POSITION PAPER OF CAPITAL MARKETS WORKING GROUP

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I – DRAFT LAW ON SECURITIES

1. Early publication of the Draft Law on Securities (LoS)

As this law is very specialist and technical, reviewing and commenting on it will require significant time and attention. We suggest that the Government (Ministry of Finance) publish the draft LoS early so that relevant stakeholders will have sufficient time to review and comment on the draft law.

2. LoS's scope of application:

The amended Law on Securities should expressly and clearly stipulate that it governs:

(a) securities-related investments/business lines; and restrictions, conditions and prohibitions in respect of securities-related investments/business lines;

(b) process and procedures for trading and investments in securities, securities companies, fund managers, public companies and investment funds; and

(c) foreign ownership limits in securities companies, fund managers, public companies and investment funds.

3. Foreign ownership limits in the LoS:

The amended Law on Securities should:

(a) permit up to 100% foreign ownership in securities companies, fund managers [as currently permitted under Decrees 58/2012/ND-CP and 60/2015/ND-CP], in public companies and investment funds unless the laws or international agreements specifically and clearly stipulate a lower threshold; and

(b) consider all securities companies, fund managers, public companies and investment funds incorporated in Vietnam as domestic investors regardless of the foreign ownership in those companies and funds.

4. Securities investment funds

Vietnam's capital markets still lack institutional presence, making it critical to develop through all available incentives, a network of mutual funds, investment companies, and pension funds.

Thus, we suggest that the Law on Securities should be amended as follows:

(a) Form of a securities investment fund: It allows securities investment funds to be established under the Enterprise Law 2014 (in addition to the current types of funds).

(b) Diversified types of funds: This allows the fund management industry to establish the most common types of funds in the world to meet the diversified investment needs of different investor groups. on investment objectives, risk tolerance and risk-return requirements such as:

- Open-ended members fund
- Hedged fund
- Capital Guaranteed fund
- Types of leveraged / inversed ETFs such as:
  - The leveraged / inversed ETFs allowed to implement cash-creation/redemption and in-kind creation/redemption
  - The leveraged / inversed ETFs are allowed to borrow to invest
  - The leveraged / inversed ETFs are allowed to borrow with value which is bigger several times more than NAV
  - The leveraged / inversed ETFs is allowed to invest in derivatives with borrow to several times.

(c) Application of international practices to various types of funds: To facilitate the effective use of Vietnam funds in accordance with the universally applicable regulations such as:

- Allow open-ended funds to borrow to meet the fund's redemption orders
- Allow open-ended funds to use cash in advances from sell orders in trading day to make purchase orders.
- Create a mechanism that allows open-ended funds, close-ended funds, and public funds to be invested in the ETF with a certain percentage

(d) Variety of Special Fund: Providing the legal basis for some special types of funds to carry out the following transactions to increase the performance of the fund, in accordance with the specific requirements of investors. Investment in funds based on the rules have been applied in the world as:

- Allows some types of special open-ended funds (ex: hedged funds, open-ended member funds etc) having trading frequency less than twice a month
- Loans (money / securities)
- Short Sale

(e) Increasing the Fund's performance: Facilitating the effective of ETF operations related the following issues:

- Allow the ETF to use the underlying securities to lend in exchange transaction for ETF shares.
- Allow ETF fund certificates to be margin traded within 3 months of listing and not applied regulation on NAV / unit under par value
- Revise the disclosure regulations of the ETF in order to:
  - Reduce unnecessary, overlapping regulations.
  - Abolish, reduce as much as possible the disclosure regulations relating to the Market Makers, Authorized Participants so that these organizations can perform their particular functions related to create liquidity for ETF funds, meet the trading requirements of investors, increase efficiency (reduce costs) for investors.

(f) Time mismatching between settlement and clearance process of exchange-traded of ETF fund (ETF system) and settlement and clearance process of listed stocks (Core system) of VSD:

Currently there is no connection between ETF system and Core system. Increase or decrease of ownership of investors trading through Stock Exchange is recorded in the Core system by 15:30 to 16:00 whereas it is recorded by 16:00 to 16:10 for investors trading via exchange-traded mechanism of ETF fund. Therefore, ETF market makers and ETF authorize participants cannot use underlying securities generated until 16:10 T+2 resulted from exchange of ETF (on T+1) to fulfil their selling order of underlying securities (via Stock Exchange on T) which they are liable to deliver these underlying securities not later than 16:00 T+2. As a result, they are not able to structure their relevant trades in primary market (exchange-traded mechanism) and in secondary market (Stock Exchange) to meet ETF investors' buy or sell trades on the Stock Exchange without taking market risk which does not incur to ETF market makers and ETF authorize participants in other markets.

