西村あさひ法律事務所
NISHIMURA & ASAHI
Asia Newsletter

May 7, 2021

Vietnam: New Rules for Foreign Investment in the Stock Market

Ha Hoang Loc, Mai Thi Ngoc Anh

In pursuit of the goal of improving the legal framework for investment and businesses, the government adopted Decree 155/2020/ND-CP on 31 December 2020 ("**Decree 155**"), which came into effect on 1 January 2021.

Decree 155 introduces, among other things, new rules for foreign investment in the stock market. By these new rules, the government aims to promote foreign investment in the stock market while maintaining appropriate control over the inflow of foreign investment. This article highlights some of the key components of Decree 155.

1. Foreign Ownership Caps

After being fiercely opposed by the banking industry, the proposal of the State Securities Commission (SSC) to take away the right of a public company to set its own foreign ownership cap (the "**Foreign Cap**") has been set aside. Decree 155 goes further than its predecessor by now explicitly recognizing the right of a public company to set its own Foreign Cap, at its discretion, lower than the statutory Foreign Cap.

2. Foreign Invested Entities (FIEs)

Foreign investment control does not merely target the investments of foreign investors[1], but also the investments of FIEs.

Previously, an FIE was defined as an entity **51% or more** of whose charter capital was held by foreign investors. Decree 155 now lowers the threshold to **more than 50%** (the "**FIE Threshold**"). This change means that (i) entities in which foreign investors hold more than 50% but less than 51% of the charter capital are now deemed to be FIEs and thus their investment will

[1] "Foreign investors" means individuals with foreign nationality and organizations established under foreign laws conducting investments and business in Vietnam.

be captured by the rules on foreign investment control, and (ii) such new FIEs' shareholding will be counted towards and cause a significant increase in the foreign ownership of public companies. Notably, investments by a subsidiary of an FIE are still not subject to the rule on foreign investment control.

Aside from the redefinition of FIEs, however, a long-standing problem in the determination of the FIE Threshold with respect to public companies is now resolved by Decree 155. Despite the fact that the actual foreign shareholding in public companies changes continuously due to the liquidity of shares on the stock markets, it is the foreign shareholding recorded in the shareholders register produced by the Vietnam Securities Depository and Clearing Corporation ("**VSDCC**") for annual general shareholder meetings of public companies that forms the sole basis for determining the FIE Threshold of such companies. This means that the FIE status of a public company will be determined only once per year and presumably remain unchanged for the duration of such year.

Regarding public companies whose shares are not listed on a stock exchange, registered with UpCom, or deposited at the VSDCC, the actual foreign ownership ratio is the basis for determination of their FIE status. Any change to their FIE status must be notified and registered for issuance or cancelation of trading codes (which is required for foreign investors and FIEs to trade stocks on the stock market) within three working days from the date of change.

3. Re-calculating Foreign Ownership Ratio

Decree 155 now requires that the ratio of foreign ownership to domestic ownership in a public company be calculated based on the total number of shares (and not just voting shares, as previously required) held by foreign investors and FIEs leading to an increase in such ratio (and thereby moving closer to or even exceeding the Foreign Cap) of the public companies that currently have foreign investors and FIEs holding non-voting shares.

It is expected that this change will limit the number of shares in such companies that may be sold to foreign investors and FIEs, which suggests an end to the investment channel whereby foreign investors and FIEs could invest in non-voting shares, such as dividend preference shares, without any concerns about the Foreign Cap. However, NVDRs, as discussed below, may offer a suitable alternative for some foreign investors.

4. Excessive Foreign Investment

If the Foreign Cap in a public company is exceeded due to a change of the FIE status or other reasons, the following rules apply until the number of shares held by the foreign investors and FIEs in such company is brought within the parameters of the Foreign Cap: (i) the foreign investors and FIEs holding shares in the public company may sell, but not purchase, shares in the public company; *and* (ii) the public company must ensure no further increase in its foreign ownership.

Although it is not explicitly expressed, the rule stated in item (i) results in a restrictive situation in which, during the period of applicability, foreign investors and FIEs may not sell to, or purchase from, foreign investors and FIEs shares in such public company, but they may sell their shares in the public company to *domestic* investors. As such, the share price of such a company can fall as a result of the stock's low liquidity.

