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Corporate Governance Manual

Second edition

IFC Advisory Services in East Asia and the Pacific
In partnership with:

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Corporate Governance

Manual

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The State Securities Commission of Vietnam is an organization under the Ministry of Finance of Vietnam, whose purpose is to develop capital markets, regulate securities activities, license market participants, and enforce regulations.

The Vietnamese Corporate Governance Manual (Manual) was commissioned by IFC and The State Securities Commission of Vietnam as part of the Vietnam Corporate Governance Program that IFC is implementing in Vietnam since 2008.

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All references to the male gender throughout this Manual apply to both sexes, unless otherwise indicated.

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IFC International Finance Corporation World Bank Group

FOREWORD

The Corporate Governance Program in Vietnam is implemented by International Finance Corporation in partnership with Finland, Ireland, the Netherlands, New Zealand, and Switzerland.

The Project was launched in September 2009 with the aim of assisting companies and banks in Vietnam to improve their corporate governance standards.

Why is corporate governance important? Good corporate governance will make a company more profitable, enable its growth and increase its access to external finance - domestic and international, public and private. A key factor when deciding to get involved with any business is trust. Without trust, which is reflected in good corporate governance, it is very difficult to attract investors. Nowadays, this is truer than ever - especially in the aftermath of the 2008 global financial crisis. Employees also want to be certain they will obtain a fair share of return on their labor or expertise.

Our Project aims to increase trust between companies and their stakeholders. We are assisting companies and their stakeholders to create an environment based on responsibility and accountability, openness, transparency, performance evaluation and commitments, based on recognized standards of good corporate governance.

The Project is working with policy makers - assisting them to draft new, and amend existing, legislation. We are also helping stock exchanges develop national corporate governance codes and universities to include corporate governance topics in their curricula.

By publishing this Manual, we want to contribute to the growing body of literature on the topic of corporate governance in Vietnam. We hope that this Manual will not only be used by academics and students, but also by shareholders, managers and board members to improve the practice of good corporate governance in their companies.

Juan Carlos Fernandez Zara
Project Manager
IFC Corporate Governance Project in Vietnam

STATE SECURITIES
COMMISSION
OF VIETNAM

FOREWORD

During its past decade of operating, the Vietnamese securities market has made large strides and secured a firm position as a channel for mid- and long-term capital mobilization for national economic development. However, the management and regulations of an emerging securities market have posed numerous challenges to the national securities regulator – the State Securities Commission of Vietnam. The Vietnamese securities market is considered to be developing in a stable manner with a gradually improving legal corridor in line with global securities market regulatory standards. However, the facilitation of capital mobilization for companies needs to be accompanied by guidance on how to implement legal regulations in a correct manner, to ensure transparency and thus a more stable and efficient market.

The quality of commodities has received great attention amid the securities market's establishment and development. As a result of the State's equitization and securities market development policies, the number of public and listed companies on the market has significantly increased. Yet, given the greater number of enterprises transformed to catch up with the equitization roadmap and greater number of shares issued to mobilize capital to further develop enterprises via a booming securities market, Boards of Management and Directors have not paid due attention to the corporate governance quality of public and listed companies.

In its role to establish, regulate and supervise the securities market towards international corporate governance standards and best practices, the State Securities Commission has taken the initiative in obtaining assistance from international organizations to help with the securities market's more transparent and efficient operations. In this regard, the State Securities Commission and International Finance Corporation have published this Manual to provide corporate governance international knowledge, experience and best practices by drawing on comparisons with the reality on the ground in Vietnam. This Manual aims to help public companies enhance their knowledge and improve their corporate governance. It also marks the 10th anniversary of the Vietnamese securities market's opening.

We hope the Manual will be a useful tool for public holding companies, especially listed companies, giving them the knowledge and experience to enhance their professionalism and value in the securities market. The enhanced capacity to apply corporate governance principles also helps the State regulator enhance the application of related international standards and best practices.

The State Securities Commission supports the initiative to publish this Manual and hopes it will serve as a valuable resource for companies. We recommend that joint stock and public companies absorb the knowledge and experiences presented in the Manual which can be applied to local companies' operations.

Vu Bang
Chairman
State Securities Commission of Vietnam

FOREWORD

Since 2000, Vietnam's private sector has grown strongly. The number of companies, especially public companies, has greatly increased. Hundreds of businesses have increased in size and developed towards becoming serious regional and global players. Similarly, Vietnam's economy has also integrated comprehensively, at an increasing depth, into regional and international economies.

However, the language of change has translated into companies facing more ferocious competition pressures. As a result, the need for developing and improving corporate governance, in compliance with national regulations and in alignment with international best practices, has become more acute. To meet these challenges, this Manual will act as a guiding hand to navigate Vietnam's private sector towards sound corporate governance standards. I am confident the value of this Manual will quickly become apparent to companies for a number of reasons.

The comprehensive analysis of Vietnam's prevailing corporate governance regulatory system offers a unique insight into laws, Government decrees, related circulars and Ministry of Finance decisions. The Manual also introduces international good corporate governance practices and offers an analytical comparison with local corporate governance practices within similar contexts. Best practices and approaches are recommended which can be employed to perfect corporate governance within local conditions and the legal framework.

The Manual offers significant value as a reference tool for relevant state agencies polishing Vietnam's corporate governance regulatory framework and adapting international principles and best practices to deal with issues specific to local companies. It will also become essential reading for researchers, graduate students and students, who wish to broaden and improve their corporate governance awareness and knowledge.

The timely arrival of this Manual will provide added impetus to the local business community's journey towards sound corporate governance practices.

Nguyen Dinh Cung, PhD
Vice President
Central Institute for Economic Management

ABOUT IFC

International Finance Corporation (IFC), a member of the World Bank Group, creates opportunity for people to escape poverty and improve their lives. We foster sustainable economic growth in developing countries by supporting private sector development, mobilizing capital for private enterprise, and providing advisory and risk mitigation services to businesses and governments. Our new investments totaled $14.5 billion in fiscal 2009, helping channel capital into developing countries during the financial crisis. For more information, visit www.ifc.org.

IFC's Advisory Services in the Mekong Region

In the Mekong region covering Cambodia, Lao PDR, and Vietnam, IFC advises governments, private companies, and industry sectors on how to grow businesses sustainably and create a healthy investment climate. The work includes advising national and local governments on how to improve the investment climate, expand access to finance for businesses, strengthen basic infrastructure, and raise social and environmental standards. In the Mekong region, our advisory services are delivered in partnership with the European Union, Finland, Ireland, the Netherlands, New Zealand, and Switzerland.

The advisory programs are concentrated in five business lines:

Investment Climate: working with governments, civil society, and private firms to improve conditions for private sector development.

Access to Finance: working with financial institutions and regulators to extend their outreach to smaller businesses.

Environmental and Social Sustainability: working with service providers, governments and NGOs to increase company competitiveness and upgrade labor and environmental standards.

Corporate Advice: working with firms to increase opportunities in potential growth sectors, and supporting the promotion of international best practices in corporate reporting and raising awareness of stakeholder and management responsibilities.

Access to Infrastructure: working with government and private firms for better infrastructure across the region to facilitate growth.

About the Corporate Governance Program:

Assisting companies and investment funds to implement good corporate governance practices, working with regulators to support establishing effective corporate governance frameworks, support to develop training capacities of educational institutions and raising public awareness about corporate governance issues.

Purpose and Target Audience

This Manual provides executives, and shareholders of Vietnamese public companies with a comprehensive summary of the corporate governance framework and practices prevalent in Vietnam today, and a practical toolkit designed to help implement good governance in practice. It provides readers with:

- An overview of the legislative and regulatory requirements related to corporate governance and internationally recognized corporate governance principles.
- Recommendations on how to fulfill the governance obligations of public and listed companies.
- Practical examples of how corporate governance standards can be implemented, and guidance for executives and directors in meeting their obligations with respect to the governance of the enterprise.
- General outlines of authorities, obligations, and procedures of the governing bodies of public and listed companies.

This Manual also provides government officials, lawyers, judges, investors and others with a framework for assessing the level of corporate governance practices in Vietnamese companies. Finally, it serves as a reference tool for educational institutions that will train the next generation of Vietnamese managers, investors, and policy makers on good corporate governance practices.

How to Use this Manual

This Manual is divided into 14 chapters:

Chapter 1: An Introduction to Corporate Governance
Chapter 2: The General Governance Structure of a Company
Chapter 3: The Internal Corporate Documents
Chapter 4: The Board of Directors
Chapter 5: The Executive Bodies
Chapter 6: The Role of the Corporate Secretary
Chapter 7: An Introduction to Shareholder Rights
Chapter 8: The General Meeting of Shareholders
Chapter 9: Corporate Governance Implications of the Charter Capital
Chapter 10: Dividends
Chapter 11: Corporate Governance Implications of Corporate Securities
Chapter 12: Material Corporate Transactions
Chapter 13: Information Disclosure
Chapter 14: Control and Audit Procedures

The 14 chapters of the Manual focus on the key corporate governance issues. All issues are closely examined through Vietnamese law and regulations and when applicable, internationally recognized best practices. While it is recommended to read the entire Manual to gain a full understanding of the corporate governance framework in Vietnam, it is not necessary to read all the chapters in chronological order. The reader is encouraged to begin with a topic of interest and follow the links and references included in the text for guidance to other chapters.

Examples, illustrations and checklists are included to make the Manual clear and useful. The following tools will reappear at various intervals in the text:

? The Chairman's Checklist

- The Chairman's Checklist is intended to help the Chairman of the Board of Directors focus Board discussions on key corporate governance issues faced by companies.

Best Practices:

- Best Practices summarizes OECD Principles of Corporate Governance, as well as leading national standards from other countries.

Comparative Practices:

- Comparative Practices illustrate how other countries currently approach corporate governance issues. It highlights red flags, i.e. common corporate governance abuses as well as model company practices in good corporate governance.

Company Practices

Mini-Case:

Mini-Case 1

- Mini-cases illustrate abstract concepts and show the real problems that companies face.
- Figures, tables, and other illustrations are included to illustrate key concepts.
- Detailed references to law and regulations refer the reader to original texts.

List of References (with Abbreviations)

Civil Code	Civil Code of the National Assembly dated June 14, 2005.
Company Law (CL)	Company Law adopted by the National Assembly dated December 21, 1990.
	Draft Law on Independent Auditing - March, 2010.
Labor Code	Labor Code of the National Assembly dated June 23, 1994, as amended by the National Assembly on April 2, 2002, November 29, 2006 and April 1, 2007.
Law on Bankruptcy (LOB)	Law on Bankruptcy No. 21/2004/QH11 adopted by the National Assembly dated June 15, 2004.
Law on Competition (LOC)	Law on Competition No. 27/2004/QH11 adopted by the National Assembly dated December 3, 2004.
Law on Credit Institutions (LCI)	Law on Credit Institutions adopted by the National Assembly on December 12, 1997, as amended by the National Assembly on June 15, 2004, and replaced by the new law No. 47/2010/QH12 adopted by the National Assembly on Jun 16, 2010 with effect from January 1, 2011.
Law on Enterprises (LOE)	Law on Enterprises No. 60/2005/QH11 adopted by the National Assembly dated November 29, 2005, as amended by the law on amending a number of articles of laws relating to capital construction dated June 19, 2009.
Law on Foreign Investment (LFI)	Law on Foreign Investment adopted by the National Assembly dated December 29, 1987.
Law on Insurance Business (LSB)	Law on Insurance Business adopted by the National Assembly on December 9, 2000.

Law on Investment (LOI)	Law on Investment No. 59/2005/QH adopted by the National Assembly on November 29, 2005.
Law on Private Enterprises (LPE)	Law on Private Enterprises adopted by the National Assembly dated December 21, 1990.
Law on Real Estate Business (LREB)	Law on Real Estate Business adopted by the National Assembly dated June 29, 2006.
Law on Securities (LOS)	Law on Securities No. 70/2006/QH11 adopted by the National Assembly dated June 29, 2006.
Law on SOEs (LOSOEs)	Law on State-Owned Enterprises adopted by the National Assembly dated April 20, 1995.
Law on State Bank (LSB)	Law on State Bank of Vietnam adopted by the National Assembly on December 12, 1997, as amended by the National Assembly on June 17, 2003, and replaced by the new law No. 46/2010/QH12 adopted by the National Assembly on Jun 16, 2010 with effect from January 1, 2011.
Penal Code	Revised Penal Code No.37/2009/QH12 of the National Assembly dated June 19, 2009.
Decree 01	Decree 01/2010/ND-CP on the private placement of shares dated January 4, 2010.
Decree 14	Decree 14/2007/ND-CP dated January 19, 2007 on implementing the Law on Securities.
Decree 27	Decree 27/2007/ND-CP dated February 23, 2007 on e-transactions in financial activities.
Decree 30	Decree 30/2009/ND-CP dated March 30, 2009 amending and supplementing a number of articles of Decree No. 105/2004/ND-CP dated March 30, 2004, on independent audits.
Decree 43	Decree 43/2010/ND-CP dated April 15, 2010 on business registration (replaced Decree 88/2006/ND-CP dated August 9, 2006).
Decree 45	Decree 45/2007/ND-CP dated March 27, 2007 implementing the Law on Insurance Business.
Decree 46	Decree 46/2007/ND-CP dated March 27, 2007

	on the financial regime applicable to insurance businesses.
Decree 52	Decree 52/2006/ND-CP dated December 28, 2006 on issuing regulations on corporate bonds.
Decree 53	Decree 53/2009/ND-CP dated June 4, 2009 on the issuance of international bonds.
Decree 59	Decree 59/2009/ND-CP dated July 16, 2009 on the organization and operation of commercial banks.
Decree 84	Decree 84/2010/ND-CP dated August 2, 2010 amending and supplementing some articles of Decree 14/2007/ND-CP.
Decree 85	Decree 85/2010/ND-CP dated August 2, 2010 on the sanctioning of administrative violations in the domain of securities and the securities market (replaced Decree 36/2007/ND-CP dated March 3, 2007).
Decree 105	Decree105/2004/ND-CP dated March 30, 2004 on independent audit.
Decree 109	Decree 109/2007/ND-CP dated June 26, 2007 on the transformation of 100% state-owned companies into joint stock companies.
Decree 120	Decree 120/2005/ND-CP dated September 30, 2005 on dealing with breaches in the competition sector.
Decree 129	Decree 129/2004/ND-CP dated May 31, 2004 on implementing the Law on Accounting applicable to business activities.
Decree 102	Decree 102/2010/ND-CP dated October 1, 2010 on implementing a number of articles in the Law on Enterprises (replaced Decree 139/2007/ND-CP dated September 5, 2007).
Decree 146	Decree 146/2005/ND-CP dated November 23, 2005 on the financial regime applicable to credit institutions.

Circular 06	Circular 06/2010/TT-NHNN dated February 26, 2010 guiding the organization, governance, administration, charter capital, transfer of shares and supplementation and modification of licenses or charters of commercial banks (replaced Decision 383/2002/QD-NHNN and Decision 1087/2001/QD-NHNN).
Circular 09	Circular 09/2010/TT-BTC of the Ministry of Finance dated January 15, 2010 guiding the disclosure of information on the securities market.
Circular 17	Circular 17/2007/TT-BTC of the Ministry of Finance dated March 13, 2007 guiding initial public offerings.
Circular 18	Circular 18/2007/TT-BTC of the Ministry of Finance dated March 13, 2007 guiding the redemption and resale of stocks and some cases of additional issuances of public company stocks.
Circular 19	Circular 19/2003/TT-BTC of the Ministry of Finance dated March 20, 2003 guiding the increase and reduction of charter capital and the management of treasury shares in joint stock companies.
Circular 50	Circular 50/2009/TT-BTC of the Ministry of Finance dated March 16, 2009 guiding electronic trading on the securities market.
Circular 60	Circular 60/2004/TT-BTC of the Ministry of Finance dated June 18, 2004 guiding the issuance of stocks to the public.
Circular 62	Circular 62/2009/TT-BTC of the Ministry of Finance dated March 27, 2009 providing further guidance and clarification for the application of Circular 84/2008/TT-BTC dated 30 September 2008 guiding on the Law on Personal Income Tax.
Circular 64	Circular 64/2004/TT-BTC of the Ministry of Finance dated June 29, 2004 guiding the implementation of some articles of Decree 105/2004/ND-CP.

Circular 84	Circular 84/2008/TT-BTC of the Ministry of Finance dated September 30, 2008 guiding a number of articles of the Law on Personal Income Tax.
Circular 86	Circular 86/2009/TT-BTC of the Ministry of Finance dated April 28, 2009 amending some provisions of Circular 155/2007/TT-BTC dated December 20, 2007.
Circular 155	Circular 155/2007/TT-BTC of the Ministry of Finance dated December 20, 2007 guiding the implementation of a number of articles from Decree 45 dated March 27, 2007 guiding the implementation of a number of articles from the Law on Insurance, as amended by Circular 86 of the Ministry of Finance dated April 28, 2009.
Circular 156	Circular 156/2007/TT-BTC of the Ministry of Finance dated December 20, 2007 guiding the implementation of a number of articles from Decree 45 dated March 27, 2007 guiding the financial regimes applicable to insurance and insurance brokerage companies.
Circular 194	Circular 194/2009/TT-BTC of the Ministry of Finance dated October 2, 2009 guiding the public bidding offering of public company shares.
Decision 01	Decision 01/2009/QD-TTg of the Prime Minister dated January 2, 2009 on establishing the Hanoi Stock Exchange.
Decision 12	Decision 12/2007/QD-BTC of the Ministry of Finance dated March 13, 2007 promulgating corporate governance regulations applicable to companies listed on the stock exchange/securities trading center.
Decision 13	Decision 13/2007/QD-BTC of the Ministry of Finance dated March 13, 2007 promulgating regulations on the prospectus forms of companies listed on the stock exchange/securities trading center.

Decision 15	Decision 15/2007/QD-BTC of the Ministry of Finance dated March 19, 2007 on the Model Charter applicable to companies listing on the stock exchange. Decision 15/2008/QD-TTLK dated April 2, 2008 issuing regulations on exercising shareholders' rights.
Decision 24	Decision 24/2007/QD-NHNN of the State Bank of Vietnam dated June 7, 2007 issuing regulations on the issuance of establishment and operation certificates for joint stock commercial banks.
Decision 27	Decision 27/2007/QD-BTC of the Ministry of Finance dated April 24, 2007 issuing regulations on the organization and operation of securities companies, as amended by Decision 126/2008/QD-BTC of the Ministry of Finance dated December 26, 2008.
Decision 36	Decision 36/2006/QD-NHNN dated August 1, 2006 issued by the Governor of the State Bank of Vietnam, on the issuance of the regulation on the internal inspection and control of credit institutions.
Decision 37	Decision 37/2006/QD-NHNN dated August 1, 2006 issued by the Governor of the State Bank of Vietnam, on the issuance of the regulation on the internal audit of credit institutions.
Decision 87	Decision 87/2007/QD-BTC of the Ministry of Finance dated October 22, 2007 providing regulations on the registration, depository, clearing and payment of securities.
Decision 112	Decision 112/2009/QD-TTg of Prime Minister dated September 11, 2009 on regulating roles, responsibilities of State Securities Commission.
Decision 168	Decision 168/QD-SGDHCM dated December 7, 2007 issued by the Ho Chi Minh Stock Exchange general director promulgating the regulations on listing securities on the Ho Chi Minh Stock Exchange.

Decision 234	Decision 234/2003/QD-BTC of the Ministry of Finance dated December 30, 2003 on promulgating Vietnamese Accounting Standards.
Decision 324	Decision 324/QD-SGDHN dated June 4, 2010 issued by the Hanoi Stock Exchange's director promulgating regulations for listing securities on the Hanoi Stock Exchange (replaced Decision 420/QD-TTGDCKHN).
Decision 832	Decision 832/TC-QD-CDKT dated October 28, 1997 on the promulgation of internal audit regulations applicable to State-Owned Enterprises.
OECD Principles	OECD Principles of Corporate Governance (2004).
	Serbian Corporate Governance Manual Second Edition Published by IFC in 2008.

Frequently Used Abbreviations and Acronyms

AGM	Annual General Meeting of Shareholders
AICPA	American Institute of Certified Public Accountants
Board	Board of Directors
Chairman	Chairman of the Board of Directors
CII	Council of International Investors
CL	Company Law
CPA	Certified Public Accountant
EGM	Extraordinary General Meeting of Shareholders
EU	European Union
FASB	Financial Accounting Standards Board
FIEs	Foreign-Invested Enterprises
GCGF	Global Corporate Governance Forum
GMS	General Meeting of Shareholders
HNX	Hanoi Stock Exchange
HOSE	Ho Chi Minh Stock Exchange
IAS	International Accounting Standard
IFC	International Finance Corporation
IOSCO	International Organization of Securities Commissions
IPO	Initial Public Offering
LCI	Law on Credit Institutions
LDI	Law on Domestic Investment
LFI	Law on Foreign Investment

LIB	Law on Insurance Business
LLCs	Limited Liability Companies
LOA	Law on Accounting
LOB	Law on Bankruptcy
LOC	Law on Competition
LOE	Law on Enterprises
LOI	Law on Investment
LOS	Law on Securities
LOSOE	Law on State-Owned Enterprises
LPE	Law on Private Enterprises
LREB	Law on Real Estate Business
LSB	Law on State Bank
MOF	Ministry of Finance
MoLISA	Ministry of Labor, Invalids and Social Affairs
MPI	Ministry of Planning and Investment
MPS	Ministry of Public Security
NACD	National Association of Corporate Directors
NASDAQ	National Association of Securities Dealers Automated Quotation
NGOs	Non-Governmental Organizations
OECD	Organization for Economic Cooperation and Development
OECD Principles	OECD Principles of Corporate Governance
OTC	Over-the-Counter Market
PIT	Personal Income Tax
SBV	State Bank of Vietnam

SCIC	State Capital Investment Corporation
SOEs	State-Owned Enterprises
SSC	State Securities Commission of Vietnam
The CG Regulations	Decision 12 of the Ministry of Finance dated March 13, 2007 providing regulations on corporate governance applicable to listed companies
The Model Charter	The Model Charter issued together with Decision 15 of the Ministry of Finance dated March 19, 2007
UPCOM	Unlisted Public Company Market
U.S.	United States
U.K.	United Kingdom
VACPA	Vietnam Association of Certified Public Accountants
VAFI	Vietnam Association of Financial Investors
VSD	Vietnam Securities Depository
WTO	World Trade Organization

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The Vietnamese Manual was produced as a part of IFC's Corporate Governance Program in Vietnam. The Manual's text was adapted by Hoang Thi Thanh Thuy and Nguyen Thanh Ngan.

Nguyen Nguyet Anh (Project Officer, IFC) was in charge of the contents and publication of the Vietnamese Manual under direct supervision of Juan Carlos Fernandez Zara (Project Manager, IFC). The development of the Manual was also contributed to by Nguyen Van Lan (Project Manager, IFC), Pham Lien Anh (Project Officer, IFC) and Chu Van Anh (Communication Analyst, IFC).

Overall support was provided by Simon Andrews (Regional Country Manager, IFC Mekong) and Cerstin Sander (Regional Business Line Leader, Corporate Advice & Sustainability, IFC). Technical support was provided by Charles Travis Canfield (Senior Corporate Governance Officer, CG Unit, IFC).

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1

Chapter

AN INTRODUCTION TO CORPORATE GOVERNANCE

1 | An Introduction to Corporate Governance

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The Chairman's Checklist

- ☑ Do all directors and key executives understand the concept of corporate governance and its significance to the company and its shareholders?
- ☑ Has the Board of Directors developed a clear and explicit governance policy, and a plan to improve the company's governance practices? Have steps been taken to implement this plan?
- ☑ Has the company formally nominated an individual, for example the Corporate Secretary, or established a Board of Directors committee, or a similar body responsible for supervising the corporate governance policies and practices of the company?
- ☑ Are key officers familiar with the OECD Principles of Corporate Governance, legal framework of Corporate Governance in Vietnam, and the Corporate Governance Regulations applicable to listed companies in Vietnam (the CG Regulations)?[1] Does the company follow the requirements of the CG Regulations and disclose information on compliance to shareholders and stakeholders in its annual report? Has the company adopted its own Corporate Governance Code? Has the company included in financial reports a report on its corporate governance structure and practices?
- ☑ Is the company familiar with the main institutions active in the field of corporate governance that can serve as external resources for the company?

1 Decision 12 of the Ministry of Finance (MOF) dated 13 March 2007 providing regulations on corporate governance applicable to listed companies.

Corporate governance has become a familiar and increasingly popular term in Vietnam. With the introduction of the 1999 Law on Enterprises,[2] the role of the private sector in economic development and job creation in Vietnam began to accelerate. The following decade brought increasingly sophisticated domestic production, private enterprise growth and increased global competition. The downside to these developments has been the occurrence of major corporate scandals. While various domestic and international efforts have made corporate governance a household name, few Vietnamese companies appear to truly appreciate the depth and complexity of this topic.

Indeed, corporate governance reforms are often introduced superficially and used as a public relations exercise, rather than as a tool to introduce the internal structures and processes that enable a company to hold the trust of its shareholders, increase the company's ability to access capital and reduce vulnerability to financial crises. But to successfully introduce these structures and processes, a company must fully and continually commit to the principles of fairness, transparency, accountability and responsibility.

This chapter defines corporate governance, makes a business case for its implementation, and provides an overview of the legal, regulatory and institutional frameworks for corporate governance in Vietnam today.

2 The LOE adopted by the National Assembly dated 12 June 1999, as repealed and replaced by the LOE adopted by the National Assembly dated 29 November 2005, as amended by the law on amending a number of articles of laws relating to capital construction dated 19 June 2009.

A. Corporate Governance Explained

1. Defining Corporate Governance

There is no single definition of corporate governance that can be applied to all situations and jurisdictions. The various definitions that exist today largely depend on the institution or author, country and legal tradition.

IFC defines corporate governance as "the structures and processes for the direction and control of companies." The Organization for Economic Cooperation and Development (OECD), which in 1999 published its Principles of Corporate Governance, offers a more detailed definition of corporate governance as:

> *"The internal means by which corporations are operated and controlled […], which involve a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and shareholders, and should facilitate effective monitoring, thereby encouraging firms to use resources more efficiently."*[3]

Most definitions that center on the company itself (an internal perspective) do, however, have certain elements in common, which can be summarized as follows:

- **Corporate governance is a system of relationships, defined by structures and processes:** For example, the relationship between shareholders and management consists of the former providing capital to the latter to achieve a return on their (shareholders') investment. Managers in turn are to provide shareholders with financial and operational reports on a regular basis and in a transparent manner.

3 OECD Principles of Corporate Governance (see also: www.oecd.org).

Shareholders also elect a supervisory body, often referred to as the Board of Directors or Supervisory Board, to represent their interests. This body essentially provides strategic direction to, and control over, the company's managers. Managers are accountable to this supervisory body, which in turn is accountable to shareholders through the General Meeting of Shareholders (GMS). The structures and processes that define these relationships typically center on various performance management and reporting mechanisms.

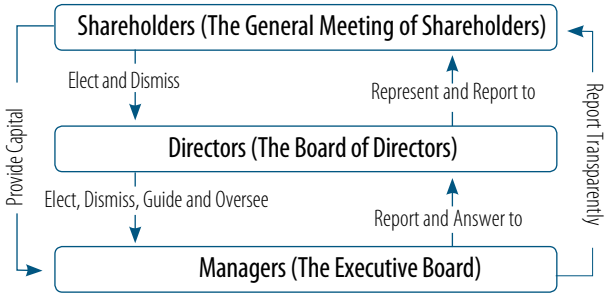
- **These relationships may involve parties with different and sometimes contrasting interests:** Differing interests may exist between the main governing bodies of the company, i.e. the GMS, the Board of Directors, and/or the General Director (or other executive bodies). Contrasting interests exist most typically between owners and managers, and are commonly referred to as the principal-agent problem.[4] Conflicts may also exist within each governing body, such as between shareholders (majority vs. minority, controlling vs. non-controlling, individual vs. institutional) and directors (executive vs. non-executive, outside vs. inside, independent vs. dependent). Each of these contrasting interests needs to be carefully observed and balanced.
- **All parties are involved in the direction and control of the company:** The GMS, representing shareholders, takes fundamental decisions, for example the distribution of profits and losses. The Board of Directors is generally responsible for guidance and oversight, setting company strategy and controlling managers. Executives, finally, run the day-to-day operations, such as implementing strategy, drafting business plans, managing human resources, developing marketing and sales strategies, and managing assets.

4 The principal-agent problem is defined as follows by the Oxford Dictionary of Economics: "The problem of how Person (A) can motivate Person (B) to act for (A's) benefit rather than following his self-interest." In a company setting, Person (A) is the investor (or principal) and (B) the manager (or agent). Managers at times may follow different goals than investors (e.g. building business empires rather than creating shareholder value), act dishonestly and, at times, even in an incompetent manner. This essentially creates three types of agency costs: (i) divergence costs (i.e. managers that do not maximize the investors' wealth); (ii) monitoring costs (investors have to develop and implement control structures), including replacement costs; and (iii) incentive costs (costs incurred by investors to remunerate and incentivize their managers). The core role of a corporate governance system is to reduce total agency costs, thus maximizing the value of the company to investors.