5. Review definitions of securities-related offences

Given that the securities-related offences (both criminal and administrative ones) have become much more sophisticated, the LoS should provide for clearer and more detailed definitions of securities-related offences which will then enhance regulators' ability and probability to administratively punish, or to lay criminal charges against, those offences.

II – RECOMMENDATIONS FOR NEW SECURITIES LAW AND ITS GUIDING DOCUMENTS:

1. The role of the supervising bank (SB): Specific clauses of the Securities Law that need revising to remain consistent with common practices

- According to Article 84.1.c, investors are entitled to request the SB to repurchase open-end fund certificates. However, the SB is not designed or allowed to trade stock certificates. As such, this provision needs modification to reflect that fact.
- According to Article 88.2, on how to calculate the net asset value (NAV), it would be better not to go into details on how to compute NAV, but instead set the general guidance for the Board of Trustees and investors' general meeting to give the final decision on how to do it. The SB only confirms the procedure and method of valuation, and has no role for price review.
- Article 98.2.c establishes that the SB must make sure that the asset management company managing an investment fund, Manager or Managing Director of a securities investment company managing the company's assets comply with this Law, the Articles of Association of the securities managed fund, and the Articles of Association of the securities investment firm. We suggest amendments since the SB only monitors compliance with the investment restrictions that the fund is exposed to and the fund's trading activities, rather than an asset management company's compliance, as asset management companies are outside the reach of the SB.
- Article 98.2.e requires that the SB monitors reporting and disclosure compliance by asset management companies and securities investment companies in accordance with this Law. Changes are recommended since the SB only monitors compliance in reporting the net asset value of asset management companies and for the funds they manage, and other reporting practices are outside the overseeing scope of the SB. For example, if an asset management company must report to investors or disclose information on an information portal within a specific period of time, the SB has no control over that.

2. Regulations on asset management company and investment restrictions

- Article 89 regarding Reporting on mutual funds and asset management company requires periodic reporting to be done. Nevertheless, in case of holidays when funds do not issue fund stock nor trade fund stock, it would be better to have in place reporting guidance in case the scheduled reporting date is on a holiday.
- Article 92.1.b establishes that an asset management company is not allowed to invest in an issuer's stock by more than 15% of the total value of the issuer's stock in the market. We suggest this regulation is made consistent with the provisions of relevant implementing circulars, for example Article 15.d, Circular No. 183/2011/TT-BTC, on investment restrictions applicable to open-end funds (10%), and Article 3.a, Circular No. 224/2012/TT-BTC, on investment restrictions applicable to ETFs.
- As Article 92.d sets forth restrictions on investment in real estates, we suggest making clear if this is about direct investment or indirect investment.
- Article 92.dd does not allow investments that exceed 30% of the total value of an investment fund in companies in a same corporate group having ownership relationships with one another. More clearly defined regulations on what a corporate group with mutual ownership relationships is, what sources of information may be used to identify such ownership relationships, and restrictions applied to such ownership relationships, such as parent-daughter company relationships.
- According to Article 92.e, a publicly traded company is not allowed to loan or guarantee any loans. An exception for bond trading is recommended. Article 16.4, Circular No. 183/2011/TT-BTC, now allows open-end funds to engage in government bond trading.

3. Issuance – Enhancing the efficiency of share auction/offering/public offering processes:

Guidance on the procedure, rule template for offering/public offering by non-SOEs

We recommend that these procedures/rule templates and documentation requirements for non-SOEs are standardized and prescribed in the regulatory documents (similarly to that in Circular 196/2011/TT-BTC, Circular 115/2016/TT-BTC, Decision 895/QĐ-UBCK which are applied for IPO of equitized SOEs). This will help to create harmonized market practices on issuance and help relevant parties to effectively coordinate in the whole process.

In practices, many issuers are applying different processes and requirements in their offering events, resulting in various difficulties in implementation. For example:

- Deposit requirements vary in wide range amongst different issuers. Recently, there is one issuer who requires 100% deposit. These variety causes confusion to foreign investors who are interested to participate, as well as raise serious concerns about counterparty risks (as mentioned above).
- The registration form for participation does not require foreign investors to declare their cash account number and STC number. Meanwhile, the investor and their depository member and broker encounter a very complicated and time-consuming process to confirm these information to the issuer during the participation process.
- Issuance of physical ownership certificates creates burden, costs and risks to the investors, especially foreign investors, as they have to complete excessive documents and complicated process to receive and safe-keep the certificates. These should ideally be replaced with the mechanism of "registration – auto-depository" at the VSD (similarly to the process prescribed in Circular 115/2016/TT-BTC).

