

Client Alert

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Vietnam - New Decree 71 offers further clarity on Corporate Governance for Public Companies

On 6 June 2017, the Government issued Decree No. 71/2017/ND-CP providing guidelines on corporate governance applicable to public companies ("Decree 71"). Decree 71 took effect on 01 August 2017 and replaced Circular No. 121/2012/TT-BTC issued by the Ministry of Finance on 26 July 2012 ("Circular 121"), which had set the corporate governance regime for public companies in Vietnam for the past five years.

Overall, Decree 71 reflects the provisions of the current Law on Enterprises. However, it introduces stricter regulations on transactions with related persons, conflict of interests, organizational structure and disclosure obligations for public companies. We highlight the key provisions of Decree 71 below.

Clarity on intercompany loans and guarantees

Circular 121 prohibited public companies from providing loans and guarantees to its shareholders and "related persons", with no clarification on whether it meant "related persons" to the public company or to the shareholders. Such ambiguity created certain legal risks for intercompany loans and guarantees provided by a public company, as subsidiaries of the public company may be considered related persons.

Decree 71 clarifies that the restriction only applies to the company's shareholders and shareholders' related persons, and not to the public company's related persons (including subsidiaries). Decree 71 also stipulates three exceptions to this restriction:

- (a) where the public company is a credit institution;
- (b) where the shareholder is also the public company's subsidiary (without shareholding portions held by the State), whose crossownership was established before 1 July 2015 (when crossownership between a subsidiary and its parent company was still allowed); or
- (c) where the public company and the related person of the shareholder are in the same group of companies, provided that appropriate approval is obtained from the general meeting of shareholders ("GMS") or the board of management ("BOM") of the public company in accordance with the public company's charter.

Options for organizational structure of public companies

In light of the Law on Enterprises, Decree 71 enables public companies to choose between two options for its organizational structure:

- (a) Two-tier structure - GMS, BOM, Board of Controllers, and (General) Director

If the public company adopts the structure of having a Board of Controllers, at least 1/3 of the BOM members must be non-executive members (i.e. cannot concurrently be the (General) Director, Deputy (General) Director, chief accountant or other managers provided under the company's charter).



(b) One-tier structure - GMS, BOM, and (General) Director

If the public company adopts the one-tier structure, no Board of Controllers is required. In that case, an internal audit committee must be established under the BOM and the composition of the BOM members must satisfy that:

- at least 1/3 are non-executive members, and
- at least 1/5 are independent members.

Notwithstanding the above, if a public company is listed, at least 1/3 of the board must be independent members under both options.

Please refer to the table below, which summarizes the options available to a public company in choosing an organizational structure:

	Two-tier structure	One-tier structure
Non-listed public company	<ul style="list-style-type: none"> • GMS, BOM, Board of Controllers, and (General) Director • BOM non-executive members: at least 1/3 • BOM independent members: not required • Internal audit committee established under BOM: not required 	<ul style="list-style-type: none"> • GMS, BOM, and (General) Director • BOM non-executive members: at least 1/3 • BOM independent members: at least 1/5 • Internal audit committee established under BOM: required
Listed company	<ul style="list-style-type: none"> • GMS, BOM, Board of Controllers • BOM non-executive members: at least 1/3 • BOM independent members: at least 1/3 • Internal audit committee established under BOM: not required 	<ul style="list-style-type: none"> • GMS and BOM • BOM non-executive members: at least 1/3 • BOM independent members: at least 1/3 • Internal audit committee established under BOM: required

New criteria for BOM independent members

Decree 71 no longer applies the criteria for BOM independent members as set out in Circular 121. Instead, it refers to Article 151.2 of the Law on Enterprises, which provides that a BOM independent member must satisfy all of the following conditions:

- (a) not a person currently working for the company or any subsidiary of the company; or not a person having worked for the company or any subsidiary of the company for at least three preceding years;



- (b) not a person who is currently entitled to salary or remuneration from the company, except for allowances which members of the BOM are entitled to;
- (c) not a person whose spouse, natural father, adoptive father, natural mother, adoptive mother, child, adopted child or sibling is a major shareholder of the company, or a manager of the company or its subsidiary;
- (d) not a person directly or indirectly owning at least 1% of the total voting shares in the company; and
- (e) not a person who was a member of the BOM or the Board of Controllers of the company for at least five preceding years.

Tighter regulations on prevention of conflict of interests

The responsibilities of, and restrictions applicable to, persons holding managerial positions in a public company have been tightened under Decree 71, in particular:

	Circular 121	Decree 71
Chairman of the BOM	The chairman of the BOM must not concurrently be the (General) Director, unless it is approved at the annual meeting of the GMS.	The chairman of the BOM must not concurrently be the (General) Director under any circumstances. The GMS cannot issue a resolution to waive such restriction. This restriction will take effect on 1 August 2020 .
BOM Members	A BOM member of a listed company or large-scale public company must not serve as a BOM member of more than 5 other companies, except where such member is a BOM member of a company in the same group with the public company. This restriction is not applicable to small-scale public companies.	BOM members of a public company (whether large-scale or small-scale, listed or non-listed) cannot serve as a BOM member of more than 5 other companies under any circumstances. This restriction will take effect on 1 August 2019 .
Transactions with Related Persons	Under Circular 121 and Article 162.1 of the Law on Enterprises, transactions between a public company and a BOM member or the (General) Director and their related persons requires special approval from the GMS or the BOM.	In addition to BOM members and (General) Director, Decree 71 now requires transactions between a public company and its controllers, any management personnel and their related persons to be approved by the GMS or the BOM. This restriction took effect on 1 August 2017 .



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New disclosure requirements

To improve compliance with disclosure obligations by public companies, Decree 71 requires public companies to adopt information disclosure rules and to appoint a specific person to be in charge of information disclosure on behalf of the public company. In addition, Decree 71 introduces certain changes to the current disclosure requirements, including:

- (a) disclosure of the salaries of the (General) Director and other managers in the annual financial report of the public company is now required;
- (b) any change in the selection of an organizational structure must be reported to the State Securities Commission, relevant stock exchange, and publicly disclosed within 24 hours after the GMS approves the change;
- (c) in relation to the existing requirement for disclosure by a BOM member and other managerial personnel of transactions between themselves and any company "controlled" by the public company, the term "controlled" has now been clarified as "more than 50% control of the charter capital"; and
- (d) there are changes on timing for disclosure on preparation of the list of shareholders eligible to attend a GMS meeting (from 5 days to 20 days before the deadline for registration for the meeting) and timing for disclosure of nominees for BOM member election (from 7 days to 10 days before the date of the relevant GMS meeting).

New standard form of charter for public companies to be issued

Since Decree 71 wholly replaced Circular 121, the standard form attached to Circular 121 is no longer applicable for public companies. Furthermore, Article 6.2 of Decree 71 provides that the Ministry of Finance shall issue a (new) standard form of charter for public companies to refer to when drafting their own charters.

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