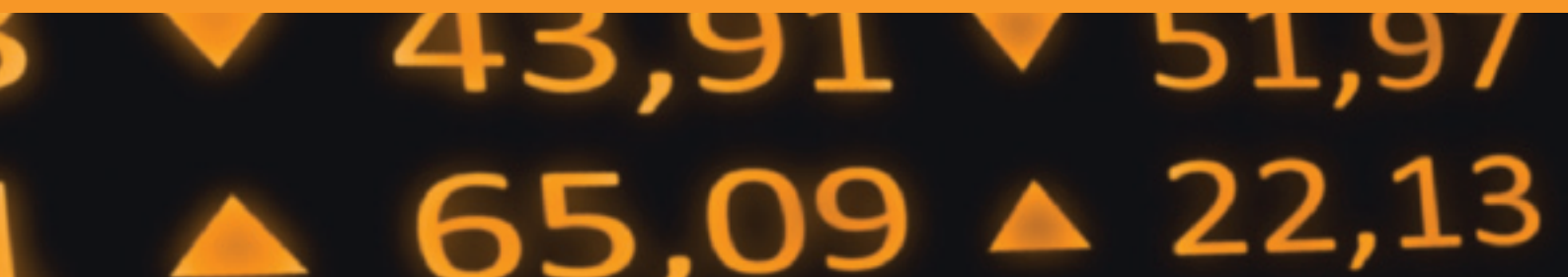




CLIFFORD
CHANCE

Vietnam Investment Guide
Capital Markets

V I L A F
VIETNAM INTERNATIONAL LAW FIRM



The capital market

1. The securities trading market

In Vietnam, there are two centralised securities markets, the Ho Chi Minh City Stock Exchange (“**HOSE**”) and the Hanoi Stock Exchange (“**HNX**”).

The listing requirements applicable to companies wishing to list on HOSE and HNX are different. For instance, a company wishing to list on the HOSE must have conducted a profitable business operation for the two consecutive years immediately preceding the year of registration. However, a company wishing to list on the HNX need only have profitable business operations for the year immediately preceding the year of registration.

Vietnamese law recognises the following major types of securities: shares, bonds and fund certificates (which are issued by securities investment funds).¹

2. Offers of securities

2.1 Public offers²

Par value and denomination

Securities offered to the public in Vietnam must be denominated in VND. The par value of shares and investment fund certificates in an initial public offer is set at ten thousand (10,000) VND. The par value of bonds in a public offer is set at one hundred thousand (100,000) VND and integral multiples thereof.

Public offers of shares

In order to launch a public offer of shares in Vietnam:

- (a) the issuer must have minimum paid-up charter capital of VND 10 billion in order to register the offer with the State Securities Commission (“**SSC**”);
- (b) business operations in the year immediately preceding the year the offer is registered must have been profitable, and there cannot be accumulated losses up to the year of registration of the offer;
- (c) there must be an issuance plan and a plan for utilisation of the proceeds earned from the offer, approved by a shareholders’ general meeting; and
- (d) an issuer must provide an undertaking, approved by a shareholders’ general meeting to trade its shares on a stock exchange within one year from the date of completion of a public offer.

Public offer of bonds

The general conditions for the issuance of bonds to the public in Vietnam are as follows:

- (a) the issuer must have, at the time of registration of the offer, minimum paid-up charter capital of VND 10 billion;
- (b) business operations in the year immediately preceding the year of registration of the offer must have been profitable, the issuer must have no accrued losses up to the year of registration of the offer, and there must be no outstanding debt that is payable and overdue for more than one year;
- (c) there must be an issuance plan and a plan for utilisation of and repayment of the proceeds earned from the offer, approved by the board of management or the members’ council or the company owner (if the issuer is a sole member limited liability company); and
- (d) there must be an undertaking from the issuing organization to discharge its obligations to investors with respect to the conditions of the issue, the conditions for payment, ensuring the lawful rights and interests of investors and certain other conditions relating to the issue.

Public offer of fund certificates

Under Vietnamese law, securities investment funds comprise of public funds and members’ funds.

