



NEWSLETTER

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Dear Readers,

We welcome you to our June edition of the Frasers Newsletter with some interesting articles to while away quiet moments, during the summer.

We report on a number of interesting government initiatives including:

- Regulations on the selection of strategic shareholders for equitising state owned commercial banks: how will existing banks, domestic and foreign fare?;
- A review of the law relating to the new land use rights certificates, what has changed and when they will be applicable;
- A brief look at new rules applicable to the qualifications of auditors in Vietnam; and
- The new VAT rules for insurance companies, which identifies the categories of insurance goods and services for which VAT will be applied to, and VAT incentives for foreign investors and for insurance products to be provided to enterprises located in non-tariff zones or overseas organisations and individuals.

We trust that you find this month's newsletter an interesting read and welcome any feedback or comments you may have on any of our subjects. Our address for comments is newsletter@frasersvn.com.

Equitisation of State Owned Commercial Banks: Selection of Strategic Investors

On 22 April 2011, the State Bank of Vietnam (**SBV**) issued Circular 10/2011/TT-NHNN (**Circular 10**) which sets out the criteria for selecting strategic shareholders for equitised state-owned commercial banks. In force as from 1 June 2011, Circular 10 clarifies the groups of entities applicable to be governed by Circular 10, which are:

- state-owned commercial banks being equitised;
- state-owned commercial banks that have been equitised, but which have not yet been listed on the stock market; and
- state-owned commercial banks that have been equitised and listed on the stock market.

With a number of state-owned commercial banks such as Vietcombank (which has finalised its

equitisation, but has not yet chosen a strategic partner) and the Bank for Investment and Development in Vietnam (BIDV), which is planning to equitise, going through the process (and other banks currently in the approval stages), Circular 10 contains some interesting points and sets tough criteria for investors, particularly for foreign investors, considering such an investment.

Objectives and Criteria for the selection of strategic partners

As stated under Circular 10, the purpose of selecting strategic shareholders for equitising state-owned commercial banks is to seek investors with the reputation, financial capacity and ability to support the banks themselves in:

- improving administration, governance capacity, and risk management;
- applying modern technology;
- developing products and banking services;
- developing other fields which complement the development strategy of equitised

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state-owned commercial banks;

Clearly, any investor with such know-how and capabilities is likely themselves to be in the banking sector, however, the further criteria described below also make it challenging for potential strategic shareholders to meet the conditions imposed by Circular 10.

In pursuit of these achievements, Circular 10 requires that strategic shareholders of equitising state-owned commercial banks satisfy several conditions, as follows:

- to have strategic interests suitable to the development strategy of the equitised state-owned commercial bank;
- to have no conflict of interests;
- to have no monopoly or unfair competition for customers, other investors of the equitised state-owned commercial bank and other credit institutions.

It will be interesting to see how the prohibition on conflicts of interests and unfair competition is interpreted when it comes to choosing strategic shareholders for equitising banks. Interpretation may be wide or narrow and, in the absence of concrete examples, discretion will inevitably play a part.

As well as this, strategic partners must satisfy additional criteria, depending on whether they are foreign-owned or Vietnamese owned. If a strategic partner is foreign owned, it must:

- be a foreign credit institution or foreign financial institution with total assets equivalent to at least 20 billion U.S. dollars in the year preceding the year of enrolment as a strategic shareholder;
- have over five years experience in international activities;
- be rated by an international independent rating organisation (e.g. Moody's, Standard &

Poor's, Fitch Rating) at a level which signals their ability to implement financial commitments and normal operations even when there are adverse changes in economic circumstances;

- not be a strategic shareholder, major shareholder, or founding shareholder of any credit institution in Vietnam; and
- make a written commitment to assist the equitising state-owned commercial bank in the fields specified above, and have a long-term close commitment to the equitising state-owned commercial bank.

However, these stringent criteria mean that going forward, foreign banks already operating in Vietnam may find it harder to become a strategic partner for an equitising bank, as the conflict of interests prohibition would likely rule many of them out or might require them to divest parts of their business. However, Circular 10 does not have retrospective effect, and existing strategic interests are not subject to the conditions above.

