

# NO&T Thailand Legal Update

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## I. Summary of the Official Explanatory Notes on Regulation on Credit Terms

### 1. **Background**

Following the Trade Competition Commission Notification on Guidelines for the Assessment of Unfair Trade Practices, made with respect to the Credit Terms for SMEs regarding goods and services dated 24 May 2021 (“**Regulation on Credit Terms**”) which we have explained in our previous article (click the link [here](#)), the Office of Trade Competition Commission (“**OTCC**”) has published explanatory notes (“**Credit Terms Explanatory Notes**”) in late November 2021 to provide better understanding and a guideline for entrepreneurs who are considering to engage in trading with Small and Medium Enterprises (“**SMEs**”) under Credit Terms.

The key takeaways from the Credit Terms Explanatory Notes are as follows:

#### (1) **Confirmation on the determinative factor of SMEs**

The Regulation on Credit Terms defines an “SME” as:

- a) a manufacturer of goods (i) having no more than 200 employees; or (ii) having an annual turnover not exceeding THB 500,000,000; or
- b) a seller of goods or a service provider (i) having no more than 100 employees; or (ii) having an annual turnover not exceeding THB 300,000,000<sup>1</sup>.

As we mentioned in our previous newsletter, the OTCC previously explained that this definition of SMEs was adopted based on the Ministerial Regulation Prescribing the Criteria for Small and Medium Sized Enterprises of 2019 dated 20 December 2019 (“**Ministerial Regulation under SME Act**”). Under the Ministerial Regulation under SME Act, a business operator with high annual turnover and a small

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<sup>1</sup> Clause 2 of the Regulation on Credit Terms

workforce may not be deemed an SME, so it would not be entitled to the protections under the Regulation on Credit Terms<sup>2</sup>. However, the Credit Terms Explanatory Notes clearly mentions that the definition of SMEs in the Ministerial Regulation under SME Act will be applied to serve the intent of the Credit Terms Explanatory Notes, i.e., to broaden the protection thereunder to cover as many SMEs as possible.

As a result, the determinative factor of SMEs is either the annual turnover or the number of employees. In this regard, considering (aa) a manufacturer of goods having 210 employees with an annual turnover of THB 490,000,000, and (bb) a service provider having 90 employees with an annual turnover of THB 400,000,000 - both (aa) and (bb) would be SMEs according to the Credit Terms Explanatory Notes.

	Annual turnover > THB 500,000,000 (or THB 300,000,000)	Annual turnover ≤ THB 500,000,000 (or THB 300,000,000)
Number of employees > 200 (or 100)	Non-SME	SME
Number of employees ≤ 200 (or 100)	SME	SME

This interpretation is in line with the wording of the regulation and makes sense as the law aims to protect genuine small and medium enterprises, and high annual turnover business operators should not be treated in the same way as low annual turnover business operators.

**(2) No clarification on the ‘business, marketing, or economic justifications’ exception**

The Regulation on Credit Terms states that parties may set a longer Credit Term if there are ‘business, marketing, or economic justifications stipulated under the contractual obligations’<sup>3</sup> related to the payment or the Credit Terms. The Credit Terms Explanatory Notes does not have any specific explanation or example on this provision, however, it provides that while contractual parties may freely enter into a mutual agreement to waive such Credit Terms on the basis that no complaint is raised to the OTCC thereof, the OTCC still has jurisdiction to determine whether such an agreement is an abuse of power, unfair or otherwise, as the OTCC may conduct motu proprio review. Therefore, the parties should bear in mind when they enter into the agreement the extent to which a party can exercise its dominant bargaining power without violation of the rules on unfair trade practice.

**(3) Further clarification on how to count credit terms**

The Credit Terms Explanatory Notes provides further clarifications based on two types of transactions:

3.1 For general trading or service businesses, including the non-complex production of agricultural-related products with primary agricultural processing, the credit term will begin from the day on which<sup>4</sup>:

- (i) goods or services are delivered in accordance with the quantity, type, and quality standard as agreed; and
- (ii) the delivery of documentation is completed.

In the event that either party challenges the other on grounds of non-completion of the delivery of goods or services, the general principle governing the rights and duties of buyer and seller

<sup>2</sup> This is because Section 5 of the Ministerial Regulation under SME Act provides that in the event that the enterprise has a number of employees matching one type of enterprise when its turnover matches that of another type of enterprise, the turnover shall be used for the determination of the type of such enterprise.

