



Vietnam: new securities law

Vietnam's new Securities Law came into effect in early 2007. Although the new law attempts to open up the Vietnamese capital markets, this area will remain in a very nascent stage of development. Among other things, the Securities Law only contemplates domestic issues of VND denominated securities. This briefing examines the provisions of the new law.

While Vietnam is some way off from structuring complex products on its exchanges, it is overhauling its domestic capital markets with a new Securities Law, which came into effect in early 2007.

The Securities Law governs public offerings of securities, listings, dealing, trading and investment in securities, securities services, and the establishment and regulation of securities companies and investment funds.

The Securities Law contemplates two types of domestic securities trading market: the Securities Trading Centre and the Stock Exchange. These are independent legal entities, although their operation and personnel are controlled and supervised by the local regulator, the State Securities Commission (SSC). The SSC is a state body overseen by the Ministry of Finance (MOF) and, therefore, remains under the watchful eye of the Government.

On 17 January 2007, the Government issued Decree 14 implementing the Securities Law with regard to public offerings, listings, and the regulation of securities companies, fund management companies and securities investment companies. The MOF has also issued a number of other regulations to implement the Securities Law and Decree 14, including the following:

- Decision 35 dated 15 May 2007 on the organisation and management of fund management companies;
- Decision 45 dated 5 June 2007 on the establishment and management of securities investment funds;
- Decision 27 dated 24 April 2007 on securities companies;

- Decision 13 dated 13 March 2007 on the model prospectus and registration files for the listing of securities on the stock exchanges and securities trading centres;
- Decision 12 dated 13 March 2007 issuing regulations on corporate governance applicable to listed companies on the stock exchanges and securities trading centres;
- Circular 17 dated 13 March 2007 providing guidelines on application files for registration of securities offerings; and
- Circular 38 dated 18 April 2007 on publishing information on the securities market.

Public offerings of securities

Vietnam has a broad informal over-the-counter market. The Securities Law may slowly cause this grey market to migrate onto the regulated market. Offers of securities via the 'mass media' or to more than 100 investors (excluding offers to professional investors) or to an unspecified number of investors constitute a public offering that must be registered. The Securities Law is limited to public issues of securities and does not apply to the private placement of unlisted securities.

The term 'securities' is widely defined. It includes all stocks, bonds, warrants, certificates, put and call options, and futures contracts, whether held in certificated, electronic or book entry form.

Publicly offered securities in Vietnam must be denominated in Vietnam Dong (VND). Denominations

are low. The par value of a listed share is VND10,000 (less than US\$0.75) and the minimum par value of a publicly offered bond is VND100,000 (around \$6.25). In practice, the success of an offering is measured, slightly oddly, by the multiple to par value that investors are willing to pay.

Conditions for public offerings

An issuer of shares or bonds under the Securities Law must have paid-up share capital of not less than VND10bn at the time of the listing (VND80bn for listings on the HCMC stock exchange) and have made a profit in the year before the listing (two years for listings on the HCMC stock exchange).

To establish a fund, the minimum capital must total not less than VND50bn.

Additional conditions apply to a number of types of enterprise (such as foreign-invested enterprises converting into a shareholding company to make a public offer of shares).

Procedures for public offerings

The application takes the form of a registration statement, which includes the prospectus, the audited financial statements for the preceding two fiscal years, and the issuer's constitutional documents and relevant corporate resolutions.

The prospectus will need to cover the following:

- brief information about the issuing organisation, including organisational structure, assets, financial status, management and shareholder structure – names of shareholders with 5 per cent or more of the shares will need to be disclosed in the prospectus;
- information regarding the shares offered, including the terms of the offer, risk factors, projected profits and dividends, the issuance plan and the plan for the use of the sale proceeds;
- financial statements of the issuing organisation for the previous two years; and
- other information stipulated in the sample prospectus issued by the MOF.

The main contents of a prospectus are prescribed in Decision 13 of the Ministry of Finance dated 13 March 2007. It is mandatory to follow the sample prospectus in this Decision. However, this does not preclude the

inclusion of additional information necessary to make the prospectus accurate, true and objective.

There are no set standards for financial statements. Foreign issuers may, therefore, enter the Vietnamese securities market with financial information provided to a high standard, which could result in inconsistencies in financial reporting and quality levels.

