



# 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 topics ranging from food safety inspections to stock market actions to offshore indirect investments.

We also take a brief look at how FATCA affects international banking and local accounts held by American citizens.

As always 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.

Kind regards,  
Indochine Counsel

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# Food Safety Inspection

On 1 December 2015 the Ministry of Health (“**MOH**”) issued Circular No. 48/2015/TT-BYT on food safety inspection in food production and trading under the administration of the MOH (“**Circular 48**”).

Entities that are subject to the food safety inspection comprise (i) entities engaging the business lines of producing and/or trading of bottled water, mineral water, functional foods, micronutrient-fortified foods, food additives and substances; food toolkits and package materials under the administration of the MOH; (ii) food services providers, including food street vendors; and (iii) food manufactures and food traders whose products are out of the administration of the Ministry of Agriculture and Rural Development, the Ministry of Trade and Industry, or under the administration of at least two Ministries, including the MOH as regulated in Joint Circular No. 13/2014/TTLT-BYT-BNNPTNT-BCT, dated 09 April 2014, guiding the assignment and cooperation in food safety management.

The food safety inspection is based on the national technical regulations on food products; laws and regulations on food safety; food safety standards applied and published by food manufactures or food traders; regulations on food safety conditions for food manufacturers, food traders, food services providers; regulations on food advertising and food labeling; regulations on food testing; and other regulations on food safety. The competent authorities for food safety inspection comprise the Vietnam Food Administration; the Departments of Health, Departments of Food Safety at province level; People’s Committees at district level, Medical Departments belonging to the People’s Committees at district level, and Medical Centers of the districts; and People’s Committees at commune level. Regarding contents of food safety inspection, food manufacturers and food traders may expect to be inspected as to (i) administrative and legal records, comprising Certificate of Business Registration, Certificate of Food Safety Conditions, Certificate of Food Safety Training, Certificate of Health for the owners and person directly involved with the food production and processing; (ii) the implementation of the regulations on conformity with food safety conditions by the food establishment owners, comprising food establishment facilities, personnel, process of food production and processing, conveying and preservation of foods, conditions of material, additives, and finished products; (iii) product labelling; (iv) regular food testing; (v) food advertising, if any; and (iv) documents relating to the state food safety inspection for imported food products, if any.

Meanwhile, for food services providers, the food safety inspection will comprise the contents of administrative and legal records of the food establishment, and the implementation of the regulations on conformity with food safety conditions, wherein the later content will further comprise the inspection of water source and the sample keeping. In addition, for any subjects of the food safety inspection, if necessary, the competent authorities can take food samples for testing.

Regarding the frequency of the food safety inspection, Circular 48 refers to Circular No. 30/2012/TT-BYT, dated 05 December 2012, and Circular 16/2012/TT-BYT, dated 22 October 2012. Accordingly, for food services providers, the competent authorities can perform regular inspection no more than two times per year for food services providers having valid Certificates of Food Safety Conditions granted by competent authorities at the province level, or no more than three times per year for food

services providers having valid Certificates of Food Safety Conditions granted by competent authorities at the district level, or no more than four times per year for food services providers having valid Certificate of Food Safety Conditions granted by competent authorities at the commune level. For food manufacturers and food traders, the regular inspection should not be more than two times per year for food establishments having a valid Certificate of Food Safety Conditions and Certificates of GMP, HACCP, ISO 22000 or the equivalent certificate, or not more than three times per year for food establishments having valid Certificate of Food Safety Conditions, or not more than four times per year for food establishments not being the subject of Certificate of Food Safety Conditions. The competent authorities shall notify the food establishment their inspection at least one day in advance, except for street food vendors and other food establishments not being the subject of business registration as regulated by laws.

In addition, the competent authorities may make extraordinary inspection in certain cases, such as detecting the sign of breaching laws and regulations, problems in food safety, in intensive inspection periods, inspection at the request of a superior authority, having warning as to food safety from relating organizations, etc. In this case of extraordinary inspection, the competent authorities are not required to notify food establishments in advance.

Depending on the kind of violations detected through the food safety inspection by the competent authorities, the remedies applied may be the recall and handling of the non-safe foods as regulated, warnings or fines as administrative sanctions, or transfer of the case to the competent authority for examination of penal liability, if appropriate, in case of detecting counterfeit products, products prohibited from the business.

This Circular 48 comes into effect from 15 January 2016.

## Security-Trade on Upcom

On 13 November 2015 the Ministry of Finance issued Circular No.180/2015/TT-BTC guiding security-trade registration on the trading system for unlisted securities (also known as “**Upcom**”) (“**Circular 180**”). There are, inter alia, noticeable points as follows:

Firstly, under Articles 3 of Circular 180, companies which are mandated to register their trading on the Upcom system comprise: (i) a public company being inadequate for listing on the Security-Trade Centers, (ii) a public company satisfying listing conditions that has not been listed on the Security-Trade Centers, (iii) a company which still meets conditions of a public company in spite of having cancelled its listing and (iv) a state owned enterprise which has implemented its public offer but has not listed on the Security-Trade Centers.

In addition to this, Circular 180 also regulates cases whereby a company which has already registered its trade on the Upcom system must implement procedures to record its changes. In particular, the registered enterprise must conduct procedures for recording its changes if such

company either is merged or separated; or conducts separation, grouping its shares; or issues additional shares.

Lastly, under Circular 108, if a registered enterprise either no longer meets conditions for a public company; or ceases to operate as a result of merger, acquisition, separation, dissolution or bankruptcy; or cancels its enterprise registration certificate; or is approved for its listing on Security-Trade Centers, then competent bodies shall cancel the registration for the securities of such enterprise.