- **All this is done to properly distribute rights and responsibilities and thus increase long-term shareholder value**: For example, how outside, minority shareholders can prevent a controlling shareholder from gaining benefits through related party transactions, tunneling or similar means.[5]

The basic corporate governance system and the relationships between the governing bodies are depicted in Figure 1.

Figure 1: The Corporate Governance System



Source: IFC, March 2004

The external aspect of corporate governance, on the other hand, concentrates on relationships between the company and its stakeholders. Stakeholders are those individuals or institutions that have an interest in the company. Such an interest may arise through legislation or contract, or by way of social or geographic relationships. Stakeholders include investors, but also employees, creditors, suppliers, consumers, regulatory bodies and state agencies, and the local community in which a company operates. Some commentators also include consideration of the environment as an important entry on the list of stakeholders.

5 Corporate Governance: A Framework for Implementation, the World Bank. See also: http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187283&siteName=WDS&entityID=000094946_00082605593465.

2. The Role of Stakeholders

Many international codes, including the OECD Principles, discuss the role of stakeholders in the governance process. The role of stakeholders in governance has been debated in the past, with some arguing that stakeholders have no claim on the enterprise other than those specifically set forth in law or contract. Others have argued that companies fulfill an important social function, have a societal impact and, accordingly, must act in the broad interests of society. This view recognizes that companies should, at times, act at the expense of shareholders. Interestingly, there is a consensus that modern companies cannot effectively conduct their businesses while ignoring the concerns of stakeholder groups. However, there is also agreement that companies which consistently place other stakeholder interests before those of shareholders cannot remain competitive over the long run.

Best Practices:

A key aspect of corporate governance is ensuring the flow of external capital to firms. Corporate governance is also concerned with finding ways to encourage stakeholders to undertake socially efficient levels of investment in firm-specific human and physical capital. The competitiveness and ultimate success of a corporation is the result of teamwork that embodies contributions from a range of resource providers including investors, employees, creditors and suppliers. Corporations should recognize that stakeholders' contributions constitute a valuable resource for building competitive and profitable companies. It is, therefore, in the long-term interest of corporations to foster wealth-creating co-operation among stakeholders. The governance framework should acknowledge that the interests of the corporation are served by recognizing the interests of stakeholders and their contribution to the long-term success of the corporation. Therefore, it is in the interest of the company to stimulate productive co-operation with the stakeholders, establish a governance framework to acknowledge the existence of these interests and recognize their importance for the long-term success of the company.

3. A Brief History of Corporate Governance

Corporate governance systems have evolved over centuries, often in response to corporate failures or systemic crises. The first well-documented failure

of governance was the South Sea Bubble in the 1700s, which revolutionized business laws and practices in England. Similarly, much of the securities law in the U.S. was put in place following the stock market crash of 1929. There has been no shortage of other crises, such as the secondary banking crisis of the 1970s in the U.K., the U.S. savings and loan debacle of the 1980s, the 1998 financial crisis in Russia, the 1997-1998 financial crisis in Asia (especially in Indonesia, South Korea and Thailand) and the current global financial crisis which started in 2008 and has not shown signs of ending at the time of this book.

The history of corporate governance has also been punctuated by a series of well-known company failures. The early 1990s saw the Maxwell Group raid the pension fund of the Mirror Group of newspapers and witnessed the collapse of Barings Bank. The new century likewise opened with a bang, with the spectacular collapse of Enron in the U.S., the near-bankruptcy of Vivendi Universal in France, the scandal at Parmalat in Italy, the trading fraud which hit Société Générale and the most recent Madoff multi-billion dollar ponzi scheme, make other scandals pale in comparison. Each of these corporate failures, often occurring as a result of incompetence or outright fraud, was swiftly met by new governance frameworks, most notably the many national corporate governance codes, the Sarbanes-Oxley Act and the current trend towards imposing stricter regulatory oversight on banking and financial activities in various countries.

It is fair to say that, although there is still plenty of room for improvement, the legal and regulatory framework on corporate governance has changed and improved dramatically in recent years. The adoption of (i) the Law on Foreign Investment[6] in 1987, its amendments in 2000 and its later unification with the Law on Enterprises and the Law on Investment[7] in 2005, (ii) the Law on Enterprises in 1999, and its amendments in 2005, (iii) the Law on State Bank[8] in 1997; the Law on Credit Institutions[9] of 1997 and the amendments to both laws in 2003 and 2004, respectively and the replacements of both laws in June 2010, (iv) the Law on Insurance Business[10]

6 The LFI adopted by the National Assembly dated 29 December 1987.

7 The LOI adopted by the National Assembly dated on 29 November 2005.

8 The LSB adopted by the National Assembly dated 12 December 1997, as amended by the National Assembly on 17 June 2003 , and replaced by a new law adopted by the National Assembly dated 16 June 2010 (effective from 1 January 2011).

9 The LCI adopted by the National Assembly dated 12 December 1997, as amended by the National Assembly on 15 June 2004 , and replaced by a new law adopted by the National Assembly dated 16 June 2010 (effective from 1 January 2011).

10 The LIB adopted by the National Assembly dated 9 December 2000.

in 2000, (v) the Competition Law[11] in 2004, and (vi) the Law on Securities[12] in 2006, are but some examples of the many positive changes to the legal and regulatory framework. The adoption of the CG Regulations, although not heavy in detail, certainly must be hailed as another positive step for Vietnam corporate governance, providing the first ever set of corporate governance guidelines for companies in Vietnam, in general and listed companies, in particular.

Figure 2 illustrates some highlights in the history of corporate governance, largely from the western world and Vietnam.

1600s: The **East India Company** introduces a Court of Directors, separating ownership and control (U.K., the Netherlands)

1776: **Adam Smith** in the "Wealth of Nations" warns of weak controls over and incentives for management (U.K.)

1844: First Joint Stock Company Act (U.K.)

1931: **Berle and Means** publishes its seminal work "The Modern Corporation and Private Property" (U.S.)

1933/34: The Securities Act of 1933 is the first act to **regulate the securities markets,** notably registration disclosure. The 1934 Act delegates responsibility for enforcement to the SEC (U.S.)

1968: The EU adopts its first **company law directive** (EU)

1987: The **Treadway Commission** reports on fraudulent financial reporting, confirming the role and status of audit committees and **develops a framework for internal control,** or COSO, published in 1992 (U.S.)

1987: The National Assembly of Vietnam adopts the Foreign Investment Law

1990: The National Assembly of Vietnam adopts the Company Law[13] and the Law on Private Enterprises[14]

Early 1990s: Polly Peck (£1.3 billion in losses), BCCI and Maxwell (£480 million) **business empires collapse**, calling for improved corporate governance practices to protect investors (U.K.)

11 The LOC adopted by the National Assembly dated 3 December 2004.
12 The LOS adopted by the National Assembly dated 29 June 2006.
13 The CL adopted by the National Assembly dated 21 December 1990.
14 The LPE adopted by the National Assembly dated 21 December 1990.

1992: The **Cadbury Committee** publishes the first code on corporate governance and in 1993, companies listed on the **U.K.'s stock exchanges** are required to disclose governance on a "comply or explain" basis (U.K.)

1994: Publication of the **King Report** (S. Africa)

1994,1995: **Rutteman** (on Internal Controls and Financial Reporting), **Greenbury** (on Executive Remuneration), and **Hampel** (on Corporate Governance) reports are published (U.K.)

1995: Publication of the **Vienot Report** (France)

1995: The National Assembly of Vietnam adopts the **Law on SOEs**[15]

1996: Publication of the **Peters Report** (the Netherlands)

1996: The National Assembly of Vietnam adopts the new **Foreign Investment Law,** which replaces the Foreign Investment Law of 1987

1997: The National Assembly of Vietnam adopts the **Law on State Bank and the Law on Credit Institutions**

1998: Publication of the **Combined Code** (U.K.)

1999: OECD publishes the first international benchmark, the **OECD Principles of Corporate Governance**

1999: Publication of the **Turnbull** guidance on internal controls (U.K.)

1999: The National Assembly of Vietnam adopts the **Law on Enterprises,** which replaces the Company Law and the Law on Private Enterprises

2000: The National Assembly of Vietnam amends the **Foreign Investment Law** of 1996

2000: The National Assembly of Vietnam adopts the **Law on Insurance Business**

2001: **Enron Corporation**, then the seventh largest listed company in the U.S., declares bankruptcy (U.S.)

2001: The **Lamfalussy Report** on the Regulation of European Securities Markets (EU) is published

2002: The Government Office of Vietnam issues the first **Model Charter** of listed companies[16]

2002: Publication of the **German Corporate Governance Code** (Germany)

15 The LOSOEs adopted by the National Assembly dated 20 April 1995.

16 Decision 07/2002/VPCP, applicable to listed companies with effect from 1 January 2003.

2002: The Enron collapse and other corporate scandals lead to the Sarbanes-Oxley Act (U.S.); the **Winter Report** on company law reform in Europe is published (EU)

2003: The **Higgs Report** on non-executive directors is published (U.K.)

2003: The National Assembly of Vietnam adopts the new **Law on SOEs** to replace the Law on SOEs of 1995

2004: The Parmalat scandal shakes Italy, with possible EU-wide repercussions (EU)

2004: The National Assembly of Vietnam adopts the **Law on Competition**

2004: The National Assembly of Vietnam amends the **Law on State Bank** of 1997 and the **Law on Credit Institutions** of 1997

2005: The National Assembly of Vietnam adopts the **new Law on Enterprises** and the **Law on Investment**, which replaces (i) the Foreign Investment Law, (ii) the Law on Enterprises of 1999, and (iii) the Law on SOEs[17]

2006: The National Assembly of Vietnam adopts the **Law on Securities**

2007: The MOF of Vietnam adopts the **CG Regulations** and the **Model Charter.**[18]

2010: The MOF of Vietnam adopts **Circular 09/2010/TT-BTC** governing the disclosure of information on the securities market.

2010: The National Assembly of Vietnam adopts the **new Law on State Bank** and **new Law on Credit Institutions**.

4. The International Scope of Good Corporate Governance

Numerous codes of best practices and corporate governance principles have been developed over the last 10 years. Worldwide, more than 200 codes have been written in some 72 countries and regions.[19] Most of these codes focus on the role of the Supervisory Board or Board of Directors in a company. A handful are international in scope.[20]

17 The replacement of the LOSOEs is being phased out until 1 July 2010 to give time for the equalization of all state-owned enterprises (SOEs). See Article 166 of the LOE.

18 The Model Charter issued together with Decision 15 of the MOF dated 19 March 2007.

19 For a complete list of country codes of corporate governance, see the website of the European Corporate Governance Institute at www.ecgi.org.

20 Corporate governance codes of international scope include the OECD Principles of Corporate Governance (www.oecd.org), the International Corporate Governance Network's Statement on Global Corporate Governance Principles (ICGN - www.icgn.org), and the Commonwealth Association of Corporate Governance (CACG – www.commonwealthfoundation.com).

Among these, only the OECD Principles address both policymakers and businesses, and focus on the entire governance framework (shareholder rights, stakeholders, disclosure and board practices). The OECD Principles have gained worldwide acceptance as a framework and reference point for corporate governance. Published in 1999 and revised in 2004, they were developed to provide principle-based guidance on good governance.

The OECD corporate governance framework is built on four core values:

- **Fairness:** The corporate governance framework should protect shareholder rights and ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violations of their rights.
- **Responsibility:** The corporate governance framework should recognize the rights of stakeholders as established by law, and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.
- **Transparency:** The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the company, including its financial situation, governance structure, performance and ownership.
- **Accountability:** The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the Board, and the Board's accountability to the company and shareholders.

Many national corporate governance codes have been developed based on the OECD Principles. Vietnam's CG Regulations were also developed based on the OECD Principles and contain certain principles which conform to international best practices. For instance, the CG Regulations state that (i) they were developed to ". . . help ensuring the sustainable development of the securities market and contributing to a cleaner and healthier economy", that (ii) "[The] regulations set out the basic rules of corporate governance with a view to protecting legitimate rights and obligations of shareholders, establishing standards for professional acts and morality of the directors, the Board of Directors, the Supervisory Board and the managers of the listed company", and that (iii) "the regulations also serve as the basis for assessing the implementation

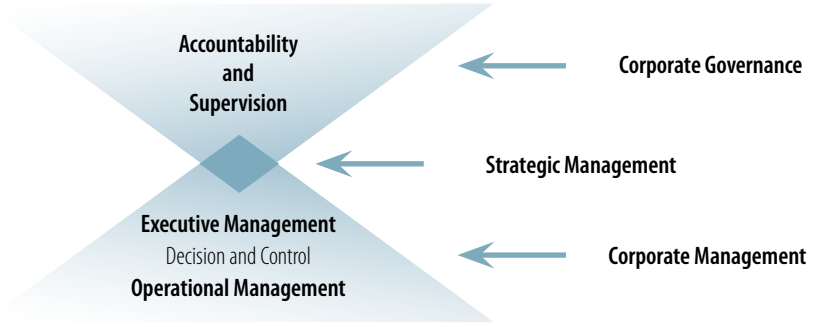
of corporate governance of a listed company".

Although they represent a good start in the right direction, the CG Regulations are much simpler in form in comparison to other national codes of corporate governance. The CG Regulations are also likely to add more in volume over time, when corporate governance is taken more seriously by Vietnamese companies. The OECD Principles can serve as an excellent reference point for international practices and are recommended reading for those interested in understanding some of the principles that underlie national standards.

5. Distinguishing Corporate Governance

Corporate governance must not be confused with corporate management. Corporate governance focuses on a company's structure and processes to ensure fair, responsible, transparent and accountable corporate behavior. Corporate management, on the other hand, focuses on the tools required to operate the business. Corporate governance is situated at a higher level of direction that ensures that the company is managed in the interests of its shareholders. One overlapping area is strategy, which is dealt with at the corporate management level and is also a key corporate governance element. Figure 3 illustrates the difference between corporate governance and corporate management.

Figure 3: The Activities of Governance and Management Compared



Source: Robert I. Tricker, Corporate Governance, 1984

Corporate governance must also not be confused with public governance, which deals with the governance structures and systems within

the public sector. Corporate governance must further be distinguished from good corporate citizenship, corporate social responsibility and business ethics. Good corporate governance will certainly reinforce these important concepts. But while companies that invest in socially responsible projects, run charitable foundations or do not pollute often benefit with a superior reputation, public goodwill and even better profitably, corporate governance is and remains distinct from these concepts.

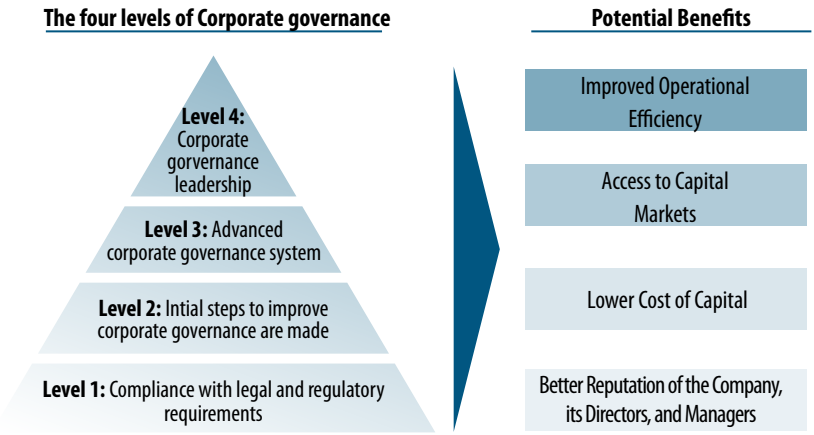
B. The Business Case for Corporate Governance

Good corporate governance is important on a number of different levels. At the company level, well-governed companies tend to have better and cheaper access to capital, and tend to outperform their poorly governed peers over the long-term. Companies that insist upon the highest standards of governance reduce many of the risks inherent to an investment in a company. Companies that actively promote robust corporate governance practices need key employees who are willing and able to devise and implement good corporate governance policies. These companies will generally value and compensate such employees more than their competitors that are unaware of, or ignore, the benefits of these policies and practices. Such companies, in turn, tend to attract more investors who are willing to provide capital at lower cost.

Generally, well-governed companies are better contributors to the national economy and society. They tend to be healthier companies that add more value to shareholders, workers, communities, and countries in contrast with poorly governed companies that may cause job and pension losses, and even undermine confidence in securities markets.

Some of the building blocks, or levels, and specific benefits of good governance are depicted in Figure 4 and discussed in further detail below.

Figure 4: Levels and Potential Benefits of Good Corporate Governance

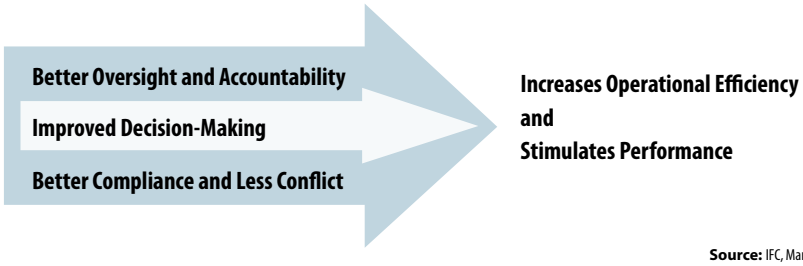


Source: IFC, March 2004

1. Stimulating Performance and Improving Operational Efficiency

There are several ways in which good corporate governance can improve performance and operational efficiency, as illustrated in Figure 5.

Figure 5: Advantages of Corporate Governance



Source: IFC, March 2004

An improvement in the company's governance practices leads to an improvement in the accountability system, minimizing the risk of fraud or self-dealing by the company's officers. Accountable behavior, combined with effective risk management and internal controls, can bring potential problems to the forefront before a full-blown crisis occurs. Corporate governance improves the management and oversight of executive performance, for example by linking executive remuneration to the company's financial results. This creates favorable conditions not only for planning the smooth succession and continuity of the company's executives, but also for sustaining the company's long-term development.

Adherence to good corporate governance standards also helps to improve the decision-making process. For example, managers, directors and shareholders are all likely to make more informed, quicker and better decisions when the company's governance structure allows them to clearly understand their respective roles and responsibilities, as well as when communication processes are regulated in an effective manner. This, in turn, should significantly enhance the efficiency of the financial and business operations of the company at all levels. High quality corporate governance streamlines all the company's business processes, and this leads to better operating performance and lower capital expenditures,[21] which, in turn, may contribute to the growth

21 Paul A. Gompers, Joy L. Ishii and Andrew Metrick, Corporate Governance and Equity Prices, NBER Working Paper No. w8449, August 2001.

of sales and profits with a simultaneous decrease in capital expenditures and requirements.

An effective system of governance practices should ensure compliance with applicable laws, standards, rules, rights, and duties of all interested parties. Furthermore, it should allow companies to avoid costly litigation, including costs related to shareholder claims and other disputes resulting from fraud, conflicts of interest, corruption and bribery, and insider trading. A good system of corporate governance will facilitate the resolution of corporate conflicts between minority and controlling shareholders, executives and shareholders, and between shareholders and stakeholders. Also, company officers will be able to minimize the risk of personal liability.

2. Improving Access to Capital Markets

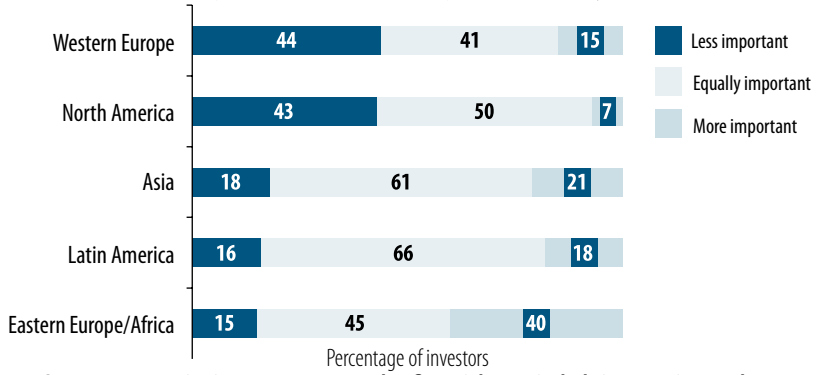
Corporate governance practices can determine the ease with which companies are able to access capital markets. Well-governed firms are perceived as investor friendly, providing greater confidence in their ability to generate returns without violating shareholder rights.

Good corporate governance is based on the principles of accessibility, accuracy, completeness, efficiency, timeliness and transparency of information at all levels. With the enhancement of transparency in a company, investors benefit from being provided with an opportunity to gain insight into the company's business operations and financial data. Even if the information disclosed by the company is negative, shareholders will benefit from the decreased risk of uncertainty.

Of particular note is the observable, if recent trends among investors to include corporate governance practices as a key decision-making criterion in investment decisions. The better the corporate governance structure and practices, the more likely that assets are being used in the interest of shareholders and not being tunneled or otherwise misused by managers. Figure 6 illustrates that corporate governance practices can take on particular importance in emerging markets where shareholders do not always benefit from the same protections available in more developed markets.

Figure 6: The Importance of Governance Compared to Financial Statements

How important is corporate governance relative to financial issues, e.g., profit perfomance and growth potential, in evaluating which companies you will invest in?



Governance remains important compared to financials, particularly in emerging markets

Source: McKinsey & Company, Global Investor Opinion Survey, July 2002

Finally, new listing requirements on many stock exchanges around the world require companies to adhere to increasingly strict standards of governance. Companies wishing to access both domestic and international capital markets will need to adhere to specific corporate governance standards.

3. Lowering the Company's Cost of Capital and Raising the Value of Assets

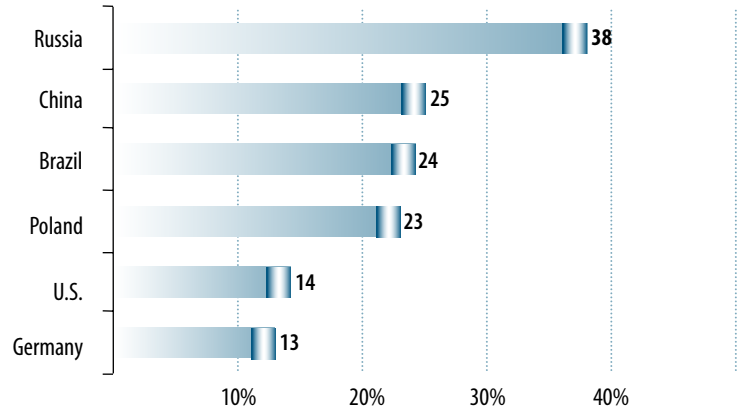
Companies committed to high standards of corporate governance are typically successful in obtaining reduced costs when incurring debt and financing for operations. As a result, they are able to decrease their capital costs. The cost of capital depends upon the level of risk assigned to the company by investors - the higher the risk, the higher the cost of capital. These risks include investor rights violations. If investor rights are adequately protected, the cost of equity and debt capital may decrease. It should be noted that investors providing debt capital, i.e. creditors, have recently tended to include a company's corporate governance practices (for example, a transparent ownership structure and appropriate financial reporting) as a key criterion in their investment decision-making process. Thus, the implementation of a good corporate governance

system should ultimately result in the company paying lower interest rates and receiving longer maturity on loans and credits.

The level of risk and cost of capital also depend on a country's economic or political situation, institutional framework and enforcement mechanisms. Corporate governance at a particular company thus plays a crucial role in emerging markets, which often do not have as good a system of enforcing investors' rights as countries with developed market economies.

This holds particularly true in countries such as Vietnam where the legal framework is relatively new and still being tested, and where courts do not always provide investors with effective recourse when their rights are violated. This means that even modest improvements in corporate governance relative to other companies can make a large difference for investors and decrease the cost of capital.[22] Figure 7 tellingly demonstrates that a significant percentage of investors are willing to pay a premium for a well-governed company (for example, this premium amounts to 25% for Chinese companies).

Figure 7: A Premium for Better Corporate Governance



Source: McKinsey & Company, Global Investor Opinion Survey, July 2002

At the same time, there is a strong relationship between governance practices and how investors perceive the value of company assets (such as fixed assets, goodwill, human capital, product portfolios, receivables, and research and development).

22 Leora F. Klapper, Inessa Love, Corporate Governance, Investor Protection and Performance in Emerging Markets, World Bank Policy Research Working Paper 2818, April 2002.

4. Building a Better Reputation

In today's business environment, reputation has become a key element of a company's goodwill. A company's reputation and image effectively constitute an integral, if intangible, part of its assets. Good corporate governance practices contribute to and improve a company's reputation. Thus, those companies that respect the rights of shareholders and creditors, and ensure financial transparency and accountability, will be regarded as being an ardent advocate of investors' interests. As a result, such companies will enjoy more public confidence and goodwill.

This public confidence and goodwill can lead to greater trust in the company and its products, which in turn may lead to higher sales and, ultimately, profits. A company's positive image or goodwill is known to play a significant role in the valuation of a company. Goodwill in accounting terms is the amount that the purchase price exceeds the fair value of the acquired company's assets. It is the premium one company pays to buy another.

Best Practices:

The following principles of corporate conduct are fundamental guidelines underlying the formation, operation and enhancement of a company's system of corporate governance:

1. Corporate governance practice should provide shareholders with a real opportunity to exercise their rights in relation to the company.
2. Corporate governance practice should provide for the equitable treatment of all shareholders. Shareholders should have access to effective recourse in the event of a violation of their rights.
3. Corporate governance practice should provide for the Board of Directors' direction and control of the executive bodies of the company and for the accountability of the Board of Directors to shareholders.
4. Corporate governance practice should ensure that executive bodies manage the day-to-day activities of the company without undue interference, in good faith and solely in the interests of the company, and ensure that executive bodies report in full and on a timely basis to the Board of Directors and shareholders.

5. Corporate governance practice should, in particular, provide for the full, timely and accurate disclosure of all material information (including information about a company's financial position, financial indicators, and ownership and management structure) in order to enable shareholders and investors to make informed decisions.
6. Corporate governance practice should ensure compliance with applicable laws as related to the statutory or contractual rights of all stakeholders. Corporate governance practice should, more generally, encourage the consideration of stakeholders' interests, including employees, even when they are not expressly set forth in law, and support active co-operation between the company and stakeholders with a view to increasing the assets and value of the company and creating new jobs.
7. Corporate governance practice should provide for the effective control of financial and business operations of the company to protect the rights and lawful interests of shareholders.

C. The Cost of Corporate Governance

Good governance entails real costs. Some of the costs include hiring dedicated staff, such as corporate secretaries, experienced and independent directors, internal auditors or other governance specialists. It will likely require the payment of fees to external counsel, auditors, and consultants. The costs of additional disclosure can be significant as well. Furthermore, it requires considerable managerial and Board of Directors' time, especially in the start-up phase. These costs tend to make implementation considerably easier for larger companies that may have the resources to spare than smaller companies whose resources may be stretched thin.

Best Practices:

Corporate governance is most, if not solely, applicable to larger, open joint stock companies that are publicly traded on an exchange. A large, dispersed shareholder base, where controlling shareholders and managers can wield extraordinary powers and potentially abuse shareholder rights, often defines such companies. Large companies are, moreover, important elements of a country's economy and thus require close public scrutiny and attention.

Notwithstanding, corporate governance is beneficial to all companies, irrespective of size, legal form, number of shareholders, ownership structure or other characteristics. Of course, a one-size-fits-all approach should be avoided and companies should carefully apply corporate governance standards. For example, smaller companies may not require a full set of Board committees or a full-time Corporate Secretary. On the other hand, even a small company may benefit from an advisory body.

A company will not always see instant improvements to its performance due to better corporate governance practices. However, returns, while sometimes difficult to quantify, generally exceed the costs, in particular over the long term. This is especially true when one takes into account potential invested capital, job and pension loss risks and the disruption that may be caused to communities when companies collapse. In

some cases, systemic governance problems may undermine faith in financial markets and threaten market stability.

Finally, it must be noted that corporate governance is not a one-time exercise, but rather an ongoing process. No matter how many corporate governance structures and processes the company has in place, it is advisable to regularly update and review them. Markets tend to value long-term commitment to good governance practices rather than a single action or "box-ticking" exercises.

D. The Corporate Governance Framework in Vietnam

1. Specifics of Corporate Governance in Vietnam

All countries have a unique history, culture, legal and regulatory framework, each of which influences a company's corporate governance framework. The following is a list of features that characterize Vietnam's corporate sector.

The role of SOEs: Since the early 1990s and especially in the last 10 years, many SOEs have been equitized and converted into joint stock companies in which the State may hold a majority interest. Despite that fact, many important sectors in Vietnam's economy remain either State monopolies, or largely dominated by wholly State-owned enterprises, such as those in the banking, education, electricity, media and publishing, mining, oil and gas, post and telecommunications, railways and shipbuilding sectors. In numerous equitized SOEs, the State retains a majority interest of 51% and exercises its control via the GMS and the directors appointed by the State to the company's Board of Directors.

Concentrated ownership: Many private companies in Vietnam start out as small private companies owned either by a single controlling shareholder, members of a family, or a small group of shareholders. Although many have expanded significantly, the controlling shareholders have not changed. This concentrated ownership structure often entails a lack of proper documents (such as the company charter or financial regulations) and a lack of supervisory activities and proper book-keeping. This impedes the ability of outsiders to become shareholders and leaves room for minority shareholder abuses. Such insider dominance and weak protection of external shareholders/investors has resulted in failed deals and the underdevelopment of the capital markets in Vietnam. A trend, albeit nascent, towards initial public offerings (IPOs) and thus more dispersed ownership can, however, be witnessed. Whether these majority shareholders are truly willing to reduce or even exit their investments remains to be seen.