Moreover, because the rule stated in item (ii) above prohibits public companies from issuing new shares to foreign investors and FIEs in the aforementioned situation, such public companies may be generally dissuaded from raising foreign funds despite their efforts to preserve their right to set a lower Foreign Cap (as discussed in item 1 above).

The rules above are necessary to maintain control over foreign investment on the stock market. However, given that excessive foreign investment may be caused by a sudden change of law, such as the lowering of the FIE Threshold or changing the way the ratio of foreign ownership to domestic ownership is calculated, as implemented by Decree 155, foreign investors, FIEs, and public companies may suddenly find themselves subject to the foregoing restrictions.

5. Foreign Caps and Conditional Businesses

In an effort to increase foreign ownership of shares in public companies engaging in certain businesses that, by law, are subject to conditions on foreign investment but for which no Foreign Cap is specified, the Foreign Cap was increased from 49% to 50%.

Further to this goal, the government has adopted a single, comprehensive list of the conditional businesses that is expected to solve a long-standing difficulty encountered by both public companies and foreign investors in identifying what businesses are actually conditional.

6. Non-voting Depository Receipts

For greater efficiency, flexibility and convenience of foreign investors, non-voting depository receipts (“**NVDRs**”) have been introduced under the Law on Enterprises and further detailed by Decree 155 as a new and alternative investment channel to attract foreign investment in conditional businesses.

Under Decree 155, subsidiaries of the Stock Exchange of Vietnam (“**NVDR issuer**”) will issue and sell NVDRs to foreign investors based on the underlying shares issued by listed companies or UpCom-traded companies. The NVDR issuer has the right to join, and vote on the delisting of the relevant companies at, the general shareholders meetings of the companies with respect to which NVDRs are issued, but the NVDR issuer does not have any other economic/financial rights. The NVDR holders, on the other hand, have the same economic/financial benefits and obligations as the holders of ordinary shares. NVDR holders may not, however, be involved in the decision-making regime of the relevant company as they have no voting rights.

Decree 155 appears to be a positive improvement to the foreign investment legal framework of Vietnam. Nevertheless, some uncertainties remain, such as enforcement and implementation of the remedies for excessive foreign investment as well as the regime for determination of FIEs status. Such kind of uncertainties will require further clarification and guidance from legislators.

Contacts: na_vnnl@eml.nishimura.com

Akira Hiramatsu Partner, Hanoi Office Representative

Mr. Hiramatsu has extensive experience in M&A transactions in Japan and provides legal assistance in a wide range of areas in Vietnam. He was admitted to practice law in Japan in 2006 and registered as a foreign attorney in Vietnam in 2014. Mr. Hiramatsu also has experience in the Disclosure Statements Inspection Division of the Securities and Exchange Surveillance Commission of Japan from 2010 to 2012, and the Inspection Bureau of the Financial Services Agency of Japan from 2012 to 2013. He graduated from Tokyo University (LL.B., 2004) and the University of Virginia School of Law (LL.M., 2014).

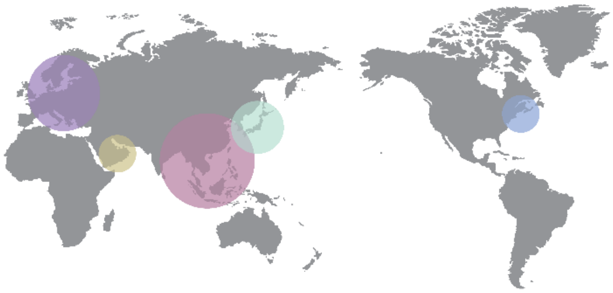
Vu Le Bang Partner, Ho Chi Minh City Office

Mr. Bang is a Vietnam partner specializing in inbound investments, corporate and commercial matters, M&A, banking and finance, real estate and construction, and labor. Mr. Bang is a 2001 graduate of the Hanoi University of Law (LL.B.) and received an LL.M. from the Transnational Law & Business University in Seoul, Korea in 2006. He is a member of the Ho Chi Minh Bar Association and the Vietnam Bar Federation and is fluent in both English and Vietnamese.

