

**SUMMARY OF CONSULTATION
BETWEEN STATE SECURITIES COMMISSION AND
CAPITAL MARKET WORKING GROUP – VIETNAM BUSINESS FORUM**

Time: 14:00-17:00, May 20, 2016

Venue: Securities Commission headquarters, 164 Tran Quang Khai, Hanoi

Mr. Kien Nguyen, Representative of the Capital Market Working Group

Specific issues the Capital Market Working Group (CMWG) requests State Securities Commission (SSC) guidance on include:

Legal environment and framework for increasing foreign ownership: While Decree 60 on increasing foreign ownership has been in effect for eight months, of the total 700 listed companies only five have finished procedures for foreign ownership enlargement. This is viewed as a very small number.

While the CMWG has accessed the latest draft decree on specific eligibility requirements for investing and trading securities from the SSC, it is different to the draft the CMWG commented on during the February 24, 2016 meeting. Specifically in relation to increased foreign ownership in public companies, instead of a more laissez-faire approach adopted by the draft decree articulated to the CMWG in February 2016, the new version appears to be generic on this matter.

Two pressing issues the CMWG wants to point out are:

- The stock market should be independently regulated. The direct application of direct investment laws on portfolio investment is not an option.
- Since up to 100% foreign ownership has been allowed as in the current draft decree, where the law has not yet or does not provide clear regulations, it is suggested foreign ownership in such companies be up to 100% instead of capping it at 49%.

Voluntary pension fund: The CMWG proposes the SSC relays VBF recommendations to the Ministry of Finance (MoF) and other relevant agencies. It is hoped the decree will finally be released soon and include reasonable tax incentives to draw investment in this adjunct pension fund.

Partial privatization: The CMWG recommends increasing penalties for listing timings and procedure infringements up to 10% of net earnings of companies in breach and holding the chairperson and Board of Directors members of violating firms personally accountable for such listing timing and procedure infractions. The SSC in its amendments of existing laws for partial privatization, is encouraged to consider setting a specific time line between the end of the partial privatization process and actual conversion to a shareholding company. Also, when a company applies for partial privatization it should be required to complete listing application procedures on UPCOM or mainstream exchanges, as specified in its application for partial privatization.

Response by Ms. Ta Thanh Binh, Vice Director, Market Development Department, State Securities Commission

While the CMWG has pointed out the potential minimal impact Decree 60 will have on the market, the SSC believes a broader view of the decree's effectiveness must be taken aside from implications on how many companies apply for foreign ownership enlargement, market sentiment and investors' perspectives. Even when Decree 60's predecessor restricted foreign ownership to 49%, foreign investors appeared more interested in certain groups of listed companies.

After Decree 60 was rolled out, the SSC worked closely with relevant agencies to handle applications from businesses that wished to increase foreign ownership. To this point, the SSC has not encountered companies struggling to complete this procedure. Moreover, not all companies need to expand foreign ownership to 100%.

Regarding the VBF's comment that the draft decree, by putting in place new eligibility requirements for investing in and trading stock, has taken a step back compared to the version released in February 2016, SSC responses are:

- There is a need for clear segregation between investment and securities laws, as the former apply to direct investment whereas the latter apply to portfolio investment. Provisions of Article 4.2, Investment Law of 2014, set the order of priority applied in case a same matter may be subject to varying regulations of different laws, including the Investment Law and other sector-specific laws, where the Investment Law will prevail unless otherwise provided for in investment procedures and formalities in the Securities Law. Similarly Article 45.2, Decree 118, clearly points out that in the course of investing or trading securities in the stock market, business entities with foreign equity shall follow existing securities laws in terms of investment procedures.

Following consultation with various stakeholders and relevant agencies and ministries - especially the Ministry of Justice (MoJ), the SSC recognizes the lack of legal justification to include criteria in the decree to identify foreign investors engaged in the stock market. To embrace this issue in securities laws a higher-level piece of legislation is required, specifically the Securities Law.

- In any case, shares and equity under ownership of public companies and mutual funds will not be accounted for as part of foreign ownership in a company, unless otherwise clearly provided for in sector-specific laws of Vietnam. Other than the lack of legal justification, from a monitoring perspective if a company with more than 51% foreign ownership trading in the stock market is considered a Vietnamese entity and thus entitled to unlimited investment, the rule will become meaningless and unfair to other businesses.
- Permitting foreign ownership of up to 100% for public companies in all business lines, unless Vietnamese law or international treaties that Vietnam is a party to specifically sets a lower foreign ownership cap: Decree 60 rules that public companies active in conditional lines of business where related preconditions apply to foreign investors but there are no specific foreign ownership rulings, the foreign ownership ratio shall be no more than 49%. This is clearly stated in the decree and businesses are expected to comply with it.

Response by Ms. Khue, Vice Director, Legal Department, SSC

In the first and second versions of the draft decree providing specific eligibility requirements for investing and trading securities, the SSC had open-minded rules pertaining to foreign ownership. Regarding how foreign ownership is calculated in the first and second drafts for listed companies, it was not factored into foreign ownership. Following consultation with relevant ministries, line agencies and stakeholders, many voiced concern that such a regulation was in conflict with the Investment Law, specifically Article 23 and some other aspects of the law. Thus, this rule has been set beyond the SCC's jurisdiction as it integrated the matter into the draft decree.

