



# New regulations affecting foreigners' investment activities

Vietnam's Ministry of Finance has issued a new decision on the activities of foreign investors in the Vietnamese securities market. This briefing summarises the new regulations and their implications for foreign investors and local securities services providers.

About two years after the effective date of the first Securities Law of Vietnam and a long period of consultation, with various draft regulations released by the authorities for discussion with the participants in Vietnam's securities industry, the Ministry of Finance (the MOF) issued Decision 121/2008 passing new regulations on the activities of foreign investors in the Vietnamese securities market.

Decision 121 aims at widening and strengthening the securities regulators' monitoring of foreign investors' activities in Vietnam. It generally increases the level of registration and reporting requirements for foreign investors and their securities services providers in Vietnam with respect to listed and unlisted investment in Vietnam. Decision 121 also prohibits the provision of asset management services by persons other than local fund management companies, while unfortunately raising a number of issues and uncertainties that will probably take time to be clarified by the authorities.

Although Decision 121 is dated 24 December 2008, it was not posted on the State Securities Commission's website (the SSC) until the week beginning 12 January 2009. Decision 121 will become effective only 15 days after it is published in the *Official Gazette*. It has not yet been published in the *Official Gazette*, so our comments here are based on the text posted on the website.

## Foreign investors

Under Decision 121, 'foreign investors' include not only individuals of foreign nationality (including

'Viet Kieu', ie overseas Vietnamese) and organisations established abroad, but also (i) branches in Vietnam of foreign organisations; (ii) 100 per cent foreign-owned organisations established and operating under Vietnamese law and their branches; and (iii) investment funds established abroad (which are probably already captured as organisations established abroad) and 100 per cent foreign-owned local investment funds.

## Foreign investment subject to the obligation to obtain an ST code

Until the effective date of Decision 121, only foreign investors investing in listed securities are required to obtain a securities trading code (an ST code) from the Vietnam Securities Depository (the VSD).

Under Decision 121, a foreign investor (i) investing in any type of shares, bonds and other Vietnamese securities (irrespective of whether they are listed or registered for trading) or contributing capital in local securities investment funds or local enterprises, or (ii) participating in auctions to purchase securities or capital in enterprises undergoing equalisation, will have to obtain an ST code from the VSD through a depository member (ie either the custodian bank appointed by the foreign investor or, if the foreign investor does not appoint one, the foreign investor's securities company). Foreign investors investing only through a local fund management company under a portfolio management agreement will not have to apply for an ST code (in such cases the burden of obtaining an ST code in relation to the

portfolio management activity will fall on the local fund management company and in accordance with guidance to be issued by the VSD).

The scope of types of investment requiring a foreign investor to obtain an ST code is much wider under Decision 121 than it is under current regulations. Indeed, Decision 121 catches at least all foreign indirect investment in Vietnam (with the exception, as mentioned above, of cases where a foreign investor entrusts a local fund management company to perform its investment under a portfolio management agreement). The wording of Decision 121 is wide enough to, arguably, require a foreign investor to obtain an ST code from the VSD for any type of investment in Vietnam, including 'foreign direct investment'. We do not believe that this was the regulators' intention, especially given the general scope of Decision 121 ('guidelines on investment activities of foreign institutions and individuals in the Vietnamese securities market') and that Decision 121 lists permitted investments of foreign investors 'in the Vietnamese securities market' (although there is no clear definition of 'Vietnamese securities market', it is generally understood to exclude direct investment).

We also understand that SSC officials who have been asked to comment on this aspect of Decision 121 have informally advised that foreign investors carrying out only 'foreign direct investment' in unlisted enterprises will not have to obtain an ST code. This appears to make sense because the MOF does not usually supervise foreign direct investment (we note, however, that the contours of 'direct investment' and 'indirect investment' are in themselves uncertain) and the supervision of the VSD over foreign direct investment in unlisted enterprises would be an oddity. Ideally the MOF or the SSC would officially clarify the specific types of foreign investment that require an ST code and the ones that do not. We have suggested that such clarifications should, to the extent possible, adopt practical, objective and clear criteria to determine whether an ST code is required; for instance, foreign investment that requires the issue of an investment certificate or licence would not in itself require an ST code. If no clarification is provided, for the sake of security, all foreign investors (including foreign investors with only direct investment in unlisted enterprises) will have to consider applying for an ST code while complying with the other obligations set out in Decision 121.

