POSITION PAPER OF GOVERNANCE & INTEGRITY WORKING GROUP

PROPOSED ISSUES AND COMMENTS ON DRAFT LAW ON ANTI-CORRUPTION

The Governance and Integrity Working Group ("GIWG") has focused recent efforts on reviewing and commenting on the draft Anti-Corruption Law (the "**Law**"). The GIWG has focused on those aspects of the Law that impose obligations on private businesses, a unique element of the Law compared with the current Anti-Corruption Law. Our intent is to support the government to pass a law that is fair, appropriate and practically workable.

No.	Issues	Comments	Recommendations	Updates in latest draft[1]
1.	The Law, for the first time, brings private enterprises within its orbit. There are various obligations imposed on private sector that would benefit from careful thought about the intent and effect.	Article 95.3 of the Law requires "enterprises" and "business associations" to issue rules of business ethics for their members and staff. As drafted, this requirement appears to apply to all enterprises and all kinds of business associations. It is not clear how this relates to similar obligations in Article 96.1 on enterprises to issue codes of conduct. (see below). While it makes some sense to require professional bodies to issues such rules, it is not appropriate to mandate this for all kinds of enterprises and business associations in addition to other codes of	Delete Article 95.3.	Article number is changed to 78.2. The title of the Section is also amended: from "Building of a Healthy and Corruption-Free Business Environment" to "Encouragement of the Building of a Healthy and Corruption-Free Business Environment" The key issue here has now been addressed as the issuance of rules of business ethics is now "encouraged/ optional" rather than an "obligation" for enterprises and business associations (see Article 78.2)

[1] *The draft appears to be undated but was available as of 8 November 2018*

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		conduct that may be required. With respect to business associations, the general language re obligations in Article 96.3 is sufficient and more appropriate.		
2.	Despite differing views among private companies, it is appropriate for private sector to play a role in combat of corruption. However, using the Law to impose blanket obligations on all companies to adopt codes of conduct, and develop internal control mechanisms is a blunt tool that is unlikely to contribute directly to the stated goals and, on the other hand, opens up concerns for private companies of another regulatory obligation that could be used as a pre-text for more oversight by the authorities.	Article 96.1 of the Law obliges all enterprises and economic organizations to issue and implement codes of conduct in order to build a fair and corruption free business culture. Article 96.2 goes on to further oblige the same entities to include terms in their charters providing for internal controls to prevent conflicts of interest, abuse of power and other acts of corruption. These obligations are very broad, unclear and unnecessarily onerous on private enterprise, opening up further avenues for oversight and inspection by state agencies that will not achieve any particular goals. Private enterprises should be encouraged to adopt such policies and procedures and indeed many do pro-actively and voluntarily have such policies and procedures in place. Companies and individuals are of course already obliged to comply with law and the Enterprise Law mandates the content	Amend the draft Law to encourage, rather than mandate, private companies to adopt appropriate codes of conduct, and anti-corruption policies and procedures. Separately develop a clear voluntary code of conduct that is deemed sufficient as a minimum standard in Vietnam. This could be based on international best practice, such as ISO37001, adapted for the Vietnam context as necessary and formally adopted into Vietnam's standards regime. Alternatively, amend the draft Law to provide some further clarity (e.g. – in the definitions section) about what content a code of conduct ought to include to ensure certain minimum standards and limit	Issues remain despite amendment to the language (now Article 79). The language of the now-renumbered Article 79 continues to indicate that this will be a mandatory obligation. It also now suggests that the codes of conduct must cover "healthy business environment" (kinh doanh lành mạnh), in addition to "prevention of internal conflicts, resistance of corruption acts, and build a business environment free of corruption". Recommended to amend Article 79.1 to make expressly clear that this is "encouraged" and not mandatory in all cases.

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		of company charters as well as provides rules for dealing with related party transactions which may have inherent conflicts of interest. Rather than mandate in this Law that all private enterprises adopt codes of conduct and internal control mechanisms, it would be preferable to implement a regime that takes any such measures into account when considering culpability for possible wrongful actions that may be discovered/ investigated. This is closer conceptually to the approach taken by the UK Bribery Act where adequate procedures are not mandatory per se but can be a defence to wrongful behaviour of individuals working for companies. This would also be more in keeping with the position adopted in Vietnam in the latest Penal Code where only individuals, and not companies, can be criminally liable for bribery. Mandatory codes of conduct are suitable where corporate entities themselves can be criminally liable for corruption-related activity of their officers or employees. In such case, there should also be provisions on which agencies have the responsibility/power to monitor	room for confusion. This could also be an opportunity to address private enterprises putting in place whistleblower policies that will assist with enabling actors to come forward with information.	

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		and potentially impose sanction for failure to put in place (two notable items that are missing from the current draft Law).		
3.	The Law imposes onerous obligations on private entities to take on active anti-corruption investigation roles that should be the primary preserve of State authorities.	Many private companies acknowledge their role in helping to detect and prevent corruption in their organizations. However, any positive obligations to involve authorities in their internal activities must be based on clear and specific grounds that are not open to discretionary interpretation. As currently drafted, Article 97.2 of the Law provides that in "complicated cases", "heads of enterprises" must inform competent agencies about signs of corruption. These obligations are too vague and unclear to be meaningful. The Penal Code already obliges anyone who detects criminal behaviour to report it so this it is unnecessary to add it to this Law. Furthermore, the threshold for imposing such obligations on "heads of enterprises" (i.e. – detecting "signs of" corruption) is: (i) lower than that already existing in Article 19 of the Penal Code (which requires actual knowledge); and (ii) lower than that imposed on public officials under Article 73 of the draft	Delete Article 97.2. Add express assurance that no adverse consequences will befall companies complying with any legal obligation to denounce acts of public sector corruption.	The amended version of this article (now Article 82.1) is less onerous than previously for private companies but still requires enterprises to "by their own initiative, check in order to timely identify, solve, and recommend actions for authorities to deal with acts of corruption in their own enterprises." While the amendments reduce obligations (and potential personal liability) for heads of enterprises, Article 82.2 appears to empower inspectorates (not clear which bodies exactly) to impose liability on enterprises for failure to comply with this obligation. The penalty / remedy for failure to comply is not provided in the draft. This requirement is vague and without standard for enterprises to fully comply with. We recommend to delete this requirement.

