

## Decree 53 on Issuance of International Bonds and its Draft Implementing Circular

### Summary

On 4 June 2009 the Vietnamese government issued Decree No. 53/2009/ND-CP on the issuance of government and corporate bonds on international capital markets (“Decree 53”) and the Ministry of Finance has drafted an implementing circular to clarify some articles of Decree 53.

Among other things, Decree 53 sets out the scope, issuance file, principles of issuance, conditions and procedures for conducting bond issuance and registration with the State Bank of Vietnam.

### Definition of international bonds

International bonds mean certificates of a loan with a par value and a term (with interest) which the government or a Vietnamese enterprise issues in order to raise capital on the international finance market to serve requirements for investment and economic development.

Under Decree 53, international bonds comprise of:

- Government bonds which are international bonds that the government delegates issuing authority to the Ministry of Finance
- Enterprise bonds which are international bonds that a Vietnamese enterprise itself issues, with or without a government guarantee.

### What’s new in Decree 53?

This is the first piece of legislation permitting the issuance by non-state enterprises of foreign convertible currency bonds via a private placement or a public offer to international investors. Previously, only government bonds and bonds with a government guarantee by large state-owned companies were issued in foreign currency. Domestic enterprises now may access international financing via their issuing of bonds or convertible bonds,

subject to the annual limit on foreign commercial loans approved by the Prime Minister.

Also, under Decree 53, the role of lawyers is enhanced: they are specifically required to participate in the process of bond issuance to ensure compliance with both domestic and international laws on bond issuance.

### Scope

Decree 53 provides for borrowing and repayment of foreign loans via the form of issuance of bonds on the international financial market by the government and by Vietnamese enterprises.

### Issuance file

An issuance file means the legal documents which the issuer, jointly with the lead underwriter and legal consultants, prepares pursuant to international law

An issuance file contains the following main documents:

- Prospectus
- Underwriting contract
- Contract for purchase and sale of bonds
- Legal consultancy contracts
- Legal opinion
- Agency agreements

### Principles for issuances

International bonds are issued to raise money for national-level key works and effective investment projects and under favourable international market conditions.

Enterprises undertaking an international bonds issuance must ensure the principles of self-borrowing, self-repayment and self-responsibility for effective utilisation of capital raised.

## Conditions for an issue of bonds

- The issuer must be established and legally operating under Vietnamese law.
- An enterprise that wishes to issue bonds must have its own issuance plan approved by the relevant competent body. The issuance of bonds by a group or state corporation must have an issuance plan passed by the board of management and approved in principle by the Prime Minister of Vietnam. Issuance of bonds by a shareholding company, limited liability company or private enterprise must have an issuance plan passed by the general meeting of shareholders, members' council or owner's representative.
- A state enterprise, if issuing bonds without a government guarantee, must have a credit rating equal to or higher than the national one.
- The value of an issuance must lie within the overall limit on foreign commercial borrowing of Vietnam which is approved annually by the Prime Minister.
- An issuance of convertible bonds or bonds secured by various means must comply with current regulations.
- The issuer must satisfy international market requirements on its credit rating in order to conduct the issuance (in cases where the issuance requires a credit rating).
- The issuer must have completed the entire application file for the issuance in accordance with foreign and Vietnamese law.

## Procedures for conducting bond issuance

After a proposal for the issuance of bonds has been approved, the enterprise will, in its capacity as the issuer, carry out the issuance through the following steps:

- Selection of syndicate of underwriting banks: the issuer selects a number of world leading international investment banks with experience in the bonds issuance sector to act as the syndicate of the particular issue on the basis of a competitive tender

- Selection of legal consultants: the issuer co-ordinates with the syndicate to select reputable law firms with experience both in and outside Vietnam to act as domestic legal consultants and/or international legal consultants for the issuer and underwriter
- Completion of the issuance file
- Determination of credit rating
- Conducting advertising and conducting the issuance
- Completion of the issuance transaction.

After completion of the issuance, the issuer will report the results to the body which approved the issuing tranche and to the Ministry of Finance as well.

## Registration with State Bank of Vietnam

Foreign currency bonds are regarded as "foreign loans" and as such, the issuance of such bonds is subject to limitation on foreign commercial loans approved annually by the Prime Minister of Vietnam.

