**LEGAL ISSUES AND PROCEDURES FOR ISSUANCE OF**

**STOCK OPTION FOR EMPLOYEES**

An issuance of the Stock Option of a company (referred to as “**Company**”) for its employees may be construed as granting them a right to purchase a number of Company’s shares depending on exercise price determined at a specific time before or on a specified date in the future.[[1]](#endnote-1) The Stock Option agreement shall be signed between the Company and employees and a subject matter of this Stock Option will be new shares (ordinary shares) issued by the Company at the time employees exercises the right to purchase or shares held by existing shareholders.

Currently, there are no specific regulations concerning the issuance of Stock Option for the Company’s employees in Law on Enterprises 2020 and Law on Securities 2019. It should be noted that the essence of the Stock Option is that the employee can choose whether to exercise or not exercise the right to purchase shares. In case the employee exercises the right to purchase shares, the Company can exercise this Stock Option in the form of a private placement of shares as prescribed by the Law on Enterprises 2020.[[2]](#endnote-2) At that time, the Company should pay attention to the following issues:

1. **Stock option**
	1. Sources of shares

The Company may consider to issue new shares or use the shares of existing shareholders to perform the Stock Option with the characteristics analyzed as follows:

1. For issuing new shares (private placement of shares): The employee only have to sign a sale and purchase agreement with the Company, in the means time, existing shareholders are not subject to transfer tax. However, for this method, the Company need to carry out the complicated procedure for private placement of shares and increase capital.
2. For using the shares of existing shareholders: If this option is applied, all existing shareholders will simultaneously reduce the number of shares in a certain proportion to transfer to the employee without increasing the Company’s capital. In this case, the Company is not required to carry out the procedures for private placement of shares and increasing capital, however, the existing shareholders are subject to transfer tax and the employee must sign a sale and purchase agreement with each existing shareholder of the Company.

Accordingly, private placement of shares is an optimal and convenient. The following analysis will revolve around the above -mentioned private placement of shares.

* 1. Private placement of shares and conditions thereof

Under the law, the private placement of shares must ensure the following regulations:[[3]](#endnote-3)

1. Not offered through the mass media; and
2. Offered to less than 100 investors, not including professional securities investors or only offered to professional securities investors.

Process of private placement of shares:[[4]](#endnote-4)

1. The Company decides the plan of private placement of shares;
2. Existing shareholders exercise the right to buy shares (shareholders have the right to transfer their own right to buy to others); and
3. In case existing shareholders and the people who are transferred the right to not buy, the remaining shares are sold to others under the plan of private placement of shares with not more favorable conditions than the conditions for sale to existing shareholders.
	1. Purchase price under the Stock Option

According to the provisions of the law on enterprise, the Board of Directors will have the right to decide the time, method and price of shares. The price of shares is not lower than the market price at the time of sale or the value stated in the Company’s book at the nearest time, except for some cases, including cases of discount under the resolution of the General Meeting of Shareholders[[5]](#endnote-5). Accordingly, in case the General Meeting of Shareholders approves the transfer price that has been discounted for employees, this price will be recognized and applied in the process of private placement of shares.

1. **The main contents of the Stock Option**
	1. The number/ratio of shares is exercised the call option

There is no regulation that limits the number and ratio of shares allowed to sell to employees under the Stock Option. However, a rate of around 5%-10% is suitable to ensure the purpose of retaining the employee as well as minimizing the dilution of shares (reducing the ownership) of existing shareholders.

The allocation of these 5%-10% of shares to the employee or groups of employees depends on the Company’s decision. The number of shares allocated to each employee is not necessarily equal.

* 1. Conditions to exercise the Stock Option

The Companycan consider one or some following condition(s) in accordance with the actual needs:

1. Has worked for the Company for a certain period of time: usually 03 - 05 years; and/or
2. Holding one of the certain positions at the Company; and/or
3. Has never been disciplined for labor in any form. This condition applies to employees who sign labor contracts with the Company; and/or
4. Achieved the year-end KPI evaluation index of the previous year to a certain level decided by theCompany.

Accordingly, this content can help the Company control the condition of exercising the call option of employees. Specifically, if the above conditions (or may be supplemented with other conditions) are not achieved, the employee will not be able to exercise the call option.

