

The Securities Market in Vietnam – 14 March 2007

This article is an introduction to the legal framework that governs the securities market in Vietnam, in particular public offers, listing, public companies and buying shares. This article focuses on the provision of Law 70-2006-QH11 of the National Assembly on Securities (Law 70) and Decree 14-2007-ND-CP of the Government dated 19 January 2007 Providing Detailed Regulations for Implementation of a Number of Articles of the Law on Securities (Decree 14) . The MOF is to shortly issue a regulation to further provide guidance to the SSC on regulating and establishing investment funds, securities companies and fund management companies. An update will be provided once the regulation has been promulgated.

1. Relevant bodies

1.1 The State Securities Commission (SSC)

The SSC is the official regulator of the stock exchange, and is overseen by the Ministry of Finance (MOF).

1.2 The HCMC Securities Trading Centre (HCMCSTC)

The HCMCSTC is an administrative unit of the SSC. It is a securities trading and listing market and offers an official mechanism through which new government bonds are issued and is the secondary markets for several existing bonds.

Currently, the HCMCSTC is an administrative unit under the SSC. Under Law 70 it is to convert to either a Stock Exchange or a Securities Trading Centre in the form of a limited liability company or a shareholding company by July 2008. It is expected that the HCMCSTC will be converted into a Stock Exchange.

1.3 The Hanoi Securities Trading Centre (HASTC)

The HASTC is an administrative unit of the SSC. It is a securities trading and listing market and offers and is also Vietnam's official over-the-counter market for securities.

Under Law 70 it is to convert to either a Stock Exchange or a Securities Trading Centre in the form of a limited liability company or a shareholding company by July 2008. It is expected that the HASTC will be converted into a Securities Trading Centre.

2. Public offer (PO)

In Vietnam the processes of a public offer (**PO**) and listing are different, although companies may do the two simultaneously. A PO is an offer to sell shares, bonds or fund certificates via the mass media, or to at least 100 investors excluding institutional investors or to an unspecified number of investors.

2.1 Participants

- (a) The issuer or issuing organization. This is the enterprise making the PO. The securities may be listed or unlisted.
- (b) Underwriters. Securities in a PO may be distributed by underwriters. Underwriters must be securities companies authorized to underwrite issues of securities or a commercial banks approved by the SSC to underwrite issues of bonds, on conditions regulated by the MOF. The role of the underwriter is to assist the issuer to complete procedures prior to the PO, to purchase the securities for resale or the unsold portion of the securities from the issuer, and to assist the issuer to distribute the securities to the public.
- (c) Custodian banks. These are commercial banks that are either domestic or foreign invested (that is, not an offshore licensed bank) and are licensed to carry out securities depository activities including the keeping and maintaining of securities.

- (d) Investors. Investors who wish to purchase securities may be Vietnamese or foreign investors but foreign investor must first apply for a securities trading code. Foreign investment is also subject to limitations (discussed below).

2.2 Currency and par value

Securities offered by a PO must be denominated in Vietnamese dong. The par value for shares and fund certificates is VND10,000 and the minimum par value for bonds is VND100,000.

2.3 Conditions for a PO

- (a) Shares. An issuer of shares must be a shareholding company with paid-up capital of at least VND10 billion at the time of registration of the PO, must have made a profit in the year prior to the PO and must not have accumulated losses as at the year of registration of the offer. The general meeting of shareholders¹ of the issuer must pass an issue plan and plan for utilization of the proceeds earned.

Under Decree 14 other specific conditions apply to newly established enterprises conducting an initial public offer if the enterprise is in the infrastructure or high-tech sectors. These conditions include the obligation for there to be an underwriter, and the obligation for there to be a bank supervising utilization of the proceeds earned from the offer.

- (b) Bonds. An issuer of bonds must have paid-up capital of at least VND10 billion at the time of registration of the PO, must have made a profit in the year prior to the PO, must not have accumulated losses as at the year of registration of the offer and must not have more than 100 overdue debts payable. The board of management or members' council of the issuer (as applicable) must pass an issue plan and plan for utilization and repayment of the proceeds earned. The issuer of bonds must also give an undertaking to investors to discharge its obligations.

In the case of convertible bonds the issue plan and plan for utilization proceeds must also have a plan for issuance of the shares for conversion and all plans must be passed by the general meeting of shareholders (not the board of management).

- (c) Fund Certificates. Issued fund certificates must have total value of at least VND50 billion. There must also be an issue plan and a plan for investment of the capital funds earned.