A public fund is a fund which makes a public offer of certificates in the fund which includes:

- (i) Open-ended funds: a public fund whose fund certificates offered to the public must be redeemed at the request of investors.³
- (ii) Closed-ended funds: a public fund whose fund certificates are offered to the public but investors do not have the right to request redemption of the fund certificate.⁴

A members’ fund is a fund with no more than thirty (30) capital contributing members, all of which must be legal entities.⁵

Conditions for public offering of fund certificates:

Public funds: The conditions for a public offer of fund certificates (public closed-ended and open-ended funds) in Vietnam are, amongst others:

- (a) the total value of the fund certificates registered for the offer must be valued at a minimum of VND50 billion; and
- (b) there must be an issue plan and a plan for investment of the funds earned from the offer consistent with the applicable laws and regulations.

A members’ fund is a closed-ended securities investment fund established by capital-contributing members on the basis of a written agreement with respect to capital contribution and the fund charter.

Members’ funds are not required to comply with provisions governing the investment activities of securities investment funds and which regulate a public offering of fund certificates.⁶

The establishment of a members’ fund must be reported to the SSC and satisfy, amongst others, the following conditions:⁷

- (i) A contributed capital of at least VND 50 billion;

¹ This is a type of security which certifies an investor’s ownership over a portion of contributed capital of a public fund.

² A public offering of securities means the public offering of securities for sale by mass media to 100 investors or more (excluding professional securities investors (i.e. securities investment fund, securities company etc.)), or to an unspecified number of investors.

³ Article 6.30 of the Securities Law.

⁴ Article 6.31 of the Securities Law.

⁵ Article 6.29 of the Securities Law.

⁶ Article 21.1.c of Circular 224 of the Ministry of Finance dated 26 December 2012 guiding the establishment and management of closed investment fund and member’s fund (“Circular 224”).

⁷ Article 21.2 of Circular 224.

- (ii) A minimum of thirty (30) capital-contributing members (all of which must be legal entities). Organizations contributing capital for the establishment of a member fund may only use their own capital, (excluding trusted capital for investment and capital owed to other organizations and individuals).

Procedure and order of registration for public offers of securities

A public offer of securities in Vietnam must be registered with the SSC, except where the public offer falls under the following categories:

- (a) an offer of bonds by the Government;
- (b) an offer of an international financial institution's bonds approved by the Government;
- (c) a public offer of shares by a State-owned enterprise during the process of conversion to a shareholding company (equitisation);
- (d) the sale of securities pursuant to a verdict or decision of a court, or the sale of securities by the manager or receiver of assets in the case of bankruptcy or insolvency.

After completion of the public offering, the issuer is required to report to the SSC on the result of the offering.

Registration of a public offering of securities requires the submission of a registration dossier. The registration dossier for a public offering of shares must include (amongst other things) a prospectus and a decision of the shareholders' general meeting adopting the issuance plan, whereas a registration dossier for a public offering of bonds needs to include (amongst other things) a prospectus and a decision of the board of management, the members' council or the company's owner adopting the issuance plan.

A recent regulation⁸ now provides more detailed provisions on the conditions and procedures for various public offering scenarios, (these reflect recent market practice but were not covered by the existing regulations).

These scenarios include public offers of, amongst other things:

- existing shares by major shareholders;
- convertible bonds;
- shares for the purpose of merger or consolidation of enterprises;
- shares for exchange of shares in another company;
- dividend shares and bonus shares; and
- foreign stock options for Vietnamese employees of foreign organisations in Vietnam.

The recent regulation also further clarifies the commencement date and completion date of a public offer tranche.

2.2 Private offers

Public companies

Public companies are permitted to make private placements of shares. Public companies are bound by reporting requirements as set out in the Law on Securities for transactions where a shareholder becomes a majority shareholder (i.e. directly or indirectly owning at least 5% or more of the voting shares of an

issuing organisation) or the transaction involves 1% or more of the total shareholding of the company.

Private placements of shares by all public companies including public credit institutions and public insurance companies are administered by the SSC.

