



Lawyers

DNH Law Alert

October 20, 2009

**Decree N°. 53/2009/ND-CP dated 4 June 2009 governing the
issuance of foreign currency denominated government and
corporate bonds**
越南政府有关发行政府外币债券及境内企业发行外币债券之规定

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The new Decree allows for the first time the issuance by non-state owned companies of foreign convertible currency bonds through private placement or public offers to international investors. Prior to this Decree only government bonds and bonds with government guarantee by large state-owned companies were allowed to be issued in foreign currency as foreign exchange control took the priority over the need by local enterprises to access foreign financing. Domestic companies now have the same ability to access international financings through issuing bonds or convertible bonds subject to the annual limit on foreign commercial loans approved by the Prime Minister. Foreign currency bonds issued are treated as “foreign loans” and are subject to conditions, registration, reporting and other requirements as set forth in this Decree.

Unlike previous regulations in areas such as corporate or securities laws in Vietnam, lawyers under this Decree are specifically required to participate in the process ensuring that compliance with both domestic and international laws for bond issues are met.

Decree N°. 53/2009/ND-CP issued on 4 June 2009 and took effect on July 30, 2009 sets out in 4 chapters and 37 articles conditions, procedures and process for offering of bonds by government, state-owned and non-state owned enterprises through either private placement or public offer as well as compliance such for registration and reporting by issuers of bonds denominated in foreign convertible currencies.

Scope

The Decree regulates issuance of foreign currency denominated bonds by the Government, and domestic enterprises (state-owned enterprises, private companies, banks, and financial institutions) for economic development investment.

In parallel with the foreign exchange control regulations, this Decree provides regulations on “*the borrowing and repayment of foreign loans through the issue of bonds on international financial markets by the Vietnamese Government and enterprises.*” The foreign currency bond issues are therefore treated similar as “foreign loans” which are subjected to the annual limitation on foreign commercial loans approved by the Prime Minister (PM) each year (for 2009, see PM Decision N°. 457/QD-TTg), registration with the State Bank of Vietnam (SBV) of the amount of “foreign debt” issuance, and the opening and use of a “foreign loan and debt account” for all transactions in relation to bonds issuance for receipt and payment of principal and interests.

Conditions for Bond Issue

Government bonds and bond issues with government guarantee need to satisfy stricter conditions than private enterprises. This alert addresses only the bonds issuance by enterprises, either state or non-state owned without government guarantee.

Chart 1 lists conditions and other requirements for issuance of bonds by enterprises under the Decree.

Procedures for Conducting Bond Issue

After securing the necessary approval for the issue plan, the issuer shall then obtain certification from the State Bank of Vietnam that the size of offer is within the limit of annual commercial foreign loan. Issuer may then undertake to proceed with the offer which is in par with international practice with some variants: choosing from “world leading international investment banks” to be an underwriter (or syndicate) through competitive bidding; the underwriter and the issuer each will select their international and domestic legal counsels who will give legal opinions on the bond issue among others; the issuer, underwriter and the lawyers prepare relevant issue dossiers, obtain necessary credit ratings if required, and then underwriter promotes the offer with issuer’s participating, and the signing of agreements, and closing.

Registration with State Bank of Vietnam

As noted earlier, the bonds in foreign currency are treated similar as obtaining commercial foreign loans. Issuer therefore will need to register the issuance with SBV prior to closing under relevant SBV regulations.

Further, the issuer must open and use a “foreign loan and debt account” through which proceeds are to be deposited and payments of principal and interest to be made.

Implementing Regulations

Circulars and other legal documents are usually issued by relevant line ministries to provide detailed guidelines on some of the articles in a decree. For example in this Decree, the procedures and forms used for registration of the “foreign loans” and how will transfer of the bonds be handled (i.e., whether registration is required for each subsequent transfer) will be likely to be provided out in the detailed guidelines by MOF/SBV.

Effective Date

This Decree takes effect on 30 July 2009.