Little separation of ownership and control: Most controlling shareholders also act as the company's General Director and sit on the Board of Directors. Those companies that separate ownership and control often do so only on paper. It is not uncommon to find joint stock companies in which the General Director

acts concurrently as the Chairman of the Board of Directors. Failure to separate ownership and control typically results in weak accountability and control structures (effectively, the majority/controlling shareholders oversee themselves in their function as directors and managers), abusive related party transactions, and poor information disclosure (insiders have access to all information and are unmotivated to disclose to outsiders or minority shareholders).

Unwieldy holding structures: Some major business groups, especially large SOEs, are set up in the form of parent companies controlling subsidiary companies. While holding structures can serve legitimate purposes, cross-shareholdings and lack of transparency have the tendency to create opaque ownership structures. This could make a company difficult to understand for shareholders and investors. Such structures could be used to expropriate and circumvent the rights of individual shareholders. Poor consolidated accounting, or even the absence thereof, is a further corporate governance issue that has yet to be tackled.

Inexperienced and inadequate corporate bodies: Parts of Vietnam's current concept of Board of Directors, General Director and Supervisory Board were first introduced in the Company Law in 1990 and the Law on SOEs in 1995. However, these concepts were not taken seriously until recently, when companies began to draft and adhere to elaborate charters with company rules and regulations. However, in reality, it is still common for Boards of Directors to attempt to bypass the supervision mechanisms put in place by the charter (such as internal auditors or the Supervisory Board), and to limit direct contact to the controlling shareholder (to the extent they are not one and the same). The role of the Supervisory Board, as well as the Board Committees, the General Director and Corporate Secretary often remain unclear in the day-to-day company operations. The members of all these bodies are supposed to be experienced and capable, but in reality they lack awareness of their responsibilities, due to a historical lack of general good practice in their areas. A lack of experience in the field of corporate governance is a big obstacle for further economic development. Unfortunately, strong, vigilant and independent corporate bodies remain a rarity.

2. The Legal and Regulatory Framework

The legal and regulatory framework in Vietnam has some unique characteristics resulting from Vietnam's history and the development of

Vietnam's economy. Prior to 1987, under the "command market economy", only SOEs were created and existed as corporate bodies. The introduction of the Foreign Investment Law in 1987 brought the first concepts of corporate governance to Vietnam, although it only applied to foreign-invested enterprises (FIEs). Throughout the 1990s and up until now, FIEs have been growing fast in both number and size. Most FIEs have some corporate governance structure in place.

As mentioned, the first comprehensive piece of legislation for domestic companies was approved in 1999 with the Law on Enterprises. However, the dominant players in the economy were SOEs and not subject to the Law. Over the next 10 years, Vietnam's legal and regulatory framework for corporate governance has improved dramatically, but actual implementation and adherence by Vietnamese companies to corporate governance practices is still in its early stages.

Impact of World Trade Organization (WTO) commitments: From 2004 to 2006, Vietnam accelerated its efforts to get its legal framework ready to join the WTO. Since 2006 to date, Vietnam has been making more efforts to revamp its legal framework and comply with the commitments made when it joined the WTO. As a result of these circumstances, from 1 January 2004 to 1 December 2009, the National Assembly adopted around 90 new laws. The laws and the areas they regulate vary widely, but notably they include landmark laws which promise to have significant impacts on companies and shareholders, such as the Law on Enterprises and the Law on Investment (which unified the previously separate domestic and foreign investment legal frameworks), the Housing Law, the Law on Personal Income Tax and the Law on Securities.

Fragmentation: As a result of the economic transformation in 1987 (from a "command market economy" to a "market-oriented economy") and the history of legislative developments as described above, Vietnamese laws and regulations are rather compartmentalized and fragmented. For instance, prior to 1 July 2006, FIEs were regulated by the Foreign Investment Law, and domestic companies were regulated by the Law on Enterprises and the Law on Domestic Investment, and FIEs were not allowed to be converted into joint stock companies and offer shares. The Law on Enterprises and the Law on Investment have unified previously separated legal frameworks, and were adopted with the aim of providing a level playing field for domestic and foreign investors. However, since these two laws have been in effect for only just over three years, ambiguities and uncertainties remain in the implementation of these two laws.

Application of industry-specific laws and regulations: In Vietnam, companies are required to comply with the Law on Enterprises and other laws and regulations which govern the specific industry and activities carried out by such companies. Thus, a company in the insurance business is subject to the Law on Enterprises and the Law on Insurance Business. Similarly, a bank is subject to the Law on Enterprises and the Law on Credit Institutions. In addition to these two laws, a listed bank is also subject to the Law on Securities. A real estate brokerage company is subject to the Law on Enterprises and the Law on Real Estate Business,[23] and so on.

The Law on Enterprises: As an example, the Law on Enterprises allows (i) the GMS of a joint stock company to elect members of the Board of Directors and members of the Supervisory Board, and (ii) either the GMS or the Board of Directors to elect the Chairman of the Board of Directors.[24] However, banking regulations require that the appointment and dismissal of the General Director, the Chairman and members of the Board of Directors, and members of the Supervisory Board of a joint stock commercial bank be approved by the Governor of the State Bank of Vietnam (SBV).[25] Similarly, insurance regulations require that the appointment and dismissal of the General Director, the Chairman and members of the Board of Directors and the members of the Supervisory Board of an insurance company be approved by the MOF.[26] This is one of many examples of how there are different and overlapping legal requirements which are relevant to the corporate governance of a company.

Article 3.2 of the Law on Enterprises expressly provides that "In special cases where the establishment, organization, management and operation of an enterprise are regulated by a specialized law, the provisions of such law shall prevail". However, in practice, there are numerous cases where the distinctions are not clear-cut, and the overlapping laws and regulations have created confusion, ambiguities and uncertainties to the companies trying to follow the laws and implement good corporate governance practice. These also create the danger of inconsistencies in the implementation of these laws by Ministries, the courts and other law enforcement bodies.

23 The LREB adopted by the National Assembly dated 29 June 2006.

24 LOE, Articles 104.2(d) & 111.1.

25 Chapter 2, section 3 of Circular 06/2010/TT-NHNN (Circular 06) of the SBV dated 26 February 2010, guiding the organization, governance, administration, charter capital, transfer of shares and supplementation and modification of licenses or charters of commercial banks.

26 Article 13.2 of Decree 45 of the Government on the detailed implementation of several articles of the LIB.

Thus, it is prudent that whilst companies should use this Manual for reference for corporate governance practice, they should also review other laws and regulations which may be applicable to their line of business, and comply with such laws and regulations. Where it encounters what seems to be some inconsistency or ambiguity of different legislation, a company should try to clarify such an inconsistency or ambiguity, either by engaging the company's in-house legal department, internal compliance department, advice from the company's external legal counsel and clarification from law enforcement agencies or law-making agencies, to achieve full compliance with the law and best corporate governance practice.

Applicable laws and legal framework: As of 2009, all commercial enterprises, regardless of their legal form, are subject to a comprehensive set of laws, regulations, and governmental decrees as illustrated in Figure 8. In addition to the general legal and regulatory framework, there are Ordinances, Decrees, Circulars and Decisions from the National Assembly, the Government, Ministries and other law enforcement bodies that deal with specific corporate issues in Vietnam in more detail for joint stock companies, limited liability companies (LLCs) and other corporate entities.

Figure 8: Principal Laws and Regulations Impacting on Corporate Governance

Law/Regulation	Applicability	Comments
Law on Investment	All investment activities	Regulates the formations, licensing, implementation, and liquidation of projects to be carried out by all forms of corporate entities (including FIEs), and indirect foreign investments. In relation to new companies, the procedures for licensing projects are also procedures for setting up the companies.
Law on Enterprises	All corporate entities and activities	Regulates founding, operation, reorganization, and liquidation of all forms of corporate entities (including FIEs), such as partnerships, LLCs, private enterprises and joint stock companies.
Law on Securities	Joint stock companies and investors	Regulates the issuance, offering, sale and purchase of securities, securities-related services and information disclosure.

Model Charter	Listed companies	Mandatory for listed joint stock companies. Non-mandatory, but advisable for non-listed joint stock companies.
CG Regulations	Listed companies	Mandatory for listed joint stock companies. Non-mandatory, but advisable for non-listed joint stock companies.
Ho Chi Minh Stock Exchange and Hanoi Stock Exchange Listing Requirements	Companies listed on the Ho Chi Minh Stock Exchange and Hanoi Stock Exchange	Regulates access to trading for issuers and investors.
Circular 09/2010/ TT-BTC	Public and listed companies	Mandatory governing the disclosure of information on the securities market.
New 2010 Law on Credit Institutions	Credit institutions operating in Vietnam	This new law was adopted by the National Assembly on 16 June 2010 and is effective from 1 January 2011.

As discussed previously in this Chapter, the Law on Enterprises now applies to all corporate entities in Vietnam,[27] and in addition to this general rule, companies in the banking, investment, and insurance industries need to comply with specific legislation. The Law on Securities and its implementing regulations applies to activities relating to the issuance, offering, sale and purchase of securities, securities-related services and information disclosure by corporate entities, shareholders and investors.

Vietnamese companies are also subject to other accounting, anti-corruption, auditing, bankruptcy, commerce, competition, construction, labor, tendering and taxation laws. Where appropriate, this Manual refers to these laws and other legal documents.

The list of legal acts in Figure 8 is far from complete. Moreover, Vietnamese legislation continues to change as it develops and improves. For example, as discussed previously, the Law on Enterprises has evolved from a number of laws. It has been amended several times to unify separate legislation and eliminate inconsistencies in provisions that regulate the activities of governing bodies, securities issuance, the exercise of shareholder rights and other matters. Most of the laws and regulations that have an impact

27 LOE, Articles 1 and 3.

on corporate governance and will be used in this Manual have been enacted in the last few years, although they may have evolved from past laws.

Finally, all Vietnamese companies are being encouraged to adhere to the corporate governance rules included in the CG Regulations, although these provisions are only mandatory for listed companies.

Best Practices:

Corporate governance frameworks typically comprise elements of legislation, regulation, self-regulatory arrangements, voluntary commitments and business practices that are the result of country specific circumstances, history and tradition. The desirable mix between legislation, regulation, self-regulation, voluntary standards, etc. in this area will vary from country to country. As new experiences accrue and business circumstances change, the content and structure of this framework needs to be adjusted.[28] Companies will need to carefully monitor such adjustments on a regular basis and update their governance systems accordingly.

3. The Corporate Governance Regulations Applicable to Listed Companies in Vietnam

The CG Regulations were adopted by the MOF in March 2007 (see footnote1) and draw upon generally accepted principles of corporate governance, including the OECD Principles.

28 OECD Principles of Corporate Governance, Annotations to the OECD Principles of Corporate Governance, ensuring an effective corporate governance framework. See also: www.oecd.org.

Best Practices:

Good corporate governance practices are focused on respect for the lawful interests of all participants in corporate activities. They can improve the quality of a company's operations by means of, among other things, increasing the value of corporate assets, creating jobs and enhancing the financial stability and profitability of a company. Trust among all those involved in corporate activities is at the root of the effective operation of a company and the ability to attract investment. The OECD Principles are aimed at the creation of trust in relations arising in connection with corporate governance.

The CG Regulations comprise the following three categories of rules:

1. Legal requirements: The rules that refer to mandatory legal requirements; these provisions are mandatory not because they are part of the CG Regulations, but because they overwrite or rephrase legal requirements. Legal requirements in the CG Regulations can be recognized by using words "must", "is obliged to", "cannot", etc.

2. Comply or explain rules: These rules are to be followed. Listed companies are compelled to disclose and explain all deviations from these rules in the declaration of compliance with the corporate governance principles, comply or explain rules allow companies to deviate from certain rules only when the deviation is justifiable. The comply or explain rules of the CG Regulations are marked in the text by the use of the word "shall".

3. Suggestions: These rules are recommendations in their nature. Non-compliance with these rules requires neither disclosure nor explanation. For these rules the CG Regulations use terms such as "should" or "can".

4. The Institutional Framework

There are numerous institutions that make-up the institutional framework for corporate governance in Vietnam today, too many to list exhaustively. The following institutions have at least one core activity focusing on corporate governance.

Table 1: Corporate Governance Related Institutions in Vietnam	
Courts	
Supreme People's Court of Vietnam	http://www.toaan.gov.vn
Supreme People's Procuracy of Vietnam	http://www.vksndtc.gov.vn/
Provincial economic courts	N/A
Arbitration Center	
Vietnam International Arbitration Center	http://www.viac.org.vn
Public Sector Institutions	
National Assembly of the Socialist Republic of Vietnam	www.na.gov.vn/
The Government of Vietnam	http://www.chinhphu.vn/
Ministry of Justice	www.moj.gov.vn
Ministry of Finance	www.mof.gov.vn
State Securities Commission	www.ssc.gov.vn/
Ministry of Planning and Investment	www.mpi.gov.vn/
Departments of Planning and Investment of provinces and cities	Please refer to the specific province
Ministry of Police	N/A
Vietnam Securities Depository	www.vsd.org.vn/
State Bank of Vietnam	www.sbv.gov.vn
Official Gazette of the Socialist Republic of Vietnam	N/A
Vietnam Chamber of Commerce and Industries	www.vcci.com.vn
Ho Chi Minh Stock Exchange	http://www.hsx.vn/
Hanoi Stock Exchange	http://hnx.vn/
The Securities Research and Training Center	http://www.srtc.org.vn/

NGOs	
Vietnam Lawyers Association	N/A
International Organizations	
Global Corporate Governance Forum (GCGF)	www.gcgf.org
International Finance Corporation (IFC)	www.ifc.org
Organization for Economic Cooperation and Development (OECD)	www.oecd.org
The World Bank	www.worldbank.org

NOTES

2 Chapter

THE GENERAL GOVERNANCE STRUCTURE OF A COMPANY

2 | The General Governance Structure of a Company

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- ☑ What is the significant governance difference between listed and unlisted joint stock companies?
- ☑ In addition to the GMS and Board of Directors, has the company established an Executive Board, Supervisory Board, Audit Committee, Human Resources Committee, Development Policy Committee, Remuneration Committee and an Internal Audit Function?
- ☑ Have these bodies been given the appropriate structures and proper resources to be effective?
- ☑ Does the company need to have a Corporate Secretary?

The Law on Enterprises defines a joint stock company's status and provides for the structure of its governing bodies. The CG Regulations and the Model Charter[1] further includes recommendations to establish additional governing bodies for listed companies,[2] for example the Board Committees and Corporate Secretary. This chapter discusses the concept and governance structure of joint stock companies as they are defined by the Law on Enterprises and as recommended by the CG Regulations and the Model Charter. The authorities, functions and structures of the governing bodies are described in more detail in other chapters of this Manual.

1 The Model Charter is issued together with Decision 15 of the MOF dated 19 March 2007. All listed companies need to adopt a charter that is in line with the Model Charter.

2 Listed company means any joint stock company approved to be listed on the Stock Exchange or a Securities Trading Center within the territory of Vietnam (Article 2.1(b) of the CG Regulations).

A. What Is a Joint Stock Company?

1. The Definition of a Joint Stock Company

Under Article 77 of the Law on Enterprises, a joint stock company has the following characteristics:

- Limited liability
- Independent legal status and can enter into contracts in its own name
- Equity capital, referred as "charter capital", is divided into shares which are freely transferable
- At least three shareholders
- May issue shares and bonds.

Joint stock companies are the only legal entities that can issue shares. Shares in a joint stock company may include (i) ordinary shares, (ii) voting preference shares, (iii) redeemable preference shares, (iv) dividend preference shares and (v) other preference shares as determined in the charter of the company.[3]

The shareholders of a joint stock company are normally liable for the debts and other property obligations of the company up to the amount of capital they have contributed to the company.[4] The Law on Enterprises, however, contains certain specific exceptions to the limited liability principle, including:

a) Under the Law on Enterprises, founding shareholders[5] are together obliged to subscribe at least 20% of authorised ordinary shares and make full payment of subscribed shares within 90 days from the date of company registration. They are responsible for any failure by any of the other founding shareholders to pay in full for the shares to which they have subscribed. This obligation can be met either by the other founding shareholders paying for such unpaid shares or by finding third parties to purchase such unpaid shares.[6]

3 LOE, Article 78, Clause 2.

4 LOE, Article 77.

5 Founding shareholders of a joint stock company are the shareholders who prepare and sign the first charter of the company (LOE, Article 4.11). A person who purchases shares from a founding shareholder within the first three years after incorporation will also be regarded as a founding shareholder.

6 LOE, Article 84, Clause 3.

Until all subscribed founding shares are fully paid up, all founding shareholders are jointly responsible for the debts and other property obligations of the company up to the value of shares not yet paid for.

b) An ordinary shareholder would be personally responsible if it commits any of the following acts in the name of the company:[7]
   (i) Violates any laws
   (ii) Conducts any business or other transactions for personal benefit or for the benefit of other organizations or individuals
   (iii) Pays debts that are not due when the company is in financial danger.

c) A joint stock company can only redeem shares from its shareholders in certain cases and subject to various conditions.[8] If the company redeems shares from a shareholder in violation of the Law on Enterprises, the shareholder whose shares have been redeemed and all directors of the company are jointly liable for the debts of the company. The limitation of the liability in such case would be up to the amount of the money paid to such shareholder.[9]

2. Public and Private Joint Stock Companies

Vietnamese law does not distinguish clearly between public and private joint stock companies. In general, a company is considered a private company if it is out of the definition of a public company.[10] Public companies require higher charter capital, and are subject to stricter and more complex rules regarding their governance and disclosure. Private companies may be better suited for smaller enterprises for which a simple structure is usually preferable. Public companies are generally better suited for larger and growing companies that might wish to raise money in the equities markets.

7 LOE, Article 80, Clause 5.

8 LOE, Articles 90, 91 & 92.

9 LOE, Article 94.

10 A public company is defined to as a joint stock company which has: (i) share issued to the public, or (ii) shares listed on a stock exchange or a securities trading center, or (iii) shares owned by at least 100 investors, excluding professional securities investors, and paid-up charter capital of VND10 billion or more (LOS, Article 25, Clause 1).

Table 1: Comparison of Public and Private Joint Stock Companies		
	Public Companies	**Private Joint Stock Companies**
Characteristics	- Public offering - Listing shares[11] - 100 shareholders or more and paid-up charter capital of VND10 billion or more[12]	- No - No - Three shareholders and above
Minimum Charter Capital	VND10 billion[13]	N/A(not required), except for companies engaging in certain specific sectors[14]
Issuance of Shares	Open subscription. A closed subscription is subject to the approval of the Securities State Commission of Vietnam.[15]	Closed subscription (only among founders or other pre-determined groups of people). Cannot issue shares through an open subscription.

11 Vietnam currently has two stock exchanges, the Ho Chi Minh Stock Exchange (HOSE) and Hanoi Stock Exchange (HNX).

12 LOS, Article 25, Clause1.

13 LOS, Article 25, Clause1(c) and Article 8.1(a) and 9.1(a) of Decree 14 of the Government dated 19 January 2007 implementing the LOS. The minimum charter capital applicable to companies listed on the HOSE is VND80 billion and those listed on the HNX is VND10 billion only.

14 E.g. banking, finance or insurance. For instance, the minimum charter capital of a joint stock commercial bank must be at least VND3,000 billion in 2010. The minimum charter capital of a finance company and finance leasing company is VND500 billion and VND100 billion in 2010, respectively (Decree 141 of the Government dated 22 November 2006 on legal capital of credit institutions). The minimum charter capital of a life insurance company, a non-life insurance company and an insurance broker is VND600 billion, VND300 billion and VND4 billion, respectively (Article 4 of Decree 46 of the Government dated 27 March 2007 on the financial regime of insurance companies and insurance brokers (Decision 46)).

15 Directive 20 of the Prime Minister dated 23 June 2008 on the management of the securities market and Official Correspondence 14285 of the MOF dated 26 November 2008. A closed subscription of (i) a joint stock commercial bank and joint stock finance company will be also subject to the approval of the SBV and (ii) a joint stock insurance company will be also subject to MOF approval.

Transferability of Shares	No restrictions allowed (except for voting preference shares[16] and shares held by founding shareholders).[17] Neither the consent of other shareholders nor the company is required.	Potentially restricted. Transferability of shares is unrestricted, except for voting preference shares and shares held by founding shareholders and some kind of restriction which may be included in the charter of the company.
Corporate Secretary	Mandatory for listed companies[18]	Unregulated
Disclosure	The company must disclose a wide range of information regarding its financial position, operations and governance.[19]	No legal requirements to publicly disclose information.

Under certain circumstances, e.g. when the number of shareholders reaches 100 and the charter capital reaches VND10 billion, a private company must register with the State Securities Commission of Vietnam (SSC) to become a public company.[20] It is also possible for a private company to voluntarily transform itself into a public company and vice-versa by following legal requirements, in accordance with the Law on Securities (for example, by increasing its shareholders to 100 and charter capital to VND10 billion, by listing shares on a stock exchange). Procedurally, this has to be done by amending the company's charter and business registration certificate and is not considered to be a conversion of the business organization's legal form.

! As this Manual focuses on public joint stock companies, each reference to company, or public company, means "public joint stock company".

16 LOE, Article 81, Clause 3.

17 Pursuant to the LOE, shares of founding shareholders may not be transferred during the first three years following the issuance of the business registration certificate of a company except (i) to other founding shareholders, or (ii) if the shareholders' meeting approves a transfer to external shareholders (in such case the transferring shareholder may not vote on the issue at the shareholders' meeting). In addition, the transferee of shares in these cases will automatically become founding shareholders and will be subject to the statutory lock-up for the balance of the three year lock-up period.

18 CG Regulations, Article 16, Clause 1.

19 LOS, Chapter VIII.

20 LOS, Article 25, Clause 2.

3. The Advantages and Disadvantages of Public Companies over Other Legal Forms

a) Legal Forms of Commercial Entities

Vietnamese law allows for the establishment of the following types of commercial entities:

- LLCs (one member and multi-member)
- Joint stock companies (public and private)
- Private enterprises[21]
- Partnerships
- Cooperatives[22]
- Individual household businesses.[23]

Company Practices in Vietnam:

LLCs are the most popular form of commercial entity in Vietnam (about 50%), private enterprises are the second most common form (26%) and private joint stock companies are the third most common form (14%) of about 156,000 companies in operation as of 31 December 2007.[24] There were 964 public companies as of 15 May 2009[25] and among them 421 were listed companies.[26]

21 Doanh nghiệp tư nhân in Vietnamese.

22 Tổ hợp tác in Vietnamese. Decree 151 of the Government dated 10 October 2007 on organization and operations of cooperatives.

23 Hộ kinh doanh cá thể in Vietnamese. Chapter VI of Decree 88 of the Government dated 29 August 2006 on business registration (Decree 88).

24 2008 Statistical Yearbook of Vietnam, page 123.

25 This is the total public companies which have registered with the SSC. In practice, the companies qualified as public companies may be 4,000 (http://www.taichinhdientu.vn/Home/Gan-1000-cong-ty-dai-chung-da-dang-ky/20095/47295.dfis).

26 http://www.hastc.org.vn/Quymo_niemyet.asp?stocktype=2; http://www.hsx.vn/hsx/Modules/Statistic/QMNY.aspx.

b) Advantages of Public Companies Compared to Private Companies and LLCs

The public company offers many advantages, including:

- **Access to investors:** Public companies have greater opportunities to attract investment at lower cost. In comparison with other commercial entities, public companies are more transparent to potential investors due to information disclosure obligations. A better market position improves their availability to attract investment under privileged conditions. Furthermore, the scale of capital-intensive companies, such as banking, is so large that few individual lenders or equity investors can provide the needed capital.
- **Free transferability of shares:** Shares of the company can be transferred without the consent of other shareholders, the company, or its management in accordance with legal requirements.
- **Limitation on the risks to shareholders:** The risks carried by shareholders are limited to the value of their investment and duties set by Vietnamese legislation. Shareholders are not normally liable for the legal and financial obligations of the company.
- **Diversification of risks:** The risks of a public company are spread over a large number of shareholders.

c) Disadvantages of Public Companies

The principal economic advantage of the public company form is the ease with which it can access financial markets. However, this special access is not without disadvantages. A number of organizational, legal and regulatory hurdles must be cleared for a company to have the right to offer its securities to investors. A public company requires:

- **Compliance with securities regulations:** LLCs are generally outside the purview of such regulation.
- **A complex organizational structure:** It is designed to protect shareholders from abuse and allow professional managers to run the company. The company bears the costs associated with supporting its governing bodies.
- **Compliance with disclosure and other regulations:** A public company must ensure appropriate level of transparency and publicity through timely, accurate and complete disclosure of all important events that are significant for determination of legal and financial position of the company. Disclosure obligations encompass the

business report of the company, financial reports and audit report, as well as other reports and information that are important for the company, in accordance with the securities market regulations. Therefore, a public company must comply with more rigorous legislation and regulations, and should follow codes and standards designed to protect shareholder rights. It must ensure the proper registration of issued shares.

- **Shareholders willing to invest in the company:** The company should be able to attract shareholders willing to accept the risk of investing in the company and at the same time maintain good investor relations once shares have been floated. These activities imply significant costs for the company. Some of them are associated with marketing an offer to investors and maintaining continuous communication with shareholders after the IPO.
- **Professional management:** The separation of ownership and control provides investors with the possibility to hire professional managers who devote their efforts and skills to run the company. The separation of ownership and control also provides professional managers with access to the capital needed to manage the company. Finding, developing and retaining trustworthy professional managers is, however, a difficult task.
- **Higher minimum charter capital:** This is more than other normal legal requirements.

4. Regulatory Distinctions Based on the Shareholding

There are some differences in the rights of a shareholder on the basis of his/her shareholding. These differences are designed to provide for enhanced shareholder protection and/or easier administration of a joint stock company.

Table 2: Difference in Rights According to the Shareholding		
No.	**Shareholding**	**Specific Rights**
1	Fewer than 10%[27]	• Attend and vote on all issues within the authority of the GMS, with each ordinary share having one vote • Receive dividends as resolved by the GMS • Have pre-emptive right to purchase new shares issued by the company in proportion to its current shareholding • Transfer shares to third parties or other shareholders • To examine and obtain information from the shareholders register, and examine and obtain information from the charter, minutes and resolutions of the GMS • Sell its shares back to the company in case it votes against the decision of the GMS on changes to the rights and obligations of the shareholders or on the restructuring of the company • Receive a proportionate share of the remaining assets upon the dissolution or bankruptcy of the company.
2	10% to less than 25%[28]	• All rights in (1) above • Read and obtain an extract of minutes of meetings and resolutions of the Board of Directors and mid-year and annual financial reports of the Supervisory Board • Request the Supervisory Board inspect certain management or operational issues if the shareholder deems it necessary • Convene a shareholders' meeting in certain cases • Examine and receive a copy or an excerpt of the list of shareholders who are entitled to attend and vote at shareholders meetings • Subject to specific shareholding, to nominate one or two candidates[29] to the Board of Directors or the Supervisory Board of the company (unless otherwise provided by the charter or decided by the GMS).[30]

27 LOE, Article 79, Clause 1.

28 The shareholder is required to maintain this percentage within at least six consecutive months (LOE, Article 79, Clause 2).

29 Two candidates applicable to shareholders holding 20% to less than 30% of shareholding (Article 29, Clause 3b of Decree 102 of the Government dated 1 October 2010 on implementing a number of articles of the LOE (Decree 102).

30 Article 29, Clause 3 of Decree 102.

3	More than 25% to less than 35%	• All rights in (2) above • To veto important decisions of the company which require the approval of a number of shareholders representing at least 75% of the total voting shares of all shareholders attending the shareholders meeting[31] • Subject to specific shareholding, to nominate two or three candidates[32] to the Board of Directors or the Supervisory Board of the company (unless otherwise provided by the charter or decided by the GMS).
4	More than 35% to less than 65%	• All rights in (2) above • To veto all decisions of the GMS[33] • Subject to specific shareholding, to appoint from three to six candidates[34] to the Board of Directors or the Supervisory Board of the company (unless otherwise provided by the charter or decided by the GMS).

31 I.e. decisions relating to classes of shares and the total number of shares of each class which may be offered, on amendments of and additions to the charter of the company; on re-organization or dissolution of the company, in respect of investments or sales of assets equal to or more than 50% of the total value of assets recorded in the most recent financial statement of the company (Article 104.3(b) of the LOE). Note that under Vietnam's WTO Accession Commitments, notwithstanding the requirements of the LOE, the charter of a joint stock company may provide that all decisions which required the approval from the GMS may be passed on the basis of simple majority of 51%.

32 Applicable to shareholders holding 30% to less than 40% of shareholding (Article 29, Clause 3 of Decree 102).

33 Under the LOE, decisions of the GMS can only be passed by the approval by a number of shareholders representing at least 65% or 75% of the total voting shares of all shareholders attending the shareholders meeting, as the case may be.

34 Three candidates applicable to shareholders holding 30% to less than 40% of shareholding, four candidates applicable to shareholders holding 40% to less than 50% of shareholding, five candidates applicable to shareholders holding 50% to less than 60% of shareholding, six candidates applicable to shareholders holding 60% to less than 70% of shareholding.