<sup>3</sup> Clause 4 (1), Paragraph 2 of the Regulation on Credit Terms

<sup>4</sup> According to Clause 4 (1) of the Regulation on Credit Terms, the credit term periods are not to exceed 45 days or 30 days as the case may be.

under Section 465 of the Civil and Commercial Code<sup>5</sup> shall govern. This is because the rights and duties of buyer and seller are still subject to normal practice - and not the Trade Competition Act of 2017 or the Regulation on Credit Terms.

Similarly, in relation to the completion of the delivery of documents, document means the document including the details or descriptions therein in accordance with the ordinary course of business, e.g., an invoice.

- 3.2 For consignment<sup>6</sup>, the credit term will begin from the day of the goods being sold in accordance with the quantity or the proportions agreed in the ordinary course of business. This is because the terms of agreement are varied depending on the parties' intentions.

However, competition law implications may arise in the event of an abuse of the acceptance of delivery, delay in the inspection of goods without the fault of the seller, or any other reasonable grounds, and there could be a legal violation on such bases.

#### **(4) How to properly structure the payment system under the Regulation on Credit Terms**

The Credit Terms Explanatory Notes provides the following advice:

- 4.1 On the buyer's side, whether or not it is an SME, the details and payment procedures must be clear. Modifications to the payment procedures and relevant accounting systems may be necessary and therefore accepted in accordance with the Regulation on Credit Terms (e.g., billing system).

In the event that the buyer extends the credit terms by abusing its bargaining power, stipulates other conditions, or fails to elaborate on the details and payment procedures to sellers who are SMEs, the buyer may be subject to the rules on unfair trade practice and the penalties thereto.

- 4.2 On the seller's side, evidence confirming its status as an SME, e.g., documents showing (i) the number of employees at the time of entering into the contract, or (ii) the latest annual turnover, must only be presented to another party once the status of the SME is changed. Samples of these evidence include the contribution of the Social Security Funds document and an official receipt thereof, a personal or corporate income tax filing form and an official receipt thereof, or audited financial statements, etc.

If the seller fails to provide evidence confirming the status of the seller as an SME, it can be deemed that the seller has waived the protections and privileges accorded under the Regulation on Credit Terms.

## **2. Our remarks**

A prudent business operator should, with the support of a professional legal advisor, ensure that transactions with SMEs that involve the Credit Terms are in line with the Regulation on Credit Terms and the Credit Terms Explanatory Notes.

<sup>5</sup> Section 465 of the Civil and Commercial Code states that in a sale of movable property:

- (1) where the seller delivers the property with an amount less than contracted for, the buyer may reject it; but if the buyer accepts it, the buyer must pay the proportionate price.
- (2) where the seller delivers the property with an amount more than contracted for, the buyer may accept the property according to the contract and, or the buyer may reject the property. If the buyer accepts the property so delivered, the buyer must pay the proportionate price.
- (3) where the seller delivers the property he contracted for a property of a different description not included in the contract, the buyer may accept the property according to the contract and choose not to make payment of the excess amount, or the buyer may reject the property.

<sup>6</sup> In this article, "consignment" generally means a transaction where an SME delivers goods to a merchant for the purpose of sale to the merchant's customers and the merchant receives a commission from the sale.

[Authors]



**Yothin Intaraprasong**

yothin\_intaraprasong@noandt.com

Yothin Intaraprasong is a partner at Nagashima Ohno & Tsunematsu, Bangkok office. He has been involved in providing legal advice on civil and commercial laws, focusing on foreign investments in Thailand. He also represents a number of Japanese, Thai, and international clients in a wide range of ongoing business issues.



**Luxsiri Supakijjanusorn**

luxsiri\_supakijjanusorn@noandt.com

Luxsiri is a Thai qualified lawyer, registered and licensed in Bangkok and fluent in both spoken and written Thai and English. She has a wide range of experience in commercial transactions (M&A, foreign investment law, contract drafting, personal data protection, anti-trust and general commercial law etc.).