* 1. Execution time of the call option

The law only has a general provisions on the call options that will be exercised before or on the determined date in the future, not limited to the period of exercising. Accordingly, the time when the employee is entitled to exercise the option can be determined according to the Company’s decision. Usually, this time is not more than 5 years.

The Company may negotiate with the employee to be allowed to exercise call option in one time or divided into several tranche. For the divided into several tranche option, each tranche of call option of the employee, the Company must carry out the entire process of private placement of shares, leading to time consuming and complicated procedures. Accordingly, the Company should apply only allowing the employee to exercise the call option of all shares in one time to limit the procedures to be implemented.

* 1. Call option after the employee leaves the Company

In case the employee leaves the Company before exercising the call option, the Company has the right to negotiate with the employee on whether the employee is allowed or not allowed to exercise the call option after leaving.

However, since the Company’s original purpose is to retain employees, it should be stated in the Stock Option that if this happens, the Stock Option will automatically be terminated and the employee will no longer have the right to exercise the call option.

* 1. Right to tranfer the Stock Option

Since there are no specific provisions in the law, the Company is entitled to negotiate with the employee on whether the employee has the right to transfer the Stock Option to another organization/individual. In case the Company and the employee agree to allow the employee the right to transfer the Stock Option before exercising the call option, it is beneficial for the employees who do not want to exercise the call option, but can still assign the Stock Option. However, it is a disadvantage for the Company, the Company cannot control the shareholders and it is also difficult to achieve the purpose of retaining employees.

The Company may consider the options (i) allowing the employee to assign the Stock Option; (ii) not allow the employee to assign the Stock Option; or (iii) subject to the Company’s approval from time to time.

However, in line with the purpose of retaining the employee and controlling the quantity and quality of shareholders of the Company, the employee should not be able to transfer the Stock Option to other organizations and individuals.

* 1. Restrictions on transfer of shares after exercise of the call option

In order to achieve the purpose of retaining the employee, the Company is possible to include in the Stock Option the conditions related to the limitation of the employee’s right to transfer shares for a certain period of time from the time of exercise of the call option. This content help the Company to meet the purpose of retaining the employee and controlling the number of shareholders. However, this restriction may face the risk of being invalidated due to violation of the law. Specifically, according to the provisions of law, shareholders have the right to freely transfer their shares to others, except for the case where the shares of founding shareholders will be restricted from transferring for 3 years[[6]](#endnote-6). In addition, the Law on Enterprise 2020 prohibits acts of preventing shareholders from exercising their rights and obligations in accordance with the law and the Company Charter.[[7]](#endnote-7) In case of violation of any prohibition by law, this agreement will be at risk of being invalidated.[[8]](#endnote-8)

* 1. Provision of non – competition

For employees holding important positions, related to the Company’s business secrets, the Company may consider to add provisions to limit competition to protect its interests.

Specifically, the Company may consider reaching an agreement with employees on the content, duration of protection of business secrets, methods of protecting business secrets, interests and compensation in case of violation. In which, the method of protecting business secrets can be considered as not working for the Company’s competitors for a certain period of time (usually 01 year). The addition of this regulation can help employees have more motivation to accompany the Company for a long time.

In fact, this agreement is quite common and the practice of adjudication has also been recognized by arbitrations and courts.[[9]](#endnote-9)

1. **Process**

According to the analysis in Section II and III above, the process of issuing the Stock Option shall conduct through the following steps:

**Step 1: Drafting the Stock Option and preparing and making a plan for private placement of shares (if necessary)**

Based on the analysis in Section II and III above, in parallel with the drafting of the Stock Option, it is necessary to consider preparing and making a project/plan for the private placement process as a basis for conducting its intended transaction. The project/plan for the private placement of shares (if any) will need to be properly discussed and approved by the General Meeting of Shareholders before being applied as stated in Step 2 below.

**Step 2: Internal approval of the General Meeting of Shareholders**

Although there are no specific regulations concerning the procedure for issuance of Stock Option in the applicable law, in essence, Stock Option shall affect the private placement of shares by the Company at a specified period of time in the future. Accordingly, before signing Stock Option with employees, the Company should fulfill internal procedures for the approval of issuance of the private placement of shares (in the case employees exercise the right to purchase shares).

According to laws, shares are entitled to offer of the joint stock company are the total number of shares that are offered by the General Meeting of Shareholders to raise capital[[10]](#endnote-10). On the other hand, the issuance of shares must be duly approved by the General Meeting of Shareholders[[11]](#endnote-11). Accordingly, the Company needs to carry out procedures for the General Meeting of Shareholders to approve the issuance of the Stock Option as well as the issuance and private placement of shares in case the employee exercises the right to purchase shares.