Mitigating counterparty risks for foreign investors by allowing the custodian bank to block the deposit amount in investors' cash accounts in share auctions at the Stock exchange (SE)

Nowadays, foreign investors who participate in share auctions of equitized SOEs at the SE are required to transfer the deposit amount to the cash account under the broker's name. Due to serious concerns about counterparty risks, many foreign investors limit their participation scale in share auctions in Vietnam.

We recommend that the regulations allow blocking the deposit amount in the investors' cash accounts which are opened at the custodian banks; i.e. a circular should require that the custodian bank to block the deposit amount in investors' cash accounts in share auctions at the Stock exchange until the auction result is announced.

4. Corporate governance – Supporting foreign investors' participation in shareholder meetings in Vietnam:

Due to the distance and language barriers, foreign investors need support from the public companies so that they can attend the shareholder meetings and exercise their voting rights, especially with the following matters:

- Regulations should require the public companies to accept the POA of foreign investors to the local custodians and their voting instructions via SWIFT (which is currently in fact widely accepted in the market) instead of the authorization letter of the foreign investors for shareholder meetings in Vietnam;
- Prescribing a standardized template for the authorization letter which are applied by all public companies. The template must be specified in the company's internal rules on corporate governance and announced on the company's website, so that the investors can pro-actively prepare the authorization in a timely and effectively manner. Currently, Circular 95/2017/TT-BTC has not specified such template. This will prevent the issuer to change their template every year which causes difficulties for foreign investors in their preparation.
- According to the template for company charter as prescribed in Circular 95, the authorization letter must be countersigned by both parties. This is very challenging for foreign investors as most of them authorized their local custodian for casting the votes on their behalves via a POA which was signed by themselves only (without the signatures from the local custodian). We understand that the authorization letter which is signed by the authorizing party only is also in compliance with the existing regulations under the Civil Codes. **We recommend to remove the above-mentioned stipulations** in the charter template, as such stipulation means most of the foreign investors must re-execute their POA to the local custodians. This would be a huge exercise, especially for big institutional foreign investors and those using global custodians. As per our observation in 2018 voting season, almost all issuers embedded the above-mentioned template in their rules on corporate governance and get them endorsed by the shareholder meetings. Consequently, from 2019 voting seasons, thousands of foreign investors will suffer.
- Requiring the public companies/listed companies with large scale and having aggregate foreign ownership at a certain level to use the V-vote system of the VSD to collect shareholders' votes.

5. Trading

First trading date for newly-issued shares upon stock dividend/bonus/additional issuance

According to international practices, investors would be allowed to trade the new shares as soon as the shares are paid to their accounts. We recommend the SSC to prescribe that the new shares

will be paid to the investors' accounts only when they are available for trading or at least when the first trading date has been announced.

Allowing securities borrowing and lending for commercial purposes

Currently, securities borrowing and lending via the VSD's SBL are limited for covering settlement shortage or supporting authorized participants of ETFs. The Ministry of Finance also issued regulations allowing the HNX's auction members to borrow Government-bonds for sale trade execution. We recommend the SSC allow borrowing and lending equities and fixed incomes for commercial purposes and allowing investors (including foreign investors) to participate as the borrowers and lenders.

Continue FOL relaxation and simplifying the process to identify the applicable FOL

FOL is still one of the biggest obstacles for foreign investors in Vietnam market. Though the Government has made progress in issuing regulations on FOL relaxation, it is complicated to identify which FOL applies in certain cases of enterprises operating/having business in multi sectors, and the FOL relaxation in these cases can hardly be recognized by the investors. We would recommend the Government, the MOF and relevant regulatory bodies to issue clear guidance on how to identify the applicable FOL which is helpful for both the public companies and the investors.

Database on the FOLs

The FOLs which are newly announced or relaxed according to the new regulationsare being announced on the website of the SEs or the public/listed companies. It is difficult for the foreign investors to look for FOL information which are updated, official and centrally provided. We recommend the SSC/SEs/VSD to build up a centralized database on FOLs of public companies/listed companies and announce the list on their websites for the foreign investors' easier access. These information must be kept updated on a timely manner upon any changes in the FOLs.