	65% to less than 75%	• All rights in (2) above • To decide all ordinary matters under the authority of the GMS which require the approval of a number of shareholders representing at least 65% of the total voting shares of all shareholders attending the shareholders meeting • Subject to specific shareholding, to appoint six or seven candidates[35] to the Board of Directors or the Supervisory Board of the company (unless otherwise provided by the charter or decided by the GMS).
	75% or more	• All rights in (2) above • To decide all matters under the authority of the GMS • Subject to specific shareholding, to appoint seven or eight candidates[36] to the Board of Directors or the Supervisory Board of the company (unless otherwise provided by the charter or decided by the GMS).

35 Six candidates applicable to shareholders holding 60% to less than 70% of shareholding, seven candidates applicable to shareholders holding 70% to less than 80% of shareholding.

36 Seven candidates applicable to shareholders holding 70% to less than 80% of shareholding, eight candidates applicable to shareholders holding 80% to less than 90% of shareholding.

B. The Governance Structure of a Joint Stock Company

Legislation provides companies with substantial flexibility in establishing their governance structure. The bodies required by Law on Enterprises do not depend on how many shareholders the company has or the amount of charter capital. The only distinction which has legal consequences for the governance structure of the company is the one between non-listed and listed joint stock companies.

Non-listed joint stock companies

A non-listed joint stock company must have at least the following bodies:[37]

- GMS
- Board of Directors
- General Director
- Supervisory Board.[38]

Listed companies

In addition to the bodies required for non-listed joint stock companies, listed companies must have:[39]

- Executive Board
- External Auditor
- Corporate Secretary.

In addition, it may establish the following Board Committees at its discretion:[40]

- Audit Committee
- Development Policy Committee

37 LOE, Article 95.

38 Only joint stock companies with more than 11 shareholders or an institutional shareholder holding more than 50% of the shares of the company must establish a Supervisory Board consisting of three to five members who will be appointed by the GMS, unless otherwise provided under the charter (LOE, Articles 95 & 121).

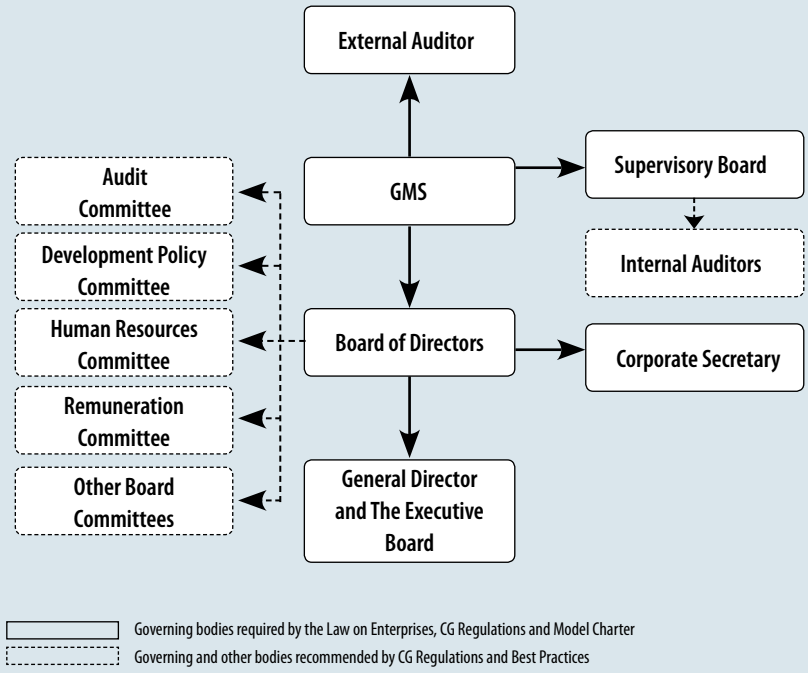
39 CG Regulations and Model Charter.

40 CG Regulations, Article 15.

- Human Resources Committee
- Remuneration Committee
- Other Board Committees.

The mandatory and voluntary governing and other bodies of the listed companies and their responsibilities, as set forth by the Law on Enterprises, CG Regulations and Model Charter respectively, are summarized in Figure 1.

Figure 1: Mandatory and Voluntary Governing and other Bodies



1. The General Meeting of Shareholders

The GMS of a joint stock company is the highest decision-making body in the company. All ordinary shareholders have the right to participate in the GMS and have the number of votes corresponding to the respective ordinary shares held by them. The GMS normally makes decisions only on major issues affecting the company. The GMS approves nominations for the Board of Directors and Supervisory Board membership. In addition, it approves the annual report and the financial statements, the distribution of profits and losses (including the payment of dividends), amended charter capital,[41] amendments of the charter, re-organization and dissolution, and extraordinary transactions.[42]

➔ *See Chapter 8.*

2. The Board of Directors

The Board of Directors plays a central role in the corporate governance framework. The Board of Directors is responsible for guiding and setting the company's strategy and business priorities, including the annual financial and business plan, as well as guiding and controlling managerial performance. It acts in the interests of the company, protects the rights of all shareholders, oversees the work of the General Director and the Executive Board, as well as financial control systems. An effective, professional, and independent Board of Directors is essential for the implementation of good corporate governance practices.

41 Except for the amendment of the charter capital as a result of sale of new shares within the number of authorized shares (LOE, Article 96, Clause 1(dd)).

42 The GMS would approve extraordinary transactions having value at 50% or more of the total asset value of the company as recorded in the most recent financial statement (LOE, Article 120, Clause 3).

Best Practices:

Vietnamese companies are not able to choose between different corporate governance frameworks, depending on the structure of the company's Board of Directors. Essentially, two opposite board models have been developed in Europe, the one-tier board (unitary board system) and the two-tier board (dual system). The tendency in Europe is towards an increase in flexibility, allowing companies to choose between the different systems and adapt them to the different business environments:

- The **one-tier,** or **unitary board system is** characterized by a single board that governs the company, and includes both executive and non-executive members. In such a setting, the supervisory body is often called the Board of Directors. This governance structure can facilitate strong leadership structures and efficient decision-making. Non-executive and independent directors, however, play a crucial role in monitoring managers and reducing agency costs. This system is typical for companies based in countries with a common law tradition, for example the U.S. and the U.K.
- **The two-tiered, or dual system**, on the other hand, is characterized by the existence of distinct supervisory and management bodies. The former is commonly referred to as the Supervisory Board, the latter as the Executive Board. Under this system, the day-to-day management of the company is handed down to the Executive Board, which is then controlled by the Supervisory Board (which in turn is elected by the GMS). These two bodies have distinct authorities and their composition cannot be mixed, i.e. members of the Executive Board cannot sit on the Supervisory Board and vice-versa. The advantage of the two-tiered system is a clear oversight mechanism, but it has been criticized for inefficient decision-making. This system is most famously represented in Germany.
- Besides the one-tiered and the two-tiered systems, many countries recognize a third governance structure, **the hybrid system**, which is essentially an amalgam of the two abovementioned models. According to this system, every joint stock company must establish a Supervisory Board and a Board of Directors, with a possibility of organizing an Executive Board as well.

Regardless of which system a country allows, the following must be kept in mind:

1. There is always a trade-off between efficiency and control. When the agency problem and conflict of interests is high, shareholders may choose the two-tiered system, but must realize that a tight monitoring governance system could tie managers' hands and render business operations and decision-making inefficient. On the other hand, when shareholders and managers trust each other and the company needs better efficiency to explore more business opportunities, the company may choose a more pro-management oriented, one-tier board system.
2. While all systems have many elements in common, important differences do exist and these will affect the board's authority, structure and operations, and consequently the duties and obligations of directors.[43]

3. The Executive Bodies

a) The General Director

Every company must have a General Director (or director) who is responsible for day-to-day management of the company.[44] The General Director is the legal representative of the company unless the company charter appoints the Chairman of the Board of Directors to this position.[45] The General Director is accountable to the Board of Directors. Legislation, the charter and internal regulations, and the contract signed between the General Director and the company regulate the authority and election of the General Director, as well as relations with other governing bodies.

➔ *On the authority of the General Director, see Chapter 5, Section A.1.*

43 These differences are embedded in, among other things, national legislation (legal tradition), organizational theory (composition requirements and functional distribution of authorities), corporate culture and will affect the supervisory body's authority, structure and operations. This Manual will not further discuss distinct features of one- and two-tiered systems, because Vietnam has adopted a unitary system.

44 LOE, Article 116, Clause 2.

45 LOE, Article 116, Clause 1.

b) The Executive Board

The Executive Board is composed of the General Director and the top executives of the company. It may be referred to as a "board of management", "managerial board", "executive team", "directorate" or "collective executive body" among other terms. The term "Executive Board" is used for the purposes of this Manual. A listed joint stock company is required to establish an Executive Board.[46] The Executive Board is responsible for the day-to-day management of the company and carries out the decisions set by the Board of Directors.

➔ *For a discussion on the advantages and disadvantages of an Executive Board, see Chapter 5, Section A.*

4. Board Committees

Board Committees are provided for by CG Regulations which are applicable to listed companies. CG Regulations recommend the establishment of certain Board Committees such as an Audit Committee, Development Policy Committee, Human Resources Committee and Remuneration Committee. The primary task of these committees is to assist the Board of Directors' functions. The discussion in this Manual as to the authority, composition, and functions of individual Board Committees is mostly based on recommendations of the CG Regulations and best practices.

➔ *See Chapter 4, Section C.*

5. The External Auditor

Vietnamese regulations on auditing stipulate that an annual, independent audit shall be conducted by a certified independent External Auditor (licensed and accredited audit company/organization). It is an obligation for a company that is:

a) Considered to be a compliance-audited company (a SOE, FIE, commercial bank, credit institution, financial institution, insurance company and listed company)
b) A controlling company that makes consolidated financial statements

46 Model Charter, Article 29.

c) Issuing securities or other financial instruments traded on the organized market.

For listed companies, the External Auditor is a separate body of the company, elected by the GMS within the list of auditors authorized by the MOF to conduct the audit of financial statements of listed companies[47], prepare the report of the auditor and submit to the Board of Directors. The External Auditor is permitted to attend all shareholder meetings, receive notices and information in relation to the shareholder meetings and speak at the shareholder meetings regarding the related-audit matters.[48]

➔ *See Chapter 14, Section B.*

6. The Supervisory Board[49]

Non-listed joint stock companies with more than 11 shareholders or one institutional shareholder holding more than a 50% shareholding and listed companies are obligated to establish a Supervisory Board, the purpose of which is to carry out internal control procedures on a daily basis. The Supervisory Body should be independent of the Board of Directors and Executive Board. The Supervisory Body reports directly to the GMS.

➔ *See Chapter 14, Section A.*

7. The Internal Auditor

According to current regulations, except for banks, Vietnamese public companies are not obligated to establish an Internal Auditing function. However, the role of Internal Auditing is increasingly becoming more important in strengthening corporate governance of many public and listed companies. An effective Internal Audit function plays a key role in assisting the Board (or equivalent body) to discharge its governance responsibilities.

➔ *See Chapter 14, Section D.*

47 See: http://www.vacpa.org.vn.

48 Model Charter, Article 48.

49 Ban Kiểm Soát in Vietnamese.

8. The Corporate Secretary

It is mandatory for a listed company to appoint one (or more) Corporate Secretary.[50] The main task of the Corporate Secretary is to organize the meetings of the GMS, Board of Directors and Supervisory Board and will ensure Board of Directors' resolutions are in compliance with law. The Corporate Secretary is responsible for keeping the book of shareholders, the preparation and recording minutes of all meetings of shareholders, Board of Directors, and Supervisory Board, keeping minutes of all meetings of these corporate bodies and other documents in accordance with the law and the charter of the company as permanent records. The Corporate Secretary is required to keep confidential all information of the company.[51]

➔ *See Chapter 6.*

50 CG Regulations, Article 16 and Model Charter, Article 32.

51 CG Regulations, Article 16.

NOTES

NOTES

3 Chapter

THE INTERNAL CORPORATE DOCUMENTS

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The Chairman's Checklist

- ☑ Does the company have a valid charter, with provisions on the protection of shareholder rights, equitable treatment of shareholders, division of authority among the governing bodies and information disclosure?
- ☑ How detailed is the charter? Does the charter merely copy the exact language of legislation?
- ☑ Is the charter freely available to interested parties and accessible on the internet?
- ☑ Has the company adopted internal regulations? If yes, were these internal regulations approved by the Board of Directors or the GMS? Is adopting internal regulations a legal obligation of the company? Is it possible for a company to be incorporated without having internal regulations? Does the company regularly consult and follow its internal regulations?
- ☑ Has the company adopted its own corporate governance code? If so, does the company code touch upon the principles of fairness, responsibility, transparency, and accountability? Does the company code provide recommendations on the relationship between the corporate bodies, notably the interaction between the Board of Directors and General Director or Executive Board?
- ☑ Has the company identified a core set of values? Does the company have a code of ethics based on these values?

The charter is the founding document of a company. No company can be established without a charter. A charter establishes the company, and determines its structure and purpose. It is fundamental to the company's system of corporate governance, ensuring the protection and equitable treatment of shareholders, distribution of authority between the governing bodies, and disclosure and transparency of the company's activities. It also plays an important public role in relation to third parties since it provides information about the company, especially on its corporate governance system. The company is required to register the charter and its amendments with a licensing authority.[1]

In addition to the charter, the company may adopt internal regulations for different purposes. Certain internal regulations are compulsory for a number of specific types of companies. For instance, a credit institution and an insurance company are required to adopt financial regulations which provide the framework for the financial administration of the company and aim to maintain the integrity of the company's financial system. Listed companies (which include listed banks and listed insurance companies) are required to adopt a corporate governance code which ensures that a company is effectively operated and controlled in the interests of shareholders and related persons.[2] A corporate governance code is useful in regulating detailed procedures for the company's governing bodies and can help avoid an unwieldy charter that is difficult to understand. This internal regulation, however, must be consistent with the charter.

The company-level corporate governance code and ethics code allow the company to make its governance structure more transparent while demonstrating the company's commitment to good corporate governance and good business practices.

This chapter examines corporate governance issues as related to charter provisions. It also explains when and how a charter and internal regulations can be amended, and how the amendments are registered. This chapter further touches upon the important role that company-level corporate governance and ethics codes play.

1 LOE, Articles 19 & 26.

2 CG Regulations, Article 4.2.

A. The Company Charter

1. Charter Provisions

The charter must include minimum provisions related to the company's structure and charter capital, the authority of the governing bodies and shareholder rights. Regardless of the company's activities, ownership and management structure, the charter must include the following mandatory provisions:[3]

- Names, addresses of the head office, branch, representative office
- Business lines
- Charter capital; method of increasing and reducing the charter capital
- Names, addresses, nationality and other basic characteristics of all founding shareholders[4]
- Number of shares subscribed for by founding shareholders, par value of shares and total number of shares of each type which may be offered for sale in the case of the company
- Rights and obligations of shareholders
- Management and organizational structure
- Legal representative of the company
- Procedures for passing resolutions of the company, rules for resolution of internal disputes
- Grounds and method of calculating remuneration, wages and bonuses of managers and members of the Supervisory Board
- Circumstances in which a shareholders may require the company to redeem its shares
- Rules for distribution of after-tax profits and dealing with losses in the business
- Cases of dissolution, procedures for dissolution and liquidation of the company assets
- Procedures for amendments of/or additions to the charter of the company

3 LOE, Article 22.

4 Founding shareholder means a shareholder involved in formulating, approving and signing the first charter of a joint stock company (LOE, Article 4.11).

- Names and signatures of the legal representative and founding shareholders.[5]

In addition to the foregoing mandatory provisions, the company's charter may set forth other matters as agreed by the shareholders, but may not be inconsistent with provisions of the law.[6] These provisions give the company and its shareholders great flexibility in organizing the company structure, including its activities, financial structure, and shareholder rights. In other words, the charter largely determines the characteristics and activities of the company.

2. Model Charter

All listed companies in Vietnam are required to follow a Model Charter issued by the MOF.[7]

Company Practices in Vietnam:

Many Vietnamese companies copy the exact language of legislation into the charter and/or include many extraneous details. Neither practice contributes to the quality of the charter. The charter should include the information required by legislation (not the text of legislation) and other provisions that are needed for sound corporate governance. For example, Article 104 of the Law on Enterprises provides that a GMS resolution will be passed if it is approved by at least 65% or 75% of voting shares of shareholders attending the shareholders' meeting. The Law on Enterprises, however, allows the charter to provide a higher percentage (e.g. 80% or 90%). The company, therefore, may provide a higher statutory percentage required to pass certain specific matters for the purpose of protecting the rights of minority shareholders. The company may also provide additional matters subject to the approval of the GMS in addition

5 For a shareholding company equitised from a SOE, transformed from a LLC, divided, consolidated, separated or merged with another shareholding company there can only be name and signature of the legal representative or shareholders of common shares (Article 23, Clause 2 of Decree 102/2010/NĐ-CP).

6 LOE, Article 22, Clause 16.

7 CG Regulations, Article 4.1. Commercial joint stock banks would also need to follow regulations on charter of Circular 06 of the SBV dated 26 February 2010.

to those listed in the Law on Enterprises (e.g. any proposal to accept strategic investors in the company, the appointment of a liquidator or administrator to the company). In addition, the charter may stipulate provisions that are recommended by the Model Charter and best suit the company's objectives (for example, a director may appoint an alternative director to attend and vote at a meeting of the Board of Directors on his/her behalf). [8]

3. When to Amend the Charter?

The charter should be amended when changes occur that affect any provisions.[9] For example, a decision of the company to expand its business scope, increase its charter capital, change its corporate name or its registered office should be accompanied by respective amendments of the charter. This rule is in accordance with the principle of accuracy and reliability of all registered data, and is advised to be followed as good corporate practice.

The charter should also be brought into conformity with changes in legislation when new requirements are introduced that affect charter provisions.

4. Who can Amend the Charter?

As a rule, only the GMS has the authority to amend the charter, except for adjusting the charter capital as a result of the sale of new shares within the number of authorized shares.[10] The Board of Directors has the right to decide the sale of new shares within the number of authorized shares.[11] These provisions seem to suggest that the Board of Directors should have the right to amend the charter to the extent such amendments relate to the adjustment of the charter capital due to the sale of new shares within the authorized shares. However, such a charter amendment should be reported to the GMS at its annual meeting.

8 Article 27 of the Model Charter. The SSC is in the process of amending the Model Charter and also the CG Regulations.

9 Decree 88, Chapter V

10 LOE, Article 96, Clause 2(dd).

11 LOE, Article 108, Clause 2(c).

5. How to Amend the Charter?

Preparing amendments to the charter requires legal drafting skills and specialized knowledge of legislation.

Best Practices:

It is accepted practice that the company, through its legal counsel/ department, prepares the charter amendments in cooperation with outside legal consultants and with the participation of the Corporate Secretary. The General Director should closely follow the process, in order to ensure that provisions of the charter are formulated in accordance with the Board's guidelines. The final text of the draft proposal must be evaluated and accepted at the Board of Directors meeting. That text will be submitted to the GMS as a proposal, except in those cases when amending the charter falls within the Board's authority. In that case, the Board of Directors will, instead of a final proposal, adopt the decision that amends the charter.

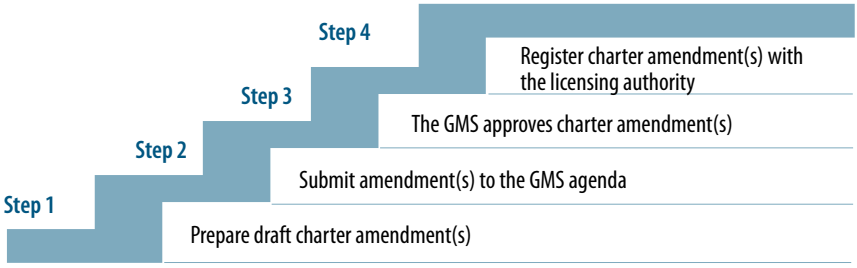
A company may amend its charter at any time to add or change a provision that is required or permitted in the charter or delete a provision that is not required in the charter.

There are three ways a company can amend its charter:

- Change existing charter provisions
- Add new charter provisions
- Approve an entirely new version of the charter (redrafting the charter), which is useful when many changes must be made.

Figure 1 illustrates the procedure for amending the charter. The procedure for restating the charter is similar.

Figure 1: Procedure for Amending the Charter



When under specific circumstances special regimes are introduced (as illustrated in Figure 1), the procedure for amending the charter changes in such a way that some of the above mentioned steps will be excluded or broadened.

The GMS has the authority to approve the charter amendments with at least 75% voting shares of all shareholders attending the shareholders' meeting.[12] The GMS may also approve the charter amendments by a written resolution with at least 75% of voting shares.[13] The charter can provide for a higher percentage of votes.[14]

6. Objection to the Amendments of the Charter

By law, when a shareholder votes against a change of rights and/or obligations of the shareholders provided in the charter, such shareholder has the right to request the company redeem his shares. Such request must be sent to the company within 10 working days from the date on which the resolution approving such change is passed.[15]

The price to redeem shares may be:[16]

12 LOE, Article 104, Clause 3(b).

13 LOE, Article 104, Clause 5.

14 Notwithstanding the provisions of the LOE, Vietnam's WTO accession commitments allow a foreign-owned company to provide any matter under the authority of the GMS (which would include the charter amendments) to be passed with simple a majority of voting shares.

15 LOE, Article 90, Clause 1.

16 LOE, Article 90, Clause 2.

- The market price
- A price calculated in accordance with the principles provided in the charter (if any)
- A price given by a professional valuation organization appointed by the parties.

If the relevant shareholder and the company cannot reach a price to redeem shares, the shareholder may sell his/her shares to another party.

7. Registration of Charter Amendments

Article 26 of the Law on Enterprises requires that any change in the business registration document of a company, including the company charter, is registered with the business registration authority. However, neither the Law on Enterprises nor its implementing regulations provide for any procedure for registration of amendments to a charter. In practice, a company normally registers an amended charter with the business registration authority at the same time the company applies for any change of contents recoded in the business registration certificate (e.g. increase of charter capital, change of business activities).

The following documents should be submitted to the business registration authority to reflect the change of contents recorded in the business registration certificate:[17]

- Notification of the change(s) of business registration contents
- Resolution of the GMS approving such change(s)
- Amended charter.

8. When do Charter Amendments Become Effective?

Although the law is silent on when charter amendments become effective, given the GMS is imposed a right to approve any amendments of the charter, it is reasonable to conclude that the charter amendments will become effective from the date they are duly approved by the GMS.[18]

17 Decree 88, Chapter V of the Government dated 29 August 2006 on business registration.

18 Amendments of the business registration contents of a company which are subject to the approval of the licensing authority (e.g. business activities, legal representative or charter capital) would only come into effect from the issuance of an amended business registration certificate, even though such changes have been recorded in the amended charter duly approved by the GMS.

9. Disclosure of the Charter

The charter is an important source of information for shareholders and potential investors. The original charter document, as well as all charter amendments, should be kept at the registered office of the company.[19] Shareholders of the company are entitled to inspect and copy the charter and its amendments.[20]

19 LOE, Article 12.

20 LOE, Article 79, Clause 1(e).

B. The Internal Regulations of the Company

1. Types of Internal Regulations

Internal regulations are internal company documents that specify charter provisions and may contain any provision for managing the business and regulating the affairs of a company.

Internal regulations may be an optional or compulsory subject to each type of internal regulations and each type of company. In any case, the company's internal regulations must be consistent with the charter and cannot conflict with legislation. As between the charter and internal regulations, the charter is the dominant instrument so far as their provisions are mutually conflicting, the charter prevails.

The company has no obligation to register its internal regulations with the business registration authority for the purpose of establishment. In other words, the company may be formed and may exist without the internal regulations. The application for the formation of the company does not have to be accompanied by the internal regulations.

There are various types of company internal regulations:

- Corporate governance internal rules which are required for listed companies (see section C of Chapter 3 below)
- Internal labor rules which are compulsory for all companies with 10 or more employees. The internal labor rules must be registered with the relevant labor authority[21]
- Other internal regulations such as financial regulations,[22] rules on allocating responsibilities, rules on insurance underwriting, assessment and compensation, investment regulations, or regulations on internal control and audit which are compulsory for insurance companies.[23]

21 Labor Code, Article 82 of the National Assembly dated 23 June 1994 (as amended).

22 Credit institutions are also required to establish financial regulations (Article 29 of Decree 146 of the Government dated 23 November 2005 on financial regimes applicable to credit institutions).

23 Decree 45 of the Government dated 27 March 2007 implementing the LIB and Decree 46 of the Government dated 27 March 2007 on the financial regime applicable to insurance businesses.

Best Practices:

Although certain provisions must be stipulated in the charter, internal regulations have several advantages:

- Internal regulations do not need to be registered with the business registration authority, saving the company resources by avoiding registration fees and bureaucratic procedures
- In comparison with the charter, the procedure for amending internal regulations is simplified, making it easier to adjust to changing circumstances
- Internal regulations contribute to the protection of shareholders' rights. In particular, internal regulations set out a sound and proper framework for the administration and operations of the company. Internal regulations also assist shareholders to understand the implementation of the charter provisions in practice.

2. How to Adopt and Amend Internal Regulations?

By law, the General Director has the right to suggest and the Board of Directors has the right to decide internal regulations of the company.[24] It is a statutory presumption that the Board of Directors has the authority to adopt or change the internal regulations.

24 LOE, Articles 108, Clause 2(k) & 116, Clause 3(d). Although the term "internal management rules" is not defined by law, it could be interpreted to include all internal regulations set out in B(1) above given that such internal regulations are relevant to the management of the company.

C. Company Codes of Corporate Governance

1. What is a Company Code of Corporate Governance?

A company-level corporate governance code is a principle-based statement on the company's corporate governance practices. It is intended to make the company's governance structure more transparent and demonstrate the company's commitment to good corporate governance by developing and furthering:

- Responsible, accountable and value-based management
- An effective Board of Directors and executive bodies that act in the best interests of the company and its shareholders, including minority shareholders and seek to enhance shareholder value in a sustainable manner
- Appropriate information disclosure and transparency, as well as an effective system of risk management and internal control.

By adopting, following and updating a company-level corporate governance code on a regular basis, the company confirms its desire to demonstrably lead and promote good corporate governance. To foster the confidence of its shareholders, employees, investors and the public, a company-level corporate governance code should, however, go beyond the established legal and regulatory framework and embrace both nationally and internationally recognized best corporate governance practices.

Best Practices:

Many companies in countries with well-developed corporate governance practices have voluntary corporate governance codes or guidelines in addition to their charter. Most codes are brief and simple statements of principle that generally reflect the desire of the Board of Directors and management to conduct company operations in an honest, fair, legal and socially responsible manner.

Company codes and guidelines may cover a vast number of topics including:

- **General Issues of Corporate Governance:**
  - Goals and objectives of the company
  - Relationship between the shareholders and the Board of Directors
  - Relationship between the Board of Directors and the General Director or Executive Board
  - Relationship between controlling and minority shareholders.

- **Good Board Practices:**
  - Composition, including the number of independent directors
  - Number and structure of committees
  - General working procedures
  - Remuneration of non-executive directors.

- **Good Executive Board Practices:**
  - Executive remuneration
  - Interaction and relationship with the Board of Directors.

- **Good Supervisory Board Practices:**
  - Composition, including the qualifications of the Supervisory Board members
  - Responsibilities and working procedures of the Supervisory Board
  - Relationship between the Supervisory Board and the Board of Directors, the GMS and shareholders
  - Mechanism to ensure the independence of the Supervisory Board when conducting its responsibilities
  - Remuneration of the Supervisory Board members.

- **Shareholder Rights:**
  - On organizing and conducting the GMS
  - Minority shareholder protection
  - Disclosure of related party transactions
  - The company's dividend policy.

- **Disclosure and Transparency Issues:**
  - Internal control function, including risk management
  - Policy on the use of audit and consulting services and External Auditor rotation
  - Accounting policies and standards
  - Disclosure of financial reports and important information about the company.

- **Accountability of the Company to Stakeholders:**
  - Communications and relations with investors and other parties that have an interest in a company.

Topics to be covered will depend upon the issues of greatest relevance to the company. As a rule, company codes are approved by the Board of Directors, communicated to shareholders and investors, and published on the company's website. Company codes or guidelines must be consistent with legislation, as well as the charter, and should generally follow the provisions of the relevant corporate governance code. They cannot, however, replace the charter.

2. Vietnamese Company Code of Corporate Governance

Codes of corporate governance are important sources for corporate governance in many economies ranging from advanced to transitional economies. The framework for corporate governance in Vietnam, especially for listed companies, is in the early stages of development. In 2007, the MOF adopted the CG Regulations. The CG Regulations primarily address listed companies. The purpose of the CG Regulations is to implement "the best international practice on corporate management suitable to the conditions of Vietnam to ensure a stable development of stock market and a transparent economy in Vietnam". All listed companies are obliged to follow the recommendations and to adopt their own written corporate governance code.[25] It is also recommended non-listed companies follow the CG Regulations to the extent the rules are applicable.

A corporate governance code must cover at least the following:

- Order and procedures for convening and voting at shareholders' meetings
- Order and procedures for nominating, standing for election, electing and dismissing directors

25 CG Regulations, Article 4, Clause 2. Although most Vietnamese listed companies comply with the above requirement and adopt their own code of corporate governance, the internal governance structures of listed companies show a lack of flexibility, efficiency and accountability. The listed companies need to improve their corporate governance to ensure market transparency, investor protection and effective management in order to ensure better development of the securities market.