Private companies

Shareholding companies are permitted to issue shares in order to mobilise capital. In such cases, the following approvals and notifications are, amongst others, required:

- (i) any acquisition of 5 per cent or more of the total shares of a shareholding company must be reported to the licensing authority and, with respect to the founding shareholder, recorded in the business licence issued by the licensing authority;
- (ii) any acquisition of shares in a shareholding company by foreign investors must be carried out through a "capital contribution share purchase account in Vietnamese dong," which needs to be opened in a commercial bank in Vietnam.

3. Public companies

A public company means a shareholding company that also falls under at least one of the following three categories:

- (a) a company which has already made a public offer of shares;
- (b) a company which has shares listed on a Stock Exchange;
- (c) a company which has shares owned by at least 100 investors (an investor is defined under the law to include Vietnamese or foreign organisations or individuals participating in investments on the securities market), excluding professional securities investors (professional securities investors refer to commercial banks, financial institutions, finance leasing companies, insurance business organisations or securities business organisations), and which has a paid-up charter capital of VND 10 billion or more.

The securities of a public company must be centrally registered and deposited at the Vietnam Securities Depository ("VSD").

Disclosure by major shareholders

- (a) Any investor that becomes a major shareholder of a public company (i.e. who directly or indirectly owns at least 5 per cent or more of voting shares of the relevant public company) must report such stock ownership to: the public company; the SSC; and the relevant stock exchange on which the shares of such public company are listed. This must be done within seven days from the date of becoming a major shareholder.⁹ The report is required by law to contain certain relevant information including: the name and address of the major shareholder (major shareholders that are organisations are required to include details regarding their business lines) and the number and percentage of shares owned by the major shareholder in relation to the total number of shares outstanding.

⁸ Decree 58 of the Government dated 20 July 2012 implementing the Law on Securities (as amended) ("Decree 58").

⁹ Article 26.2 of Circular 52 of the Ministry of Finance dated 5 April 2012 on information disclosure in stock market ("Circular 52").

- (b) any acquisition of shares from an organisation, individual or group of affiliated persons holding 5 per cent or more of voting shares in a public company, which exceeds the threshold of 1 per cent of shares of that public company, must be reported to the SSC and the relevant stock exchange where the shares of the public company are listed within seven days from the date of such change;¹⁰
- (c) The reporting requirements are also applicable to any group of affiliated persons owning 5% or more of the voting shares in a public company.¹¹

Acquisition of securities by public offer

There are three circumstances under which a public offer must be conducted:

- (i) the purchase of voting shares in a public company (the "target") in respect of which the proposed purchase would result in the purchaser owning at least 25% or more of the entire issued shares of the target;
- (ii) existing investors (whether organisations or individuals), together with their related parties, holding 25% or more of the voting shares of a public company acquire 10% or more of the issued voting shares;
- (iii) existing investors, together with their related parties, holding 25% or more of the voting shares of a public company acquire from 5% to less than 10% of the issued voting shares of such public company for a period of less than 1 year from the completion of the public offering.

The duration for conducting a public offer is between 30 and 60 days from the date of commencement of the public bid (i.e. in the public bid application dossier to the SSC).¹² During that period, the organisation or individual making the public offer is not permitted to:

- (a) other than pursuant to the public offer itself, directly or indirectly purchase or undertake to purchase shares in the target company or fund certificates in the target fund;
- (b) sell or undertake to sell shares or certificates in the target company or the target fund which such organisation or individual is seeking to acquire by way of the public offer;
- (c) unfairly discriminate against owners of the same class of shares which are the subject of the public offer;
- (d) supply discrete information to a fixed number of shareholders of the target or to supply different levels of information to different shareholders of the target or to supply information to shareholders of the target at varying times. This provision also applies to underwriters which have underwritten the issue of shares subject to the public offer. If after completing a public offer, the acquirer holds 80% or more of the entire issued share capital of the target, the acquirer is obliged, within 30 days of such completion, to acquire stocks of the same type held by other shareholders, if these shareholders so request, at

the announced bid price.¹³

The investor is required to submit an application to register the public offer with the SSC and the target company. Within 3 days from the date of receipt of the investor's application for a public offer, the target company shall publish information about the proposal of the investor through mass media or on the website of the relevant stock exchange which the target company is listed. Within 10 days from the date of receipt of the investor's application for a public offer, the board of management of the target company shall send their written opinion regarding the public offer to the SSC with, and notify all shareholders of, its opinion on whether or not to accept the offer for purchase. Within 7 days from the date of receipt of SCC approval, the investor shall publish information about the public offer in 3 consecutive issues of a print or electronic newspaper.