6. Reporting & information disclosure

Simplifying the requirements on reporting and information disclosure for foreign investors

Currently, foreign investors and their affiliates are defined in Clause 7 Article 2 Circular 123/2015/TT-BTC. However, this definition is not match with the definition of "affiliates" in the Securities Law. In addition, "foreign investors and their affiliates" only refer to master-sub funds, MIM funds or funds under the same managers, not covering investors in non-fund form.

Moreover, in practices, complying with reporting/information disclosure of "foreign investors and their affiliates" is very complicated, difficult to follow and may lead to duplicated reports. In some cases, one investor may have to appoint 2 information disclosure representatives, as that investor is a foreign investor using multiple fund managers and a member of an investor group using the same fund manager.

Therefore, we would recommend to remove these reporting/disclosure obligations as prescribed in Circular 123/2015/TT-BTC. Instead, foreign investors should only comply with the requirements as set forth in Circular 155/2015/TT-BTC.

A mechanism and a system to share information on investors' reports/information disclosure amongst the SSC, VSD, SEs and issuers

The investors are filing reports/information disclosure to the SSC, VSD, SEs and issuers in hardcopies via post as required by Circular 155/2015/TT-BTC and Circular 123/2015/TT-BTC. The SSC developed FIMs for reports/information disclosure in electronic form, however, the VSD, SEs and issuers do not have access to these information in FIMS.

To enhance the efficiency of these activities and reduce relevant expenses for the investors (especially foreign investors), we suggest the SSC to develop the FIMS into a centralized database for reports/ information disclosure as follows:

- When the obligations arise as required by Circular 155/2015/TT-BTC and Circular 123/2015/TT-BTC, the investors would submit the reports in FIMS
- Upon completion, FIMS will release notifications to the SEs, VSD and issuers. These entities will use their user accounts to log in FIMS and download the reports for their filings.

This mechanism will ensure a centralized database for the SSC for management purpose, as well support investors' reports at low cost and in a timely manner. In addition, this will simplify the STC application form (which currently requires the investors to declare their affiliates as defined in Circular 123/2015/TT-BTC).

VSD's static data

The VSD's static data is important for analyzing the settlement and clearing system in our market. Currently, the statistic on depository, market shares of top 10 members, value of the Settlement Compensation Fund, etc. are disclosed in the VSD's annual reports in July; hence, become outdated for market analyzing.

We would suggest the VSD to publish these data on a monthly basis, or at least on a quarterly basis.

7. Bankruptcy

Procedure for handling and ensuring the benefits and assets of investors & market participants in cases of bankruptcy of designated settlement bank/custodian banks/supervisory banks

Bankruptcy of designated settlement bank/custodian banks/supervisory banks would impact the investors in securities market. In principle, such bankruptcy would be handled subject to relevant regulations under the Law on credit institutions. However, these regulations are silent on how to separate the funds being reserved for settlement of the securiries trades in securities market, therefore, impact the settlement process of the whole securities market and many investors. Meanwhile, Securities Law is also silent on this matter. The securities law only prescribes the principles for handling bankruptcy of securities companies & fund managers. Hence, we recommend the SSC/MOF to coordinate with the SBV to issue a guidance on this matter.

Guidance on settlement obligation in case a foreign investor goes bankrupt in the country of domicile – after the trade is executed and before the settlement is made.

There has been no similar case in practice. However, upon occurrence, if the trade has been matched and confirmed for settlement in Vietnam but the investor's asset and funds are blocked

due to the regulations on bankruptcy in the country of domicile, we are not sure if the investor's depository member is allowed to transfer funds for settlement as required by Vietnamese regulations? If not, how would this case be handled?

Currently, as per the VSD's rules, if the member cancels the trade, they will be subject to serious penalty. But if the case is that a foreign investor goes bankruptcy in their country of domicile and the member must cancel the trades, it is not reasonable that the member is subject to the penalty as it is out of their control.

8. Cash accounts for securities trades of foreign investors

We recommend the SBV to issue regulations on cash accounts for investment in securities market (including the cash account for foreign indirect investment, foreign currency cash accounts for funding securities trades, and cash accounts of local investment funds) which is separated with Circular 23 – Circular 32 of the SBV.