Ha Hoang Loc Partner, Ho Chi Minh City Office

Ha Hoang Loc is a Vietnam partner with more than 12 years of post qualification experience in M&A, real estate, labor, banking and finance, antitrust, general corporate and all aspects of investment and licensing in Vietnam. Mr. Loc is a 2001 graduate of the Ho Chi Minh City University of Law (LL.B.) and received an LL.M. (with Merit) from Southampton Solent University (England) in 2008. He has been a member of the Ho Chi Minh City Bar Association since 2008 and the Vietnam Bar Federation since 2009. He is fluent in both English and Vietnamese.

Nishimura & Asahi has 18 offices throughout Japan and in the markets that matter, with Asia as the starting point.



Tokyo
Otemon Tower, 1-1-2 Otemachi, Chiyoda-ku, Tokyo 100-8124 Japan
Tel +81-3-6250-6200 +81-3-6250-7210 (Nishimura & Asahi LPC Principal Office)

Nagoya
Tel +81-52-533-2590
LPC Partner Hiroki Fujii

Osaka
Tel +81-6-6366-3013
LPC Partners Hiromune Usuki, Taisuke Igaki, Yuichiro Hirota, Masanori Ban

Fukuoka
Tel +81-92-717-7300
LPC Partners Tsuneyasu Ozaki, Kengo Takaki, Yasuko Maita

New York
Nishimura & Asahi NY LLP
Tel +1-212-830-1600
E-mail info_ny@nishimura.com
Managing Partner Katsuyuki Yamaguchi
Vice Managing Partner Megumi Shimizu
Partners Kaoru Tatsumi, Yusuke Urano

Dubai
Tel +971-4-386-3456
E-mail info_dubai@nishimura.com
Counsel Masao Morishita

Frankfurt (main office)
Nishimura & Asahi Europe Rechtsanwaltsgesellschaft mbH
Tel +49-(0)69-870-077-620

Düsseldorf (branch office)
Nishimura & Asahi Europe Rechtsanwaltsgesellschaft mbH
Tel +49-(0)211-5403-9512

E-mail info_europe@eml.nishimura.com
Co-representatives Noriya Ishikawa, Dominik Kruse

Bangkok
Tel +66-2-126-9100
E-mail info_bangkok@nishimura.com
Co-representatives Chavalit Uttasart, Hideshi Obara, Jirapong Sriwat

Jakarta*1
Walalangi & Partners
Tel +62-21-5080-8600
E-mail info@wplaws.com
Representative Luky Walalangi

Rosetini & Partners Law Firm
Tel +62-21-2933-3617
E-mail info_jakarta@nishimura.com
Partner Noriaki Machida

Yangon
Tel +95-1-8382632
E-mail info_yangon@nishimura.com
Representative Yusuke Yukawa
Vice Representative Isamu Imaizumi

Beijing
Tel +86-10-8588-8600
E-mail info_beijing@nishimura.com
Chief Representative Azusa Nakashima
Representative Masashi Shiga

Shanghai
Tel +86-21-6171-3748
E-mail info_shanghai@nishimura.com
Chief Representative Takashi Nomura
Representatives Satoshi Tojo, Seita Kinoshita

Singapore
Tel +65-6922-7670
E-mail info_singapore@nishimura.com
Co-representatives Masato Yamanaka, Shintaro Uno
Partners Masataka Sato, Yuji Senda, Ikang Dharyanto

Note: We are in formal law alliance with Bayfront Law LLC, a Singapore law practice, under name of Nishimura & Asahi-Bayfront Law Alliance.

Okada Law Firm (Hong Kong)*2
Tel +852-2336-8586
E-mail s.okada@nishimura.com
Representative Saori Okada

Hanoi
Tel +84-24-3946-0870
E-mail info_hanoi@nishimura.com
Partner for Vietnam offices Hikaru Oguchi
Representative Akira Hiramatsu

Ho Chi Minh City
Tel +84-28-3821-4432
E-mail info_hcmc@nishimura.com
Partner for Vietnam offices Hikaru Oguchi
Representative Kazuhide Ohya
Partners Vu Le Bang, Ha Hoang Loc

Taipei
Nishimura & Asahi Taiwan
Tel +886-2-8729-7900
E-mail info_taipei@nishimura.com
Co-Representatives Ing-Chian Sun, Sheng-Chieh Chang

*1 Associate office *2 Affiliate office

Public Relations Section, Nishimura & Asahi
Otemon Tower, 1-1-2 Otemachi, Chiyoda-ku, Tokyo 100-8124, JAPAN
URL: https://www.nishimura.com/en