To ensure that an international bond offer is within the borrowing limit, the issuer must provide its issuance plan to the State Bank of Vietnam for its confirmation. The State Bank of Vietnam must work with the Ministry of Finance to provide confirmation to the issuer within fifteen days of the submission of the issuance plan.

The issuer has to register with the State Bank of Vietnam the amount of "foreign debt" and will open and use a "foreign loan and debt account" for all transactions in relation to the bond issuance for receipt and payment of principal and interest.

## Offering and listing bonds offshore

As has been mentioned above, the Ministry of Finance has drafted a circular guiding the offering and listing of securities of Vietnamese enterprises offshore ("Draft Circular") with the State Securities Commission ("SSC") playing a very active role as the official regulator of the Vietnamese securities market.

Pursuant to the Draft Circular, the issuing organisation must send to the SSC the following documents at least ten days prior to lodging its application file for making an offer of bonds overseas:

- A copy of the application file for registration of the offer with the competent authority of the local country
- Resolution of the board of management or the general meeting of shareholders in accordance with the Law on Enterprises approving the plan on issuance of bonds overseas, which must contain the following particulars:
  - » Purpose of utilisation of proceeds from the offer tranche in detail
  - » Proposed number of bonds to be offered and estimated amount of money to be raised from the offer tranche
  - » Particulars of bond characteristics, which must comprise of at least, the following items: interest rate or principles for determining interest rate, maturity date, rights and obligations of bondholders, and method of payment warranty or guarantee (if any)
  - » Principles for determining price of the offer
  - » Market for the offer of bonds
  - » Method of the offer (determining whether a public offer or a private placement to special entities) (in the case of a private placement, the criteria for selecting the offeree entities must be stated in detail)
  - » Method of underwriting issuance of bonds (if any)
  - » Estimated expenses for the offer and issuance
  - » Principles for selecting an underwriter guaranteeing payment or assets to be used for payment guarantee in a case where offered bonds are secured bonds
  - » Plan on the issuance of shares within the duration of the term of the bonds as approved by the general meeting of shareholders in the case of issuance of bonds which carry with them security rights

- Audited financial statements prepared pursuant to Vietnamese accounting standards; audited financial statements prepared at the request of the foreign securities market administrative body; and explanatory statements certified by the auditing organisation approved by the SSC on items where there are differences (if any) in financial statements which arise from discrepancies between accounting standards
- Certificate of the foreign currency account for the issued securities capital from an authorised credit institution
- Confirmation of the State Bank of Vietnam that the value of the issuing tranche lies within the overall limit on foreign commercial borrowing of Vietnam which is approved annually by the Prime Minister of Vietnam
- Standard form document disclosing information on the issuance of bonds to be made

Regarding the listing of bonds offshore, the Draft Circular requests that issuing organisations should satisfy the conditions for listing securities on foreign stock exchanges as stipulated in Article 15 of Decree No. 14/2007/ND-CP dated 17 January 2007 providing detailed regulations for implementation of a number of articles of the Law on Securities. When an issuing organisation submits its application file for registration of listing to the foreign stock exchange, it must concurrently submit to the SSC and to the domestic stock exchange (if the issuing organisation has its securities listed there) the following documents:

- A copy of the application for listing on the foreign stock exchange
- Decision of the general meeting of shareholders on listing the securities overseas
- Audited financial statements prepared pursuant to Vietnamese accounting standards; audited financial statements prepared at the request of the foreign securities market administrative body; and explanatory statements certified by the auditing organisation approved by the SSC on items where there are differences (if

any) in financial statements which arise from discrepancies between accounting standards

- Standard form document disclosing information on the listing to be made

The Ministry of Finance on 15 January 2010 released Circular No. 09/2010/TT-BTC guiding publicising in the securities market to replace Circular No. 38/2007/TT-BTC dated 18 April 2007 with stricter and more requirements on information to be disclosed. Under this newly-issued piece of legislation, enterprises when listing shares will have to explain about their profit after tax in the previous year.

In addition to the foregoing, with the regulatory flexibility as shown in Decree 53 and its implementing circular, Vietnamese enterprises will have the ability to become more regional or global. For example, by listing on the Hong Kong stock exchange. This would give Vietnamese enterprises more exposure at this stock exchange, currently ranked world number one in IPO fund raising and number seven in terms of market capitalisation.

However, to be on the safe side and for extra comfort, bondholders should insist on an arbitration clause, bearing in mind that Vietnam is a signatory of the New York Convention and as such, the country recognises foreign arbitral awards.

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