-Vietnam Legal Update

Positive Changes To Tender Offer Rules Under New Securities Law

NOV 26, 2020

**This article is based on information available as of November 16th, 2020.*

Vietnam: Positive Changes To Tender Offer Rules Under New Securities Law (as of 16 November 2020)

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From 1 January 2021, the new law on securities ("**New Securities Law**") will come into effect introducing some notable changes and clarifying some existing ambiguities in the current tender offer/takeover bid ("**TOB**") rules, in particular with respect to TOB triggering events and exemptions.

Adjustments to Triggering Events

The New Securities Law introduces several changes to the current TOB triggering events to clarify some ambiguities in the existing law.

1. Inclusion of related persons' shares

Under the current regulations, a TOB is required if an acquisition of shares by a non-shareholder or a shareholder holding less than 25% of the shares of a public company causes such acquirer's post-closing shareholding to reach or surpass 25% of the total voting shares in such public company. Current law is silent as to whether the shares of "related persons" (a concept defined under both the current securities regulations and the New Securities Law) are included or not. However, the New Securities Law makes it clear that the shareholding ratio of certain related persons[1] of an acquirer will be counted in all TOB triggering events in order to determine whether the applicable triggering thresholds have been met.[2]

[1] New Securities Law, Articles 4.46(a), (b), (c), (d), (e) and (g).

[2] New Securities Law, Article 35.1.

2. New way of determining triggering thresholds for subsequent share acquisitions

Under the current regulations, the TOB rules become applicable when an acquirer (together with its related persons), holding 25% or more of the total voting shares of a public company target, undertakes efforts to acquire (a) 10% or more of the voting shares in such public company or (b) less than 10% but at least 5% of the voting shares in such public company within one year from the end of the acquirer's last TOB transaction with respect to that target company ("**Current Triggering Events**"). The Current Triggering Events create a loophole where an acquirer can easily circumvent the TOB rules by conducting multiple acquisitions of less than 10% of the voting shares of the target within a short period of time. To eliminate such loophole, the State Securities Commission has in practice interpreted the Current Triggering Events in a way similar to the following revisions prescribed in the New Securities Law. The New Securities Law, therefore, codifies such practice.

The New Securities Law reframes the Current Triggering Events by subjecting to the TOB rules any additional share acquisition by an acquirer that causes the acquirer's ownership, *whether direct or indirect*, to reach or pass 35%, 45%, 55%, 65% or 75% of the total voting shares in the public company target ("**Reframed Triggering Events**").[3] The Reframed Triggering Events attempt to reify by statute the actual interpretation/implementation of the Current Triggering Events by the State Securities Commission to ensure that no accumulation of stock over time circumvents the TOB rules. As a result of such change, it has become clear that an additional acquisition of even a minimal amount of the total voting shares in a public company could trigger the TOB rules if such acquisition reaches or crosses any of the Reframed Triggering Event thresholds.

3. Elimination of a triggering event

The New Securities Law excludes a triggering event that was formerly specified in a 2012 decree. The requirement that a redemption by a public company of 25% or more of its total outstanding shares be carried out in accordance with the TOB rules has not been incorporated into the New Securities Law.

The adjustments above aim to clarify all of the Current Triggering Events and thereby instill greater confidence in acquirers in determining whether their proposed share acquisitions will be subject to the TOB rules or challenged by the State Securities Commission.

Revised Exemptions

The New Securities Law provides an exhaustive list of exemptions from the TOB rules and clarifies certain related regulations. In the following sections, we discuss some of the more salient changes to the exemption rules.

1. No discretionary exemptions

Unlike the current regulations, the New Securities Law does not provide a legal basis for the Ministry of Finance to create at its discretion an exemption not otherwise provided in the New Securities Law.

2. New exemptions[4]

The New Securities Law includes a number of new exemptions from the TOB rules. Any individual or organization that, as a result of any de-merger, separation, consolidation or merger, owns shares reaching or passing the threshold of 25% or any Reframed

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3 New Securities Law, Article 35.1(b).

4 New Securities Law, Articles 35.2(d) and (dd).

Triggering Event threshold will no longer be subject to the TOB rules in that instance.

In addition, although not new exemptions strictly speaking, certain exemptions currently available under various legislation have been formally incorporated into the New Securities Law.[5] Particularly, acquisitions of shares via public offering by auction (APO) or an offering in cases of transfer of state-owned capital or capital owned by state-owned enterprises (SOEs) are now formally listed as exemptions under the New Securities Law.

3. Certain clarifications

The New Securities Law clarifies the following points that have been typically applied in practice but are not expressly provided for in current legislation:

(a) A share acquisition of existing shares that is approved by a resolution of the general meeting of shareholders of the target company is exempted from the TOB rules, but the identities of the buyer and sellers must be clearly stated in such resolution to qualify as an exemption.[6]

(b) A share acquisition among group companies, including between sibling companies, will be exempted from the TOB rules under the New Securities Law in addition to a share acquisition between a parent company and its subsidiary, which is already exempted under current law.[7]

(c) A share transfer under an arbitral award (in addition to a court judgment) will be exempted from the TOB rules.[8]

The expansion of exemptions aims to avoid the unnecessary imposition of the TOB rules on cases where the shareholders' rights and interests can be protected by other mechanisms. It is expected that the expansion of exemptions will eliminate unnecessary costs for the relevant parties.

The New Securities Law appears to be an improvement to the TOB legal framework. Nevertheless, some uncertainties remain, such as whether or not the relevant sellers, buyers and their related persons will be entitled to vote in a resolution of the general meeting of shareholders in which a TOB is presented for purposes of exemption. Such kinds of uncertainties will require further clarification and guidance, which are expected to be addressed in the forthcoming guidelines, implementing regulations and explanatory materials of the legislators.

Please contact us for further updates, questions and analysis on the New Securities Law.

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5 New Securities Law, Article 35.2(d), which incorporates exemptions created under Article 41.3 of Decree No. 58/2012/ND-CP, as amended, and Article 3.7 of Circular No. 219/2015/TT-BTC, as amended.

6 New Securities Law, Article 35.2(b).

7 New Securities Law, Article 35.2(c).

8 New Securities Law, Article 35.2(g).

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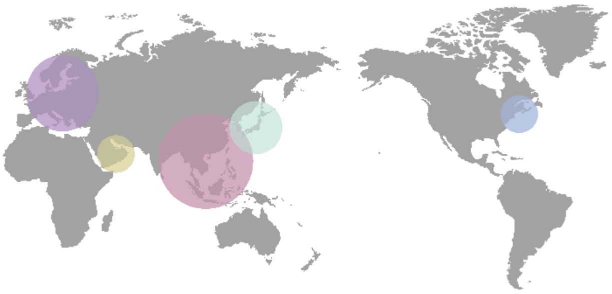

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