***NOTABLE LEGAL MATTERS FOR SHARE SWAP DEAL IN VIETNAM***

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***What is a share swap deal?***

*The term of “share swap” has been used in the M&A practice in the recent years whereby:*

* *In a share acquisition deal, the buyer can use its shares as money to pay for purchasing price of the shares in the target company instead of having to pay 100% cash or along with cash payments to the sellers of the target company. As a result, the buyer shall become the owner of the target company and the sellers (i.e. the shareholders) of the target company shall become the shareholders of the buyer.*
* *In a share subscription deal, the subscribers can use its shares as money to contribute to the investee company instead of having to use cash or other kind of assets. As a result, the subscribers shall become the shareholders of the company issuing shares and this company in return shall become the owner of the company to which the subscribers can use its shares for the share subscription.*

*Accordingly, a share swap is also commonly called as “share exchange” or “stock-for-stock”.*

*Practically, apart from the above two traditional forms of share swap, the relevant parties may further convert other forms of share swap based on the above principle. Otherwise, in some cases, “share swap” is simply referred to transactions involving stock movements between the two companies regardless of their specific payment method.*

*As a matter of practice in Vietnam, the use of shares to swap shares of the other enterprises is popularly applied in public companies which are under the management of the State Securities Committee and is officially recognized in several legal documents promulgated by the Government and the Ministry of Finance of Vietnam, for example: Decree 155/2020/ND-CP of the Government and Circular No. 118/2020/TT-BTC of the Ministry of Finance providing instructions about the offering and issuance of stocks, public tender offer, redemption, registration of public companies and cancellation of registration of public companies. However, for non-public companies which are under the management of the Department of Planning and Investment and with involvement of foreign element, we have not found any specific regulation governing this kind of capital exchange.*

***Key legal steps for implementation of the share swap transaction in Vietnam***

* *Obtaining a ruling on implementation possibility of the non-cash flow in the proposed shares swap transaction*

*For good preparation of the to-be-divestment and remittance of dividend and capital from Vietnam to overseas later on, the relevant parties are recommended to obtain a ruling from the State Bank of Vietnam (SBV) and the General Tax Department of Vietnam (GTD) and overseas authorities (if necessary) in regard to the non-cash flow in the shares swap transaction.*

* *Preparing and signing the transactional documents*

*The relevant parties to prepare and should sign a Shares Swap Agreement and a Shares Transfer Agreement at the same time.*

*Despite of non-cash flow in the shares swap transaction, for full compliance with the applicable laws of Vietnam, a direct investment capital bank account (DICA) in foreign currency and/or in Vietnam Dong of the target company must be opened at a licensed commercial bank in Vietnam. Of note, the ruling on the non-cash flow matter of the shares swap transaction as above should be filed in accompany with this DICA matter to facilitate the money flow in any of its future capital related transactions, which must go through the DICA by law of Vietnam.*

*The relevant parties may be required to explain in detail the ownership structure for assessment and decision of the tax authority and/or the SBV.*

* *Obtaining an Outward Investment Registration Certificate (Outward IRC) for outward investment in overseas of the sellers (i.e. the shareholders) of the target company*

*Upon the issuance of the Outward IRC to the shareholders of the target company, an outward investment capital account (OICA) shall be opened for the function of the foreign currency account as required by the SBV.*

* *Obtaining an Approval Letter for the capital acquisition of the foreign buyer in the target company*

*This step is for obtaining a written approval for the foreign buyer to legally conduct its investment in Vietnam (i.e. capital acquisition) before officially conducting the shares swap transaction.*

* *Applying for an Amended Enterprise Registration Certificate of the target company recording the shares swap transaction*

*The target company to prepare required application files and register for change of the target company’s owner/equity members.*

*As mentioned above, currently, the law of Vietnam remains silent on possibilities and legal frameworks to conduct a share swap with involvement of the parties which are all non-public companies; and between a Vietnam-based company and an overseas entity. With the above in mind, we recommend the parties should seek official guidance from the competent authorities in Vietnam and overseas (in case it is still a vague legal matter under the relevant jurisdiction) and legal advice from professional law firm/advisor/tax consultancy under a legal/tax perspectives on the possibility of the proposed payment offsetting method and other relevant material legal implications.*