Details of the difficulties when implementing Circular 32 has been raised and recorded in various meetings between the SSC, SBV, MOJ, MPI and market participants. Key points are:

- Account opening for non-legal entities (domestic and offshore)
- Using SWIFT messages and the model using Global custodians in account opening/operating

Till now, the SBV and relevant ministries/agencies have not worked out the solutions for these gaps. Though the SBV issued 02/2018/TT_NHNN to extend the deadline for conversion of the existing cash accounts of non-legal entities in the market from 01/03/2018 to 01/03/2019, this action only gives the market one more year to handle the accounts which have been opened as at 01/03/2017 (the effective date of Circular 32). New cash accounts which are opened after 01/03/2017 are still required to comply with Circular 32.

Foreign custodian banks have been receiving feedbacks from most of the foreign investors that they will revisit all their investments in Vietnam to avoid compliance risks. We recommend that the SSC and the SBV and relevant ministries/agencies to:

- Allowing local investment funds, institutional investors being non-legal entities/entities which we cannot determine if they have a legal entity to open cash accounts under their name.
- As the nature of the activities of the cash account for foreign indirect investment is unique compared with other payment account types, the SBV needs to issue a specific regulatory document to govern. It is ideally that Circular 05/2014/TT-NHNN is supplemented with the stipulations on account opening/operating which accept the use of SWIFT messages.

9. Setting up an investor protection fund and establising a comprehensive, synchronized mechanism for the fund's operations

Securities companies, fund management companies or financial advisors may fall in to liquidation, bankruptcy, which lead to the loss of capital or assets of their clients or investors. When such cases occur, Vietnamese government does not have any public funds to assist investors yet.

It is necessary to establish a comprehensive mechanism with synchronized legal corridors to protect investors. That mechanism is demonstrated through an investor protection fund.

Hence, we suggest the Law on Securities should be amended with the establishment of investor protection fund. Key elements that make up its mechanism are as follows:

- Specific provisions on the establishment and operation of the Fun for the protection (compensation) of investors;
- A standing body/agency is responsible for administering and managing the fund with its members designated by the interested parties;
- Companies and associations protecting investors in these mechanisms are social or governmental organizations, whose funds and operation are non-profit and for the protection of investors.
- Compensation funds are derived from the contributions of market participants, securities trading companies. The state only provides financial support and assistance when needed.
- Collective dispute resolution and litigation, by which an organization can be mandated by its members to actively initiate lawsuits and take action when necessary.

10. Others

Information on Double Treaty Agreements (DTA)

Information relating to the DTAs which are signed with Vietnam is currently not publicly available in the websites of the Government, the MOF and the General Department of Taxation (GDT). Meanwhile, these information are crucial to the benefits of the foreign investors in Vietnam securities market.

We recommend the MOF and GDT to build up a specific section in their websites to publish the information on signing date, entry into force, effective date and full documents of the DTAs (in both Vietnamese and English).

Upgrading Vietnam to Emerging market in the MSCI classifications:

In the last 2 years, the SSC and the MOF have been leading the actions in order to upgrade Vietnam to Emerging market in the MSCI classifications. However, the actions taken are not sufficient to persuade the foreign investors as well as MSCI to name Vietnam in the review list. Many of the market drawbacks as analysed by MSCI require joint actions by multiple ministries/ agencies to address. Positive changes in the market also need to be effectively communicated to the investor community to support the research and review of the MSCI.

We recommend that SSC/MOF continue enforcing their leading role in these action plans to exchange information and cooperate with other ministries/agencies to enhance the efficiency of our actions.

Other items which have been raised in previous meetings in 2017

- A mechanism to allow market participants to handle abandoned assets/accounts
- Shorten the timeline for UPCOM registration/listing/ after IPOs/public offerings in which applying listing – registration - auto-depository to eliminate physical certificate issuance.
- Set forth the legal framework in new securities law for the VSD to play the CCP role for both cash market and derivatives market, and replace pre-funding requirements with other risk mitigation methods (eg. CCP model for cash market, Settlement Guarantee Fund and compulsory buy-in mechanism in CCP model).
- Compulsorily requiring the SEs, VSD and other market participants (i.e. custodian banks, supervisory banks, securities companies, fund managers, etc.) to have Business Continuity

Plan in place and carry out testing at least on an annual basis. For the SEs and the VSD, the testing results must be announced to the market (which is similarly to other markets' practices).

- In case of Pension funds, we suggest removing the rule requiring the OB to be independent from depository banks, as this rule is no longer consistent with international market practices. On the other hand, for a developing market such as Vietnam, requiring segregation of these two services will give the parties involved a hard time in processing information and trading.
- Modifications to the current rules are recommended in ways that allow financial institutions that are commercial banks to distribute fund stock.