The requirements on the documentation needed to apply for an ST code are generally less cumbersome than under the current regulations, but still imply that some foreign documents be notarised offshore, legalised by a Vietnamese consulate and translated into Vietnamese with certified translation. Although the standard application form for foreign institutional investors is mainly a tick-the-box sheet, the level of disclosure expected from the foreign institutional investor on its organisational structure, shareholders and investments plans in Vietnam is extensive.

Foreign investors already investing in investments requiring an ST code under Decision 121 at its date of effectiveness, but who do not have yet an ST code, will have to apply for one within three months of the effective date of Decision 121. This will mainly affect foreign investors investing only in unlisted securities or contributing capital in local investment funds or enterprises (who currently do not need to obtain an ST code). The three-month window for registration appears relatively short, especially given the requirements on the form of the supporting documents that need to be filed with the VSD with the application form and the various issues and uncertainties highlighted herein.

## **Requirements and limited role of the trading representative**

Subject to a prior registration with the VSD, a foreign investor may appoint a trading representative to execute trades/investment transactions on its behalf. A 'trading representative' is defined as an individual in Vietnam who is appointed or authorised by a foreign investor to make certain transactions and/or investments (excluding investment that amounts to capital contributions in local securities, investment funds or local enterprises).

The wording of Decision 121 suggests that the trading representative can be either a Vietnamese national or a foreigner. A trading representative will be subject to various ad hoc and periodic reporting requirements to the authorities in relation to the investment activities of the foreign investor who has appointed him. Most important, a trading representative will have to comply with the trading and payment instructions given by the foreign investor and will not be allowed to make any investment decision for the foreign investor.

Consequently, a trading representative will not be allowed to execute or implement any transaction for the foreign investor before he receives, for each transaction, a specific trading order or investment instruction from the foreign investor. Decision 121 is unclear on whether the foreign investor and the trading representative will have to enter into an 'investment instruction agreement' with the standard terms provided in an appendix of Decision 121.

It seems that a foreign investor will be allowed to appoint only one trading representative. A trading representative will have to satisfy various qualification requirements, such as having a 'clean' criminal and securities regulatory record, holding a securities practitioner's certificate issued by the SSC and not being employed by a securities company, fund management company or custodian bank operating in Vietnam. Though it is not clear, the latter requirement would arguably imply that staff of a foreign securities company or fund management company that has a representative office in Vietnam will not be allowed to be appointed as the trading representative of a foreign investor.

However, it is uncertain whether an individual who is defined under Decision 121 as an authorised representative of a foreign institutional investor (ie the chairman of the board or the CEO; someone who has the power under the foreign institutional investor's constitutional documents to sign documents on behalf of the foreign institutional investor; or a person who is authorised in writing by the chairman of the board or the CEO) but is not appointed as a trading representative and is physically in Vietnam will need to comply with the requirements applicable to trading representatives. The wording of Decision 121 suggests that an authorised representative will not have to comply, even if he is based in Vietnam. However, if this is the case it is difficult to understand the rationale for imposing strict requirements and prohibitions on trading representatives and, for instance, not on individuals authorised in writing by the chairman of the board or CEO of a foreign institutional investor (who, by definition, are authorised representatives in the meaning of Decision 121), especially in cases where such individuals are in Vietnam. The authorities will probably take the view that a foreign investor's authorised representative will have to comply with the conditions applicable to trading representatives.