Responsibility for the registration statement

An organisation issuing shares to the public must register the issuance with the SSC. The information in the registration file of a public offering must be accurate, true and not misleading and the file must contain all material information that would affect an investor's decision. Of the information in the registration file, only the prospectus is open to the public. The prospectus must be accurate, true and 'objective'. An issuer is liable if it is not.

The directors and senior management personnel can be liable for the prospectus if they certified it. Directors can also be liable if they were involved in preparing the registration file.

In addition, the issuing organisation, the general director, the deputy general director, the chief accountant or other related persons of the issuing organisation, the underwriter and the organisation advising on the issue can be liable if they intentionally disclose misleading information or conceal the truth. Although the law is not clear, the SSC has the room to view the failure to disclose material information as concealment of the truth.

In a registration file for a public offering:

- the registration application must be signed by the chairman of the board of directors of the issuing organisation;
- the prospectus must be signed by the chairman of the board of directors, general director, chief accountant and legal representative of the issuing organisation – in addition, the sample prospectus requires the chairman of the board of inspection of the issuing organisation to be responsible for the prospectus; and
- a decision *approving* the registration file must be passed by the board of directors of the issuing organisation.

In light of the above provisions, although this issue is not entirely clear, the following persons within an

organisation may be subject to liability under the Securities Law if the prospectus or the registration file contains untrue or misleading information or does not disclose all material information:

- the chairman of the board of directors, general director, chief accountant and chairman of the board of inspection;
- the deputy general director if he/she intentionally discloses misleading information or conceals the truth;
- all members of the board of directors if the approval of the board of directors of the registration file constitutes 'certifying' or 'preparing' the registration file; and
- any member of the board of directors or other 'related persons' (i) certifying, (ii) preparing, or (iii) intentionally disclosing misleading information, or (iv) intentionally concealing the truth.

The following could also become liable under the Securities Law if the prospectus or the registration file contains untrue or misleading information or does not disclose all material information:

- the audit company and the auditor certifying the financial statements forming part of the registration file;
- the underwriter or adviser of the public offering; and
- any organisation or individual certifying the registration file.

Time frame for the registration

The SSC has 30 days from the date of receipt of the registration statement in which to consider the issuance licence. The issuer may market the proposed offering during this period but not through the use of mass media. Within seven days from the date of the licence, the issuer must make a public announcement in three consecutive newspaper issues. All securities must be allotted within 90 days and transferred to investors within 30 days from the date of completing the offering.

Ownership by foreigners

Ownership by foreigners of Vietnamese listed companies remains restricted. Foreign ownership is limited to 49 per cent, and foreign ownership of a company operating in certain 'sensitive' sectors may be more restricted. For example, foreign ownership of listed banks is limited to just 30 per cent.

Foreigners' ownership of bond issuances is not limited.

To purchase Vietnamese securities, foreigners need to comply with various requirements regarding foreign exchange and registration with the authorities. The issues include:

- the fact that securities can be settled in VND only, so the necessary foreign exchange transactions must be performed;
- the necessity for a foreign investor to obtain a 'securities trading code' from a Securities Trading Centre via a 'depository member' (which is a company that has been granted a licence for the provision of securities registration, custody, clearing and settlement services by the SSC);
- the necessity for the foreign investor to appoint an individual as a 'representative person' to represent the foreign investor for all transactions on the securities trading centres; and
- the necessity for the foreign investor to open one 'securities trading account' and one 'securities depository account' linked to its securities trading code, and to carry out all trades only through those accounts.

Further regulations on foreign purchases of Vietnamese securities are expected soon and the above regulations may change.

Overseas offerings

The Securities Law regulates only the domestic market and domestic issuers. However, it allows domestic issuers to make secondary offerings outside Vietnam under certain conditions, including (i) not being a business in which participation by foreign investors is prohibited, (ii) not permitting foreign shareholding in an amount greater than that allowed by laws, (iii) having a plan for utilisation of the proceeds that has been approved by the directors or owners, and (iv) being able to meet the legal requirements of the overseas country in which the secondary offering is registered.

Some domestic issuers, such as Vinamilk, are trying to take advantage of this reform. Advisers and underwriters of such offshore issues must contend with greater legal ambiguity in their position, as the laws and regulations are not yet complete.

Securities offerings by foreign investors

An issuer of publicly offered securities will normally be a joint stock company established in Vietnam. International financial institutions in which Vietnam is a member may also make offers of VND-denominated bonds, subject to certain specified conditions.