**II. Updates on the BOI’s Investment Promotion Packages and Conditions during the 3<sup>rd</sup> and 4<sup>th</sup> Quarter of 2021 (Thailand)**

**1. Background**

During the 3<sup>rd</sup> and 4<sup>th</sup> quarter of this year, the Board of Investment of Thailand (the “BOI”) committee approved several investment promotion packages and amended some of the existing conditions to encourage investment in various sectors in response to changing global trends. The key takeaways of these updates can be divided into three categories as follows:

**1) New businesses eligible for the BOI promotions**

The following activities have been added as businesses eligible for the BOI promotions.

Eligible activities	Material conditions and incentives
Operation of a natural gas separation plant <sup>7</sup>	<p>The incentives vary based on the level of technology used in the plant.</p> <ul style="list-style-type: none"> <li>• a plant using standard technology is eligible for a five-year CIT<sup>8</sup> exemption; and</li> <li>• a plant using Carbon Capture Utilization and Storage (CCUS) technologies is eligible for an eight-year CIT exemption.</li> </ul>
Manufacture of Electric Bicycles (individually, an “E-Bike”) <sup>9</sup>	<ul style="list-style-type: none"> <li>• the project must be proposed within a package consisting of (a) the manufacturing of E-Bikes, (b) the manufacturing of electric batteries (either by the applicant or by others), and (c) a disposal plan for used batteries.</li> <li>• the manufacturing must commence within three years from the date of issuance of the BOI certificate.</li> <li>• the E-Bike structure must be manufactured from lightweight materials such as Aluminium Alloy, Chromium-Molybdenum Alloy Steel (Chrome moly), Titanium Alloy, and Carbon Fiber.</li> <li>• the E-Bike must conform to the EN15194 standard or an equivalent standard.</li> <li>• the battery of the E-Bike must contain environmentally-friendly technology.</li> </ul>

<sup>7</sup> BOI Announcement No. Sor. 7/2564 dated 17 November 2021

<sup>8</sup> “CIT” means Corporate Income Tax.

<sup>9</sup> BOI Announcement No. Sor. 8/2564 dated 17 November 2021

Eligible activities	Material conditions and incentives
	<ul style="list-style-type: none"> <li>• the E-Bike is entitled to a three-year CIT exemption, but will be entitled to an additional one-year CIT exemption if (i) a traction motor or (ii) a lightweight material is also manufactured in the project within three years from the date of issuance of the BOI certificate.</li> <li>• it is possible to manufacture non-electric bicycles together with the E-Bikes, but the manufacture of such non-electric bikes will not entitle the manufacturer to the tax incentives.</li> </ul>

## 2) Amendment of conditions relating to existing businesses eligible for the BOI promotions

### 2.1 Trade Investment Support Office (“TISO”) and International Business Center (“IBC”)<sup>10</sup>

The scope of activities of TISO and IBC has been extended to cover the provision of loans to associated enterprises both in Thailand and overseas, which must be done in either one of the following manners:

- loans in foreign currencies to overseas associated enterprises;
- loans in THB currency to associated enterprises in Thailand; or
- loans in THB currency to associated enterprises in Vietnam, Laos, Myanmar, Cambodia, and Malaysia for trading or investment purposes in Thailand or in such countries only.

With regard to the application under TISO or IBC, it must be noted that the lending activity under TISO or IBC must be paired with other eligible TISO or IBC activities (i.e., an application where the lending activity is a stand-alone activity will not be accepted), and the lending activity shall not fall under any of the treasury center’s activities. In addition, lending to foreign countries must comply with the exchange control regulations under Bank of Thailand’s supervision.

### 2.2 Manufacture of platforms for Battery Electric Vehicles<sup>11</sup>

The manufacture of platforms for the following business categories will be eligible for BOI promotion:

- category 4.24: manufacture of Battery Electric Vehicles (individually, a “BEV”);
- category 4.26: manufacture of electric battery tricycles; and
- category 4.27: manufacture of electric battery buses and trucks.

The manufacture of such platforms must comply with specific conditions as follows:

- the platform must consist of (i) an energy storage system; (ii) a charging module; and (iii) a front & rear axle module;
- production must start within three years from the date of issuance of the BOI certificate; and
- at least one of the material components i.e., the traction motor, BMS, or DCU must be manufactured together with the platform within three years from the starting date of manufacture.

With regard to the tax incentives, the manufacturers of BEV platform will be entitled to the same privileges as those engaging in the manufacture of BEVs i.e., a three-year CIT exemption or up to an eight-year CIT exemption in the event that a BEV platform with an investment amount of THB 5,000,000,000 or more is manufactured.