An issuance-underwriting organisation is a securities company licensed to operate in the domain of underwriting securities issuance or a commercial bank licensed by the SSC to underwrite the issuance of bonds under the conditions specified by the Ministry of Finance.

4. Foreign investment in the capital market

Foreign ownership limits

Under Decision 55 of the Prime Minister dated 14 April 2009, foreign investors are allowed to own up to 49% of the shares of any public company, up to 49% of the fund certificates of any public securities investment fund and up to 49% of the charter capital of a public securities investment company. Except for public companies, public securities investment companies and public funds, the foreign ownership limit of 49% has been removed as from 11 January 2012 (i.e. five years from the date Vietnam joined the WTO Commitments).

Decree 58 allows a limited number of foreign investors to acquire 100% of the charter capital of an existing securities company or to set up a 100% foreign-owned securities company.¹⁴ Such foreign investors must be, amongst other requirements, a foreign bank, a foreign securities company or a foreign insurance company with at least two years of operational history.

One notable exception is in the banking sector, where foreign investors may not hold more than a total of 30% of the shares of any bank and no single foreign investor may hold more than 15% (or 20% with Prime Minister's approval) of the shares of any bank. The Vietnamese government has discretion to allow foreign ownership beyond 30% for those local banks which are under a scheme of restructuring on a case by case basis.

¹⁰ Article 26.1 of Circular 52.

¹¹ Article 50.3 of Decree 58.

¹² Article 51, clause 1 of Decree 58.

¹³ Article 44.1 of Decree 58.

¹⁴ Article 71 of Decree 58.

Taxation issues

Individual investors are subject to personal income tax in respect of income earned from the trading of securities in Vietnam. Personal income tax is imposed at 5% on any payment of dividends (on shares or fund certificates) or interest (on bonds). In relation to the transfer of securities, personal income tax would be charged in one of two ways (at the option of the investor): (i) 20% of any capital gain earned on any sale of securities; or (ii) 0.1% of the value of the sale, irrespective of whether there is any capital gain.

Corporate investors are exempt from tax on payments of dividends but are subject to a 10% tax imposed on interest earned on bonds. In relation to the transfer of securities, proceeds of such transfers received by foreign corporate investors will be taxed at the rate of 0.1%, irrespective of whether there is a capital gain.

Listing on foreign stock exchanges

Vietnamese organisations are permitted to list securities on foreign stock exchanges, as long as they comply with certain provisions, including (but not limited to) the following:¹⁵

- (a) the issuer shall not be engaged in a business line that is not open to foreign parties in Vietnam;
- (b) the decision to seek a foreign listing must be approved by the company's board of directors, members' council, the company's owner or of the representative of the capital owner (as the case may be);
- (c) the issuer shall satisfy the conditions for listing on the foreign stock exchange for which a cooperation agreement exists with the SSC;
- (d) the issuer, whose business line is a conditional business line must obtain approval from the relevant competent authority; and
- (e) The SSC must have approved the registration dossier.

Enterprises listed on foreign stock exchanges are obliged to disclose information (including financial statements) in accordance with Vietnamese law and to ensure that the participation ratio of foreign investors accords with Vietnamese law.

5. Bonds

Private placement of corporate bonds¹⁶

- (a) Key characteristics of corporate bonds
 - (i) Bonds are classified as one of the securities under the Securities Law.¹⁷ A company (either a limited liability company or shareholding company) is entitled to issue

non-convertible bonds or/and convertible bonds, depending on relevant conditions.¹⁸

- (ii) Convertible bonds are convertible into ordinary shares of the issuing company in accordance with terms and conditions of the convertible bond offering.¹⁹
- (iii) Non-convertible and convertible bonds may be secured or unsecured, and are issued with or without warrants, in the form of certificates, book entry or electronic data.²⁰
- (iv) The term of bonds must be at least 1 year.²¹