With respect to domestic strategic shareholders, the requirements are also considered very difficult to meet, being in particular:

- enterprises with experience and good governance;
- having total assets equivalent to at least 3 trillion Vietnamese Dong (approximately US\$150 million) in the year preceding the year of enrolment as a strategic shareholder;
- having sufficient contributed capital resources: being equity minus any long-term investment by the investor in the form of an equity stake and short-term assets minus short-term debts, the balance being equal to the contributed capital at the time of registration to be a strategic shareholder;
- having a profit to equity ratio (ROE) of more than 15%, a profit to assets ratio (ROA) of

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- more than 1% for the year preceding the year of enrolment as a strategic shareholder; and having a positive net profit for three consecutive years before the year of enrolment as a strategic shareholder;
- owing no bad debt to any credit institution;
- not being a strategic shareholder, major shareholder, or founding shareholder of any credit institution in Vietnam at the time of enrolment as a strategic shareholder;
- making a written commitment to assist the equitising state-owned commercial bank in the fields specified above;
- making a written commitment not to transfer the shares to be purchased for a minimum period of five years from the date of the purchase of the shares;
- making a written commitment of becoming a strategic shareholder and not conducting any transactions with equitised state-owned commercial banks which would lead to conflicts of interests, or create a monopoly or unfair competition for customers, other investors of equitised state-owned commercial banks or other credit institutions;

The above provisions, particular those disbaring any conflicts of interests and unfair competition, would also seem to make it difficult for existing domestic banks in Vietnam to be able to satisfy the criteria to become a strategic shareholder if they operate in similar banking sectors, and it will be interesting to see in practice how the regulators apply Circular 10.

In addition, domestic strategic shareholders which are also credit institutions, must satisfy the following criteria:

- Maintaining prescribed limitations to ensure the safe operations of credit institutions according to the provisions of the State Bank of Vietnam (SBV);
- Having a capital adequacy ratio (CAR) for the year preceding the year of enrolment as a strategic shareholder of over 10%; and
- Having a bad debt ratio for the year preceding the year of enrolment as a strategic shareholder of under 2%.

Furthermore, credit institutions are not entitled to buy shares in equitised state-owned commercial banks where such banks are the shareholders or capital contribution members of such credit institutions at the time of enrolment as a strategic shareholder.

Selection of strategic shareholders

Under Circular 10, equitising state-owned commercial banks must, pursuant to the provisions of Circular 10, establish their own specific criteria for selecting strategic shareholders. For state-owned commercial banks that are being equitised, these criteria will be included in the scheme of state-owned commercial bank equitisations, or in the plan for selecting strategic shareholders in the case of state-owned commercial banks that have been equitised.

Notably, equitising state-owned commercial banks must submit these plans/schemes to the Prime Minister for approval, and can only use the criteria to select strategic shareholders after being granted approval by the Prime Minister.

Additional regulations on Land Use Right Certificates

On 22 October 2010, the Ministry of Natural Resources and Environment (MONRE) issued Circular 20/2010/TT-BTNMT (*Circular 20*) providing supplemental guidelines on certificates of land use rights, house ownership and other assets attached to land (*the Certificate*). Circular 20 came into effect on 10 December 2010 and amended a number of articles provided in Circular No. 17/2009/TT-BTNMT dated 21 October

2009 (*Circular 17*). Moreover, the additional regulations on procedures for the issuance and amendment of the Certificates is also provided in Circular 16/2011/TT-BTNMT (*Circular 16*) issued by the MONRE on 20 May 2011 amending a number of matters relating to administrative procedures in the land sector.

To avoid confusion, the Certificates mentioned in this Article are the Certificates stipulated in Law 38/2009/QH12, dated 19 June 2009 amending a number of articles on the laws on land, housing, and construction (*Law 38*).

In brief, Law 38 is concerned with the documentation of certificates of land use rights and the ownership of houses and other assets on land. MONRE has issued a standard form for use throughout the country, however the introduction of this standard form does not nullify the legality of former documents. Therefore, former certificates including certificates of land use right; certificates of residential home ownership; certificates of residential home ownership and the right to use residential land; and certificates of project works ownership, shall remain legally valid, and are not required to be replaced by the new form, (unless a person issued with a former certificate wishes to replace it).