<sup>10</sup> BOI Announcement No. Sor. 3/2564 dated 16 September 2021

<sup>11</sup> BOI Announcement No. Sor. 8/2564 dated 17 November 2021

### 3) Other noteworthy measures

#### 3.1 Measures to encourage greenhouse gas reduction<sup>12</sup>

In order to promote environmental sustainability, the BOI has added a new purpose below as one of the investment plans in relation to machinery replacement eligible for the Efficiency Enhancement Measure<sup>13</sup>:

“The manufacturer shall invest in the upgrading of machinery to mitigate environmental impacts by reducing greenhouse gas emissions. The registration of the machinery shall be made with, and the certification of the gas emissions amount therefrom shall be obtained from Thailand Greenhouse Gas Management Organization.”

The incentives under this measure remain the same as other categories of the Efficiency Enhancement Measure, i.e., a 50% CIT exemption for three years and an exemption from import duties for machinery.

#### 3.2 Measures to promote the “Thailand 4.0” industry transformation<sup>14</sup>

To transform the economy into the “Thailand 4.0” model, the replacement of machines for specific purposes such as Automation and Network Technology, Smart Operation, and Digital Technology in Production & Enterprise Processes will entitle the manufacturer to a 100% CIT exemption for three years provided that:

- the application is submitted within the last business day of 2022, and the investment plan is initially approved by the National Science and Technology Development Agency before submission to the BOI; and
- the replacement of machines is fully implemented within three years from the date of issuance of the BOI certificate.

Further details regarding the replacement criteria will be prescribed in the BOI announcement in due course.

#### 3.3 Extension of incentives to support Small and Medium Enterprises (“SMEs”)<sup>15</sup>

To continue its policy to help strengthen local SMEs, the BOI also approved an extension of the existing special investment promotion measures for SMEs until the last business day of 2022. The incentives remain the same as previously approved in 2020, for example, a CIT exemption of up to 200% of the capital investment, an exemption from import duty on machinery, and eligibility for other merit-based incentives, as the case may be<sup>16</sup>, have also been adopted.

Further details regarding the replacement criteria will be prescribed in the BOI announcement in due course.

Should you require further details of any measures or wish to receive further updates, please feel free to contact us.

<sup>12</sup> BOI Announcement No. 23/2564 dated 17 November 2021

<sup>13</sup> The Efficiency Enhancement Measure was initiated to promote and upgrade technology and machinery for energy conservation, alternative energy utilization and the reduction of environmental impacts, as well as to encourage involvement in R&D and advanced engineering designs in order to improve production efficiency. An existing company promoted by BOI which applies for and meets the criteria thereunder shall be entitled to an additional incentive of a 50% CIT exemption for three years and an exemption from import duties for machinery.

<sup>14</sup> [https://www.boi.go.th/index.php?page=press\\_releases\\_detail&topic\\_id=129511](https://www.boi.go.th/index.php?page=press_releases_detail&topic_id=129511)

<sup>15</sup> Ibid.

<sup>16</sup> BOI Announcement No. 4/2563 dated 11 March 2020

## [Authors]

**Yothin Intaraprasong**

yothin\_intaraprasong@noandt.com

Yothin Intaraprasong is a partner at Nagashima Ohno & Tsunematsu, Bangkok office. He has been involved in providing legal advice on civil and commercial laws, focusing on foreign investments in Thailand. He also represents a number of Japanese, Thai, and international clients in a wide range of ongoing business issues.

**Poonyisa Sornchangwat**

poonyisa\_sornchangwat@noandt.com

She is a Thai qualified lawyer based in the Bangkok office. She has been involved in several cross-border transactions, joint ventures and mergers & acquisitions, assisting Japanese companies which aim to expand their businesses into Thailand, and providing legal advice on corporate matters and legal compliance for several businesses, since 2015.

**Chattong Sunthorn-opas**

chattong\_sunthorn-opas@noandt.com

Chattong is a Thai qualified attorney working at Bangkok office. He obtained a First-Class honors LL.B. from Chulalongkorn University and achieved distinction of highest honors LL.M. from Graduate School of Law, Waseda University. He represents both Thai and Japanese clients in a wide range of transactions. His principal areas of practice are foreign investment law, M&A corporate, general commercial laws and regulatory advices.