- Order and procedures for holding Board of Directors meetings
- Order and procedures for selecting, appointing and dismissing senior managers
- Order and procedures for co-ordination between the Board of Directors, the Supervisory Board and the Executive Board
- Rules on assessing activities, rewarding and disciplining Board of Directors, members of the Supervisory Board, the Executive Board and other managers.

A listed company must announce information on its corporate governance status at the annual shareholders' meeting and in annual reports of the company. Such information must at least consist of:[26]

- Members and structure of the Board of Directors and of the Supervisory Board
- Activities of the Board of Directors and of the Supervisory Board
- Activities of independent non-executive members of the Board of Directors
- Activities of Board Committees
- A plan to increase the efficiency of the company's activities
- Remuneration and expenses for the directors, members of the Executive Board and the Supervisory Board
- Information about transactions of the company's shares by the directors, members of Executive Board, the Supervisory Board and major shareholders; and about other transactions by the directors, members of Executive Board, the Supervisory Board and their affiliated persons
- The number of the directors, members of the Executive Board and the Supervisory Board attending training courses on corporate governance
- Actions not yet undertaken, but required by the corporate governance code, the reasons and proposed solutions.

26 CG Regulations, Article 28.

D. Company Code of Ethics

1. What is a Code of Ethics?

A Code of Ethics (also referred to as a Code of Conduct, or Ethics or Responsibility Statement) is a basic guide of conduct that imposes duties and responsibilities on a company's officers and employees towards its stakeholders, including colleagues, customers and clients, business partners (e.g. suppliers), government and society.

2. Why Adopt a Code of Ethics?

A Code of Ethics:

- **Enhances the company's reputation/image:** A company's reputation and image constitutes an integral, if intangible, part of its assets. Establishing a Code of Ethics is an effective way to communicate the value a company places on good business practices.
- **Improves risk and crisis management:** A Code of Ethics can bring potential problems to management's and directors' attention before a full-blown crisis occurs, as it sensitizes and encourages employees to react to ethical dilemmas.
- **Develops a corporate culture and brings corporate values to the forefront:** A Code of Ethics developed by and widely distributed to the company's officers and employees can help build a cohesive corporate culture, based on a shared set of values, that helps guide employees in their daily work.
- **Advances stakeholder communications:** A Code of Ethics also has a strong demonstration effect towards the company's stakeholders during times of crisis, communicating the company's commitment to ethical behavior and underlining that possible transgressions are exceptions rather than the rule.
- **Avoids litigation:** A Code of Ethics, in combination with an effective ethics program, can help minimize litigation risks resulting from fraud, conflict of interest, corruption and bribery, and insider trading.

3. How to Implement a Code of Ethics?

Every company is different in terms of size and industry, and each has a different business culture, set of values, and ethically sensitive operational areas. A Code of Ethics should reflect these differences.

A company's Code of Ethics should go beyond simple rules and, instead, focus on core values. Before drafting a Code of Ethics, it is fundamental that a company has identified and formulated its values.[27]

Drafting a Code of Ethics goes beyond paper. Developing a Code of Ethics is a process as much as an outcome. In assessing the need for a Code of Ethics, the company should begin by studying its internal ethics climate, the amount and type of ethical guidance its employees and officers receive, and the risk the company faces without such a Code.[28] As a second step, the company should seek buy-in from every part of the organization, from senior management to workers, if the Code of Ethics is to truly guide the company's ethical practice. Most importantly, the company should ensure that a broad consultative process takes place within the company.[29] By the time the Code of Ethics is submitted for the Board of Directors' approval, every employee should be familiar with it and have played a role in drafting it, a process that ensures buy-in and helps with implementation.

The company must also recognize that the "tone at the top" matters, and that public and demonstrable commitment by senior management and directors is a key component to the implementation of a Code of Ethics.

A Code of Ethics should be user-friendly (i.e. provide practical guidance to the company's management and employees on how to handle ethics problems that may arise in the day-to-day course of business).[30] In support of a Code of

27 For more information on how to design, manage and implement Code of Ethics, see Kenneth Johnson and Igor Abramov, Business Ethics: A Manual for Managing a Responsible Business Enterprise (Washington, D.C.: U.S. Department of Commerce, 2004). See also: http://www.trade.gov/goodgovernance/business_ethics/manual.asp.

28 Kenneth Johnson and Igor Abramov, Business Ethics: A Manual for Managing a Responsible Business Enterprise, Chapter 3, pp. 45-46 and Chapter 5, pp. 93-97.

29 Many companies can choose to establish a working group or task force to produce a first draft of the company's Code of Ethics for the Board of Directors' approval, consisting of representatives from every level. See also: Kenneth Johnson and Igor Abramov, Business Ethics: A Manual for Managing a Responsible Business Enterprise, pp. 57-61.

30 The Code of Ethics itself should include a practical procedure for raising an ethical issue ("first go to your supervisor, then to..."), and even a procedure for suggesting changes in the Code. The Code should also include an ethical decision-making model ("Step 1: Check your facts, Step 2...."). See also: Kenneth Johnson and Igor Abramov, Business Ethics: A Manual for Managing a Responsible Business Enterprise, Chapter 6, pp. 138–144.

Ethics, the company may wish to establish an ethics training program,[31] as well as appoint an ethics officer and create an ethics office and/or establish a Board of Directors' Ethics Committee to advise and educate officers and employees, and provide guarantees for confidential counseling.

The Code of Ethics should be subject to continuous change, revision and renewal by the Board of Directors' Ethics Committee.

4. Vietnamese Code of Business Ethics

Vietnam has not adopted a general Code of Ethics applicable to Vietnamese companies. However, certain specific types of companies (such as insurance companies[32] and securities companies[33]) are required to adopt professional ethics rules that establish the most important principles and rules of business ethics.

31 A practical ethics training program should be organized around cases that might arise within the context of an employee's daily work and be organized in an interactive manner. See also: Kenneth Johnson and Igor Abramov, Business Ethics: A Manual for Managing a Responsible Business Enterprise, Chapter 7, pp. 155–165.

32 Circular 156, Chapter X, Article 3, Clause 3.7.

33 Article 12 of Decision 27 of the MOF dated 24 April 2007 issuing regulations on the organization and operation of securities companies (Decision 27).

NOTES

4 Chapter

THE BOARD OF DIRECTORS

4 | The Board of Directors

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The Chairman's Checklist

The Board of Directors' Authority:

- ☑ Is the Board of Directors' focus on protecting the interests of the company and its shareholders? Do all Board of Directors members understand the role and priorities of the Board of Directors? Does the Board of Directors have sufficient powers according to the charter and the internal regulations to fulfill its oversight duties? Have these authorities been properly communicated? Does the Board of Directors use its powers in practice?
- ☑ What is the Board of Directors' role with respect to the company's governance, organization of the GMS, protection of company assets, resolution of conflicts and supervision of internal controls and risk management? How effective is the Board in guiding and setting strategy? Does the Board of Directors have the tools to properly oversee the operational and financial performance of the company? Is a succession plan in place, in particular for the General Director?
- ☑ Is the Board of Directors' authority distinct from management's, both on paper and in practice?

The Board of Directors' Election:

- ☑ Who nominates candidates to the Board of Directors? Is sufficient information provided to shareholders about nominees? How does the Board of Directors influence the nomination process?
- ☑ Does the Board of Directors ensure that all shareholders understand how cumulative voting works?

The Board of Directors' Composition:

- ☑ Has the Board of Directors designed, articulated, and implemented policies relating to its size, composition and mix-of-skills, breadth of experience and other pertinent qualities?
- ☑ Is the Board of Directors' composition, considering its competencies and mix-of-skills, suited to its oversight duties and the development of its strategy?

- How effectively does the Board of Directors work as a team? Does the company have independent directors? Is the Board of Directors constituted of a majority of non-executive directors?
- How effective is the Board of Directors' leadership, both at the Board and committee level?
- Is the number of directors consistent with the needs of the company? Does the company have enough directors to establish Board of Directors committees?

The Board of Directors' Structure and Committees:

- Does the Board of Directors have Human Resources, Development Policy, Remuneration and Audit committees or other Board committees in accordance with legal requirements and sound corporate governance practices? What are the costs and benefits of these or other committees? Are there sufficient independent (or non-executive) directors to chair and sit on these committees? Do Board of Directors committees have sufficient resources, both human and financial, to properly fulfill their functions?
- How well informed are non-committee members about the committee's deliberations? Is the information prepared by the committee for the Board of Directors adequate for effective decision-making?
- Do Board of Directors Committee members have sufficient expertise on issues relevant to delegated competence? Do they have access to information from the External Auditor, Internal Auditor and the executive bodies involved in the financial, economic and other activities of the company?

The Board of Directors' Working Procedures:

- Has the Board of Directors identified, prioritized and scheduled key issues that should be reviewed on a regular basis? Has the Board identified the information it requires to properly analyze these key issues?
- Does the Chairman take an active role in organizing the work of the Board of Directors? Does the Board of Directors meet regularly in accordance with a fixed schedule?
- Does the Chairman encourage a free and open exchange of views?

- ☑ Are procedures in place that ensure the proper preparation and conduct of Board of Directors meetings, e.g. advance notification on agenda issues, distribution of materials and documents, proper determination of the quorum, voting through absentee ballots and preparation of the minutes? How efficient are Board of Directors meetings in practice? Is the information provided to directors focused, succinct and to the point, allowing for effective decision-making? Are key issues and risks highlighted? Do the materials contain annexes with further relevant details?
- ☑ How does the Board of Directors ensure that it properly oversees the executive bodies? Does it receive periodic reports and updates from the executive bodies? Does the Board of Directors invite members of the executive bodies to Board meetings to inform its members on key issues? How well does the Board of Directors interact with senior management, including the General Director? Does the Board provide wise counsel and clear direction to members of the executive bodies? Does it challenge management sufficiently? How does it balance oversight against micro-management?

The Board of Directors' Duties and Liabilities:

- ☑ Do all Board of Directors members understand their duties to act reasonably and in good faith in the best interests of the company and its shareholders? Do Board members properly prepare themselves for Board meetings? Does the Board of Directors give proper consideration to the interests of other stakeholders?
- ☑ Does the company have contracts with directors? Do such contracts describe their duties and liabilities?

The Board of Directors' Self-Evaluation and Training:

- ☑ Does the Board of Directors conduct annual self-evaluations? Has the Board developed performance indicators or benchmarks for its work? Is this process credible and are the results made available to shareholders?
- ☑ Does the Board of Directors conduct regular training events on corporate governance and other issues of importance for improving the future work of this corporate body? Do all directors attend training sessions? Does the company hold induction training for new Board members to acquaint them with the company's strategy, future plans and operations, as well as the previous work of the Board of Directors?

The Board of Directors' Remuneration:

- ☑ Is the remuneration of directors competitive? Are all directors paid the same amount? Is the remuneration structured in a manner that provides incentives to take on additional responsibilities. For example, the chairmanship of a committee? Does the remuneration package jeopardize a director's independence? Does the total remuneration package constitute a significant portion of a director's total annual income?
- ☑ Does the Board of Directors and its Human Resource Committee and Remuneration Committee periodically review the remuneration paid to directors? Is the remuneration of directors disclosed on an individual basis?
- ☑ Does the company have a policy in place that prohibits personal loans or credits to its directors?
- ☑ Are executive and non-executive directors compensated in the same manner? Does the company have a policy on (not) remunerating executive directors for their service on the Board of Directors beyond their executive remuneration package?

An effective, professional and independent Board of Directors is essential for good corporate governance. The Board of Directors acts in the best interests of the company and its shareholders. It sets the strategy of the company, protects shareholder rights and oversees the executive bodies and financial operations of the company.

While the Board of Directors cannot substitute for talented professional managers, or change the economic environment in which a company operates, it can influence the performance of the company through its strategic oversight and control over management. The Board of Directors' activities may go entirely unnoticed when an economy is strong, share prices are rising and everything appears to be going well. On the other hand, when things go badly, the Board of Directors becomes the center of attention and the importance of the Board of Directors becomes clear.

Mini-Case:

Certainly, the catastrophic collapse of Enron in the U.S. served to focus public and government attention on boards and corporate governance. The following illustration shows some of the shortcomings of the Enron Board that contributed to the company's downfall, the loss of many thousands of jobs and pensions, and ultimately a loss in faith in U.S. financial markets. On 7 May 2002, the U.S. Senate concluded the following with respect to the role of the Board in Enron's collapse and bankruptcy:[1]

- **Fiduciary Failure:** The Enron Board failed to safeguard Enron shareholders and contributed to the collapse of the seventh largest public company in the U.S.
- **Lack of Independence:** Financial ties between the company and certain Board members compromised the independence of the Enron Board.
- **Conflicts of Interests:** Despite clear conflicts of interests, the Enron Board approved an unprecedented arrangement allowing Enron's Chief Financial Officer to establish and operate private equity funds that transacted business with Enron and profited at Enron's expense.
- **Excessive Compensation:** The Enron Board approved excessive compensation for company executives, failed to monitor the cumulative cash drain caused by Enron's financial year 2000 annual bonus and performance unit plans, and failed to monitor or halt a company-financed, multi-million dollar, personal credit line.
- **High-Risk Accounting:** The Enron Board knowingly allowed Enron to engage in high risk accounting practices.
- **Extensive Undisclosed Off-the-Book Activity:** The Enron Board knowingly allowed Enron to conduct billions of dollars in off-the-book activity to make its financial condition appear better than it was and failed to ensure adequate public disclosure of material off-the-books liabilities that contributed to Enron's collapse.

Source: IFC, March 2004

1 107th Congress, 2nd Session, Report by the Permanent Subcommittee on Investigations, The Role of the Board of Directors in Enron's Collapse, 8 July 2002. See also: http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/enron/senpsi70802rpt.pdf.

The legal regime of the Board of Directors is characterized by mandatory requirements, but is also accompanied by a degree of flexibility enabling companies to tailor their internal organization to their own needs and circumstances. This chapter describes the authority, election and dismissal, composition, structure, working procedures, duties and liabilities, evaluation, and remuneration of the Board of Directors. It also discusses corporate governance principles and standards found in the CG Regulations and other best practices.

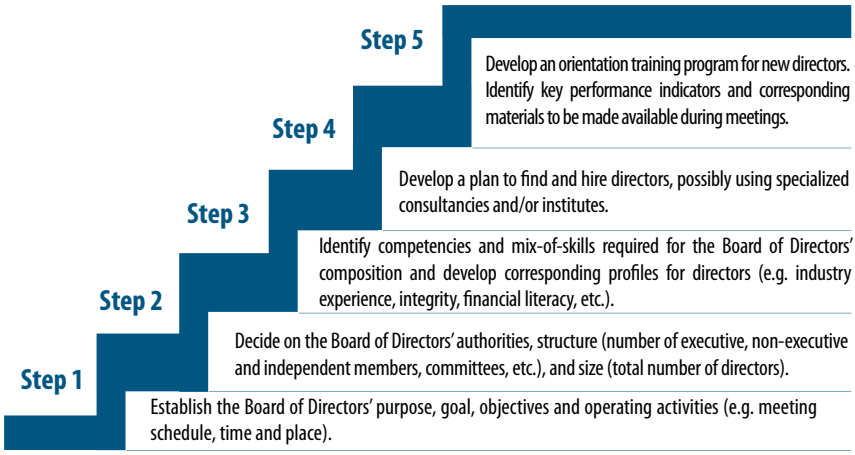
A. The Board of Directors' Authority

1. When to Establish a Board of Directors?

A joint stock company must establish a Board of Directors.[2]

A company that wishes to establish a Board of Directors will want to take the following steps illustrated in Figure 1:

Figure 1: Five Steps in Developing a Board of Directors



Source: IFC, March 2004

2. An Overview of the Board of Directors' Authority

The Law on Enterprises defines the Board of Directors' authority.[3] The Board of Directors is responsible for setting the company's strategy and business priorities, as well as guiding and controlling managerial performance, and for making decisions on matters that do not fall under the GMS' authority. In essence, the role of the Board of Directors is to direct and not to manage. The charter can assign additional powers to the Board of Directors as well.[4]

2 LOE, Article 95.
3 LOE, Article 108.
4 LOE, Article 108 , Clause 2(p).

As a rule, the Board of Directors has the authority to decide all issues that do not fall under the authority of the GMS and other corporate bodies.

Best Practices:

When additional powers and authorities are granted to the Board of Directors in the charter, these should correspond with the typical functions of the Board of Directors to avoid ambiguity with respect to the division of powers between the GMS, Board of Directors, General Director and/or Executive Board.

Matters under the Board of Directors' authority cannot be delegated to the General Director or the Executive Board.

As illustrated in Figure 2, the Board of Directors has the authority to make decisions in the following areas:[5]

- The strategic oversight and control over management, as well as the election and oversight of the General Director and Executive Board
- The organization of the GMS
- The charter capital and assets of the company
- Disclosure and transparency
- Other areas determined by the Law on Enterprises or the charter.

5 LOE, Article 108, Clause 2.

Figure 2: Board of Directors' Authority According to the Law on Enterprises and the CG Regulations

Strategic Oversight and Control

- Decides on medium-term development strategies, and plans, and annual business plans of the company
- Decides on investment plans and investment projects within its authority
- Decides on solutions for market expansion, marketing and technology
- Approves contracts for purchase, sale, borrowing, lending and other contracts valued at 50% or more of the total value of assets recorded in the latest financial statements of the company (or such smaller percentage as may be stipulated in the charter)
- Appoints, dismisses or removes, and signs or terminates contracts with the General Director and other key managers of the company
- Appoints an authorized representative to exercise ownership rights in other companies, and to make decisions on the level of remuneration and other benefits of such persons
- Supervises and directs the General Director and other management personnel
- Decides on organizational structure of the company
- Decides on the establishment of subsidiaries, the establishment of branches and representative offices and the purchase of shares from other enterprises
- Proposes the re-organization or dissolution of the company
- Creates Board committees with respect to listed companies
- Appoints or dismisses the Corporate Secretary
- Adopts internal management documents (and corporate governance code of listed companies)

Control, Disclosure and Transparency

- Submits annual financial reports to the GMS
- Proposes the adoption of financial reports, managing reports, auditor reports (and Corporate Governance Reports of listed companies) to the GMS
- Adopts the report on important events for the public companies
- Establishes internal control and risk management mechanisms

Charter Capital and Assets

- Proposes classes of shares and total number of shares of each class to be offered
- Decides on offering new shares within the number of shares of each class which may be offered
- Decides on raising additional funds in other forms
- Decides on prices for offering shares and bonds of the company
- Decides on redemption of shares of no more than 10% of the sold shares within each 12 month period

Shareholder Rights

The GMS

- Organizes the GMS
- Approves the agenda
- Organizes to obtain written opinions in order for the GMS to pass decisions

Dividends

- Recommends the GMS dividend to be paid, time-limit and procedures for payment of dividend

Conflict Resolution

- Approves related party transactions valued at 50% or more of the total value of assets recorded in the latest financial statements of the company (or such smaller percentage as may be stipulated in the charter)
- Resolves corporate conflicts

3. The Board of Directors' Authority in Relation to Strategic Oversight and Control

The Board of Directors plays an important role in the company's strategic oversight and control. The Board of Directors has the following authorities in this area:

a) Setting Medium-Term Development Strategies, Plans and Annual Business Plans of the Company

The Board of Directors has the authority to determine medium-term development strategies and plans. In addition, the Board of Directors has the right to determine or approve annual business plans of the company.[6]

Best Practices:

The Board of Directors sets the company's strategic direction in the context of the market environment, its financial position and other factors. It is very important for the Board of Directors to determine the amount and type of risks the company is ready to take in accomplishing its goals.

The strategic and business plans of the company should be reviewed and evaluated at least on an annual basis. The evaluation should also cover production, marketing and planned investments. Finally, the Board of Directors should approve a single document that contains financial projections for one year.

When the GMS appoint new members of the Board of Directors, the Corporate Secretary should inform new members about the strategy and business plan of the company.

Good corporate governance principles also suggest that:

- The General Director and the Executive Board seek the approval of the Board of Directors for transactions that fall outside the scope of the financial and business plan (non-standard operations).
- The company develop internal regulations with detailed procedures for the General Director and the Executive Board for obtaining the approval of operations that fall outside the scope of the financial and business plan.
- The Board of Directors be given the right to veto the decision of the General Director and the Executive Board to implement any non-standard operations, provided such veto can be justified.
- The company internal regulations determine rights and duties of the executive bodies, as well as the responsibility for acting not in accordance with these limitations.

6 LOE, Article 108, Clause 2(a).

The Board of Directors is not, however, involved in the day-to-day management of the company, which is the responsibility of the executive bodies.

b) Appointment and Removal of Members of the Executive Board

The Board of Directors has the authority and obligation to appoint the General Director and other key managers of the company (i.e. Deputy General Director(s) and Chief Accountant).[7] The Board of Directors may remove such persons in accordance with laws.[8]

c) Approving Conditions in the Contracts with Members of the Executive Board and Determining the Remuneration

The Board of Directors has the power to approve the remuneration, the terms and conditions of the contract between the company and members of the Executive Board.[9] After the approval, the General Director will sign the contract with each member of the Executive Board. The contract with the General Director will be signed by the Chairman of the Board of Directors. Article 117.1 of the Law on Enterprises states that the compensation of the Executive Board is determined by the Board of Directors based on the business results and efficiency of the company.

Best Practices:

It is common practice internationally for the Board of Directors' Remuneration Committee, chaired and comprised of independent directors, to set the remuneration of the General Director and other senior managers. Criteria for determining the level of compensation should include the tasks of the Executive Board member, the economic (financial) situation of the company, the performance outlook compared to competing companies, evaluation of the member's past performance as well as the performance of the Executive Board as a whole, making connections between the future results of that member and his/her remuneration and professional opinions.

7 LOE, Article 108, Clause 2(h).

8 Arguably the General Director and other key managers of the company would be considered as employees of the company and the provisions of the Labor Code would apply. Accordingly, terminating employment of the General Director and such managers would be subject to the legitimate reasons as provided in the Labor Code.

9 LOE, Article 108, Clause 2(h).

➔ *For more information on executive remuneration, see Chapter 5, Section G.*

d) Supervising the Executive Board's Operations

The Executive Board must be accountable to the Board of Directors. The Board of Directors supervises the Executive Board in its work of conducting the daily business of the company.[10] Furthermore, the Board of Directors has the right to:

1. Appoint and remove Executive Board members
2. Approve the conditions of the contracts between the company and the members of the Executive Board.

In listed companies, it is the Executive Board's obligation to send reports to the Board of Directors and the GMS.[11]

Best Practices:

The executive bodies normally report to the Board of Directors. Most shareholders, in particular minority shareholders, are not able to effectively supervise management. This is the reason why this task is the responsibility of the Board of Directors, which oversees the executive bodies on behalf of all shareholders.

When establishing and selecting an Executive Board, an appropriate balance must be struck between exercising oversight over the General Director and allowing him/her sufficient autonomy to conduct corporate affairs. The dangers of weak oversight are well known. Managers can operate in their own personal interests and defraud shareholders. There are, on the other hand, dangers associated with excessive oversight. These include micro-management and the politicization of managerial decision-making. Both weak and excessive oversight can lead to economic inefficiencies and legal problems. As a consequence, charters, internal regulations and other policy documents should be developed with a view towards dividing responsibilities among the governing bodies of the company on the basis of what body is best suited for a particular task. Managerial tasks should, clearly, be left to professional managers. Oversight tasks should be carried out by oversight bodies, such as the Supervisory Board, Internal Auditor or Audit Committee and GMS.

10 LOE, Article 108, Clause 2(i).

11 Model Charter, Article 31, Clause 4.

Best Practices:

The Board of Directors must understand what to monitor. A number of key issues every Board of Directors will want to closely monitor should include the:

- Company's overall performance, especially in comparison to competing companies
- Executive bodies' compliance with law and internal procedures, including on corporate governance, risk management and internal control, as well as ethics
- Executive bodies' performance, both at the team and individual levels
- Implementation of the company's strategy
- Company's marketing and sales targets
- Company's financial results
- Relations with key stakeholders, including the company's shareholders, as well as employees, suppliers and customers.

e) Appointing the General Director

The Board of Directors appoints the General Director of the company[12] who would act as the Chairman of the Executive Board.

f) Creating the Board Committees

According to the CG Regulations, the Board of Directors of listed committees may create one or more committees. The Board should create a Human Resources Committee, Development Policy Committee, Remuneration Committee, Audit Committee and other special Board committees in accordance with the GMS' resolution.[13]

12 LOE, Article 108, Clause 2(h). The appointment of the General Director of a credit institution or insurance company will be also subject to the approval of the SBV or the MOF, respectively (Article 51 of the new 2010 LCI and Article 13, Clause 2 of Decree 45).

13 A commercial bank would be required to establish at least (i) a risk management committee and (ii) a Human Resources Committee to assist the Board of Directors to carry out its duties and obligations (Article 16, Clause 9 of Decree 59 of the Government dated 16 July 2009 on the organization and operation of commercial banks and Article 43, Clause 6 of the new 2010 LCI).

Best Practices:

The Board of Directors can create competent committees in order to manage the company more efficiently and resolve complex problems. Creating the committee is of extreme importance if the Board of Directors consists of a large number of members or when a significant number of executive members is at the same time on the Board of Directors.

g) Appointing and Dismissing the Corporate Secretary

Appointing the Corporate Secretary, and defining the terms and conditions of the contract with the Corporate Secretary, including the amount of remuneration, fall under the Board of Directors' authority of listed companies.[14] Moreover, the Corporate Secretary is accountable to and supervised by the Board of Directors in accordance with the terms and conditions of his/her employment contract.

➔ *For more information on the Corporate Secretary, see Chapter 6.*

h) Adopting Internal Documents

The Board of Directors adopts the internal documents, excluding those that must be approved by the GMS or the executive bodies of the company.

The CG Regulations advises listed companies that their Board of Directors approves the following internal documents:

- Internal documents for every Board Committee that is created[15]
- Regulations guiding shareholders to vote for Board of Directors members by the method of cumulative voting[16]
- Rules on announcing information in accordance with the law.[17]

14 CG Regulations, Article 16.
15 CG Regulations, Article 15, Clause 3.
16 CG Regulations, Article 9, Clause 5.
17 CG Regulations, Article 30, Clause 1(a).

Best Practices:

International corporate governance practices shows that the Board of Directors can approve a number of internal documents dealing with a company's:

- Dividend policy
- Information policy
- Ethical standards
- Control and revision service
- Risk management
- Audits of the financial and business activity of the company
- Corporate Secretary.

i) Establishing and Terminating Subsidiaries, Branches and Representative Offices

The Board of Directors has authority to decide on the establishment of subsidiaries, branches and representative offices of the company.[18]

j) Adopting an Effective Code of Corporate Governance

The Board of Directors of a listed company has an overall responsibility of ensuring that an effective code of corporate governance is adopted by the company to protect shareholders' rights. The approval authority of the code of corporate governance belongs to the GMS and the Board of Directors should review the code before submitting to the GMS.

18 LOE, Article 108, Clause 2(k).

4. The Board of Directors' Authority in Relation to Shareholder Rights

a) Organizing the General Meeting of Shareholders[19]

The Board of Directors has the authority, and sometimes the obligation, to include items on the agenda.[20]

The Board of Directors must include items on the agenda of the GMS upon the request of a shareholder (or a group of shareholders) owning more than 10% of voting shares within six consecutive months.[21]

➔ *For more information on who can request an GMS, see Chapter 8, Section D.*

b) Resolving Corporate Conflicts

Best Practices:

A key Board of Directors function is to establish a system of compliance with corporate procedures. The Board of Directors' responsibility is to take all necessary steps to prevent and resolve conflicts that may arise between shareholders and the company. It may appoint officers to implement systems of enforcement. The Board of Directors may also form a Conflict Resolution Committee to this end.

5. The Board of Directors' Authority in Relation to Assets and the Charter Capital

The Board of Directors has the authority to decide on whether to issue shares within the limitations of authorized capital.[22] The Board of Directors also has the authority to decide on class of bonds, total value of bonds and timing of

19 The general aspects of organizing the GMS, including the role of the Board of Directors, are discussed at length in Chapter 8. In this section, this process is approached from the perspective of the Board of Directors and focuses on the GMS agenda.

20 LOE, Article 108, Clause 2(l).

21 LOE, Article 99, Clause 2.

22 LOE, Article 108, Clause 2(c).

issuance unless this authority has been provided to the GMS in the charter. In such circumstances, the Board of Directors is required to report and submit relevant documents in relation to the issuance of bonds to the nearest shareholders' meeting.[23] The issuance of convertible bonds, however, would be subject to the approval of the GMS.[24]

The Board of Directors has the authority to redeem no more than 10% of the issued shares of each class of the company within each 12 months and decide the redemption price of shares.[25] The Board of Directors will decide the sale and purchase contracts having value at 50% or more of the total value of the company as recorded in the most recent financial statement.[26]

6. The Board of Directors' Authority in Relation to Control, Disclosure and Transparency

a) Preliminary Approving the Financial Reports

The Board of Directors prepares annual financial statements at the end of the financial year.[27] The Board of Directors has a role to preliminary approve the audited financial statements and also needs to obtain a final review by the Supervisor Board before submitting them to the annual GMS for final approval.[28]

b) Preliminary Adoption of the Corporate Governance Report

23 LOE, Article 88, Clause 3.
24 Decree 52, Article 19, Clause 1.
25 LOE, Article 91.
26 LOE, Article 108, Clause 2(g).
27 LOE, Article 128, Clause 1.
28 LOE, Articles 108.2(m), articles 128, clauses 3 & 4.