Securities investment funds and fund management companies

The Securities Law recognises two types of securities investment fund: public funds (including closed-ended funds and open-ended funds), which are defined as securities investment funds that publicly offer securities, and member funds, which are limited to 30 members who are legal persons. The establishment of a public fund and the offering of its certificates must be registered with the SSC, whereas the establishment of a member fund requires only notification to the SSC. It is possible for a member fund to become a public fund provided the fund management company registers the fund with the SSC and complies with all regulatory requirements for a public fund.

A fund management company can be established only as either a limited liability company or a joint stock company under the new Enterprise Law. It will be licensed to conduct securities investment fund management and portfolio management. It will no longer normally be able to provide financial and securities investment consultancy, which used to be within the scope of activity of a fund management company under the former Decision 73. It is apparently not within the scope of the activities of a fund management company under the Securities Law but rather within the scope of activities that securities companies are permitted to perform.

A fund management company is permitted to invest in securities and real estate.

Shareholders of the fund company are not permitted to have day-to-day control over the investment decisions of the fund.

The Securities Law specifically permits a Vietnamese-licensed fund management company to manage foreign funds where the objective is to make investments in Vietnam. Unfortunately, Decision 45 is unclear on whether Vietnamese fund management companies can

manage funds that are not listed on a foreign exchange. In addition, a fund management company has to inform the SSC of the establishment of the offshore fund at least 10 days before the submission of the application to the foreign authority for the establishment of the fund. It also has to notify the SSC within 10 days after completion of establishment of the fund.

Securities companies

A securities company must be licensed by the SSC. An organisation that satisfies certain conditions, such as (i) having sufficient facilities and premises, (ii) meeting minimum capital requirements, and (iii) having key personnel and staff who are qualified as securities practitioners, may apply to the SSC for a securities company licence.

A securities company may conduct one or more of the following activities (as set out in its establishment and operating licence):

- securities brokerage (defined as the activity of a securities company that acts as an intermediary in the purchase or sale of securities on behalf of a client);
- proprietary trading (defined as the activity of a securities company that consists of purchasing and selling securities for its own account);
- underwriting (defined as the activity of an underwriter that ‘undertakes to an issuer to complete the required procedures prior to an offer of securities, to receive some or all of the securities of the issuer in order to re-sell them, to purchase the amount of remaining undistributed securities, or assists the issuer to distribute the securities to the public’);
- securities investment consultancy (defined as the activity of a securities company that provides results of analyses and analytical reports and makes recommendations regarding securities to investors and includes ‘consultancy on strategies and trading techniques including price, value, type, quality, volume, mode and trading time of securities traded’ and ‘provision of analytical results of securities and securities markets’); and
- financial consultancy services (this includes consultancy on (i) restructuring, corporate finance, mergers and acquisitions of enterprises and administration of shareholding companies, (ii) public offerings and listings of securities, (iii) equitisation

and valuation of enterprises, and (iv) other financial matters in compliance with the law).

Under the Securities Law, securities companies are no longer permitted to provide 'portfolio management services'. Previously, under Decree 144 and Decision 55 of the MOF dated 17 June 2004, a securities company was permitted to provide 'portfolio management services' under an investment management contract with its customers.

Under Decree 14, there are certain restrictions on shareholdings in a securities company. No organisation or individual who owns 10 per cent or more of the capital in a securities company, nor any affiliate of such person, is permitted to own more than 5 per cent of the capital in any other securities company. This restriction is aimed at preventing a holding company from being a major shareholder of more than one securities company at the same time.

Securities investment companies

For the first time, the Securities Law provides for the establishment, organisation and operation of securities investment companies, which, like fund management companies, must be established as either limited liability companies or joint stock companies under the new Enterprise Law. Decree 14 contemplates two types of securities investment company: (i) public securities investment companies, which conduct public offerings of shares, and (ii) securities investment companies, which conduct private placement of shares. The same restrictions on investment as apply to a public fund (such as investing in not more than 15 per cent of the total value of the currently circulating securities of an issuing organisation) apply to a public securities investment company. Securities investment companies conducting only private placements of shares are not subject to such restrictions.

A securities investment company is permitted to manage its own investment capital or to entrust a fund management company to do so.