Decision 121 provides that a foreign investor who already has an ST code at the effective date of Decision 121 and whose trading representative meets the various conditions set out in Decision 121 (see above) will have to file a report to the VSD including various supporting documents evidencing that the trading representative complies with such conditions by the end of the third month following the effective date of Decision 121. However, it is unclear whether the foregoing requirement imposes any real deadline for the appointment of a trading representative by a foreign investor who already has an ST code – and whether such foreign investors would be precluded from appointing a trading representative after the deadline. Interestingly, Decision 121 does not deal with the situation of 'delegated persons' nominated in accordance with the current regulations by a foreign institutional investor with an ST code before the date Decision 121 comes into effect. Presumably a delegated person will not be allowed to give or implement transaction instructions on behalf of a foreign institutional investor from the effective date of Decision 121, unless of course he qualifies as an authorised representative of a foreign institutional investor under Decision 121 (see above) or is nominated as trading representative and registered as such by the VSD upon application by the foreign investor.

## **The role of local securities companies**

A foreign investor may appoint a local securities company to execute trades/investment transactions on its behalf on the terms of an investment instruction agreement, with standard terms provided in an appendix of Decision 121, under specific trading orders or investment transaction instructions for each trade/investment transaction. This clearly excludes cases where the securities company can make any investment decision for the foreign investor.

## **The role of fund management companies**

Under Decision 121, a local fund management company will be able to assist a foreign investor in the following ways:

- providing portfolio management services under a 'portfolio management agreement' between the foreign investor and the local fund management

company, whereby the foreign investor entrusts a certain amount of money to the local fund management company, which in turn invests the money in accordance with an agreed investment plan. In such a case, the local fund management company needs to obtain one or more ST codes for the activity in accordance with guidance to be provided by the VSD; or

- implementing investment transactions on behalf of the foreign investor on the terms of an ‘investment instruction agreement’ (with standard terms provided in an appendix of Decision 121) under either specific investment instructions of the foreign investor for each trade/investment transaction or a general scope of authorisation pre-agreed with the foreign investor. In the latter case, the local fund management company actually performs investment decisions in the name of the foreign investor. In both cases, the local fund management company will be able to provide side services to the foreign investor, such as research and analysis of the securities market or the foreign investor’s projects, advice on strategy, tactics, structuring options and allocation of the foreign investor’s capital, regulations, investment procedures, auctions and trading.

Decision 121 provides that ‘a foreign investor may not authorize any individual or institution other than a fund management company licensed to operate in Vietnam to conduct asset management activities, including the selection of type, volume and price of securities, and time of trading or investment transaction’. The foregoing provisions clearly disallow some of the current practices, such as the provision of asset management services to foreign investors (such as offshore investment funds) by staff of offshore asset managers based in Vietnam either through a representative office or otherwise. This will complicate the activities of offshore asset managers managing offshore investment funds who were relying on the prospect of new regulations, once announced by the authorities as imminent, that would have allowed offshore asset managers to establish a branch or a 100 per cent subsidiary in Vietnam earlier than in January 2012 (the timeline agreed under Vietnam’s World Trade Organization commitments). Apparently such new regulations allowing branches and 100 per cent subsidiaries of offshore asset managers are not forthcoming.

On the face of it, the above provisions could also prevent an offshore asset manager from providing any asset management service to an offshore investment fund that invests in Vietnam, though there are strong arguments supporting the position that the Securities Law and its implementing regulations cannot regulate securities services provided offshore to offshore investors by offshore securities services providers. Based on informal discussions with officials of the SSC, this is not the intention of the authorities and such prohibition should be understood as preventing only the provision of asset management services to foreign investors or investment decisions made for or on behalf of foreign investors by individuals or organisations *in Vietnam* that are not local fund management companies. However, it remains unclear where an offshore asset manager managing offshore investment funds will stand and what it will be allowed to do if an offshore investment fund under its management appoints a local fund management company under an investment instruction agreement or a portfolio management agreement.

### **Indirect investment capital account**

Decision 121 suggests that each foreign investor must have one (and only one) indirect investment capital account denominated in Vietnamese dong (an ICCA) with a custodian bank authorised to conduct the foreign exchange business, to carry out its indirect investment activities in Vietnam in both listed and unlisted instruments.