Best Practices:

A listed company is required to make a public disclosure on the corporate governance of the company at the annual GMS.[29] The Board of Director is obliged to prepare the annual management and operation report of the company which should include the Corporate Governance Report of the company and submit it to the annual GMS.[30] The Corporate Governance Report should enclose all important elements of the corporate governance structure and practice in the company.[31] In that report the Board of Directors has to disclose how the company follows corporate governance principles and to explain any discrepancy from the CG Regulations. Finally, the Board of Directors is supposed to suggest improvements in the current corporate governance practice in the company.[32]

c) Adoption of the Important Events Report

A listed company is obliged to publicly disclose in line with the law and without delay any new facts which can have a significant influence on the company, the price of the company's securities and decisions of shareholders and investors (the Important Events Report).[33] The law requires a listed company to appoint an officer in charge of public disclosure of information.[34] The charter should provide for information and method of public disclosure.[35] The Board of Directors should be in charge of preparing the Important Events Report.

d) Implementing Risk Management

The Board of Directors should ensure that systems for evaluating and managing risks are in place. Some of the key Board of Directors duties are outlined in the box below and in Figure 3.

29 CG Regulations, Article 28, Clause 1.
30 LOE, Article 128.
31 CG Regulations, Article 28, Clause 1.
32 CG Regulations, Article 28, Clause 1(i).
33 CG Regulations, Article 27.
34 CG Regulations, Article 30, Clause 1(b).
35 CG Regulations, Article 27, Clause 1.

Best Practices:

Risk management is an important function of the Board of Directors. The Board of Directors should ensure that systems are established that enable the company to assess and control risks. Among other things, the Board of Directors should:

- Approve risk management procedures and ensure compliance with such procedures (these procedures should provide that the company and its employees notify the Board of Directors promptly of any substantial deficiency in risk management mechanisms)
- Analyze, evaluate and improve the effectiveness of the internal risk management procedures on a regular basis
- Develop adequate incentives for the executive bodies, departments and employees to apply internal control systems
- Establish a Risk Management Committee of the Board of Directors when necessary
- Ensure that the company complies with legislation and charter provisions.

Figure 3: Sources of Assurance

Source: The Institute of Chartered Accountants in England and Wales, Implementing Turnbull, a Boadroom Briefing, 1999.

B. The Election and Dismissal of Directors

1. The Election and Term of Directors

The members of the Board of Directors are elected at either an AGM or extraordinary shareholders' meeting convened for that purpose.[36] The GMS elects directors[37] for a term of no more than five years that starts from the moment that they are elected.[38] Note that the term of additional directors appointed during the term of office of the Board of Directors will be the remaining term of the relevant Board of Directors.[39] Despite the expiration of a Board of Directors' term, it continues to serve until a new Board of Directors is elected.

There are no limitations as to how many times directors can be reelected.

Best Practices:

Companies can maintain their vitality and ability to adapt to new challenges by changing the composition of their Board of Directors. Non-executive directors may indeed lose some of their (independent) edge if they remain on a Board too long. A company may wish to impose term-limits, either for the entire Board of Directors or a certain percentage, to keep its members focused. Either way, reappointment should not be automatic, but a conscious decision by the shareholder(s) and the director concerned.

In accordance with French law, for example, a director's mandate may not exceed six years unless the GMS decides to renew this mandate, and directors older than 70 years may not exceed one-third of Board membership. In this respect, the Hellebuyk Commission recommends that directors' mandates should not exceed four years and the number of directors over 65 years should

36 LOE, Articles 97.3(b) & 115, Clause 3.

37 LOE, Article 96.2(c). The election of the directors of credit institutions will be subject to the approval of the SBV (Article 51 of the new 2010 LCI).

38 LOE, Article 109, Clause 3.

39 The term of the Board of Directors is five years (LOE, Article 109, Clause 1).

not exceed one-third of the Board membership.[40] The French Corporate Governance Code (Vienot II) provides in turn that the duration of a director's term of office, set by the internal regulations, should not exceed a maximum of four years, in order to enable shareholders to rule upon their appointment with sufficient frequency.[41]

2. The Nomination of Candidates for the Board of Directors

The shareholders or groups of shareholders holding more than 10% of ordinary shares (or a lower percentage as provided in the charter) within six consecutive months have the right to nominate candidates for the Board of Directors.[42] The existing Board of Directors, Supervisory Board and other shareholders may nominate candidates for the Board of Directors if the number of candidates nominated by the qualified shareholders is insufficient.[43] These candidates must satisfy certain specific conditions (see Section C.2 of Chapter 4).

40 AFG ASFFI (Association Francaise de la Gestion Financiere). Hellebuyck Commission Recommendations on Corporate Governance, § II.D.4 (June 29, 1998). See also: http://www.ecgi.org/codes/documents/afg_asfff_amended_2001.pdf.

41 Report of the Committee on Corporate Governance ("the Vienot II Report"), July 1999.

42 LOE, Article 79, Clause 2.

43 Decree 102 (replaced Decree139/2007/ND-CP), Article 29, Clause 4.

Table 1: Number of candidates to be nominated by shareholders to the Board of Directors

Shareholding	Number of Candidates
Non-listed joint stock companies[44]	
Fewer than 10%	0
10% to less than 20%	1
20% to less than 30%	2
30% to less than 40%	3
40% to less than 50%	4
50% to less than 60%	5
60% to less than 70%	6
70% to less than 80%	7
80% to less than 90%	8
Listed companies[45]	
Fewer than 10%[46]	1
10% to less than 30%	2
30% to less than 50%	3
50% to less than 65%	4
65% or more	All candidates

3. Information about Board of Directors Nominees

Information about Board of Directors nominees of a listed company must be published before the shareholders' meeting.[47] Both the Law on Enterprises and the CG Regulations do not specify what information must be disseminated.

44 Decree 102, Article 29, Clause 3.

45 CG Regulations, Article 9, Clause 3.

46 This percentage is not consistent with the one provided in the LOE. Furthermore, a listed company would face difficulties to control the number of candidates to be appointed by hundreds of shareholders holding less than a 10% shareholding. The charter of a listed company should follow the relevant regulations of the LOE.

47 CG Regulations, Article 9, Clause 1.

Best Practices:

Shareholders should receive sufficient information to determine the abilities of Board of Directors nominees to fulfill their duties and, if applicable, to ascertain their independence. Some useful items of information include:

- The identity of the candidate
- The identity of the shareholder (or the group of shareholders) that nominated the candidate
- The age and educational background of the candidate
- The professional qualifications and experience
- The positions held by the candidate during the last five years
- The positions held by the candidate at the moment of his/her nomination
- The Evaluation Report about the candidate's up-to-date work for (with) the company as a member of the Board of Directors, in case of his/her reappointment
- The nature of the relationship the candidate has with the company
- Other Board of Directors memberships or official positions held by the candidate
- Other nominations of the candidate for Board of Directors or official positions
- The candidate's relationship with affiliated persons of the company
- The candidate's relationship with major business partners of the company
- Information related to the financial status of the candidate and other circumstances that may affect the duties and independence of the candidate as a Board member
- The refusal of the candidate to respond to an information request of the company.

Information about Board of Directors nominees is one item of the AGM materials that must be made available to shareholders before the AGM (i.e. 20 days prior to the AGM). It must be made available at the premises of the company's head office and any other places specified in the AGM notification. This information (included in the AGM material) should be posted on the internet, preferably on the company's website. Electronic dissemination is a simple and cost-effective method of allowing broad public access.

4. The Election of Directors

All directors must be elected with cumulative voting.[48] This rule is applicable to all joint stock companies. Cumulative voting is a system that helps minority shareholders pool their votes to elect a representative for the Board of Directors.

a) How Cumulative Voting Works

Cumulative voting works as follows:[49]

- Candidates for the Board of Directors are voted on collectively, i.e. as a group
- Each shareholder has a maximum number of votes equal to the number of directors that must be elected multiplied by the number of voting shares held
- Shareholders can allocate their votes to one candidate or divide them among several candidates as they please
- The top X candidates with the most votes are considered elected, whereby X equals the number of Board of Directors members to be elected.

48 LOE, Article 104, Clause 3(c).

49 LOE, Article 104, Clause 3(c).

Mini-Case 1

The following mini-case illustrates how shareholders, in particular minority shareholders, can calculate the minimum number of votes required to elect one Board of Directors member. Once they know this, it will help them organize their collective action to put their representative on the Board of Directors.

In this case, a company has 2,500 minority shareholders holding a total of 3,000 (or 20% of) voting shares, and one majority shareholder holding a total of 12,000 (or 80% of) voting shares. The charter states that the Board of Directors has nine members. The 2,500 minority shareholders hold 27,000 votes (3,000 shares x 9 votes) and the majority shareholder has 108,000 votes (12,000 shares x 9 votes). The nine candidates that receive the most votes are elected to the Board of Directors.

A formula can be used to calculate a minimum number of votes to elect one director:

$$\frac{nS}{D+1} + 1 = \frac{9 \times 15{,}000}{9+1} + 1 = 13{,}501 \text{ shares}$$

Where D — the number of directors to be elected, S — the number of outstanding voting shares and n — the total number of directors the majority shareholder wants to elect (n = 9 directors in this example).

For this formula to work, shareholders must know the number of voting shares the company has in total *(S)*, how many directors must be elected *(D)* and how many candidates they want to elect to the Board of Directors. The formula indicates that shareholders must have 13,501 votes to ensure that one director is elected. Minority shareholders in this example hold 27,000 votes which will enable them to elect at least one director, should they vote collectively.

b) Cumulative Voting and Collective Action

Cumulative voting increases the chance that minority shareholders elect a representative to the Board of Directors. In order to be effective, minority shareholders must organize themselves to vote. For this, they must:

- Have the resources and skills to campaign for candidates
- Make use of the shareholder list to contact other shareholders
- Be able to use cumulative voting strategically.

Best Practices:

In order to protect the interests of minority shareholders, a listed company shall prepare guidelines for using cumulative voting effectively with all the necessary clarifications.[50] In the guidelines the company should particularly explain all the shareholders' rights in case of cumulative voting, as well as the major negative consequences of using voting rights ineffectively.

Mini-case 1 above illustrates the importance of collective action and voting strategy.

c) Relationship between the Number of Directors and the Effectiveness of Cumulative Voting

There is a direct relationship between the effectiveness of cumulative voting and the number of directors. The higher the number of directors to be elected, the greater the opportunity for minority shareholders to elect a representative to the Board of Directors. This conclusion can be drawn from the results of the following three examples:

1. If the charter requires that a company elects five Board of Directors members, a shareholder (or a group of shareholders) holding roughly 16.7% of the total number of voting shares could elect one director.[51]
2. If the company must have at least seven Board of Directors members, a shareholder (or a group of shareholders) holding roughly 12.5% of the total number of voting shares could elect one director.[52]
3. In a company with nine Board of Directors members, a shareholder (or a group of shareholders) holding a mere 10% of voting shares could secure one position on the Board of Directors.[53]

50 CG Regulations, Article 9, Clause 5.

51 Using the figures in the mini-case in section B.4.a) then ((1x15,000)/(5+1))+1=2,501 shares. (2,501/15,000) x 100% = 16.7%

52 According to the formula: ((1x15,000)/(7+1))+1=1,876 shares. (1,876/15,000) x 100% = 12.5%

53 According to the formula: ((1x15,000)/(9+1))+1=1,501 shares. (1,501/15,000) x 100% = 10%

5. The Removal of Directors

A director may be removed from his office in the following circumstances:[54]

- Failure to satisfy the stipulated criteria and conditions of a director (see Section C.2 of Chapter 4)
- Failure to participate in activities of the Board of Directors for six consecutive months, except in the case of force majeure events
- Upon written notices of resignation
- Other cases as stipulated in the charter of the company and
- Suffering a mental disorder with medical expert proof of such loss of capacity for civil acts.[55]

The GMS may at any time issue a resolution to dismiss a director before the end of his/her term.[56]

Best Practices:

Both international practices and the Vietnamese Law on Enterprises allow the charter to provide for additional grounds for dismissing Board of Directors members. Grounds may include providing false information to the company as a candidate for the Board of Directors, willful neglect of Board of Directors responsibilities, or conviction of a criminal act.

54 LOE, Article 115, Clause 1.

55 Model Charter, Article 24, Clause 5, applicable to listed companies.

56 LOE, Article 115, Clause 2.

C. The Composition of the Board of Directors

1. The Number of Directors

Unless the charter specifies otherwise, the numbers of directors shall be limited to the numbers set out in the Law on Enterprises. A Board of Directors must have a minimum of three directors and a maximum of 11 directors.[57] In addition, the charter must specify the number of directors who must reside in Vietnam.

Under the Model Charter and under the CG Regulations applicable to listed companies, the Board of Directors must have a minimum of five directors and a maximum of 11 directors.[58] It also requires that approximately one-third of the directors should be independent and non-executive directors.[59]

Best Practices:

Companies should choose a Board of Directors size that will enable it to:[60]

- Hold productive and constructive discussions
- Make prompt and rational decisions
- Efficiently organize the work of its committees, if these are established.

The number of directors should be guided by legal requirements, the specific needs of the company and its shareholders.

Having either too few or too many directors can be a problem for effective decision-making. A small Board of Directors may not allow the company to benefit from an appropriate mix-of-skills and breadth of experience. A larger Board of Directors is typically more difficult to manage and can make consensus building a time-consuming and difficult task.

57 LOE, Article 109, Clause 1.
58 Model Charter, Article 24 and CG Regulations, Article 11, Clause 1.
59 CG Regulations, Article 11, Clause 1.
60 CG Regulations, Article 131.

The challenge in selecting the correct Board of Directors size is striking an appropriate balance.

2. Who Can Be a Director?

Under the Law on Enterprises. A director must meet the following requirements:[61]

- Have sufficient capacity for civil acts and not be prohibited from management of enterprises as provided for in the Law on Enterprises. Some examples of persons who are prohibited from management of enterprises include:
  1. Public officials (subject to the laws and regulations on public officials)
  2. Army officers of all ranks and military workers serving in the Vietnamese people's army or the Ministry of Public Security (MPS).
  3. Leading officers of 100% SOEs (unless appointed to be the authorised representative of the State capital contribution in another enterprise).
  4. Minor individuals or individuals of restricted capacity for civil acts or who have lost capacity for civil acts.
  5. Individuals who are serving imprisonment terms, or who are prohibited to practice or do business under a court order.[62]
- Being an individual shareholder who owns 5% or more of total ordinary shares, or a person who has expertise and experience in business management or in any main business lines of the company, although a director is not required to be a shareholder of the company.[63]
- For subsidiary companies of which the State holds more than 50% of the charter capital, in addition to requirements listed above, a director must satisfy another requirement: he/she cannot be a "related person" of (i) the managers of the parent company, or (ii)

61 LOE, Article 110.

62 LOE, Article 13, Clause 2. There are other restrictions as may be set out in the laws and regulations on bankruptcy and other industry specific regulations.

63 LOE, Article 109, Clause 4.

those who have authority to appoint the managers of the parent company.[64]

Article 4.17 of the Law on Enterprises defines "related person" as an organization or individual who is in direct or indirect relationship with an enterprise in the following cases:

i. In relation to a subsidiary company: the parent company and any management officer thereof, and the person having the authority to appoint such management officer
ii. In relation to a parent company: any of its subsidiaries
iii. A person or a group of persons who may, through the management bodies in the enterprise, control the decision-making process and control the operations of the company
iv. Any management officer of the company
v. Any of the spouse, father, adoptive father, mother, adoptive mother, child, adopted child, siblings of a management officer, or a shareholder who owns controlling capital contribution or holds controlling shares in the company
vi. Any individual who is authorised to represent any of the persons described in paragraphs (i) to (v)
vii. The company in which any person described in paragraphs (i) to (v) above and paragraph (viii) below holds a controlling ownership which may enable such person to control the decision-making process by the management bodies in the company
viii. Any group of persons who, by agreement, altogether possesses a controlling proportion of shares or other interests in the enterprise or to control the decision-making process in the company.

Under the CG Regulations. A director of a listed company cannot concurrently be a member of the Board of Directors of more than five other companies.[65]

64 LOE, Article 110, Clause 2. The LOE seems to imply that, in these cases, the parent company would be an SOE and this requirement would not apply to the cases where the parent company of a subsidiary company is not an SOE. Article 15.1(c) of Decree 102of the Government on implementing the LOE again clarifies this issue by saying that the "subsidiary companies of companies in which the State holds more than 50% of the charter capital" and this article only sets out requirements for (General) Directors of SOEs and subsidiaries of SOEs.

65 CG Regulations, Article 10, Clause 2.

Under the company's charter. The company's charter may also set out additional criteria and conditions which a director or a prospective director must satisfy, provided that such requirements do not violate basic rights of shareholders.[66]

Other requirements. Although the Law on Enterprises does not expressly require, it is implied that a legal entity cannot be a director, although an individual who happens to be a representative of a legal entity can be elected to the Board of Directors. In this case, the individual elected to the Board of Directors may only serve in his capacity as a director and not as a representative of the legal entity, i.e. he/she must act in the interest of the company on whose Board of Directors he/she is sitting and not of the company he/she is representing. The directors of a company which is subject to industry-specific regulations, such as a bank, an insurance or securities company, may be subject to stricter requirements. An example is that a person who (i) used to serve as a director of a bankrupt company, or (ii) used to be the legal representative of a company whose operation has been suspended due to serious violation of the law, will not be eligible to be a director of a joint stock commercial bank.[67] It would be prudent for companies which are subject to industry-specific regulations to investigate their industry's requirements carefully while selecting directors.

➔ *For more information on the fiduciary duties of a director, see Section F.2 of this Chapter.*

Best Practices:

At the beginning of his/her term, every Board of Directors member must fulfill all the conditions required by the law, corporate governance regulations and internal company documents. If something changes in that respect during the term, the Board members should inform the Chairman of the Board. All the conditions for the Board members shall be applicable to directors elected after a Board of Directors vacancy.

66 CG Regulations, Article 10, Clause 1.

67 Decision 1087, Article 3, Clause 4.

Upon the Board of Directors' proposal, the GMS shall adopt a resolution about the necessary conditions for the election of the Board members, taking into consideration the nature of the company's activities and its purposes. These conditions can be general, if applicable to all directors, and specific, if applicable to a particular director.

To avoid conflicts of interest, individuals should not be elected to the company's Board of Directors when they are:

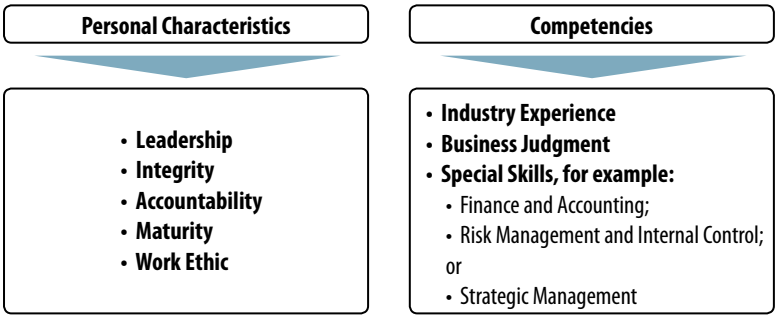
- A director of a competing company
- A manager of a competing company
- An employee of a competing company.

Nominees for the Board of Directors should also not be related to suppliers, affiliated persons, as well as employees of the independent External Auditor.

3. Qualifications of Directors

Directors should possess the necessary skills and experience to contribute to the work of the Board of Directors. Figure 4 illustrates the personal characteristics and competencies required for this task.

Figure 4: Recommended Characteristics and Competencies for Board of Director Members



Source: IFC, March 2004

Company Practices in Vietnam:

Vietnamese companies feel that work experience within the company and the industry, as well as personal maturity are important criteria when electing directors. Other popular criteria include contacts and loyalty to the company. On the other hand, criteria such as independence, expertise and leadership are not considered important. It can thus be inferred that the benefits of independent directors are not fully understood by Vietnamese companies.

There are no legal requirements with regard to the qualification criteria of directors. As a result, such criteria need to be specified elsewhere. For example, companies may find it useful to include qualifications in their internal company documents, such as their charters, internal regulations or other company policies.

Notwithstanding the above, there are of course requirements applicable to companies which are regulated by industry-specific laws regulations, such as banks, insurance companies, securities companies, and so on, in which case the directors of the Board of Directors may need to satisfy certain qualification requirements. For instance, in addition to the requirements set out in Section 2 (who can be a director?), directors of an insurance company must also (i) have a college or a graduate degree, (ii) have a minimum of either two years of management experience or three years of working in the area of insurance, finance or banking.[68] Again, it would be prudent for companies which are subject to industry-specific regulations to examine their industry's requirements carefully while selecting their directors.

68 Circular 155 of the MOF dated 20 December 2007 guiding the implementation of a number of articles of Decree 45 of the Government dated 27 March 2007 guiding the implementation of a number of articles of the LIB, as amended by Circular 86 of the MOF dated 28 April 2009.

Best Practices:

The charter should set forth the qualification criteria for directors. Directors should have the following qualifications:

- The trust of shareholders (reflected in their supporting votes for such directors), other directors, managers, and employees of the company
- The ability to relate to the interests of all stakeholders and make well-reasoned decisions
- The professional expertise and education needed to be effective
- International business experience, knowledge of national issues and trends, knowledge of the market, products, and competitors
- The ability to translate knowledge and experience into solutions.

It may, however, be difficult for the company to determine whether a potential director possesses these qualifications. Moreover, a brief description of such qualifications in the company's charter may lead to ambiguity and thus be of little use. Instead, companies may wish to include the above criteria in their internal regulations or other internal documents. Indeed, many companies in the U.S. use corporate governance guidelines for this purpose.

Shareholders should be informed of the directors' qualifications and the list of candidates for the Board of Directors should indicate whether, at the time of election, the candidate is or will be:

- The General Director
- An Executive Board member
- An officer or employee of the company
- Able to meet the qualifications of an independent director.

The background of Board of Directors candidates should be checked for a criminal record and for past administrative offences that are not de minimis in nature, and to see whether such candidates meet the requirements set out in the Law on Enterprises, the CG Regulations and the charter of the company.

In every moment during its term, the Board of Directors should comprise of members who in totality have the knowledge, capability and professional experience necessary for the successful direction of the company. At least one member needs to have the knowledge and experience of running finance and accounting in listed companies.

4. Categories of Directors

International practices distinguish between different categories of directors according to the degree to which such directors are involved (or related to) in the affairs of the company, and divides them into three categories of executive, non-executive and independent directors. In Vietnam, the Law on Enterprises is silent on the issue, while the Model Charter and the CG regulations (applicable to listed companies) only group directors into two categories: (i) executive directors, and (ii) non-executive and independent directors. Under Article 22, Decree 59 of the SBV, which is applicable to joint stock commercial banks, the SBV attempts to define "independent directors" as those who meet the following criteria:

- Not being employed by the bank or its subsidiary; not have worked for the bank or its subsidiary at any time currently or during the last three years.
- Not currently entitled to salary and remuneration (or other allowances) from the bank other than allowance received for being a member of the Board of Directors.
- None of his/her spouse, father, adoptive father, mother, adoptive mother, child, adoptive child or sibling owns 5% or more of voting stocks of a bank, or is a manager or a member of the Supervisory Board of the bank, or a dependent company of the bank (which has been or will be set up by the bank) at any time currently or during the last three years.
- Not have been a manager or member of the Supervisory Board of the bank at any time during the five immediately preceding years; and not either directly or as a representative own 1% or more of the voting shareholding capital.
- Not, jointly with a related person (as defined under Article 5.7 of this Decree), own 5% or more of the voting shareholding capital.

The fragmented regulations indicate that the concept of distinguishing "executive", "non-executive" and independent directors is fairly new in Vietnam. Many Vietnamese public companies are controlled by a single shareholder or a group of shareholders who are well informed about the affairs of the company and able to closely monitor the company's management. The remaining ownership is often widely dispersed and many of these, often

minority, shareholders lack the resources and information to effectively monitor management and defend themselves against the potential abuses of large shareholders. In these types of companies, independent directors have an especially important role.

a) Executive Directors

Although the term "executive directors" is not specifically defined under the Law on Enterprises, the CG Regulations[69] and the Model Charter, it is often interpreted to comprise of directors who also hold an executive position in the company, namely that of:

- The Director or General Director, Deputy (General) Director
- The Chief Accountant
- An Executive Board member.

In other words, members of the Executive Board who act concurrently as directors on the Board of Directors are considered executive directors.

The Law on Enterprises does not refer to executive directors as a separate category, although the Model Charter and the CG Regulations do. The Model Charter and the CG Regulations limit the number of Executive Board members that can be directors on the Board of Directors in listed companies. Executive Board members can occupy up to two-thirds of the total number of Board of Directors seats.[70]

Best Practices:

In practice, many Vietnamese companies have Board of Directors dominated by executive directors. Vietnamese companies wishing to adhere to good corporate governance practices should not follow the letter but rather the spirit of the law, and limit the number of executives, rather than merely Executive Board members, to two-thirds of the total number of the Board members.

Further, it is recommended that the General Director (i.e. the Chairman of the Executive Board) should not serve as the Chairman of the Board of Directors at the same time (in international practices, so-called

69 Although Article 2, clause (d) of the CG Regulations gives a definition of an "independent director", the term "executive directors" was not mentioned specifically.

70 CG Regulations, Article 11.1 and Model Charter, Article 24, Clause 1.

"CEO-duality"). The CG Regulations and the Model Charter applicable to listed companies prohibit the Chairman to serve concurrently as the General Director, unless this is expressly approved by the GMS annually.[71]

Executive directors are, by definition, not independent.

b) Non-Executive and Independent Directors

According to the CG Regulations, approximately one-third of directors on the Board of Directors of a listed company should be non-executive and independent directors.[72] However, there is no specific definition of the term "non-executive and independent directors" under either the Law on Enterprises, the Model Charter or the CG Regulations.[73] Without the precise legal definition, it is difficult to fathom what the regulators possibly meant when they require that listed companies have "non-executive and independent directors". In the absence of sufficient guidance from Vietnamese laws, this section attempts to provide information on international perspectives on the terms of "non-executive directors" and "independent directors". Hopefully the information in this section will serve as useful reference for companies when setting out the relevant criteria for their "non-executive and independent directors".

(i) Non-executive Directors:

The term "non-executive directors" of a company is usually understood to mean directors who do not hold an executive position in the company, i.e., those who are not members of the Executive Board. Effective non-executive directors should have the following personal attributes:

- Integrity and high ethical standards
- Sound judgment
- The ability and willingness to challenge and probe
- Strong interpersonal skills.

71 CG Regulations, Article 10, Clause 4; Model Charter, Article 26, Clause 1.

72 CG Regulations, Article 11, Clause 1.

73 Article 2, clause (d) of the CG Regulations defines "independent director" as "a member of the Board of Directors other than the Director or General Director, Deputy Director or Deputy General Director, Chief Accountant (or Chief Financial Officer) and other managerial officers appointed by the Board of Directors or the principal shareholders of a company".

Best Practices:

Most international and national codes of corporate governance recommend that Boards of Directors be composed of a majority of non-executive directors who contribute:

- An outside perspective and greater impartiality in their judgments
- Additional external experience and knowledge
- Useful contacts.

In most EU countries, non-executive directors normally exercise oversight of the financial and strategic decision-making functions of the company. Apart from these, there are three areas in need of disinterested monitoring by non-executive directors:[74]

- Nomination of directors
- Remuneration of senior managers and directors
- Internal and external audit.

In the U.K., the Higgs report groups the role of the non-executive director around four issues:[75]

1. **Strategy:** Non-executive directors should constructively challenge and contribute to the development of the company's strategy.
2. **Performance:** Non-executive directors should scrutinize the performance of management in meeting agreed upon goals and objectives and monitor the reporting of performance.
3. **Risk:** Non-executive directors should satisfy themselves that financial information is accurate, and that financial controls and systems of risk management are robust and defensible.
4. **People:** Non-executive directors are responsible for determining appropriate levels of remuneration for executive directors, have a prime role in appointing, and where necessary removing, senior management, and in succession planning.

74 Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, November 2002, page 60. See also: http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf.

75 Derek Higgs, Review of the role and effectiveness of non-executive directors, January 2003. See also: http://www.ecgi.org/codes/documents/higgsreport.pdf.

The Model Charter and the CG Regulations refer to non-executive and independent directors in the context of restricting the number of executive directors that may sit on the Board of Directors. Table 2 summarizes the relevant legal provisions and recommendations concerning executive and non-executive directors' functions.

Table 2: Restrictions on (i) Executive Directors and (ii) Non-Executive Directors

Can a Board of Directors member be a member of the Executive Board?	Yes, but Executive Board members must occupy only two-thirds of Board of Directors seats or less.
Can a Board of Directors member be a General Director?	Yes, unless prohibited by the charter.
Can the Chairman of the Board of Directors be the General Director?	(a) Yes, for a non-listed joint stock company, unless prohibited by the charter of the company.[76] (b) No, for a listed company, unless confirmed by the GMS, and approved by the GMS annually.[77]
Can the Chairman of the Board of Directors be a member of the Executive Board other than the General Director?	Yes, unless prohibited by the charter.