Chart 1: Issuing of corporate bonds by State owned and private enterprises

	Bond issue by State-owned enterprises (SOEs)	Bond Issue by private companies
Issuer 發行人	An economic entity which has its own name, assets and stable transaction office, and having been established under Vietnamese law to carry out business activities, and is lawfully operating in Vietnam	An economic entity which has its own name, assets and stable transaction office, and having been established under Vietnamese law to carry out business activities, and is lawfully operating in Vietnam
Issue Plan 發行計劃	<p>Adopted by the board of directors, and approved by the Prime Minister.</p> <p>The issue plan prepared by the issuer must include:</p> <ul style="list-style-type: none"> • Purpose and use of the proceeds • Legal grounds for issue • Size, terms, structures, currency, etc. of the issue • Interest rate based on the analysis of international market • Selection of underwriters, lawyers, agents, • Plans for use of proceeds and handling risks <p>(SOEs must go through an “evaluation” process: after the issue plan is approved by the management of the issuer and the “competent authority”, it then is submitted to MOF along with a dossier request; MOF will then evaluate and submit a report to the PM proposing for the PM’s “consideration and decision”).</p>	<p>Adopted & approved by the highest decision making body of the company (e.g., General Meeting of Shareholders if a shareholding company, Members’ Council if a limited liability company, etc.) and in accordance with the charters.</p> <p>The issue plan must include:</p> <ul style="list-style-type: none"> • Purpose and use of the proceeds • Legal grounds for issue • Size, terms, structures, currency, etc. of the issue • Interest rate based on the analysis of international market • Selection of underwriters, lawyers, agents, • Plans for use of proceeds and handling risks
Annual Foreign Debt Limit	Size of issue is within the annual limit on commercial foreign loan set by the PM, certified by State Bank of Vietnam.	Size of issue is within the annual limit on commercial foreign loan set by the PM, certified by State Bank of Vietnam.
Purpose	<p>Either for “programs and projects have been identified as key national works”</p> <p>or</p> <p>for “investment projects have been appraised by competent authorities to be effective and have completed investment procedures under current laws.”</p>	<p>Either for “programs and projects have been identified as key national works”</p> <p>or</p> <p>for “investment projects have been appraised by competent authorities to be effective and have completed investment procedures under current laws.”</p>
Compliance with current laws	<p>In case of issuing convertible or bonds secured by various forms (e.g., secured by assets in Vietnam), the issue must comply with relevant laws (likely issues are LURs, security registration, foreign ownership restrictions, etc.), when equity conversion occurs or the legal use of assets for security purpose, etc.</p> <p>Legal opinion by law firms as required under the Decree to be retained is required.</p>	<p>In case of issuing convertible or bonds secured by various forms (e.g., secured by assets in Vietnam), the issue must comply with relevant laws (likely issues are LURs, security registration, foreign ownership restrictions, etc.), when equity conversion occurs or the legal use of assets for security purpose, etc.</p> <p>Legal opinion by law firms as required by the Decree to be retained is required.</p>
Credit rating 信用評等	Having being rated with a credit rating equal to or above the national credit rating, if rating is required.	Having met the appropriate credit rating for the issue if one is required.
Documents Dossier 發行文件	<p>Having a complete document dossier for the issue meeting the requirements of both Vietnamese laws and the laws of each foreign jurisdiction in which the bond is offered.</p> <p>Legal opinion by law firms as required under the Decree to be retained is required.</p> <p>Documents may include: prospectus, agreements for underwriting, subscription, legal opinion, legal representation, agency, etc.</p>	<p>Having a complete document dossier for the issue meeting the requirements of both Vietnamese laws and the laws of each foreign jurisdiction in which the bond is offered.</p> <p>Legal opinion by law firms as required under the Decree to be retained is required.</p> <p>Documents may include: prospectus, agreements for underwriting, subscription, legal opinion, legal representation, agency, etc.</p>
Regulatory Compliance	<p>Registration with SBV prior to closing</p> <p>Opening and use a “foreign loan & debt” account</p> <p>Use of relevant accounting regime</p> <p>Reporting per SBV regulations and per MOF request</p>	<p>Registration with SBV prior to closing</p> <p>Opening and use a “foreign loan & debt” account</p> <p>Use of relevant accounting regime</p> <p>Reporting per SBV regulations and per MOF request</p>

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