2.4 Prospectus

Issuers of a PO must prepare a prospectus. The main contents for a prospectus are prescribed in Law 70 and the MOF has been delegated the task of creating a sample form prospectus. Among other things, the prospectus must include the financial statements of the issuer for the 2 years prior to the issue of the PO.

The prospectus must be signed by the chairman of the board of management, the general director, the financial director/accountant (only in the case of shares and bonds) and the legal representative of the underwriter.

2.5 Registration

The issuer must register the PO with the SSC. To register, the issuer must submit a request for registration and attach those documents that are required by Law 70 (and which will be given more detail in specific regulations of the MOF). The documents required include the prospectus, the charter (or in the case of a PO of fund certificates, the proposed charter of the securities investment fund) and relevant resolutions and undertakings by the issuer. In the case of a PO for fund certificates the

¹ In the case of an enterprise with foreign owned capital that is converting to a shareholding company in combination with making a public offer of shares, Decree 14 clarifies that the issue plan and plan for utilization is passed by the owner of the enterprise with 100% foreign owned capital and the board of management of a joint venture enterprise.

contract for supervision between the custodian bank and the securities investment fund must also be submitted.

The SSC has 30 days from receipt of the registration statement to certify registration.

2.6 Announcement

Within 7 days from certification of registration the issuer must make a public announcement in 3 consecutive newspaper issues. The announcement must stipulate the time in which investors have to register to purchase the securities. The time limit can be set by the issuer but must be a minimum of 20 days.

2.7 Registration to purchase and payment of monies

When an investor registers to purchase the securities it must pay the purchase price into an escrow bank account and this money will remain in escrow until completion of the PO.

2.8 Allocation and delivery

The issuer must allocate the securities within 90 days from the SSC's certificate of acceptance, and physically deliver the securities to investors within 30 days from the date the offer ends.

3. Listing

Listing is the process of taking a privately-owned organisation including an equitized or equitizing State owned enterprise (**SOE**) and making the transition to a publicly-owned entity whose shares can be traded on the HCMCSTC or HASTC.

3.1 Conditions, application and procedures for listing

The regulations on the conditions, application files and procedures for listing a company are not contained in Law 70, they are contained in Decree 14.

The conditions for listing on the stock exchange (of which there are currently none in Vietnam) are different from the conditions to list on a securities trading centre. However, in anticipation of the HCMCSTC converting to a stock exchange, new registrations for listing on the HCMCSTC must satisfy the conditions applicable for stock exchange listings, while existing listed companies on the HCMCSTC have two years to satisfy these conditions. Companies failing to meet these requirements will have their listing moved to the HASTC.

3.2 Conditions, application and procedures for listing on the Stock Exchange/HCMCSTC

- (a) Shares. The listing company must be a shareholding company with paid-up capital of at least VND80 billion at the time of registration for listing, must have made a profit in the two years prior to year of listing and must not have accumulated losses as at the year of registration for listing. There must not be overdue debts payable (unless a lawful reserve has been made for them) and there must be public disclosure of all debts owed to the company by officers² and major shareholders. At least 100 shareholders must own 20% of the voting shares of the listing company, and there must be an undertaking from shareholders who are also officers of the company to hold 100% of their shares for 6 months from the date of listing and 50% of their shares for the following 6 months.
- (b) Bonds. The listing company or SOE must have paid-up capital of at least VND80 billion at the time of registration for listing, must have made a profit in the two years prior to year of listing and must not have overdue debts of more than 1 year. There must be at least 50 bondholders in any one bond issue.

² Officers are the members of the board of management, members of the board of controllers, director, general director, deputy director, deputy general director and chief accountant.

- (c) Fund Certificates. Issued fund certificates must have total value of at least VND50 billion. There must be an undertaking from the initial shareholdings and members of the committee of representatives of the fund to hold 100% of their shares for 6 months from the date of listing and 50% of their shares for the following 6 months. There must be at least 100 owners of fund certificates.

3.3 Conditions, application and procedures for listing on the HASTC

- (a) Shares. The listing company must be a shareholding company with paid-up capital of at least VND10 billion at the time of registration for listing, must have made a profit in year prior to year of listing and must not have overdue debts of more than 1 year (with no current debts or financial obligations to the State). There must be at least 100 shareholders with voting shares, and there must be an undertaking from shareholders who are also officers of the company to hold 100% of their shares for 6 months from the date of listing and 50% of their shares for the following 6 months.

The conditions relating to profitable business operations and overdue debts do not apply to newly established enterprises in infrastructure and high-tech sectors or equitizing SOEs.