All the following types of money transfers of a foreign investor will have to be made through the unique ICCA of the foreign investor: payments for purchasing or selling shares, bonds or capital contributions to local investment funds or local enterprises that fall within the scope of investment activities requiring an ST code (see above); other payments in relation to the securities investment activities of a foreign investor; the receipt dividends or other distributed profits; and the purchase of foreign currencies for remittance abroad. However, transfers of monies by and to the foreign investors in relation to capital entrusted to a local fund management company under a portfolio management agreement do not need to be made through the foreign investor’s ICCA.

The custodian banks in Vietnam certainly welcome this new rule, which implies that each foreign investor will

have to select one of them to open the ICCA that the foreign investor will have to use for all payments related to its indirect investment activities (and potentially direct investment activities – see above) in Vietnam. The custodian banks are, based on the list posted on the SSC's website: HSBC – Ho Chi Minh City branch; Standard Chartered Bank – Hanoi branch; Deutsche Bank – Ho Chi Minh City branch; Vietcombank; BIDV; Citibank – Hanoi branch; Far East National Bank – Ho Chi Minh City branch; and JPMorgan Chase – Ho Chi Minh City branch.

The rules on opening, managing and closing ICCAs are left to regulations to be issued by the State Bank of Vietnam. Currently, Circular 03 of the State Bank of Vietnam dated 25 May 2004 on foreign exchange control in respect of capital contribution and purchase of shares by foreign investors in Vietnamese enterprises requires each foreign investor investing in unlisted equities in Vietnam (indirect investment only) to (i) open a 'Vietnamese dong capital contribution and share purchase account' with a commercial bank in Vietnam and register with the State Bank of Vietnam; (ii) use that account for all its unlisted equity indirect investments; and (iii) submit quarterly and annual reports in a prescribed form to the State Bank of Vietnam on its unlisted equity indirect investment activities. It is unclear whether the State Bank of Vietnam will impose similar registration and reporting requirements in respect of ICCAs.

## Appointments and changes subject to the approval of, or notice to, the VSD

Any appointment or change by a foreign investor of its local securities company, custodian bank or trading representative will be subject to the approval of the VSD.

A foreign investor with an ST code will have to report to the VSD within two months of a change to any of the information relating to the foreign investor or its investment activities that must be included in an ST code application file or a change of the bank with which the foreign investor maintains its ICCA.

Decision 121 also lists cases where the SSC may suspend for up to six months or even withdraw a foreign investor's ST code.

## What to do before or shortly after Decision 121 becomes effective?

- Foreign investors who already have an ST code will have to review their investment decision processes and liaise with their securities companies and custodian banks to ensure compliance with the new requirements. Offshore fund managers and offshore investment funds investing in Vietnam should carefully review their management structures in the light of Decision 121.
- Foreign investors who do not yet have an ST code will have to liaise with a securities company and a custodian bank to apply for an ST code and ensure compliance with the new requirements.
- Local securities companies or custodian banks will have to obtain clarifications from the MOF or the SSC in respect of the outstanding uncertainties and issues raised by Decision 121. They will also have to review their internal processes in relation to services provided to foreign investors, including in respect of reporting, to ensure compliance with the new requirements.
- Local fund management companies will have to review their internal processes regarding investment services provided to foreign investors, ensuring compliance with the new requirements and potentially identifying new business opportunities offered to them by Decision 121.
- Custodian banks will have to clarify the regime applicable to ICCAs with the State Bank of Vietnam.

---

For further information please contact	Jérôme Buzenet
	T +84 4 3824 7422
	E <a href="mailto:jerome.buzenet@freshfields.com">jerome.buzenet@freshfields.com</a>

Freshfields Bruckhaus Deringer LLP is a limited liability partnership registered in England and Wales with registered number OC334789. It is regulated by the Solicitors Regulation Authority. For regulatory information please refer to [www.freshfields.com/support/legalnotice](http://www.freshfields.com/support/legalnotice). Any reference to a partner means a member, or a consultant or employee with equivalent standing and qualifications, of Freshfields Bruckhaus Deringer LLP or any of its affiliated firms or entities.