The two Circulars focus specifically on providing the following regulations:

Additional page of the Certificate

Under Circular 20, an additional page is required within a granted certificate in order to reflect any changes in cases of mortgage, or the cancellation of a mortgage of land use rights or ownership of house and assets attached to land; and in cases of the lease or sublease of land, or the cancellation of a lease or sublease of land by infrastructure investors in industrial or hi-tech parks or economic zones.

Before the issuance of Circular 20, all such changes were recorded on the fourth page of the

Certificate. However, with the rapid development of Vietnam's economy, often a single page is not sufficient to record information of such changes, which can include information on changes in land area, floor area, land use purpose, land use duration, land parcel number and land map number, and notation on land use fees owing to the State. Therefore additional pages may now be added to the certificate. Each additional page shall be numbered and the seal of the relevant land use right registration will be fixed on the adjoining edges of this page and the fourth page of the certificate; in addition the words: "Enclosed with this certificate is additional page No. ..." shall be written at the bottom of the fourth page of the certificate, the number of the additional page shall be written in the "Notes" column of the certificate grant book.

Circular 20 requires that any changes be certified in these additional in the prescribed format only and also provides that these pages are an integral part of the Certificate. Therefore, these additional pages must be recognised when considering the current status of a piece of land or assets attached to it, and the ownership rights of the owner.

With respect to certificates that were granted before Circular 20 came into force, these additional pages will be used as per the request of land users. Therefore, the owner of the Certificate, can apply for either a new Certificate, or an amended Certificate with additional pages, in order to expand this section to reflect the details of any changes as described above.

Common and privately held areas

The aforementioned standard form requires the applicant to differentiate between common and privately held areas. In the case where a Certificate holder has part of their assets attached to land under private usage, and another part of their assets attached to land under common usage, these assets must each be detailed in the section reserved for information on assets attached to

land. This is particularly important in the case of ownership of apartments in a residential building, since the information about private and common ownership must be shown clearly. As a result of these regulations, the required information in the Certificate is much more detailed than that of Certificates previously.

Survey and drawing of plans of land plots and assets attached to land

Circular 20 also stipulates detailed provisions relating to the procedures for certificate renewals or registration changes regarding land use rights and the ownership of assets attached to land, which result in the grant of a new Certificate. Accordingly, the re-surveying or re-drawing of a land lot/attached asset plan is only required in the case of:

- Transfer of the ownership of part of the assets attached to land in the granted certificates;
- Additional certification of assets attached to land or changes in the locations, boundaries or areas of assets attached to land, contrary to those indicated in the granted certificates.

Application dossiers for issuance of the Certificate and registration of changes after issuance of the Certificate

Circular 20 and Circular 16 also provide more guidelines for both Decree 88/2009/ND-CP dated 19 October 2009 on the issuance of certificates for land use rights and residential house ownership and other assets attached to land (**Decree 88**) and Circular 17. From the implementation of Law 38, Decree 88, and Circular 17 in practice, Circular 20 and Circular 16 try to provide more detailed regulations to govern this complex sector. Circulars 20 and 16 cover things such as: the documents that are required and that are not required to be attached to an application for the issuance of the Certificate and registration of changes after issuance of the

Certificate, the timeline for the competent authorities to carry out the dossiers, and so on.

Finally, under Circular 20, land users who were allocated or leased land by the State before 1 July 2004, but have not yet received any certificates must submit application dossiers for the grant of certificates. However, land users who are allocated or leased land by the State on or after 1 July 2004 are not required to submit application dossiers for the issuance of the new Certificate. Instead, the granting of certificates and updating and modification of land survey information shall be incorporated into land allocation or lease procedures.

New regulations on standards for auditors

As the economy develops and more enterprises are established in Vietnam, so the demand for ancillary professional services increases: lawyers (of course!), accountants, and also auditors. However, the shortage of suitable qualified professionals can limit expansion and clearly makes business operations more difficult. With the goal of ensuring the best possible standards for finance professionals and bringing qualification requirements more into line with international practice, the Vietnamese Government has reviewed the professional requirements for qualifying auditors in Decree No. 16/2011/ND-CP dated 22 February 2011 (**Decree 16**) amending Decree No. 105/2004/ND-CP on independent audits (**Decree 105**).