(ii) Independent Directors

The CG Regulations define "independent directors" to mean those directors who are not the General Director, the Deputy General Director, the Chief Accountant, other managers, or a major shareholder of a company.[78] Thus, the CG Regulations' attempt to define "independent directors" seem analogous to the concept of "non-executive directors" in international practices. By contrast, we note that the concept of "independent directors" in the regulations on joint stock commercial banks seem to align better with international practices (see section 4 above "(Categories of Directors").

76 LOE, Article 111, Clause 1.

77 Model Charter, Article 26.1 and CG Regulations, Article 10, Clause 4.

78 CG Regulations, Article 2, Clause 1(d).

International practices distinguishes between independent directors and non-independent directors. Good corporate governance practice suggests that, an independent director is an individual who has not received substantial financial or other benefits from such company in the last three years, such as:

- have not been an employee of the company or a shareholder of 10% or more of the company
- have not paid to or received from the company a substantial amount, or been a major shareholder of a company that has paid to or received from the company a substantial amount (the threshold of such amount should be determined by the GMS and set out in the charter of the company)
- have not been an External Auditor of the company.

➔ *For more information on related persons, see Chapter 4, Section C.2.*

Best Practices:

Directors who are independent can make a substantial contribution to important decisions of the company, especially in evaluating executive performance, setting executive and director remuneration, reviewing financial statements, and in resolving corporate conflicts. Independent directors give investors additional confidence that the Board of Directors' deliberations will be free of obvious bias. Companies are advised to disclose information about independent directors in the annual report.

IFC defines "Independent Director" as a director who:

1. Has not been employed by the Company or its Related Parties in the past five years
2. Is not, and is not affiliated with a company that is an advisor or consultant to the Company or its Related Parties
3. Is not affiliated with a significant customer or supplier of the Company or its Related Parties
4. Has no personal service contracts with the Company, its Related Parties, or its senior management
5. Is not affiliated with a non-profit organization that receives significant funding from the Company or its Related Parties

6. Is not employed as an executive of another company where any of the Company's executives serve on that company's board of directors
7. Is not a member of the immediate family of an individual who is, or has been during the past five years, employed by the Company or its Related Parties as an executive officer
8. Is not, nor in the past five years has been, affiliated with or employed by a present or former auditor of the Company or of a Related Party
9. Is not a controlling person of the Company (or member of a group of individuals and/or entities that collectively exercise effective control over the Company) or such person's brother, sister, parent, grandparent, child, cousin, aunt, uncle, nephew or niece or a spouse, widow, in-law, heir, legatee and successor of any of the foregoing (or any trust or similar arrangement of which any such persons or a combination thereof are the sole beneficiaries) or the executor, administrator or personal representative of any Person described in this sub-paragraph who is deceased or legally incompetent.

(For the purposes of this definition, a person shall be deemed to be "affiliated" with a party if such person (i) has a direct or indirect ownership interest in; or (ii) is employed by such party; "Related Party" shall mean, with respect to the Company, any person or entity that controls, is controlled by or is under common control with the Company).

Directors should be disqualified from being independent if they answer "Yes" to one or more of the following questions in Table 3:

Table 3: Are Directors on Your Board of Directors Independent?

	Yes	No
Is the director an employee of the company? Has the director been an employee of the company over the last five years?	☐	☐
Has the director been a member of the Board of Directors or the Executive Board of the company, except as an independent director?	☐	☐
Has the director paid to or received from the company a substantial amount apart from a fee received as non-executive director?[79]	☐	☐

79 The threshold of such amount should be determined by the GMS and set out in the charter of the company.

Has the director been, directly or indirectly, a shareholder of more than 10% of the company or an associated company (including affiliated person) of the company? Has the director been a member of the Board of Directors or the Executive Board of such a shareholder?	☐	☐
Has the director had within the last three years a significant business relationship with the company or a related person or the company? Has the director been in the same period a shareholder, partner, External Auditor, director, member of the Board of Directors or the Executive Board of the entity that had a significant business relationship with the company?	☐	☐
Has the director been a member of the Executive Board of another company in which an executive director of the company is a member of the Board of Directors?	☐	☐
Is the director a representative of the significant shareholder?	☐	☐
Has the director served as a member of the Board of Directors at least six terms in a row, even if he/she was an independent member?	☐	☐
Is the director in any of the above-mentioned relationships with an associated company, controlling shareholders of the associated company, directors or members of the Board of Directors or Executive Board of the associated company?	☐	☐

If a director ceases to be independent, the director should immediately notify the Board of Directors with an explanation of why the criteria of independence no longer apply. The Board of Directors is then advised to:

- Notify shareholders that the director is no longer independent
- Disclose information about independent directors in the annual report of the company, giving shareholders the opportunity to verify any changes in the status of independent directors.

In any event, independent directors should refrain from actions that may compromise their independent status.

Other international and national codes of corporate governance have similar definitions for independent directors. In the U.K. for example, a non-executive director is considered independent when the Board of Directors determines that the director is independent in character and judgment, and there are no relationships or circumstances which could affect, or appear to affect, the

director's judgment. Such relationships and circumstances would include those, in which the director:[80]

- Is a former employee of the company or group, and his/her employment (or any other material connection) has ended less than five years ago
- Has, or has had, within the last three years, a material business relationship with the company either directly, or as a partner, shareholder, director, or senior employee of a body that has had such a relationship with the company
- Has received or receives additional remuneration from the company apart from a director's fee, participates in the company's share option or a performance related pay scheme, or is a member of the company's pension scheme
- Has close family ties with any of the company's advisers, directors or senior employees
- Holds cross-directorships or has significant links with other directors through involvement in other companies or bodies
- Represents a significant shareholder
- Has served on the Board of Directors for more than 10 years.

The large number of definitions with their detailed qualifications may give rise to confusion. In reality, understanding and defining independence need not be complex. The Council of Institutional Investors (CII), a grouping of some of the world's largest institutional investors, defines an independent director plainly in the following way: "Stated most simply, an independent director is a person whose directorship constitutes his/her only connection to the corporation." This cuts to the heart of the matter. For those interested in learning how to apply this simple definition in practice, the CII also lists specific circumstances that compromise independence.[81]

Finally, it should be noted that director independence is not a panacea. The New York Stock Exchange is a telling example. In 2003, the exchange was enveloped in a scandal over the excessive compensation of its Chief Executive Officer, despite the fact that compensation levels had been approved by a committee staffed and chaired by independent directors.

80 The Combined Code on Corporate Governance, July 2003, Section 1, A.3.1. See also: www.fsa.gov.uk/pubs/ukla/lr_comcode2003.pdf.

81 For more information on the CII (in English), see: http://www.cii.org.

D. The Structure and Committees of the Board of Directors

1. Chairman

Vietnamese law is silent on which authority shall elect the Chairman in case the company's charter fails to specify. Thus, it is important that this issue is clarified in the company's charter. Either the Board of Directors or the GMS must elect the Chairman of the Board of Directors, as determined in the company's charter.[82]

The Law on Enterprises allows the Chairman to act as the General Director if the charter of the company does not provide otherwise. The Model Charter, on the other hand, disallows the Chairman of listed companies to act as the General Director, unless the GMS approves, annually, that the Chairman can so act.[83]

The Model Charter also requires that the Board of Directors or the GMS of listed companies elect a Deputy Chairman of the Board.[84] In case the Chairman is absent, the Deputy Chairman could exercise the rights and perform the duties of the Chairman, provided that the Chairman has notified the Board about his/her absence or his/her inability to exercise such rights and perform such duties.[85] The Chairman could also authorize another director in writing to conduct the rights and duties of the Chairman as set out in the charter of the company.[86] In case there is neither a Deputy Chairman nor an authorized person, the directors can, with a majority vote of present members, select a director on the Board of Directors to substitute for the Chairman in his/her absence (or until he/she is elected, in case the Chairman post is temporarily vacant).[87]

82 LOE, Article 111.1 and Model Charter, Article 26, Clause 1.

83 LOE, Article 111.1 and Model Charter, Article 26.

84 Model Charter, Article 26, Clause 1.

85 Model Charter, Article 26, Clause 2.

86 LOE, Article 111, Clause 3. This seems to not apply in cases of joint stock companies which have already elected a Deputy Chairman, since the LOE is silent on this issue, our view is that the provisions of the Model Charter should apply to companies that already selected a Deputy Chairman, in which case the Deputy Chairman should act when the Chairman is not available.

87 LOE, Article 111, Clause 3.

Best Practices:

The ability of the Chairman to properly discharge his/her duties depends on his/her being vested with sufficient and appropriate powers, and on his/her personal and professional qualifications. The Chairman should have an outstanding professional reputation and should be of the highest integrity, be committed to the interests of the company, and enjoy the trust of shareholders and the other directors.

There should be a clear division of responsibilities at the head of the company between the running of the Board of Directors and the executive responsibility for the running of the company's day-to-day operations — both on paper, as required by law, and in actual practice. Companies should define the authority of the Chairman, as well as that of the General Director, in as much detail as possible in the internal regulations.

The Chairman has the authority to:[88]

- Set up working programs and plans for the Board of Directors
- Prepare (or organize the preparation of) the agenda, contents and materials for the meetings of the Board of Directors, convene and preside over such meetings
- Organize the adoption of Board resolutions
- Supervise the implementation of resolutions of the Board of Directors
- Preside over the sessions of the GMS
- Perform any other duties as may be set out in the Law on Enterprises and the charter of the company.

88 LOE, Article 111, Clause 2 and Model Charter, Article 26, Clause 2.

Best Practices:

The Chairman's other duties, or responsibilities, should be defined in the internal regulations for the Board of Directors. In addition, the company may wish to draft a position description, or terms of reference, which could contain the following elements:[89]

The Chairman:

- Provides leadership and ensures for the Board of Directors' effectiveness
- Establishes, implements and reviews procedures that govern the Board of Directors' work
- Schedules a Board of Directors meeting calendar and coordinates it with the Board's committee chairs
- Organizes and presents meeting agendas and ensures that all directors receive appropriate information on a timely basis
- Periodically interacts with the General Director and acts as a liaison between the Board of Directors and executives
- Ensures for accurate, timely, and clear information to and from the other directors
- Ensures for effective communication with shareholders
- Arranges regular evaluations of the Board of Directors' performance, as well as of its committees and individual directors
- Facilitates the effective contribution of non-executive and/or independent directors and enables constructive relations between executive and non-executive directors
- Carries out other duties as requested by the GMS and the Board of Directors as a whole, depending on needs and circumstances.

2. Board of Directors Committees

As the business environment continues to become more complex, the demands on and responsibilities of the Board of Directors and its members continue

89 These model terms of reference contain elements from the "Review of the Role and Effectiveness of Non-executive Directors," by Derek Higgs, January 2003 and the Report of the NACD Blue Ribbon Commission on Director Professionalism, Appendix B.

to grow. Board of Directors committees are widely considered a key tool for Board of Directors to overcome and effectively deal with such challenges. More specifically, committees:

- Permit the Board of Directors to handle a greater number of complex issues in a more efficient manner, by allowing specialists to focus on specific issues and provide detailed analysis and recommendations back to the Board
- Allow the Board of Directors to develop subject-specific expertise on the company's operations, most notably on financial reporting, risk, and internal control
- Enhance the objectivity and independence of the Board of Directors' judgment, insulating it from potential undue influence of managers and controlling shareholders.

It is of crucial importance that committees are understood to be part of the Board of Directors. It is the Board of Directors that establish committees, set their terms of reference through committee internal regulations, appoint their members and turn their recommendations into action.[90]

The Board of Directors must issue detailed regulations on the establishment and the duties and responsibilities for each Board of Directors committee and its members.[91]

a) Types of Committees

A company may establish several types of committees, as discussed in more detail in Table 4 below, if it decides that it is necessary. Committees are not a must. One of the Law on Enterprises, the Model Charter and the CG Regulations requires that a company should establish committees, although they do recommend that companies establish committees if they see that committees would facilitate the operations of the Board of Directors. Both the CG Regulations and the Model Charter suggest that the Board of Directors should set up committees in order to assist it in its activities. The types of committees suggested by the CG Regulations include committees for development policy, internal audit, personnel management, salary and bonus. The CG Regulations also allow companies to set up other committees according to resolutions of the GMS.

90 Model Charter, Articles 28.15 & 28.16 and CG Regulations, Article 15.

91 CG Regulations, Article 15.3.

It should be noted that a large number of committees can be hard to manage and may lead to a fragmentation of the Board of Directors. It is advisable to establish committees as the need arises, starting with the most critical ones, and then establishing others as experience is gained. The Board of Directors may establish either permanent or ad-hoc Board committees. The most important committee from the shareholder perspective is the Audit Committee. Some of the committees that a company should consider establishing are described in Table 4.

Table 4: Different Types of Committees

	Proposed Functions	Recommendations for the Committee's Composition
Human Resources Committee[92]	• Comments on proposals for the appointment of Board of Directors or Executive Board members • Defines qualifications for Board of Directors or Executive Board members • Drafts or evaluates the draft of appointment procedures for the Board of Directors or Executive Board members • Periodically (the recommended interval is at least twice a year) assesses the size and composition of the Board of Directors and the Executive Board, conditions for the appointment and makes recommendations with regard to any changes, which will be presented to the shareholders at the next GMS • Leads the preparation and filing of the internal labor rules of the company • Performs any other task connected with the company's personnel policy that is part of the Board of Directors competence, as assigned to it by the Board of Directors.	The majority of the Human Resources Committee members should be independent non-executive directors. One of them should be appointed as Chairman of the Committee. The Human Resources Committee members need to be knowledgeable about the basic principles of business ethics, management, Law on Enterprises, Labor Code and other applicable regulations.

92 CG Regulations, Article 15, Clause 1.

Remuneration Committee[93]	• Drafts a proposal to the Board of Directors for the remuneration policy or comments about the proposal for the remuneration policy made by the Board of Directors • Drafts a proposal for the remuneration of the individual members of the Board of Directors, Executive Board and External Auditor, or comments about the Board of Directors' proposal. Such proposal shall deal with remuneration structure and the amount of fixed remuneration • Periodically (the recommended interval is at least twice a year) assesses the size and structure of the remuneration for each Board of Directors and Executive Board member, as well as External Auditor and make recommendations with regard to any changes, which will be presented to the shareholders at the next GMS • Performs any other task connected with the company's remuneration policy, as assigned by the Board of Directors.	The majority of the Remuneration Committee members should be independent non-executive directors. One of them should be appointed as Chairman of the Committee. The Remuneration Committee members need to have professional and moral integrity and they should be knowledgeable about the basic principles of economy, finance and Labor Code.
Audit Committee[94]	• Makes a proposal or drafts a proposal for the Board of Directors considering appointment, reappointment or removal of the members of the internal audit • Comments about the candidate for the External Auditor • Comments about the draft contract that will be signed with the External Auditor • Monitors the applications of the accounting standards in preparing the financial reports • Monitors the application of the criteria for the consolidation of accounts of affiliated companies • Evaluates the accuracy and completeness of financial information before publication • Evaluates the independence of the External Auditor • Monitors the Internal and External Audit Function • Examines all the conditions that can raise the question of External Auditor's removal, and gives its proposal in that respect • Performs any other task connected with the audit function, as assigned to it by the Board of Directors.	The majority of the Audit Committee members should be independent non-executive directors. One of them should be appointed as Chairman of the Committee. At least one member of the Audit Committee needs to be an expert in accounting and finance and must not be working for the accounting/ financial department of the company.[95]

93 CG Regulations, Article 15, Clause 1.
94 CG Regulations, Article 15, Clause 1.
95 CG Regulations, Article 15, Clause 2.

Development Policy Committee[96]	• Defines the development strategies, objectives and plan, as well as key performance indicators of the company • Determines operational priorities • Develops dividend policy • Evaluates the long-term productivity of the company's operations.	Members of the Committee need experience in the industry in which the company is active. The Committee will likely benefit from members with other areas of expertise such as finance and operations.
Ethics Committee	• Ensures that the company complies with ethical standards and contributes to the creation of an atmosphere of trust within the company • Detects and prevents violations by the company of legislation and ethical standards.	Members of the Committee must be of the highest integrity, enjoy the trust of all shareholders, and be knowledgeable on legal and ethical standards.
Corporate Conflicts Resolution Committee	• Ensures that shareholder rights are appropriately and specifically defined in the company's charter, internal regulations, and company-level corporate governance code • Develops policies and procedures for the protection of these rights • Develops and periodically conducts reviews of the company's conflict resolution policy and procedures • Develops recommendations for the Board of Directors on how to effectively deal with corporate conflicts between and among the company, its shareholders, directors and managers.	The Corporate Conflicts Resolution Committee should be composed of independent directors. When this is not possible, an independent director should chair the committee.

b) Authority of Board of Directors Committees

The Board of Directors is a collective body in which:

- All members have equal rights and duties (except that the Chairman has the casting vote in case of a tie vote)[97]
- All members bear joint and several liability
- Members act together as a body according to specific decision-making procedures.

96 CG Regulations, Article 15, Clause 1.

97 LOE, Article 112, Clause 8 and Model Charter, Article 28, Clause 11.

Although the above suggests that the ultimate decision-making responsibility rests with the entire Board of Directors, Board of Directors committees can resolve and make decisions on issues delegated to them by the Board of Directors, provided that resolutions of a committee are only valid and enforceable if a majority of members of such committee who are present and vote at the meeting of the committee are also members of the Board of Directors.[98]

c) The Composition of Board of Directors Committees

The number of members on a Board of Directors committee is determined by the Board of Directors, but it is recommended that a Board of Directors committee should have at least three members.[99] The members of the Board of Directors committees do not have to be members of the Board of Directors. In every committee, at least one member should be a member of the Board of Directors (in listed companies, this is compulsory)[100] and at least one member should fulfill all the conditions for an independent and non-executive director. The Board of Directors should appoint one member as Chairman of each committee. Other parties, most notably managers, who are not members of the Board of Directors committee, may be invited to present or elaborate on particular issues, but have observer status only, i.e., are precluded from conferring or deciding on particular issues

Best Practices:

Experienced and knowledgeable directors should staff Board of Directors committees. There needs to be a sufficient number of members to accomplish the work at hand. Since the work of Board of Directors committees may involve time-consuming reviews, the participation of directors in multiple Board of Directors committees should be restricted. Before allowing participation in multiple committees, Board of Directors should review all the activities assigned to the committee, estimate time necessary for effective realization of these activities, as well as free time potential members can dedicate to

98 Model Charter, Article 28, Clause 15.
99 CG Regulations, Article 15, Clause 3.
100 Model Charter, Article 28, Clause 15.

the work of the committee. Board of Directors committees may occasionally require the assistance of outside advisors. However, these advisors must not receive Board of Directors committee member status.

Many stock exchanges further recommend that Board of Directors committees be composed of and/or chaired by independent directors. The listing requirements of some stock exchanges, for example the New York Stock Exchange, go further and require a majority of independent directors, as well as the Audit and Human Resources Committees to be composed solely of independent directors.

3. The Chairman of a Board of Directors Committee

The Chairman of a committee is responsible for its effectiveness, regardless of his/her other duties.

Best Practices:

The Chairman of a committee plays an important role in organizing its work. Ideally, committees should be chaired by independent and non-executive directors. This holds particularly true for the Audit and Remuneration Committees which, according to best corporate governance practices, are to be chaired by independent directors.

The Chairman of the committee should keep the Chairman of the Board of Directors informed about its work. In addition, the committee Chairmen should be present at the GMS to respond to shareholders' questions.

A committee Chairman should:

- At least once in three months inform the Board of Directors about all the questions important for the committee's work
- Without undue delay submit all data requested by the Board of Directors
- Take necessary administrative measures to ensure that the committee performs its tasks.

E. The Working Procedures of the Board of Directors

The Board of Directors is a governing body, which operates according to procedures defined by the Law on Enterprises, the charter, or the internal regulations of the company.

1. The Chairman and Board of Directors Meetings

The Chairman has the authority to:

- Prepare (or organize the preparation of) the agenda, contents and materials for the meetings of the Board of Directors, convene and preside over such meetings[101]
- Organize the adoption of Board resolutions[102]
- Cast a deciding vote at Board of Directors meetings in case of a tie vote[103]
- Perform any other duties delegated by the Board of Directors resolution.[104]

Best Practices:

More specifically, the Chairman facilitates the work of the Board of Directors by:

- Facilitating decision-making on agenda items
- Encouraging open discussions on issues in a friendly and constructive atmosphere
- Providing Board of Directors members with an opportunity to express their points of view on matters being discussed
- Steering the Board of Directors towards a consensus.

In doing so, the Chairman should act with conviction and, at all times, in the best interests of the company. Moreover, the internal regulations or other internal documents should impress upon the Chairman the responsibility to:

- Encourage directors to freely express their opinions on agenda items and other issues
- Discuss opinions of directors openly
- Initiate the drafting of the Board of Directors' decisions.

101 LOE, Article 111, Clause 2 and Model Charter, Article 26, Clause 2.
102 LOE, Article 111, Clause 2.
103 LOE, Article 112, Clause 8.
104 LOE, Article 111, Clause 2.

2. The Board of Directors Meetings

Board Meetings. The Board of Directors must follow legal requirements in making valid decisions, or risk having them overruled by the courts upon complaints.

Best Practices:

Directors should ensure that Board of Directors and committee meetings are well-organized and held on a regular basis. Directors should actively participate in the Board of Directors meetings and each director should:

- Take part in discussions and voting
- Participate in the work of Board of Directors committees, if he/she is a member of the committee
- Demand a Board of Directors meeting to discuss matters of concern
- Notify the Board of Directors when he/she is unable to attend meetings.

In addition, Board of Directors members should have sufficient time for the performance of their functions. The Board of Directors should develop rules to regulate the participation of its members on other companies' Boards of Directors. The general rule for directorship on multiple Board of Directors should, however, be based on time-constraints. If a director does not have the time, he/she should not take on the responsibility.

Written Resolutions. Except to the extent that the charter or internal regulations require action by the Board of Directors taken at a meeting, an action required or permitted to be taken by the Board of Directors may be taken without a meeting,[105] provided that:

- It must bear the signatures of all the directors who have the right to vote on such resolution at a meeting of the Board
- The number of directors who approve must not have been less than the minimum number of directors required to conduct a meeting of the Board of Directors.

105 LOE, Article 108, Clause 3.

A written resolution so adopted shall have the same effect and validity as a resolution passed by directors of the Board of Directors at a meeting which is convened and held in accordance with the normal procedure. A written resolution may be passed by using several counterparts of the same document so long as each counterpart bears the signature of at least one director.[106]

3. The First Board of Directors Meeting

If the Board of Directors is delegated with electing the Chairman, the first meeting of each new term of the Board of Directors should be held no later than seven working days after it is elected. This meeting shall be convened by the director who has been elected with the most number of votes. If there is more than one director who has been elected with a majority of the votes, they must come to an agreement and appoint one director amongst themselves to convene the meeting of the Board of Directors.[107]

Best Practices:

The first meeting of a newly elected Board of Directors should be held no later than one month after it is elected. As a matter of convenience, the first Board of Directors meeting can be organized to follow the GMS. In addition, it is recommended that the first Board of Directors meeting:

- Define and confirm the priorities of the Board of Directors
- Establish committees if appropriate
- Elect committee chairman.

A company may also wish to develop an induction training for new Board of Directors members that cover, among other topics, an overview of the company's:

- Industry and sector of operation
- Business operations
- Current financial situation
- Strategy
- Business risks
- Key employees' background and skills.

106 Model Charter, Article 28, Clause 13.

107 LOE, Article 112, Clause 1 and Model Charter, Article 28, Clause 1.

4. The Schedule of Board of Directors Meetings

The charter or the internal regulations can specify the procedures for convening and conducting Board of Directors meetings.

Best Practices:

The Board of Directors should have a working plan in addition to a schedule for meetings that includes the topics to be addressed. The Board of Directors should hold regular meetings. The Board of Directors should meet at least four times a year.[108] The Board of Directors may, however, wish to hold meetings as often as deemed necessary. Here is some guidance on conducting productive and efficient Board of Directors meetings:

- **Develop an annual calendar of meetings.** This will allow directors to slot the meetings in their agendas. Note that this calendar should serve as a guide, i.e. the Board of Directors should hold additional meetings when warranted and, vice versa, cancel meetings when there are no issues to be resolved.
- **Set an agenda well in advance.** Directors will thus be able to properly focus on and prepare for the task at hand. The Chairman may wish to send a draft agenda in advance, allowing for comments and suggestions. **Place important issues at the beginning of the agenda.** Directors often have other commitments and might need to leave early. Scheduling meetings for the early, rather than latter part of the day, is thus often **more conducive to foster interactive discussions.**

In addition to regular meetings, the Board of Directors needs to organize a meeting to review and approve the annual report. This Board meeting needs to take place at most two months prior to the AGM.

5. Who Has the Right to Convene a Board of Directors Meeting?

The Chairman normally convenes regular Board of Directors meetings. He/she also has the obligation to convene a Board of Directors meeting in the following cases:

108 LOE, Article 112, Clause 3 and Model Charter, Article 28, Clause 2.

- Upon the written request of (i) the majority of the Supervisory Board, (ii) the General Director or at least five other managerial officers, or (iii) at least two members of the Executive Board
- Other circumstances as stipulated in the company's charter.[109]

The request must clearly state the objectives and issues required to be discussed and that the decisions are under the authority of the Board of Directors.

The Chairman has an obligation to convene the meeting within 15 days from the date of the request. If the Chairman does not do so, he will be held responsible for all losses and damages incurred by the company, and the person which made the meeting request may convene a Board of Directors meeting.[110]

6. Proper Notice for Board of Directors Meetings

The necessary information and materials should be sent to directors together with the notice of the Board of Directors meeting sufficiently in advance to enable each director to thoroughly review the information. By law, the notice has to be sent to directors at least five days prior to the meeting.[111] The notice has to be prepared in Vietnamese, and it must provide sufficient information about the agenda, the time and location of the meeting. The notice must also be accompanied with necessary documents on the issues to be discussed and voted on at the meeting and include voting slips for directors who might be unable to attend the meeting.[112]

109 LOE, Article 112, Clause 4 and Model Charter, Article 28, Clause 3.
110 LOE, Article 112, Clause 5 and Model Charter, Article 28, Clause 4.
111 LOE, Article 112, Clause 6 and Model Charter, Article 28, Clause 7.
112 Model Charter, Article 28, Clause 7.

Best Practices:

Directors should properly prepare themselves to participate effectively in meetings. They should not vote on items on which they have not been fully informed or which they do not understand. The internal regulations or other internal documents should determine the form of the notice and the way materials are delivered that is most convenient and acceptable to all directors (for example by mail, telegraph, fax, or e-mail). Such delivery method must ensure that the notice reaches the director's contact details which have been registered at the company.[113]

7. The Quorum for Board of Directors Meetings

A quorum is the minimum number of directors that must participate in a meeting for decisions to be valid. Unless the charter or internal regulations require greater number, a quorum of the Board of Directors consists of three-quarters (75%) of the number of the directors.[114]

8. How Directors Can Participate in Board of Directors Meetings

Directors can participate in voting when they are:

- Physically present at the meeting
- Participating by conference call or other means of communication (provided that all directors can hear each other clearly, and each director may speak at the same time as other attending members if he/she wishes to do so)[115]
- Absent, but have sent his/her written vote to the Chairman in a sealed envelope, at least one hour before the meeting starts and the envelope is opened in front of other persons attending the meeting.[116]

113 LOE, Article 112, Clause 6 and Model Charter, Article 28, Clause 7.
114 LOE, Article 112, Clause 8 and Model Charter, Article 28, Clause 8.
115 Model Charter, Article 28, Clause 12.
116 LOE, Article 112, Clause 8.

Best Practices:

Although the law does not impose express requirement, certain items are of such importance that directors need to be physically present, and the company should consider making it compulsory that the directors adopt resolutions on such matters in a physical meeting (rather than by written resolution or in a telephone meeting). These items include:

- The approval of the strategic plan and the approval of the company's financial and business plan
- Calling the AGM, and making decisions on items related to the organization of the AGM
- The preliminary approval of the annual report of the company
- Convening or refusing a request by third parties to convene an EGM
- The election of the Chairman
- The creation and early termination of the authority of executive bodies
- The suspension of the General Director and the appointment of an interim General Director
- The reorganization or liquidation of the company
- Increasing the charter capital and issuing shares.

A director may delegate his/her right to vote at a Board of Directors meeting to another person if such delegation receives the approval of the majority of Board of Directors members.[117]

117 LOE, Article 112, Clause 9.

Best Practices:

When participating in Board of Directors meetings, each director should:

- Listen and understand oral presentations
- Ask questions. This is particularly important for presentations or reports given by executives during Board of Directors meetings, especially when these materials are presented in a complex or ambiguous manner
- Request supporting materials. When presented with a particular issue that does not correspond to the director's area of expertise, additional information in the form of studies, independent appraisals or opinions, and other documentation on the subject should be requested prior to the meeting.

9. The Consideration of Written Opinions (Absentee Ballots)

Good corporate governance suggests that the charter or internal regulations should specify that written opinions of directors can be considered in determining the existence of a quorum for Board of Directors meetingsand the validity of the voting results.

Best Practices:

The charter, internal regulations, or other internal documents should enable Board of Directors members to make decisions by absentee vote. However, for resolutions required by the charter to be adopted by voting in person, the votes of absentees expressing their opinion in written form should not be counted for the quorum. Companies should develop procedures for absentee voting, including the deadline for the delivery of voting ballots and deadline for the return of completed ballots. It should give directors enough time to receive the ballots and make decisions on agenda items.

