

## AMCHAM VIETNAM LEGAL COMMITTEE

### 2014 LAW ON INVESTMENT: CHECKLIST OF ISSUES FOR IMPLEMENTING LEGISLATION

As at 6 April 2015

This checklist sets out issues which members of Amcham Vietnam Legal Committee recommend to be further clarified in the legislation implementing the Law on Investment 2014 (**2014 LOI**) to enable the law to be efficiently and consistently enforced in practice. Going forward, we will update the status of this list with provisions in the draft implementing legislation to make sure that all the issues in the 2014 LOI have been addressed.

No.	Issue	LOI Reference	Comment/Suggestion	Status
1.	List of conditional business lines	7.2 and Schedule 4	<p>The list of all conditional business lines is set out in Schedule 4. The implementing regulations should specify the following issues:</p> <ul style="list-style-type: none"> <li>Can an industry specific law provide for a new conditional business line or such addition can only be done by amending Schedule 4?</li> <li>What if there is an inconsistency between the industry specific law and Schedule 4 – which legal instrument will prevail?</li> </ul>	
2.	Incorporation of foreign-invested enterprises ( <b>FIE</b> )	22.1	<p>The implementing regulations should specify:</p> <ul style="list-style-type: none"> <li>the process for the foreign investor to apply for an investment registration certificate (<b>IRC</b>) for establishment of an FIE and the standard form of the IRC;</li> <li>whether the IRC will be issued in the name of the foreign investor or to the FIE;</li> <li>if the IRC is issued in the name of the foreign investor, will it specify all the investment incentives that will apply to the project FIE to be established (ie not to the foreign investor)?;</li> <li>what will happen to the IRC if the project FIE is liquidated. Can the foreign investor set up another FIE to implement the project under the same IRC?;</li> <li>will one IRC allows the foreign investor set up only one project FIE or can multiple FIEs be set up under one IRC?</li> </ul>	

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3.	Investment conditions applicable to foreign-invested economic organisations (FIEO)	23	<ul style="list-style-type: none"> <li>There is an significant inconsistency between Article 23.1 of the 2014 LOI and Article 4.27 of the 2014 Law on Enterprises: <ul style="list-style-type: none"> <li>Under Art 23.1 of the 2014 LOI, FIE with <u>51% of the charter capital</u> held by a foreign investor (including those listed in items (a), (b) and (c) of Article 23.1), will be subject to investment conditions applicable to foreign investors;</li> <li>However, Article 4.27 of the 2014 LOE provides that ownership ratio of foreign investors is the total ownership of <u>voting capital</u> of all foreign investors in a Vietnamese enterprises.</li> </ul> </li> </ul> <p>This inconsistency makes it unclear whether a Vietnamese shareholding company will be treated as a foreign investor if it has both ordinary and dividend preference shares and the foreign investors hold 51% of the ordinary (voting) shares in the company which is less than 51% of its charter capital. This is a significant issue that will affect structuring of M&amp;A transactions in Vietnam and should be clarified in the implementing regulations.</p> <ul style="list-style-type: none"> <li>The implementing regulations should specify investment conditions and procedures applicable to FIEs that are not classified under Article 23.1(a) through 23.1(c) with a particular clarification on whether the relevant investment conditions under the Vietnam's WTO Commitments apply to these FIEs.</li> </ul>	

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4.	M&A process	26	<p>The implementing regulations should specify:</p> <ul style="list-style-type: none"> <li>the standard process and documents for registration of a foreign M&amp;A transaction under Article 26 of the 2014 LOI. It should be made clear whether a copy of the acquisition agreements or an evidence of payment of the purchase price by the foreign investor will be required as a part of the registration file;</li> <li>the scope of the local Department of Planning and Investment's review of the M&amp;A registration file. It should be made clear that this scope is only limited to checking the compliance by the foreign investor with the conditions in Art 22.1(a) and (b) of the LOI;</li> <li>which division within the local Department of Planning and Investment will handle the M&amp;A registration process – foreign investment division or the business registration division?;</li> <li>whether if the local Department of Planning and Investment does not respond within 15 days as prescribed in Art 26.3(b), then the registration file is deemed to be approved and the parties can proceed with the M&amp;A deal.</li> </ul>	
5.	Project requiring People's Committee in-principle approval	32.1(a)	<p>The wording of Article 32.1(a) is not entirely clear:</p> <p><i>Projects to which the State allocates or leases out land without auction, tendering <u>or transfer</u>; and projects with a requirement for conversion of the land use purpose.</i></p> <p>It is not clear whether the word 'transfer' in this case refers to State allocation or lease of land without a transfer. We understand that 'transfer' in this case refers to a project using land acquired by way of transfer from another existing land user (not the State) under the Land Law. The implementing regulations should clarify this important point.</p>	

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6.	IRC requirement for the foreign investor and the Vietnamese target company in an M&A transaction	36	<p>Under 36.2(c), we understand that a foreign investor does not need to obtain an IRC for its acquisition of shares or charter capital in a Vietnamese target company.</p> <p>However, it is not clear under Article 36 whether the Vietnamese target company will need to obtain an IRC following the foreign investor's acquisition if the total foreign ownership in the company exceed 51%. Article 36.1(b) can be interpreted to impose this requirement on the Vietnamese target company.</p> <p>It is important that the implementing regulations clarify this requirement and ideally confirm that no IRC is required to be obtained by both the foreign investor and the Vietnamese target company.</p>	
7.	Process for issuance of an IRC	37.1	The implementing regulations should make it that the IRC will be issued by the licensing authorities <u>automatically</u> within 5 business days after an in-principle approval for the project has been issued – i.e. the foreign investor does not need to re-submit any application file for the IRC.	
8.	Investor's equity capital for implementation of the project	39.6	<p>Under Article 39.6, the IRC will specify the investment capital of the project which includes the capital contributed by the investor and mobilised capital, the schedule for capital contribution and mobilisation.</p> <p>The implementing regulations should make it clear whether the 'capital contributed by the investor' must be equal to the initial charter capital of the FIE at the time of establishment and whether this capital can be contributed over a period longer than 90 days prescribed under the Law on Enterprises.</p> <p>For example, the investment capital of the project is \$100 of which \$40 is capital contributed by the investor and \$60 is mobilised. Does the FIE need to have \$40 as its charter capital at the time of its establishment or can the FIE have a lower initial charter capital (e.g. \$10) which the investor will contribute within 90 days and the rest \$30 will be contributed as increased charter capital of the FIE later on?</p>	
9.	Performance Bond	42	The implementing regulations should specify the procedure for paying and refunding the performance bond as required under the 2014 LOI.	

No.	Issue	LOI Reference	Comment/Suggestion	Status
	Transitional Provisions	74	The implementing regulations should specify how the existing investment licenses and investment certificates issued before the 2014 LOI comes into effect will be treated when the FIE wants to amend the content of such investment licenses/certificates.	