**Step 3: Negotiating and signing Stock Option with the employee**

Please note that, there are no specific regulations or limits concerning the duration of the option exercise, the value of the option or other related matters in applicable laws. Regulations relating to the exercise of the Stock Option shall be made at the sole discretion of the Company.

**Please note that the following steps 4, 5, 6, 7, 8 and 9 are taken after the employee decides to exercise the stock option**

**Step 4: The Company registers to purchase shares to receive a written approval of the share purchase (if necessary)**

Please note that this step is only carried out in the case employee exercising the right to purchase shares as a foreigner and this purchasing increases the ratio of shares of foreign investors in the Company.

Specifically, according to regulations of Law on Investment 2020, the share purchasing increases the ratio of shares of foreign investors in a business organization conducting business in the restricted business lines need to apply for approval of share purchase[[12]](#endnote-12).

**Step 5: Notice of offering shares for all Company’s existing shareholders**

In principle, before conducting the sale of shares, the company must notify the offering shares to all existing shareholders according to the sharing ratio of the shareholders in writing to shareholders through the guarantee method to the permanent address or their contact address in the shareholder register within 15 days before the end of the time limit for purchasing shares. In case the number of shares is expected to be offered to the shareholder and the recipient transferred the priority to purchase and register for purchasing all, the company has the right to sell the number of shares to be offered to the employee[[13]](#endnote-13).

**Step 6: Internal approval of the Board of Directors**

According to the provisions of Articles 124.3 of the Law on Enterprise 2020, the General Meeting of Shareholders will decide the release of new shares and the Board of Directors will carry out the sale of this shares to others after offering to the current shareholder. Therefore, the Company needs to conduct a meeting of the Board of Directors to decide on the sale of shares to the employee after the existing shareholders do not exercise the priority of purchase.

**Step 7: Signing a Share Purchase Agreement between the employee and the Company**

**Step 8: Adjust the current Enterprise Registration Certificate to record additional charter capital as well as additional shares and information regarding foreign shareholders (if any).**

The Company is responsible for registering to adjust the charter capital at the Business Registration Office (Department of Planning and Investment of where the Company registered) to receive the Certificate of Enterprise Registration adjustment to record the number of Charter capital has been increased within 10 days from the date of completion of the signing of the share purchase agreement.

**Step 9: Updating the Company Shareholders Register and issue and grant shares (certificate of share ownership) to new shareholders**

In principle, after adding new shareholders, the Company is responsible for updating the Company Shareholders Register to record these shareholders.[[14]](#endnote-14)

In addition, the Company is also required to issue and hand over shares (in the form of book entry or electronic data) confirming the employee’s ownership of one or more shares.[[15]](#endnote-15)

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1. Article 4.11.(a) of Law on Securities 2019 [↑](#endnote-ref-1)
2. Article 125 of Law on Enterprise 2020 [↑](#endnote-ref-2)
3. Article 125.1 of Law on Enterprise 2020 [↑](#endnote-ref-3)
4. Article 125.2 of Law on Enterprise 2020 [↑](#endnote-ref-4)
5. Article 126.4 of Law on Enterprise 2020 [↑](#endnote-ref-5)
6. Article 115.1.(d) of Law on Enterprise 2020 [↑](#endnote-ref-6)
7. Article 16.2 of Law on Enterprise 2020 [↑](#endnote-ref-7)
8. Article 123 of Civil Code 2015 [↑](#endnote-ref-8)
9. <http://congbobanan.toaan.gov.vn/3ta161738t1cvn/> [↑](#endnote-ref-9)
10. Article 112.3. of Law on Enterprise 2020 [↑](#endnote-ref-10)
11. Article 138.2.(b) of Law on Enterprise 2020 [↑](#endnote-ref-11)
12. Article 125.3 of Law on Enterprise; Article 26.2.(a) of Law on Investment 2020 [↑](#endnote-ref-12)
13. Article 124 and 135 of Law on Enterprise 2020 [↑](#endnote-ref-13)
14. Article 122 of Law on Enterprise [↑](#endnote-ref-14)
15. Article 121.1 of Law on Enterprise [↑](#endnote-ref-15)