- (b) Bonds. The listing company or SOE must have paid-up capital of at least VND10 billion at the time of registration for listing, and all bonds in the issue must have the same maturity date.
- (c) Other types of securities. The task of stipulating conditions for listing other types of securities has been delegated to the MOF.

3.4 Registration

The listing enterprise must register with the relevant exchange or trading centre. To register the listing enterprise must submit a registration slip and attach those documents that are required by Law 70 (and which will be given more detail in specific regulations of the exchange/trading centre). The documents required include the prospectus, relevant corporate resolutions, register of shareholders/bondholders and required undertakings.

The exchange/trading centre has 30 days from receipt of the registration slip to approve or refuse the application.

3.5 Trading

Current guidelines on securities, membership of the HCMCSTC/HASTC and trading in securities are contained in Circular 58³ implementing Decree 144⁴. In time, Circular 58 should also be repealed by a new circular implementing Law 70 and Decree 14. In the interim the HCMCSTC and the HASTC continue to apply the day to day trading rules contained in the Circular 58.

In addition, under Law 70, the HCMCSTC and the HASTC each are given the responsibility to issue regulations on the trading of listed securities within their respective centres.

3.6 Other trading

Securities listed on a Stock Exchange cannot be traded outside the Stock Exchange, unless otherwise stipulated in the trading rules of the Stock Exchange.

In comparison, securities listed on a securities trading centre (**STC**) can be traded at a securities company which is a trading member of the STC.

3.7 Taxation holidays – almost over

Previously, to encourage investment in Vietnam's securities market, various incentives were offered,

³ Circular 58-2004-TT-BTC of the Ministry of Finance dated 17 June 2004.

⁴ Both Circular 58 and Decree 144 were issued before Law 70 and Decree 14, and must be read down to the extent of the inconsistency.

including preferential corporate income tax rates to companies upon listing. However, this preferential tax treatment ceased on 1 January 2007.

Dividends from shares have been free of personal income tax since 1994. However this very long “temporary exemption” is expected to come to an end under the proposed Law on Personal Income Tax, which was considered by the National Assembly in October-November 2006 and is expected to be passed in 2007. If passed in its current draft form, dividends from shares will be subject to personal income tax at a proposed rate of 5% from 1 January 2009.

4. Public companies

A public company is a newly introduced concept in Vietnam. A public company is a shareholding company with any of the following characteristics:

- Shares have been issued via a PO.
- Shares are listed on the HCMCSTC or the HASTC.
- Shares are owned by 100 or more investors, excluding professional securities investors, and have a paid-up charter capital of VND10 billion or more.

Importantly, a company does not have to be listed to be deemed a public company.

New rules introduced for public companies include:

4.1 Filing

A public company must lodge the public company file with the SSC within 90 days of becoming a public company. The public company files comprises the company’s charter and business registration certificate, the most recent financial statement and summarized information on its business operations scale, management organization and shareholding structure.

4.2 Major shareholders

A shareholder of a public company is deemed to be a major shareholder when it holds directly or indirectly (undefined) 5% or more of the voting shares the company. Upon becoming a major shareholder, the shareholder must report to the SSC and the HCMCSTC or HASTC (depending on where the shares of the public company are listed/offered). The information that must be reported is not extensive: only details of the investor (name, address) and details of the shares (number, percentage). However, important changes to this information, including a change of the number of shares in excess of 1%, must also be reported.

4.3 Takeovers

An offer to purchaser 25% or more of the voting shares in a public company must be made by a “public offer to acquire”. The public offer to acquire must be registered with and approved by the SSC (the law does not detail any criteria or basis for the approval) and must be announced in the mass media.

Of note, if after implementation of the public offer to acquire, the acquirer holds 80% or more in the public company, the acquirer must, if the remaining shareholders so request, acquire the remaining shares at the announced price of the offer to acquire.

4.4 Disclosure requirements

A public company must publicly disclose certain information and report it to the SSC. Annually, a public company must disclose its audited financial statements. In addition, it must disclose information within a short period (24 hours, or 72 hours) upon the happening of a prescribed event, for example if an account of the public company is frozen (within 24 hours) or if a decision is made to borrow bonds with a value of 30% or more of the company’s equity (within 72 hours).

5. Foreign investors – how to purchase shares

5.1 Unlisted shares

To contribute capital or purchase shares in Vietnamese enterprises, foreign investors must open a Vietnamese dong capital contribution and share purchase account (**Account**) at a commercial bank operating in Vietnam. All transfers of funds for the purpose of contributing capital, purchasing and selling shares, transferring capital contribution, receiving and using dividends or profits distribution, or purchasing foreign currency from authorised banks for remittance abroad and other transactions relating to any activity of capital contribution or purchase of shares in Vietnamese enterprises by foreign investors must be performed through this Account.