Under the regime established by Decree 105, in order to qualify as an auditor, a candidate has been required to hold a bachelor's degree in one of the fields of accounting/auditing, or economics/finance/banking. Whilst this ensured a certain minimum level of know how, in practice, this disbarred candidates who held a masters degree or even a doctoral degree, but who did not have a

bachelor's degree in one of the above-mentioned fields.

According to Decree 16, a qualified auditor must now have a *graduate or post-graduate degree* specialising in economics/finance/banking or accounting/ auditing. Consequently, Decree 16 widens the potential field of candidates able to join the group of qualified auditors in Vietnam.

Additionally, unlike Decree 105, Decree 16 also clarifies the minimum work experience required for the audit qualification. Specifically, an auditor must have at least five years working in finance and accounting, or at least four years working as an assistant auditor at an auditing enterprise calculated *from the year of graduation recorded in the university degree to the year of registration to sit the examination to be issued with an auditor's certificate* by the Minister of Finance. This regulation therefore ignores any working period carried out concurrently with study in the university, or other educational establishment.

New regulations on tax instructions for insurance business

On 24 November 2010, Law 61/2010/QH12 (**Law 61**) was issued to amend and supplement a number of articles of the Law 24/2000/QH10 on Insurance Trading dated 9 December 2000. Consequent to Law 61, the Ministry of Finance promulgated Circular 09/2011/TT-BTC on 21 January 2011 (**Circular 09**) which implements the tax rules imposed on insurance businesses in accordance with Law 61, providing instructions related to value added tax (**VAT**) applicable to insurance businesses. Circular 09 took effect on 9 March 2011 and replaces Circular 111/2005/TT-BTC dated December 13, 2005 of the Ministry of Finance (**Circular 111**).

Services subject to VAT

Under Circular 09, VAT is imposed on the following: non-life insurance and non-life insurance consultancy and brokerage services; assessment, indemnity examination and third party's refund-claiming services; and other goods and services liable to VAT under the VAT law which arise during the operating process of companies engaged in insurance activities.

VAT is not imposed on companies operating in fields such as life insurance, health insurance; accident insurance; student insurance; maritime insurance; passenger insurance; travel insurance; sterilisation insurance; patient insurance; individual life insurance; insurance for electricity users; worker compensation insurance; human healthcare insurance; insurance for livestock, plants and other kinds of agricultural insurance services; reinsurance; insurance agent training; insurance for construction works, oil and gas equipment; and insurance for foreign oil tankers operational in marine areas of Vietnam's sovereignty or overlapping marine areas shared by Vietnam and other countries.

Compared to Circular 111, Circular 09 also includes non-life insurance consultancy and brokerage services as services which are now subject to VAT. Moreover, with respect to the services **not** liable to VAT, Circular 09 specifically includes the fields of reinsurance and insurance agent training services, as well as excluding insurance services provided to international transportation vehicles.

Who is liable for the VAT?

Similarly to Circular 111, the VAT payers will be the insurance enterprises, insurance brokerage enterprises and other insurance organisations that provide the goods or services subject to VAT mentioned above. However, it is likely that as with all businesses, such costs will ultimately be passed onto the consumer.

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Tax rate and tax calculation prices, incentives for foreign investors

The regulations relating to the tax calculation prices remain unchanged. Thus, the VAT calculation price is the VAT-exclusive original insurance premium, covering also surcharges and additional charges in addition to the service charges which an insurance enterprise is entitled to charge, excluding surcharges and compulsory appropriations it has to remit into the state budget. For agent services, the price for determining VAT is the VAT-exclusive remuneration or commission amount (before deductions to pay expenses for agent services). For insurance brokerage services, the price for determining VAT is the VAT-exclusive brokerage commission amount minus the reduced amount

of insurance brokerage commission for brokerage services collected by the relevant insurance enterprise.

However, unlike Circular 111, Circular 09 provides that a 0% tax rate is applicable with respect to insurance services, insurance brokerage services and assessment, indemnity examination, third party refund-claim and 100% indemnity-eligible goods handling agency services provided to enterprises located in non-tariff zones or overseas organisations and individuals who shall be construed as foreign organisations and individuals not residing in Vietnam. A 10% tax rate is imposed on other insurance business services subject to VAT, apart from those described above.