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		Law. This inconsistency is inappropriate. With respect to Article 97.3, positive obligations to report and denounce acts of corruption of public officials can only be effective when such companies are confident that their operations won't be adversely affected by such actions.		
4.	The Law imposes new obligations on companies to involve themselves in the personal affairs and assets of their senior managers. While regulations to promote fairness, and avoid conflicts of interest are desirable, they need to be promulgated with a clear purpose, workable and consistent with existing laws.	The provision regarding requirements for declaration and supervision of assets of the persons holding positions in their organisations is not pragmatic Relating to the requirements for declaration and supervision of incomes of the persons holding positions in their organisations, this provision is duplicated with the provisions of Tax Law. It is the responsibility of individuals for declaration of total incomes for personal income tax purposes The requirement that the Supervisory Board at the public companies, credit institutions shall supervise the assets and incomes of the persons who hold positions at those organisations is not workable in practice and does not	Remove Article 99	This article is removed from the latest draft so the issue is resolved.

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		achieve any meaningful purpose.		
5.	The Law seeks to impose new disclosure obligations for public companies and credit institutions. The primary focus of the Law with respect to disclosure should be on the State sector. Where the scope is extended to the private sector (particularly public companies), the regulations must be consistent with existing laws. Public companies must already comply with relevant securities regulations to ensure an appropriate level of transparency. Additional measures imposed by the Law will overlap and may cause confusion and difficulty complying. Where public companies are concerned it is essential to limit confusion about	As it stands, Article 98 of the draft Law obliges public companies and credit institutions to issue "regulations on publicity and transparency" and "regulations on control of conflicts of interest" and "regulations on responsibilities of their heads". Similar language and obligations are imposed on "social organizations" in Article 103 of the draft Law. Even if the Law does finally impose obligations on such entities, these obligations are too broad and vague to be of any value. As a matter of principle, obligations should be clear, appropriate and not overlap with other existing laws and obligations. In particular, consideration needs to be given to the existing corporate governance framework for public companies. Decree 71/2017/ ND-CP provides guidelines on corporate governance applicable to public companies to facilitate a good governance environment including terms on prevention of conflicts of interest, information disclosure etc. The IFC is also working on a Corporate Governance	Removal of the relevant obligations of the public companies and credit institutions	This article (now Article 80) now mandates that credit institutions and public companies must be subject to the same treatment (obligations?) as State bodies. Further, heads and deputy heads of credit institutions and public companies may be subject to the same personal liabilities as heads of public offices in cases of corruption. This is potentially very wide and onerous as it need not relate directly to actions under the specific individual's knowledge or direct control or responsibility. This new requirement is very onerous and ought to be removed.

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	what information must be disclosed or otherwise.	Code which is likely to include best practice terms on these same matters and additional integrity and ethics-related items. This Law should take this existing environment into account. Particularly when it comes to establishing oversight and enforcement responsibilities. For example, the SSC and stock exchanges are likely in a more suitable and effective position to monitor and control, even enforce and punish, these matters in the public/ listed company space compared with the Government Inspectorate.		
6.	The Law seems to impose obligations on private business to take drastic action against managers in certain circumstances.	Article 128.2 obliges public companies, credit institutions and investment funds that are subject to administrative penalties for certain actions to, in addition to complying with such administrative penalties, either dismiss or suspend performance of rights and responsibilities of certain senior managements officers (including Chairperson of Boards, General Directors, controllers, Chief Accountants), "depending on the nature of the seriousness of the violations". This raises multiple serious problems: 1. It is not clear what violations	Delete Articles 128.2 and 128.3. Focus efforts on ensuring that administrative penalties for breaches of governance and compliance regulations by public companies, credit institutions are clearly identified and of sufficient punitive value to deter and punish breaches. Provide the powers and tools to competent agencies to pursue individuals responsible for serious (criminal) breaches	This article is removed and subject to Government's decree. No draft decree is available for review.

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		prompt application of the measures in Article 128.2 [NOTE: references to breaches of Articles 108 and 109 of the Law in Article 128.1 appear to be errors]; 2. It is not clear what "depending on the nature of the seriousness of the violations" means. Any standard needs to be clear and objectively discernible. 3. It is unclear when removal from positions is required (Article 128.2(a)) as opposed to suspension of rights and responsibilities (Article 128.2(b)). In any case however, both measures are unnecessarily draconian and not sufficiently linked to specific wrongful actions of the individuals involved. Removing or dismissing all such individuals even in cases where they may not have any knowledge or ability to control or influence certain actions that may have occurred could be disastrous for the companies in question and could potentially seriously destabilise confidence in banks and capital markets.	of laws and regulations without resorting to blanket punishment of all management personnel regardless of facts.	

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		4. It some cases it may be contrary to labour laws and/or shareholder decisions to act to remove or suspend such management officers.		