Further, this Account may only be used for capital contributions and share purchase activities.

Within 2 working days from the date of opening the Account at a commercial bank, the foreign investor must register the Account with the State Bank (Department of Foreign Exchange Control). Under law, the State Bank must certify registration of the account within 5 working days, or otherwise provide written notice of its reasons for refusing to provide certification. A foreign investor is only allowed to perform receipt or payment transactions through the Account after obtaining a document on certification of account registration from the State Bank. Therefore it is important for potential investors to organize this account well in advance of the relevant share purchase date.

Other than the controls over the Account, trading in unlisted shares is largely unregulated.

5.2 Listed shares

The foreign investor must apply for a securities trading code from the HCMCSTC/HASTC. The application consists of an application form and supporting documents. Unfortunately, the supporting documents that originate outside Vietnam (for example the constitution and establishment documents of the foreign investor) are subject to the tedious requirements of notarization and certification.

Investors must then open a VND securities trading account with a registered broker in accordance with Decision 1550⁵ to service activities of the purchase and sale of securities. The following accounts must be opened by the broker at an authorized bank in Vietnam:

- (a) a specialized, on-call foreign currency deposit account, into which foreign currency of the foreign investor is deposited (i) for the purpose of conversion into VND for purchase of securities or (ii) after conversion from VND for the purpose of remittance overseas or other authorized foreign currency remittances in Vietnam; and
- (b) a specialized, on-call VND deposit account, into which all VND amounts (after conversion from foreign currency) and all VND income from securities investment is transferred and from which all VND remittances for purchase of securities or for conversion into foreign currency is made.

Listed share certificates must be centrally deposited at the Vietnam Securities Depository (**VSD**). This happens in two steps: first, the owner deposits the certificates with a depository member (for example, the broker or depository bank) and second, the depository member in turn deposits the certificates at the VSD.

Cash settlement is made via the settlement bank, which is the BIDV.

6. Foreign investors – restrictions

6.1 Prohibited and conditional sectors

Four prohibited sectors are listed in the 2005 Law on Investment. These sectors apply equally to foreign and local investors.

Nine conditional sectors are listed in the 2005 Law on Investment. These sectors also apply equally to foreign and local investors.

In addition foreign investment is conditional in 13 sectors specified in Decree 108 and 'other investment sectors in international treaties of which Vietnam is a member and which restrict the opening of the

⁵ Decision 1550-2004-QD-NHNN of the State Bank of Vietnam dated 6 December 2004.

market to foreign investors'. It is not yet clear what the conditions are, and whether they may include restrictions on indirect investment.

6.2 Other restrictions

The current (to the extent that they have not been specifically repealed) laws of Vietnam consist of the following restrictions:

- (a) There is a cap on total foreign shareholdings in or capital contributions to any one unlisted domestic business of 30% of the charter capital (**30% rule**).
- (b) The range of unlisted companies in which foreign investors may purchase shares is also restricted by sector (only 35 business lines are permitted).
- (c) Foreign investors may hold a maximum of 49% of the total shares of any one company listed at a stock exchange or registered for trading at a securities trading centre (**49% rule**).

Although not yet specifically repealed these restrictions may be affected by the 2005 Law on Investment which stipulates "investors must be permitted to invest in all sectors and in all industries and trades which are not prohibited by law". Therefore under this general rule foreign investors should be (in theory) permitted to invest in all sectors and all industries provided that they are not in a prohibited or conditional sector (as above).

It is not clear if the authorities will interpret the 30% rule and the 49% rule as being repealed by or alternatively, qualifying the Law on Investment. We consider that the better view is that these rules *should be* repealed by the Law on Investment. This view is consistent with the WTO principle of national treatment.

However, we understand that in a meeting held on 18 January 2007 between the Government Office, the Ministry of Finance and the SSC the Government Office expressed the Prime Minister's opinion that the 49% rule would continue to be applied 'temporarily'.

In any event, specific restrictions will continue to apply to conditional sectors (for example, banks) in accordance with commitments made under international agreements.