**Sarita Srichan**

sarita\_srichan@noandt.com

Sarita is a Thai qualified attorney in the Bangkok office. She obtained a First-Class honors LL.B., majoring in Business laws from Chulalongkorn University in 2018. She has acted for both Thai, Japanese, and other multi-national companies in a variety of projects and commercial transactions. Her main areas of practice include corporate, mergers & acquisitions, financial regulation, and compliance matters.

### III. Additional Security Standards for Voting Systems for E-Meetings

#### 1. **Background**

Last year, the Ministry of Digital Economy and Society (“**MDES**”) issued the Notification of the MDES Re: Standards for Security of Meetings Held via Electronic Means of 2021 dated 12 May 2020 (“**Notification No. 1**”), which aims to certify any meeting required by law to be held via electronic means as discussed in our previous article ‘Summary of Laws Concerning Electronic Technology Used in Day-to-Day Operations’ (click the link [here](#)).

Following the issuance of Notification No. 1, in the voting process in an e-meeting, the e-meeting organizer shall ensure that the attendees are able to vote by way of either a general vote or a secret ballot, depending on the arrangement<sup>17</sup>. Recently, the Notification of the MDES Re: Standards for Security of Meetings Held via Electronic Means (No. 2) of 2021 dated 21 August 2021 (“**Notification No. 2**”) was published in the government gazette on 7 September 2021 and became effective on 8 September 2021, to further specifically strengthen the security standards for the e-meetings in respect of voting systems.

#### 2. **Summary of the Notification No. 2**

<sup>17</sup> Clause 5(4) of the Notification No. 1

### 2.1 Key procedural requirements for e-voting

When attendees of an e-meeting will engage in voting, the e-meeting organizer shall ensure the following measures are taken:

- the attendees who have voting rights are able to vote appropriately and fairly and any vote by any means shall be counted correctly as a result;
- the attendees can vote freely and the attendees shall be given necessary information and appropriate time for consideration;
- the confidentiality of the attendees with voting rights, the confidentiality of their votes and the attendees' information prior to the confirmation of voting are maintained;
- the security of the relevant information system is maintained by taking into account of confidentiality, completeness and availability; and
- the attendees are informed of the voting method and procedures, conditions of vote count, calculation of the voting result prior to voting<sup>18</sup>.

### 2.2 Requirements if the voting system and the control system of the meeting are separated

In the event that the voting system is separated from the control system of the meeting, the voting via the voting system shall have the following procedures:

- self-identification of the attendees with voting rights prior to the voting;
- communication and interaction during voting;
- access to meeting documents by the attendees with voting rights;
- storage of information or evidence related to voting via the voting system;
- storage of traffic data of all voters as evidence; and
- notification of any obstruction that occurred during voting<sup>19</sup>.

In addition to the above-mentioned requirements, following the Notification No. 2, Electronic Transactions Development Agency (“**ETDA**”) has issued the Recommendation on ICT Standards for Electronic Transactions KorMorTorOr. 26/2564 on Electronic Voting System Version 2.0 dated 13 September 2021 (“**ETDA Recommendation**”), which can be used as a guideline for e-voting system developers to develop a reliable e-voting system that has the necessary functions and security standards.

### 3. Our remarks/conclusion

In this connection, even though voting by traditional means e.g., voice vote, show of hand, etc., is not considered as the voting system<sup>20</sup> under the Notification No. 2 (i.e., the voting system which has been specifically developed for the purposes of voting), such traditional voting method is valid so long as it complies with those explained in 2.1 above. On the other hand, if you decide to use the voting system separately from the control system of the e-meeting, the e-meeting organizer has an additional burden to ensure the requirements as mentioned in 2.2 are met.

For the ETDA Recommendation, it can be adapted to be appropriate for each e-voting system and the compliance with this ETDA Recommendation will result in passing the e-voting certification by the ETDA; however, please note that it does not certify the legitimacy of the meeting procedure or the result of voting.

Therefore, when applying the voting system under the Notification No. 2 (i.e., the voting system which has been specifically developed for the purposes of voting) in the e-meeting, it is highly recommended

<sup>18</sup> Clause 6 of the Notification No. 2

<sup>19</sup> Clause 7 of the Notification No. 2

<sup>20</sup> “Voting system” means a computer network system and/or any electronic communication device, including hardware and software that connects as a network and communicates with one another using information technology and communication and/or telecommunication or any other similar means used for voting (Clause 3 of the Notification No. 2).



that the e-meeting organizer choose an e-voting system by taking into account the requirements stipulated under the Notification Nos. 1 and 2.