- (b) Utilization of the proceeds of bonds

The issuing company can use bond proceeds for the following purposes:²²

- (i) Performing its projects (in this case, the issuing company must maintain the 20:80 ratio of equity and debt capital in respect of the relevant project);²³
- (ii) Increasing the scale of capital;
- (iii) Restructuring debts of the issuing company (however, the issuer cannot issue international bonds to restructure Vietnamese Dong-denominated debts).²⁴

- (c) Conditions for the issuance of corporate bonds

Enterprises may issue non-convertible bonds if they meet the following conditions:

- (i) the enterprise is a joint-stock company or a limited-liability company;
- (ii) the enterprise has operated for at least one year from the date it officially commenced operations;
- (iii) the enterprise generated profits from production and business activities in the year preceding the year of issuance in accordance with the financial statements audited by the State Audit Office or an independent auditing organisation licensed to operate in Vietnam;²⁵
- (iv) the capital adequacy ratio and any other conditions or prudential ratios relating to operational safety are satisfied (for conditional business lines subject to specialised regulations); and
- (v) the enterprise has a bond issuance plan approved by a competent body as specified in part (d) below.

In the case of the issuance of convertible bonds or bonds with warrants, along with the above conditions, enterprises also have to meet the following conditions:

- (i) the enterprise is allowed to issue convertible bonds or bonds with warrants as stipulated by the current regulations (i.e., the enterprise is organised in the form

¹⁵ Article 64 of Decree 58.

¹⁶ Decree 90/2011/ND-CP of the Government dated 14 October 2011 providing guidelines on issuance of enterprise bonds, which came into effect on 01 December 2011 ("Decree 90").

¹⁷ Article 6.1 of the Securities Law.

¹⁸ Under Article 5 of Decree 90, a shareholding company can issue both non-convertible and convertible bonds, and a limited liability company can only issue non-convertible bonds without warrants.

¹⁹ Article 2.2 of Decree 90.

²⁰ Article 5 of Decree 90.

²¹ Article 6 of Decree 90.

²² Article 3 of Decree 90.

²³ Article 4.4 of Decree 90.

²⁴ Article 4.3 of Decree 90.

²⁵ In the case of an enterprise issuing bonds prior to 1 April in any year without yet having its financial statements of the immediately preceding year, there must be:

- Audited financial statements for the year prior to the immediately preceding year reflecting profitable results from its production and business activities;
- Audited financial statement (if available) for the most recent quarter reflecting profitable results from its production and business activities;
- Financial statements for the year immediately preceding the year of issuance reflecting profitable results generated from its production and business activities approved by the board of management, Members' Council or the company chairman in accordance with the charter of the company.

- of a joint-stock company);
- (ii) the enterprise must maintain the ratios for the participation of foreign parties in Vietnamese organisations as prescribed in the current law; and
- (iii) The interval between two consecutive issuances of convertible bonds must be at least 6 months.
- (d) Approval of the bond issuance plan
 - (i) In terms of convertible bonds and bonds with warrants, the bond issuance plan must be approved by the shareholders' general meeting.
 - (ii) With respect to bonds other than those stipulated in paragraph (i), the bond issuance plan must be approved by the shareholders' general meeting, the board of management or members' council, or the chairman of the company depending on the corporate form of the issuing enterprise and subject to the charter thereof.
 - (iii) In addition to the approvals stipulated above, State-owned enterprises have to obtain the following approvals in relation to their bond issuance plan:
 - a. with respect to 100% State-owned enterprises established in accordance with a decision of the Prime Minister, the bond issuance plans must be examined and approved by the Ministry managing the main business line of such enterprise;
 - b. regarding 100% State-owned enterprises established by the decisions of the Ministries or the provincial People's Committees, the bond issuance plan must be examined and approved by such Ministries or provincial People's Committees;
 - c. regarding State-owned enterprises established in the form of a joint-stock company or limited-liability company with two or more members, the bond issuance plan shall be examined and approved by the organisation appointed as representatives of the State-owned capital in such enterprises.