This Circular takes effective on 1 January 2016.

## Offshore Indirect Investment

On 32 December 2015 the Government enacted Decree No. 135/2015/ND-CP regulating offshore indirect investment (“**Decree 135**”). Decree 135 stipulates in detail offshore indirect investment (“**OII**”) in the form of purchase or sale of securities or other valuable papers or investment through securities investment funds and other intermediary financial institutions offshore.

The offshore indirect investors (the “**Investors**”) under Decree 135 include (1) economic organizations established and operating under the law of Vietnam and (2) individuals holding Vietnamese nationality who are eligible to participate in offshore issued bonus share plans. Accordingly, participating in offshore issued bonus share plans is the only OII form that individual Investors are allowed to carry out.

According to Decree 135, the economic organizations may perform the OII by the method of self-trading<sup>1</sup> or entrustment<sup>2</sup> in the following forms:

- Direct purchase and sale of securities and other valuable papers offshore;
- Investment via sale and purchase of certificates of securities investment funds offshore, and entrustment of investment to other intermediary financial institutions offshore.

Particularly, organizations permitted to perform OII self-trading comprise:

- *Securities companies, fund management companies.*
- *Securities investment funds via fund management companies and securities investment companies.*

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<sup>1</sup> Offshore indirect investment self-trading means the purchase or sale of securities or other valuable papers offshore, or investment through securities investment funds or other intermediary financial institutions offshore by a permitted self-trading organization for itself.

<sup>2</sup> Entrustment of offshore indirect investment means the entrustment of capital in foreign currency by an economic organization (the “**Trustor**”) to an organization permitted to accept entrustment of domestic investment (the “**Trustee**”) to perform offshore indirect investment via an investment trust contract.

- *Insurance business enterprises.*
- *Commercial banks.*
- *General financial companies.*
- *The State Capital Investment Corporation.*

Economic organizations (except for the self-trading organization which has been issued by a competent authority with a still valid certificate of OII registration) may perform OII only in the form of entrustment to the organizations permitted to accept investment entrustment, which are fund management companies and commercial banks.

Investors may only make OII in the types of securities and other valuable papers of which are prescribed in the types and criteria for selection from time to time by the State Bank of Vietnam.

Self-trading organizations (except for commercial banks and general financial companies) may use their self-available foreign currency in accounts and foreign currency purchased from credit institutions or foreign bank branches for OII in accordance with the self-trading limit as registered with the State Bank of Vietnam. Meanwhile, the Trustors (except for commercial banks and general financial companies) may only use their self-available foreign currency in accounts for performance of OII in the form of entrustment to the Trustees.

Additionally, Investors may not use loans in Vietnamese Dong from credit institutions or foreign bank branches to purchase foreign currency nor may they use foreign currency loans from domestic or overseas sources for OII.

Decree 135 provides in details the applicable conditions, licenses and procedures to register and issue the certificate or written approval for OII self-trading and for entrusting OII as the case may be.

Decree 135 came into effect on 15 February 2016.

## FATCA and You

Recently I tried to open a bank account. When I went into HSBC--a place I've had accounts several times in the past--they asked for my tax forms from US filings. FATCA (Foreign Account Tax Compliance Act) has begun. For those of you who don't know, FATCA is the United States attempt to close every tax loophole for big fat cats who like to hide money offshore (and to screw expats who actually live and make money offshore).

The basic idea of FATCA is simple.

If you have income derived from the United States and you transfer it offshore--unless you're transferring it to a bank that has agreed to report on you to the IRS (Internal Revenue Service) --the

bank in the US making the transfer has to withhold 30% of the transfer, just to make sure the IRS gets its due.

In my opinion, this is possibly the most arrogant move the United States government has made to date, insisting that foreign banks strike deals with the IRS to report on its customers or else be forced to deal with major losses caused by the US withholdings.

And it went into effect at the beginning of this month. So it's too late to get your money out without either working with a bank that's signed an agreement with the IRS or losing 30% of your income. I think, perhaps, the best strategy is to go to Chicago, withdraw ten thousand dollars of your money, drive to Canada, and transfer the money from there. At least, that's what I would do if I had any money I had to get out of the US.

Luckily, my career has been almost entirely offshore and any transfers I make are into the US and not out of the US. Also luckily, I'm in a country that hasn't signed a treaty with the US and which has a plethora of banks that have not signed individual deals with the IRS. That means there are plenty of places for me to put my money without having to report it to the United States.

Though I should mention that the reporting requirements are for accounts holding US\$50,000 or more. That's a threshold I haven't reached yet, so I'm okay either way. But the "damned dirty apes" that constitute the US Congress have struck again. Who knows what's coming next... I've heard rumors that they are going to try to pass a bill that will deny passport renewals to individuals who owe over US\$150,000 in back taxes. You might just have to check out some of the ideas at Flag Theory, a website about developing independence from any specific nation and becoming a permanent traveler, someone who owes no one anything and who can go anywhere without incurring taxes or other obligations that may seem odious and untoward.

## 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 35 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.

Indochine Counsel advises clients in the following areas:

- Inward Investment
- Corporate & Commercial
- Mergers & Acquisitions
- Securities & Capital Markets
- Banking & Finance
- Property & Construction
- Taxation
- Intellectual Property
- Technology & Media
- Mining & Energy
- International Trade
- Dispute Resolution

A full list of partners, associates and other professionals is available on our website. |

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