[Authors]



**Yothin Intaraprasong**

yothin\_intaraprasong@noandt.com

Yothin Intaraprasong is a partner at Nagashima Ohno & Tsunematsu, Bangkok office. He has been involved in providing legal advice on civil and commercial laws, focusing on foreign investments in Thailand. He also represents a number of Japanese, Thai, and international clients in a wide range of ongoing business issues.



**Preeyanuch Jareonlarp**

preeyanuch\_jareonlarp@noandt.com

Preeyanuch graduated with a First-Class honors LL.B. from Chulalongkorn University. She has represented both local and multinational companies in a wide range of projects and commercial transactions. Her main practices are corporate, merger & acquisition, labor and compliance matters.



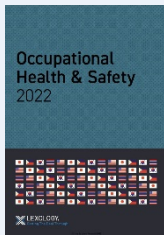
**Teeruth Suttabongoch**

teeruth\_suttabongoch@noandt.com

Teeruth Suttabongoch graduated with a Bachelor of Laws (a First-Class honors) from Chulalongkorn University. He has experienced in representing various international companies in corporate/M&A and commercial areas, as well as industry-specific regulatory and compliance sector.

## Other Publications

Recently we also featured in a number of articles and books covering a wide range of legal areas to address the latest legal issues. Please follow the link below to access each publications.



### **Lexology GTDT - Occupational Health & Safety 2022 – Thailand**

This article enabling side-by-side comparison of local insights into legislation, regulations and codes of practice; employer duties and responsibilities; worker duties and responsibilities; workplace hazards and risk management; liabilities, enforcement and penalties; and recent trends.



### **Lexology GTDT - Real Estate 2022 – Thailand**

This article provides comparative analysis of real estate regulations in different jurisdictions worldwide, with answers to crucial questions in key areas such as: acquisition of real estate, including recording conveyance documents, foreign investors, investment entities, leases and mortgages and contracts and financing, including liens, interest, enforcement, protection of collateral, covenants and bankruptcy.



### **Global Legal Insights - Fintech 2020 Second Edition Thailand**

This publication covers approaches and developments, the Fintech offering in each jurisdiction, regulatory and insurance technology, regulatory bodies, key regulations and regulatory approaches, restrictions, and cross-border business in Thailand and other jurisdictions.

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[www.noandt.com](http://www.noandt.com)

## NAGASHIMA OHNO & TSUNEMATSU

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan  
 Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com



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### Singapore Office

(Nagashima Ohno & Tsunematsu Singapore LLP)



6 Battery Road #40-06  
 Singapore 049909  
 Tel: +65-6654-1760 (general)  
 Fax: +65-6654-1770 (general)  
 Email: info-singapore@noandt.com

### Bangkok Office

(Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)



34th Floor, Bhiraj Tower at EmQuartier  
 689 Sukhumvit Road, Klongton Nuea  
 Vadhana, Bangkok 10110, Thailand  
 Tel: +66-2-302-4800 (general)  
 Fax: +66-2-302-4899 (general)  
 Email: info-bangkok@noandt.com

### HCMC Office

(Nagashima Ohno & Tsunematsu HCMC Branch)



Suite 1801, Saigon Tower  
 29 Le Duan Street, District 1  
 Ho Chi Minh City, Vietnam  
 Tel: +84-28-3521-8800 (general)  
 Fax: +84-28-3521-8877 (general)  
 Email: info-hcmc@noandt.com

### Hanoi Office

(Nagashima Ohno & Tsunematsu Hanoi Branch)



Suite 10.04, CornerStone Building  
 16 Phan Chu Trinh, Hoan Kiem District  
 Ha Noi City, Vietnam  
 Tel: +84-24-3266-8140 (general)  
 Fax: +84-24-3266-8141 (general)  
 Email: info-hanoi@noandt.com

### Shanghai Office

(Nagashima Ohno & Tsunematsu  
 Shanghai Representative Office)



21st Floor, One ICC, 999 Middle Huaihai Road  
 Xuhui District, Shanghai 200031, China  
 Tel: +86-21-2415-2000 (general)  
 Fax: +86-21-6403-5059 (general)  
 Email: info-shanghai@noandt.com

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