The issuing enterprise must inform the Ministry of Finance ("MOF") in writing before launching an issuance of bonds and must report to the MOF the results of the issuance within 15 days from the completion thereof. Annual reports throughout the term of the bonds and a report upon the final payment of the bonds must also be submitted to the MOF.

Issuance of bonds by credit institutions

In addition to the conditions for the issuance of bonds by public offer, a credit institution is permitted to issue bonds when it satisfies all of the following additional conditions:

- (a) it complies with all regulations on prudential ratios and limits during its operation in accordance with the applicable laws and regulations;
- (b) it has operated for a minimum period of one year from the date such credit institution officially commenced operations;
- (c) its operational and business results for the year preceding the issuing year up to the time the request to issue bonds is made must be profitable; and
- (d) it must have approval from the Governor of the SBV with respect to the issuance of long-term bonds for the current financial year of the credit institution.

Issuance of International bonds

The issuance of international bonds by Vietnamese companies is considered an activity of borrowing and repaying foreign loans and is therefore governed not only by Decree 90 of the Government dated 14 October 2011, but also by regulations on foreign loans. As such, the value of any such international bond issuance must be confirmed by the SBV as falling within the country's foreign commercial loan limit as approved annually by the Prime Minister.

There are also additional requirements for an issuance of international non-convertible bonds, including:

- (i) The enterprise has operated for at least three years from the date it officially commenced operations;
- (ii) The enterprise generated profits from its operations in the three consecutive years preceding the year of issuance in accordance with financial statements audited by the State Audit Office or an independent auditing organisation licensed to operate in Vietnam;
- (iii) The capital adequacy ratio and any other conditions or prudential ratios relating to operational safety are satisfied (for conditional business lines subject to specialised regulations);
- (iv) The issuing company must obtain a certification from the SBV that the proposed volume of the bonds issue is within the available total limit of national commercial foreign loans annually approved by the Prime Minister;
- (v) The issuer satisfies credit rating requirements of the international market for the issuance of international bonds. In respect of State-owned enterprises, the credit rating must be at least equal to the national credit rating;
- (vi) The bond issuance plan must be approved by the competent bodies (i.e. shareholders' general meeting, board of management or members' council, or chairman of company depending on the corporate form of the issuing enterprise and in accordance with the charter thereof); and
- (vii) The issuer has completed dossiers for the issuance of international bonds as required by the regulations applicable to each issuance and each type of issuance

With respect to State-owned enterprises, along with obtaining the above-mentioned approvals, their bond issuance plans must ultimately be approved by the Prime Minister (in addition to the approvals from the management bodies of such enterprises, which are applicable to an onshore issuance of bonds as discussed above).

In addition to the conditions for issuance of international non-convertible bonds above, if the issuing company issues convertible bonds or bonds attached with warrants to the international market, the issuing company must meet the following conditions:

- (i) it must be a joint-stock company;
- (ii) it must maintain the foreign ownership limit as required by law; and
- (iii) there must be at least a six (6) month interval between the two tranches of convertible bonds.

Once the bond issuance plan has been approved, the issuing enterprise must obtain the certification by and registration with

the SBV of the loan borrowed under the international bond issuance pursuant to the procedures applicable to foreign commercial loans.

In addition to compliance with the information disclosure requirements of the relevant international market(s), the issuing enterprise must inform the MOF in writing before launching the bonds issuance and must report to the MOF and the SBV the results of the issuance within 15 days from the completion thereof. Annual reports throughout the term of the bonds and a report upon the final payment of the bonds must also be submitted periodically to the MOF and the SBV.

6. Breach of the laws relating to securities

Organisations and individuals which breach the provisions of the laws concerning securities activities and the securities market (i.e. the Securities Law and relevant implementing regulations), depending on the nature and severity of their violations, can be disciplined, administratively sanctioned or be subject to a penal liability. If they cause damage, they are liable to pay compensation.

Penal liability, under the law, can take the form of either administrative or criminal liability, depending on the nature and extent of the transgression. With regard to administrative liability, the law provides for either a warning or a fine. Furthermore, there are other additional sanctions, such as confiscation of the revenue earned as a result of the breach, or compulsory compliance with the law.

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