or tax agent operating under the laws of Vietnam (the “**VN Tax Entity**”) to perform such Tax Obligations. Below are some remarkable points that Foreign Providers should take into account in conducting the Tax Obligations:

- ✓ The Tax Obligations must be conducted quarterly and via the GDT’s Portal;
- ✓ The payable tax amount is calculated on the revenue generated from Vietnam received by Foreign Providers, which revenue shall be in accordance with the Vietnam tax regulations (i.e., Articles 12.2 and 13.2 of Decree No. 103/2014/TT-BTC dated 6 August 2014);
- ✓ In case of mistakes found after completion of the calculation and declaration of the payable tax amount by a Foreign Provider, such Foreign Provider may make a new declaration form if the payable tax amount is not yet due; or make a supplemental declaration form, though only in the case of increasing the payable tax amount, if such amount is already due;
- ✓ Upon tax declaration, calculation and amendment by Foreign Providers, one (1) identification code for the payable amount will be issued to the Foreign Providers by the GDT;
- ✓ In case of performing Tax Obligations via authorization to a VN Tax Entity, an authorization agreement must be concluded, based on the scope of which the VN Tax Entity shall conduct tax procedures in accordance with the regulations of the Draft. Foreign Providers, however, must notify the GDT (by changing the tax registration information) at least five (5) days prior to the first commencement of tasks related to tax procedures as specified in such authorization agreement;
- ✓ In case signing an authorization agreement with a VN Tax Entity being a tax agent, legal representative of such tax agent must execute in the respective section for tax payer’s legal representative on transaction papers with the tax authorities.

Obligations of Vietnamese entities in case of non-compliance by Foreign Providers

Organizations registered and operating under the laws of Vietnam and individuals purchasing goods and/or services from Foreign Providers (the “**Buyer**”) have obligations in case the Foreign Providers do not implement their Tax Obligations. Buyers being organization are obliged to declare, withhold and pay such tax amount payable by the Foreign Providers in accordance with the laws of Vietnam. For individual Buyers, the commercial banks or intermediary payment service providers must withhold and pay such tax amount in lieu of the Foreign Providers.

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.

Indochine Counsel's objective is to provide quality legal services and add value to clients through effective customized 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 organizations, law firms to private companies, SMEs and start-up firms in Vietnam.

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