7. Securities Industry Players

7.1 General

Securities companies and fund management companies are the key players in the Vietnamese securities industry. This section provides an overview of the scope of activities under Law 70 of these companies

7.2 Securities company

As at 29 December 2006, the SSC has issued 55 operational licenses to securities companies under the previous securities law regime. After the effective date of Law 70, being 1 January 2007, there have not been any operational licenses issued and the most likely reason is that the implementing regulations for Law 70 have not been promulgated to guide the SSC in its work. Under Law 70, securities companies are permitted to engage in any or all of the following activities (the minimum legal capital is listed along side each of the activity):

- (a) securities brokerage (VND 25 billion);
- (b) securities self-trading (if the securities company engages in this activity it can only conduct the other activity of underwriting) (VND 100 billion);
- (c) underwriting issues of securities (VND 165 billion);
- (d) securities investment consultancy (VND 10 billion);
- (e) financial consultancy services; and
- (f) other financial services.

The permitted areas of activity are limited compared to the business areas permitted under the old securities law regime. The prescribed minimum legal capital has also increased. This explains why there was a rush towards the end of 2006 to obtain a securities company license from the SSC.

7.3 Fund Management Company

Prior to the effective date of Law 70, eighteen operational licenses were issued by the SSC to fund management companies. Again there was a rush to obtain a license towards the end of 2006 because the scope of business activities has been restricted under Law 70. A fund management company can only engage in fund management and portfolio management and the minimum legal capital for establishment is VND 25 billion.

8. Funds

This section provides a brief overview of investment funds as this is the subject of a detailed paper which will be released once the MOF has settled the regulation on investments funds and other related matters.

Investment funds have been driving the bullish Vietnamese stock market. There have been a growing number of offshore and onshore investment funds established in recent years. At least 25 investment funds are operating in the market with an objective of investing in Vietnam. The Prime Minister has reportedly indicated that regulations on capital controls would be tightened to prevent capital flight which probably means that the MOF's soon to be released regulations would introduce further regulatory controls on the operation of Funds.

In brief, Law 70 sets the framework for the establishment of onshore public and members' funds. Public funds and members' funds must have at least VND 50 billion in start up capital and managed by a fund management company. A public fund may be an open or closed ended fund with at least 100 investors. A members' fund must have up to 30 investors. Assets of a fund are to be held by a custodian bank. The MOF's future regulation is expected to contain other operational requirements.

This article was written by **Julia Howes**, a lawyer with Allens Arthur Robinson who has been practicing in Vietnam for 3 years. Allens Arthur Robinson is one of the largest international law firms in Asia, with more than 900 lawyers, including 179 partners. Allens Arthur Robinson has been providing legal services for clients in Australia for more than 180 years and in Asia for the past 30 years. Our Vietnam practice is managed by partners Bill Magennis in Hanoi and Nigel Russell in Ho Chi Minh City, both of whom joined the Allens Arthur Robinson partnership from 1 January 2007. The Vietnam practice was established in 1993 and is one of the largest and most successful among foreign law firms in the country.

For further information, please contact:

Bill Magennis

Partner, Hanoi
Ph: +84 4 936 0990
Bill.Magennis@aar.com.au

Nigel Russell

Partner, Ho Chi Minh City
Ph: +84 8 822 1717
Nigel.Russell@aar.com.au

Steve Pemberton

Partner, Singapore
Ph: +65 6535 6622
Steve.Pemberton@aar.com.au

Jim Dunstan

Executive Partner - Banking & Finance and Asia offices,
Sydney
Ph: +61 2 9230 4571
Jim.Dunstan@aar.com.au

Simon Lynch

Partner, Melbourne
Ph: +61 3 9613 8922
Simon.Lynch@aar.com.au

Jeremy Low

Partner, Sydney
Ph: +61 2 9230 4041
Jeremy.Low@aar.com.au

This publication is copyright. Except as permitted under relevant laws, no part of this publication may be reproduced by any process, electronic or otherwise, without the specific written permission of the copyright owner. © Allens Arthur Robinson

The material contained in Vietnam Client Updates is intended to inform you of recent legal developments in Vietnam. It is not intended, and should not be relied upon, as legal advice. Should you wish further information in relation to any legal instrument or matter mentioned in this issue, please do not hesitate to contact one of our offices.

Ho Chi Minh City

Suite 605
Saigon Tower
29 Le Duan Boulevard
District 1
Ho Chi Minh City, Vietnam
Tel +84 8 822 1717
Fax +84 8 822 1818
nigel.russell@aar.com.au

**Hanoi**

Suite 401
Hanoi Tower
49 Hai Ba Trung
Hanoi, Vietnam
Tel +84 4 936 0990
Fax +84 4 936 0984
bill.magennis@aar.com.au



Allens Arthur Robinson - a leading international law firm with lawyers in: Bangkok | Beijing | Brisbane | Hanoi | Ho Chi Minh City | Hong Kong | Jakarta | Melbourne | Perth | Phnom Penh | Port Moresby | Shanghai | Singapore | Sydney