Response by Mr. Long, Vice Director, Administration for Fund management firms and Securities managed funds

The agency drafting the Decree on voluntary pension fund, the MoF's Finance and Banking Department, recently submitted the latest version of the draft decree to the government.

Response by Mr. Truong Le Quoc Cong, head of the Stock Offering Administration

In response to VBF comments on connecting partial privatization and listings, the administration's position is that the SSC is only in charge of the after-market, while the primary market is under MoF jurisdiction.

A company, during the partial privatization process, has not yet formed. When the new shareholding company comes into shape, decision-making on how the company should be listed rests with its shareholders. VBF's recommendation that when a company completes the partial privatization procedure it should also finish listing procedures, is contrary to the Enterprise Law. As such, the administration will try to embed the recommendation into the draft revised Decree 59 in line with the Enterprise Law's intent.

In respect of foreign ownership enlargement under Decree 60, the administration is a direct implementer and processing unit on the ground, while defining foreign ownership is the Ministry of Planning and Investment's (MPI) role. That said, the MPI is just a focal point gathering comments and inputs from relevant ministries, as Vietnam's legal infrastructure has not caught up with the laissez-faire market mechanism and businesses still face challenges registering their business lines.

Regarding the suggested connection of partial privatization and listings, Decree 59 developed by the MoF's Corporate Finance Department, lays out three methods for divestment: auctions, underwriting and negotiations. The latter two, however, rely on an auction-based approach and this partial privatization method has inherent flaws. The successful auction rate by recent SSC estimates is only 30%-45%.

The SSC has worked with the MoF on a project chaired by President Vu Bang to develop a book-bidding model for partial privatization and divestment of State-owned enterprises. The project is now in its final phase and will be introduced for piloting in parallel with revision of Decree 59.

Response by Ms. Pham Thi Thanh Huong, Vice Director, Ombudsman Department

The issue of listing breaches:

While Decree No.108/2013/ND-CP on penalizing administrative infringements related to securities and stock market was being developed, the SSC made specific recommendations to relevant ministries, line agencies and bodies as well as MoJ and Government Office validating agencies on how different penalty schemes could be applied. The objective of these schemes is to ensure better deterrence in the stock market without being dependent on a specific monetary fine level, for example 1-5% of illicit earnings, 1-5 times the illicit earnings or a return-based method as recommended by VBF. Nevertheless, these recommendations have received negative views from ministries and line agencies, particularly the MoJ. This is because anything related to administrative sanctions must remain in line with current civil penalty laws and commensurate with the nature and extent of the wrongdoing.

⇒ To ensure adequate deterrence, apart from higher fine levels, the SSC has added other types of penalty and remedial actions required in the new draft.

Listing time lines or listing procedure infringements:

Penalizing schemes will be looked into to assure deterrence with punitive degrees from low to high.

Severer penalties for chairperson and Board of Director members held personally responsible:

This is actually a principle set forth in Decree 108 where an organization is subject to penalization requiring the organization, after complying with the penalization ruling, to take

steps to single out any individuals who should bear legal and financial responsibility to the company.

How to prevent businesses deliberately stalling business registration renewal:

Decree 60 has set a 90-day timeframe from the end of an offering, where the State-owned enterprise in question must complete all business registration renewal procedures and take steps to list and trade securities on the market. Based on this, corresponding punitive schemes will be developed to ensure deterrence.

Mr. Kien Nguyen, Representative of the Capital Market Working Group

Regarding foreign ownership, in the February 2016 meeting and today's meeting, there was a realization that such concerns could be resolved at decree level, as law changes are required. The CMWG is also aware the MPI has proposed revising the Investment Law and this has been discussed during the consultation meeting with the Government Office on current gaps and challenges faced by businesses following the Investment Law and Enterprise Law. The SSC is encouraged to reflect the CMWG's concerns during any revision of the Investment Law and Securities Law.

Ms. Nguyen Thanh Thuy, Representative of Citibank Vietnam

While Article 98, Securities Law, rules that monitoring banks are commercial ones with a license registering them as custodian banks, Article 19 of the draft decree specifies that banks able to register as monitoring ones could include commercial banks with a registration certificate for securities depository operations. The SSC is requested to clarify if a commercial bank with a registration certificate for depository operations is *ex officio* allowed to take on the role or it must complete procedures for registration renewal. In case registration renewal is required, what procedural steps are required?

Mr. Nguyen Khac Hai, DCEO, SSI Asset Management Company

Regarding the SSC's exclusion of equity in public companies, this will have a major impact on companies that have increased foreign ownership and those intending to do so.

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While a more manifest and specific legal framework on foreign ownership is in the pipeline the CMWG propose the SSC, as the lead and focal agency for NVDR (non-voting depository receipts), reactivate the NVDR project. After dialogue between VBF and SSC, immediate market solutions are required and the NVDR is a viable and rapid intervention.

PARTICIPANTS

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