Any foreign investment company or foreign securities investment fund that is a legal entity wishing to invest in Vietnam must entrust a domestic fund management company or establish a branch in Vietnam to manage its investment capital. The details of these requirements,

which could significantly affect the booming foreign fund business, are being debated.

Custodian banks

Custodian banks are regulated by the Securities Law. A custodian bank must be a commercial bank licensed by the SSC to provide custodial services. The main role of the custodian bank is to retain custody of the assets of an investment fund and to supervise the investment of a public fund's capital by the management company.

Reporting and disclosure requirements

Issuers of securities, listed institutions, securities firms and fund management companies are subject to certain reporting and information disclosure obligations. As well as complying with basic disclosure of financial information, timely disclosure of extraordinary items, such as significant financing arrangements or matters that may have a detrimental effect on the value of securities, will be required. The Securities Law attempts to provide greater transparency through higher disclosure requirements.

Re-registration requirements

Representative offices of foreign securities companies or foreign fund management companies that were operating under a representative office licence other than a licence granted by the SSC must re-register with the SSC within one year after the effective date of Decree 14 (ie before 8 February 2008). The question is whether such representative offices will be permitted in practice to continue operating as they currently do or whether they will have to (and be able to) set up as a branch. The former are technically not allowed to conduct business, while the latter are. Representative offices do not pay tax, whereas a branch would.

Problems

There are numerous problems with the Securities Law and the regulations issued so far. These will no doubt gradually be solved through implementing regulations and SSC decisions. The following problems are attracting the most attention at present.

Direct investments

Under the Investment Law:

- a direct investment is an investment in which the investor invests capital and participates in the management of the investment activity; and
- an indirect investment means a form of investment by way of purchase of shares, bonds or other valuable papers that does not result in the investor participating directly in the management of the investment activity.

The Securities Law may apply to investments by foreigners in Vietnamese companies without 'direct participation in management'. This concept has not been clarified at law. However, the term 'manager' is defined in the Enterprise Law to include a member of the board of directors, the general director and other management positions set out in the charter of a joint stock company. In practice, the Ministry of Planning and Investment has taken the view, at least on one occasion, that if an institutional investor has a representative on the board of an investee company, that investor would be viewed as participating in the management of the target company.

Insider trading

The insider trading rules are very broadly drafted. 'Inside information' is defined as information on a public company that has not been published and that, had it been published, might have affected greatly the share price of such company.

A person is prohibited from 'using inside information' to purchase or sell securities for itself or for a third party. A person trading on the basis of inside information may be subject to a fine or criminal liability and the proceeds of the trade may be confiscated.

The following persons, among others, would be deemed to have inside information:

- members of the board of directors and inspection board, the general director, and the deputy general director;
- shareholders with 5 per cent or more of the shares of a company;
- auditors; and
- others with access to inside information.

A large shareholder may be regarded as having inside information about an investee company on the ground that it owned 5 per cent or more of the shares or on the

ground that it had access to inside information through due diligence performed before investment. Accordingly, to sell shares after a public offering, that shareholder would need to be satisfied either that the inside information has been disclosed or that the disclosure would not have a 'major impact' on the company's share price. There is no jurisprudence on what might constitute a major impact, which might make it difficult to get comfortable on this point.

Conversion of corporate form

Many companies were originally established as limited liability companies and to offer shares they need to convert into joint stock companies. It is not clear if the record of the company while it was a limited liability company counts in meeting the listing conditions in the Securities Law. The detailed regulations on conditions for listing in force before the Securities Law came into effect clearly allowed a company that had been converted into a shareholding company and was applying for listing to rely on its period of operation before conversion to fulfill this requirement. In addition, the Enterprise Law suggests that a converted company is a new company but is entitled to 'inherit' rights and benefits of the former company. A listing company wishing to list rights after conversion would need to convince the SSC that it can inherit the 'past performance' before conversion to satisfy this listing condition. However, based on an informal discussion with an official of the SSC, we understand that the SSC now takes the view that a shareholding company converted from a limited liability company needs to have operated for two years as a shareholding company before it can apply for listing.

Conclusion

Although the Securities Law attempts to open up the Vietnamese capital markets, this area will remain in a very nascent stage of development. Among other things, the new law only contemplates domestic issues of VND denominated securities. However, the growing demand to invest in Vietnam's capital markets suggests that further change is inevitable.

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