10. Board of Directors Decisions

Board of Directors decisions must be approved by a simple majority vote of present directors unless the charter or internal regulations require the vote of greater number of directors for that decision. If the votes are equally divided, the Chairman shall have a casting vote.[118]

11. The Minutes of Board of Directors Meetings

The Board of Directors must keep minutes of its meetings. Minutes must be prepared in Vietnamese (and may be in another foreign language) and must be logged in the minutes book of the company.[119] At a minimum, the minutes must contain the following:[120]

- Name, head office address, number and date of issuance of the Business Registration Certificate, and the place of business registration
- Objectives, agenda and contents of the meeting
- Time and venue of the meeting
- Full name of each participant of the meeting or his/her authorized person, full name of absent directors and reasons for absence
- Issues to be discussed and voted on during the meeting
- Summary of each participant's opinions (in the order of the meeting progress)
- The voting result in which "for", "against" and abstention votes must be clearly stated
- Resolutions which have been adopted at the meeting
- Full name, signatures of all directors or their respective authorized persons.

The Chairman and the secretary are responsible for the accuracy and trustworthiness of the Board of Directors meeting minutes. The minutes must be signed by the Chairman and each director of the Board of Directors, or their authorized persons.[121]

118 LOE, Article 112, Clause 8.
119 LOE, Article 113, Clause 1.
120 LOE, Article 113, Clause 1.
121 LOE, Article 113, Clause 1.

Best Practices:

As legal and regulatory requirements of directors become more onerous, minutes are important records to show that the Board of Directors has discharged its duty of care. Under good corporate governance practices, the minutes will include the voting of each individual director.

The Board of Directors is often required to designate a secretary of the Board of Directors to take notes and help prepare the minutes. In international practices, the Corporate Secretary often serves as the secretary of the Board of Directors and may sign the minutes as well.

The minutes provide only a brief summary of the Board of Directors meeting. In addition to minutes, every meeting should be followed by making verbatim reports that contain a word-for-word account of discussions held. They should form an integral part of the minutes. Verbatim reports from the meeting are supposed to be kept in company's records as a part of the minutes.

Best Practices:

Regardless of whether the company chooses to keep minutes and/or verbatim reports, the following documents should be preserved together with the minutes and/or the verbatim reports:

- The voting ballots
- The written opinions of directors who were not able to attend.

Each director should also be given a summary of the deliberations of the Board of Directors. The company should establish a procedure which ensures that all directors will be provided with:

- Copies of the minutes and/or verbatim reports
- Reports detailing the outcome of the voting.

12. The Corporate Secretary and Board of Directors Meetings

The Law on Enterprises is silent on the role of the Corporate Secretary and Board of Directors meetings, although it does mention a secretary who should be responsible for recording minutes of Board of Directors meetings and sign such minutes, together with the president of the meeting (usually the Chairman of the Board).[122] However, the CG Regulations sheds some light on the issue when it requires that the Board selects a person to act as the Corporate Secretary, and sets out the duties of the Corporate Secretary, as follows:

- Organizing meetings of the Board of Directors, the Supervisory Board and the GMS at the request of the Chairman of the Board of Directors or the Supervisory Board
- Consulting on procedures of meetings
- Preparing minutes of meetings
- Ensuring that resolutions of the Board of Directors comply with the law
- Providing information relating to finance, copies of Board of Directors meeting minutes and other information to members of the Board of Directors and Supervisory Board.

Best Practices:

The Corporate Secretary should be responsible for administrative and organizational matters with respect to preparing and conducting Board of Directors meetings. While the decision to conduct a Board of Directors meeting is made by the Chairman, the Corporate Secretary should be responsible for handling such matters as:

- Notifying all directors of Board of Directors meetings
- Sending voting ballots
- Collecting completed ballots and absentee ballots
- Ensuring compliance with the procedures for Board of Directors meetings
- Keeping the minutes and verbatim reports.

➔ *For more information on the Corporate Secretary, see Chapter 6.*

122 LOE, Articles 106, Clause 1 & 106, Clause 3.

F. The Duties and Liabilities of Directors

Directors shall act honestly, with diligence and due care, and in the best interests of the company.[123]

Best Practices:

In some countries, the Board of Directors is legally required to solely act in the interest of the company (without specifying the interest of the company towards its shareholders and/or stakeholders). However, acting solely in the best interest of the company can encourage management to entrench themselves and shareholders (and indeed the legislator) will need to carefully consider whether to require directors to act in the best interests of shareholders as well.

Standards for the interpretation of the terms "due diligence," and "due care," as well as standards for professional behavior, develop over time in a country's judicial system, economy and corporate culture. Vietnamese law does not define clearly specify these standards.

It is important to note that when a court action is brought against a director, reasonableness and good faith are presumed. However, the Law on Enterprises does not define "good faith" or "reasonableness."

Turning to other jurisdictions for guidance, for example the U.S. and U.K., the concepts of reasonableness and good faith are viewed as fundamental principles of a director's duty, notably that of care and loyalty.

1. The Duty of Care

Directors on the Board of Directors are responsible for exercising their rights and discharging their duties in good faith, with care and in a professional manner.

123 LOE, Article 119.

Best Practices:

A director should:

- Act honestly and in good faith
- Refrain from being passive
- Use care and prudence to the maximum extent that could be expected from a good director in a similar situation under similar circumstances
- Not cause the company to act unlawfully
- Regularly attend and actively participate in Board of Directors meetings
- Place matters on the agenda of Board of Directors meetings, and demand such meetings when necessary
- Ensure that an efficient and effective system of internal control is in place
- Demand that the General Director and Executive Board members provide adequate information to the Board of Directors so that its members are properly informed on corporate matters
- Exercise a reasonable amount of supervision over management.

2. The Duty of Loyalty

The Law on Enterprises requires that directors have a duty of loyalty to the company and the benefits of the company and the shareholders. This means that the directors cannot use information, know-how, business opportunities, assets of the company, as well as his/her position, to seek personal benefits or for benefits of other organizations or individuals.[124] However, neither the Model Charter nor the CG Regulations elaborates further on this duty.

In international corporate governance practice, the duty of loyalty is of central importance to the governance framework, underpinning the effective implementation of key corporate governance issues, for example, monitoring of related party transactions and establishing remuneration policies for managers and non-executive directors.

124 LOE, Article 119, Clause 1(c).

The duty of loyalty requires directors to exercise their powers in the interests of the company as a whole. Simply put, directors should not allow personal interests to prevail over the company's interests. The duty of loyalty usually prohibits directors from:

- Participating in a competing company
- Entering into any transaction with the company without first disclosing the transaction and obtaining Board of Directors or GMS approval
- Using corporate property and facilities for personal needs
- Disclosing non-public, confidential information
- Using company information or business opportunities for private advantage, i.e. personal profit or gain.

It is also a key principle for directors who are working within the structure of a group of companies, even though a company might be controlled by another enterprise, the duty of loyalty for a director relates to the company and all its shareholders, and not to the controlling company of the group.[125]

Best Practices:

The duty of loyalty requires the director to act in the best interest of the company regardless of:

- Who nominated and elected such member
- Pressures from other directors, shareholders, or other individuals to take actions or make decisions that are not in the best interest of the company.

It is of fundamental importance that, in carrying out its duties, the Board of Directors should not be viewed, or act, as an assembly of individual representatives for various constituencies.[126] While specific directors may indeed be nominated or elected by certain shareholders (and sometimes contested by others), it is an important feature of the Board of Directors' work that directors when they assume their responsibilities carry out their duties

125 OECD Principles of Corporate Governance, Annotations to Principle V.A. on the Responsibility of the Board. See also: www.oecd.org.

126 OECD Principles of Corporate Governance, Annotations to Principle V.B. on the Responsibility of the Board. See also: www.oecd.org.

in an even-handed manner with respect to all shareholders. This principle is particularly important to establish in the presence of controlling shareholders that are able to select all directors.

Further, directors and affiliated persons (for example, family, friends, and business partners) should not accept gifts from persons interested in Board of Directors' decisions, or accept any other direct or indirect benefits. An exception can be made for symbolic gifts that are given as a common courtesy or souvenirs that are given during official events. These exceptions should be described in internal regulations or other internal documents of the company.

a) Conflicts of Interest

A director should not discharge his/her duties if there is a conflict of interest between him/her and the company and its shareholders.[127]

Best Practices:

A conflict of interest may arise when a director or his/her related person:[128]

- Enters into contractual relationship with a company
- Has financial interests in that action in a way that can be reasonably expected to influence the director's behavior contrary to the interests of the company.

The Law on Enterprises addresses the issue of conflicts of interest within the context of related party transactions.[129]

➔ *For more information on related party transactions and the role of directors in such transactions, see Chapter 12, Section B.3.*

127 Model Charter, Article 28, Clause 9(b).

128 Model Charter, Articles 28, Clause 9(b) & Clause 10.

129 LOE, Article 120.

Directors should refrain from actions that may potentially result in a conflict between their own interests and the interests of the company. They are also advised to refrain from voting in situations where they have a personal interest in the matter in question. Directors should immediately inform the Board of Directors through the Corporate Secretary about any potential conflicts of interest.

A director must disclose to the Board of Directors information about the existence of conflict of interest between him/her and the company. Such information must be disclosed at the first Board meeting after the director is aware of the conflict of interest.[130]

b) Confidentiality of Information

Best Practices:

Directors should not disclose confidential information or use their access to company information for their personal interests or the interests of third parties. The personal use of confidential information ultimately damages shareholders. It is recommended that:

- Directors take steps to protect confidential information
- Directors should not disclose information or use it in their own interests
- Standards for the use of confidential information should be specified in the internal documents of the company
- Contracts between the company and directors stipulate the obligation of directors to not disclose confidential information for a period of 10 years after they leave the company.

To create an effective mechanism to prevent the unauthorized use of confidential information, the company should require directors to:

- Notify the Board of Directors in writing of their intention to enter into transactions that involve securities of the company or its subsidiaries
- Disclose information about previous transactions with securities of the company in accordance with the procedures for disclosing material facts as specified by securities legislation.

Board of Directors members, before taking over their position as a member, should sign a special statement that they are aware of and that they will follow all legal requirements and duties connected with confidential information.

130 Model Charter, Article 28, Clause 10.

c) Formalization of the Duties of Directors

Best Practices:

The company should develop and incorporate into its internal documents a list of clearly defined duties of Board of Directors members.

3. Director Access to Information

Best Practices:

Every director of the Board of Directors has a right to request the General Director, Deputy General Director and other managers in the company to provide the information and documents regarding the financial conditions, business performance of various units in the company and of the company itself.[131] It is essential for directors to have access to the information they need to properly discharge their duties, including full and accurate responses to their inquiries from members of the executive bodies, and other company officers.

The company should create a mechanism to ensure that directors are provided with information about the most important financial and business developments of the company, as well as other developments that may have an impact on shareholder interests. The internal regulations or other internal documents should provide that the General Director, Executive Board members, and heads of major divisions have the duty to promptly submit full and reliable information to the Board of Directors. In reaching this goal it is of particular importance to establish co-operation in this field between the non-executive members of the Board of Directors on one hand, and the Corporate Secretary and the Supervisory Boards of the company, on the other hand.

The company's internal documents should include the right of directors to demand information from the executive bodies.

131 LOE, Article 114, Clause 1.

4. Liabilities of Directors

A director who breaches the obligation to act honestly or who fails to fulfill his/her obligations carefully, diligently and professionally shall be held liable for any loss caused by such breach.[132]

If there are several directors that caused losses to the company, they are jointly and severally liable. The representatives of State or municipal entities on the Board of Directors are liable to the same extent as other directors. It is important that customary business practices and other relevant circumstances be taken into consideration to determine the grounds and the amount of directors' liability.

Best Practices:

The company should:

- Encourage directors to perform their duties in a proper way
- Take measures to terminate the authority of directors who are responsible for inflicting losses
- Hold directors responsible when they do not fulfill their obligations towards the company.

5. When Are Directors Relieved from Liability?

Managing the affairs of a company is a complex process with the risk that decisions made by the Board of Directors, acting reasonably and in good faith, will ultimately prove wrong and entail adverse consequences for the company. Directors cannot generally be held liable for decisions made in good faith.

Directors are not relieved from liability after they have resigned from the Board of Directors or when they are dismissed from the Board of Directors for actions and decisions made during their tenure as a director.

132 Model Charter, Article 35, Clause 1.

6. Who Can File a Claim against Directors?

Best Practices:

Although Vietnamese law does not specify, it would seem reasonable that either the company or a shareholder (or a group of shareholders) holding at least 5% of share capital would have the right to file a claim in court against directors to cover the losses of the company that resulted from decisions taken by the Board of Directors.

Article 25 of the new decree No. 102/2010/ND-CP, issued by the Government on October 1, 2010 to replace Decree 139/2007/ND-CP, allows a shareholder (or a group of shareholders) holding as low as 1% of share capital of the company to ask the Supervisory Board to file a civil claim against members of the Board of Directors of the company in several circumstances, including the following:

- Failure to perform their assigned tasks or carried out their assigned duties in contradiction with laws, company charter or resolutions of the GMS
- Using information, secrets, business opportunities of the company, or taking advantage of his/her position in the company, the seal or assets of the company for personal gain or for the benefits of some other organisations or individuals
- Other circumstances as may be allowed under the law or the charter of the company.

7. The Minutes of Board of Directors Meetings and Director Liability

Best Practices:

To effectively enforce provisions that regulate the liability of directors, it is recommended that the company keep detailed minutes (and possibly verbatim reports) of meetings. It is important for the Board of Directors to keep detailed minutes of Board of Directors meetings to determine who voted for a certain decision and who can be held liable (to the extent the court considers such factors).

8. Protection from Liability for Directors

Best Practices:

Most companies should allow their directors to protect themselves from, or at least limit the liability for, losses incurred while they fulfilled their duties. Such mechanisms are:

- Officer and director liability insurance
- Provisions in the charter and internal regulations that indemnify directors against claims, litigation expenses and liabilities in certain circumstances.

Companies may reimburse a director for expenses incurred in defending a claim related to his/her role as a Board of Directors member, if he acted:

- Honestly
- In good faith
- In the best interests of the company
- In compliance with law, the charter and internal regulations.

A company may wish to obtain liability insurance for directors to cover the risk that their actions might result in losses to the company or third parties. Liability insurance for directors should allow the company to use civil law remedies more productively. It is also often needed to attract competent directors.

G. Evaluation and Education of the Board of Directors

To be effective, Board of Directors should have the necessary resources to develop and maintain the knowledge and skills of its directors. Training programs, based on periodic evaluations of the Board of Directors and its members, are fundamental to this end.

Best Practices:

The importance of Board of Directors evaluations is widely recognized in the international business community. It is also recommended that:

- The Board of Directors evaluate its performance annually
- The annual report reflects the results of the performance evaluation.

The performance evaluation of the Board of Directors and its members may be carried out by:

- Directors through self-evaluation
- Consultants, professional associations and corporate governance rating organizations.

An alternative approach calls for confidential Board of Directors peer evaluations coordinated by an external party, such as legal counsel or specialized consultants.

1. Self-Evaluation by the Board of Directors

A self-evaluation is a useful tool for the Board of Directors to privately assess the quality of its work. Through critical reflection and self-evaluation, directors can be more responsive to shareholders, investors, and other stakeholders. Self-evaluation methods include:

- Organizing a retreat and inviting an outside facilitator
- Organizing a special Board of Directors meeting to evaluate the work of the Board of Directors or, alternatively, setting aside time during a regular meeting to address performance issues

- Designing checklists that Board of Directors members can use to assess their work
- Participating in specialized training programs, thereby providing directors the opportunity to critically reflect on their performance and develop and share new ideas.

Best Practices:

The CG Regulations requires that the internal corporate governance rules of a company should include a mechanism to evaluate the effectiveness of the Board's performance, activities of every committee that it had established, Executive Board and every member of the Board of Directors.[133]

Best Practices:

Another useful way to evaluate the Board of Directors is to invite a consultant, advisor, institute of directors, or rating agency to independently assess the Board of Directors. Rating agencies for example, not only evaluate the Board of Directors, but also evaluate other aspects of the company's corporate governance system. The main advantage of inviting outside consultants is enhanced level of their impartiality, while main disadvantages are high costs for using these services and determining criteria for their independence.

2. Education and Training

In international practices, it is customary for directors to take vigorous executive and professional training before they are appointed to the Board. In many multi-national corporations, it is compulsory to give directors (i) periodical corporate training, (ii) corporate governance training and (iii) evaluation of their performance. The training and evaluation of directors may be conducted internally or by a third party to ensure impartiality.

133 CG Regulations, Article 4, Clause 2(f).

The evaluation of the Board of Directors and its members can result in important insights into the Board's strengths and weaknesses. This information can also be used by the Board of Directors to identify training needs, both collectively and individually. Corporate training events take on added importance in the context of transitional economies, as directors need to be kept abreast of changes to the legal and regulatory framework, as well as best practices. All this makes a company education policy for the Board of Directors and its directors a key success factor in developing and supporting a competent, knowledgeable and vigilant Board.

Best Practices:

A variety of organizations contribute to the professional development and training of directors. These include stock exchanges, financial institutions, government and industry regulators, business associations, chambers of commerce, institutions of higher education, institutes of directors and associations set up to promote good corporate governance practices.

Director training is delivered primarily by two broad types of organizations. One is corporate governance associations, which are devoted to improving corporate governance and provide training as one aspect of that effort. The other is organizations that are focused on directors and support, represent and set standards for directors. Both types of organizations can be membership associations, such as the National Association of Corporate Directors in the United States, the Institute of Directors in the United Kingdom, and the Brazilian Institute of Corporate Governance. They may serve directors without having a membership base, such as the Corporate Governance Centre in Kenya and the Corporate Governance Forum of Turkey.

Training can provide directors with:

- New skills
- Increased professionalism
- Greater awareness of relevant issues
- Access to current thinking on governance and other issues
- Opportunities to discuss issues with peers and mentors
- An increased appreciation of the ethics and values underpinning effective governance.

H. The Remuneration of Directors

Directors may be remunerated for their work. The amount of such remuneration is determined by the GMS.[134]

Details of the remuneration policy for directors generally and the remuneration of the individual directors should be disclosed in detail in the annual financial statements of the company. Details such as the annual salary and bonus of each director must also be published in the annual financial statements. It should be an explicit item on the agenda of the annual general meeting (AGM) in order to give shareholders the opportunity to debate over these matters.[135]

The issue of director remuneration is one of the more contentious in the field of corporate governance, and companies are advised to choose a cautious and circumspect approach to the question of Board of Directors remuneration. Excessive compensation plans are often perceived as an unjustified privilege of power. Therefore, it is of the utmost importance that director compensation be competitive, yet stay within reasonable limits.

An important distinction in this respect must, however, be made between executive and non-executive directors. As a rule, executive directors do not receive additional fees for their participation on the Board of Directors. Their executive compensation packages are generally thought to include Board of Directors duties. Non-executive directors, on the other hand, should be remunerated. The most common form of remuneration for non-executive directors is a monetary fee. For example, directors can receive:

- An annual fee (which may be paid in the form of shares in lieu of cash)
- A fee, based upon meeting attendance
- Fees for additional work, such as for work on Board of Directors committees and
- Fees for additional responsibilities, such as for serving as the Chairman of the Board of Directors or one of its committees.

Directors can also be reimbursed for travel costs and other business expenses.

134 LOE, Article 117.

135 LOE, Article 117 and Model Charter, Article 14, Clause 2(f).

Best Practices:

The remuneration payable to directors should be equal for all non-executive directors. Moreover, the fees that a company pays should be competitive, i.e. sufficient to attract competent individuals. They should be set so that they are neither very much below nor above director fees paid at a peer group of companies. Setting a reasonable level of director remuneration is particularly important in order not to jeopardize the special status of independent directors. Independent or not, a director's judgment may be clouded if he/she receives a significant percentage of his/her total income in the form of a director's fee. A director who relies on Board compensation for his/her livelihood will soon become beholden to the company and may not be relied upon to fill his/her responsibilities in an unbiased manner.

The Board of Directors should regularly review the remuneration of directors.

Best Practices:

Ideally, this should be done either by a remuneration committee, composed entirely of independent directors, or by the independent directors. The company should disclose its remuneration plan and the remuneration of each director, either on an individual basis or in the aggregate, in its annual report. The former is easiest to implement when all Board members receive the same fees with a simple statement in the annual report: "All non-executive directors receive fees of _____ per year."

Great care needs to be exercised in establishing performance-based remuneration, in particular, stock-based remuneration. Performance-based remuneration is generally considered a factor that impinges on director independence.

Best Practices:

While stock-based remuneration is common in the U.S., it is a good deal less common elsewhere and considerable controversy still surrounds it. Stock-based remuneration plans and, in particular, stock option plans are complex arrangements. While they are generally thought to provide incentives for managers and directors, they can also have a significant impact upon the company and shareholders.

- Stock options, it is argued, cause directors to focus on short-term performance and stock price movements
- If stock option grants are large, they may also create complicity between directors and executives who stand to make enormous sums from short-term price movements
- Shareholders risk share dilution when large option plans are granted
- Finally, large option grants have not prevented managers from manipulating companies and financial information to their benefit.

Consequently, option plans are coming under increasing scrutiny. Such plans require careful consideration, good planning, and special disclosure. Companies may be best served by avoiding stock options for directors.

If a company chooses to implement stock option plans, it should be transparent about the costs in terms of share dilution. The company should also be transparent about the accounting methods used to measure the costs of stock and option grants. Best practices would call for shareholder approval of stock, or option based compensation plans that could dilute shareholder value or affect profits.

Personal loans or credits to the company's directors are also a minefield and a potential source of controversy that companies would be well advised to avoid.

Company Practices in Vietnam:

The low level of remuneration compared to the importance of the Board of Directors is striking. Whatever the explanation, it seems clear that director remuneration needs to receive greater attention. Transparent systems of remuneration, capable of attracting qualified directors, need to be put in place.

I. Summary Checklist to Determine the Board of Directors' Effectiveness[136]

Questions	Yes	No
1. Has the Board of Directors recently devoted a significant amount of time and serious thought to the company's longer-term objectives and to the strategic options open to it for achieving them? If so, have these deliberations resulted in a Board consensus or decision on its future objectives and strategies, and have these been put in writing?	☐	☐
2. Has the Board of Directors consciously thought about and reached formal conclusions on what is sometimes referred to as its basic corporate philosophy that is, its value system, its ethical and social responsibilities, its desired 'image' and so forth? If so, have these conclusions been set forth in explicit statements of policy, for example, in respect of terms of employment? Does the company have formal procedures for recording and promulgating major Board of Directors decisions as policy guidelines for line managers?	☐	☐
3. Does the Board of Directors periodically review the organizational structure of the company and consider how this may have to change in future? Does it review and approve all senior appointments as a matter of course? Are adequate human resource development programs in place?	☐	☐
4. Does the Board of Directors routinely receive all the information it needs to ensure that it is in effective control of the company and its management? Have there been any unpleasant surprises, for example, unfavorable results or unforeseen crises that could be attributed to a lack of timely or accurate information?	☐	☐
5. Does the Board of Directors routinely require the General Director to present his/her annual plans and budgets for their review and approval? Does the Board regularly monitor the performance of the General Director and his/her immediate subordinate managers in terms of actual results achieved against agreed plans and budgets?	☐	☐

136 Source: Parker, Hugh, Letters to a New Chairman, (1990) London: Director Publications, pp. 12-14. (As cited in Cadbury, Adrian, Corporate Governance and Chairmanship, (2002) Oxford University Press, pp. 47-48).

6. When the Board of Directors is required to take major decisions on questions of future objectives, strategies, policies, major investments, senior appointments, does it have adequate time and knowledge to make these decisions soundly, rather than finding itself overtaken by events and, in effect, obliged to rubber-stamp decisions already taken or commitments already made?	☐	☐

If the answers to all of these questions are yes, it is safe to say that the company's Board of Directors can be considered effective. On the other hand, if the answers are negative, or perhaps not clear, then the company needs to reevaluate the composition and role of its Board of Directors and undertake other activities on improving its work.

NOTES

5 Chapter

THE EXECUTIVE BODIES

5 | The Executive Bodies

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The Chairman's Checklist

- ☑ Does the company have a clear delineation and separation of authorities between shareholders, directors, and managers? Has the company properly established an Executive Board? Does the charter or some other general act of the company clearly distinguish the powers of the General Director from those of the Executive Board?
- ☑ Do the General Director and all Executive Board members possess the knowledge and skills necessary to manage the company? Do they perform their functions on a full-time basis? Is there a transparent division of tasks among the Executive Board members, such as finance, legal, marketing and operations?
- ☑ Who elects members of the executive bodies? Is the General Director sufficiently involved in the nomination process of other executives?
- ☑ Do the executive bodies meet regularly to discuss the affairs of the company? Are these meetings well prepared, with an agenda and reference materials distributed in advance (in writing and/or electronically)?
- ☑ Do the General Director and the Executive Board regularly and adequately inform the Board of Directors about all operations of the company? Do the executive bodies provide all relevant information to the Board of Directors, the Supervisory Board, the Committees of the Board and the External Auditor in a timely manner?
- ☑ Do all members of the executive bodies clearly understand their duties to act reasonably and in good faith in the best interests of the company? Does the Board of Directors take measures to ensure that managers who fail to act in accordance with these duties are held liable under civil, administrative, and/or criminal law?
- ☑ Are thorough performance reviews of the executive bodies based on periodically conducted analysis of key performance indicators? Does the Board of Directors rigorously evaluate executives at least

annually, if not more frequently? Does the Board of Directors clearly link performance and remuneration when deciding on executive remuneration?

☑ Do all directors fully understand how stock options function? Are all directors and shareholders aware of the different methods of recording and reporting the cost of stock options? Has the Board of Directors critically examined the use of options as an incentive tool, ensured that option grants are not merely a management giveaway and communicated this fully and effectively to shareholders? Is the shareholders meeting properly informed before the shareholders decide to issue stock options or to delegate that authority to the Board of Directors?

The Law on Enterprises does not clearly define what the "executive bodies" comprise of, and what their functions are. The main management function in a joint stock company which is mentioned in the Law on Enterprises is the General Director or director of that company.[1] The Model Charter helps shed some light on the issue, by reserving an article to set out the detail of the "organization of the management body in listed companies", which consists of the General Director, one or several Deputy General Directors and the Chief Accountant all shall be appointed by the Board of Directors.[2]

Despite the lack of an express and precise legal definition, "executive bodies" is the term broadly used to indicate executives who are entrusted with managing the company's day-to-day activities. They implement the strategic direction set out by the Board of Directors and/or the GMS, and are an essential part of the company's governance structure. This chapter describes the composition of "executive bodies" as they are often structured in practice, and the authorities, formation and working procedures of such executive bodies, as well as their interaction with the Board of Directors, their duties evaluation, liabilities and remuneration.

1 LOE, Article 116.

2 Model Charter, Article 29.

A. The Executive Bodies and Their Authorities

Executive bodies may comprise of:

- A two person executive body, i.e., the General Director and the Deputy General Director; or
- A collective executive body, i.e. the Executive Board, consisting of the General Director, the Deputy General Director, Chief Accountant and one or more managers.

A listed company must have a management body (hereinafter called the "Executive Board") which consists of the General Director, one or several Deputy General Directors and the Chief Accountant all shall be appointed by the Board of Directors.[3] The appointment of the General Director is mandatory for all companies.

Best Practices:

Regardless of the fact that the establishment of the Executive Board is not mandatory for all companies, it is always recommended. However, companies could consider setting out a mechanism in their charters for the Executive Board to make decisions on a collective rather than an individual approach, at least for important company decisions. When such issues are brought before the Executive Board, it can facilitate discussion and coordination among key managers and help them to arrive at a decision which is most beneficial to the company.

The Executive Board assembles the key resources at the General Director's disposal to help achieve the company's goals. Larger companies may need an Executive Board to deal with more complex business models and organizational structures. Smaller companies typically have simpler business models and fewer resources to establish formal structures.

Vietnamese law requires that the GMS and/or the Board of Directors decide certain key issues of a joint stock company. The GMS and the Board of Directors may not delegate, to the executive bodies, matters that fall within their respective authority. Furthermore, the charter and the internal regulations should specify the authority of the executive bodies.

3 Model Charter, Article 29.

Best Practices:

The work of the executive bodies should be guided by a financial and business plan that is approved annually by the Board of Directors. The financial and business plan should contain basic guidelines for the daily operations of the company. Good corporate governance principles further recommend that:

- The General Director and Executive Board seek the approval of the Board of Directors for transactions that fall outside the scope of the financial and business plan (non-standard operations)
- The company develop internal regulations or other internal documents detailing procedures for the General Director and Executive Board to obtain such approval from the Board of Directors
- The Board of Directors has the right to veto decisions made by the General Director and Executive Board to implement non-standard operations.

1. The Authority of the Executive Board

Vietnamese law does not set out a legal framework for the Executive Board, as an executive unit, to make decisions on a consensus basis. Any such mechanism must be provided for in detail in the charter of the company. The Law on Enterprises only specifies the General Director's duties and obligations towards the day-to-day management of the company, which include:

- Executing decisions of the Board of Directors
- Managing the company's day-to-day activities, unless they are under the authority of the GMS or the Board of Directors
- Making decisions on all matters in the ordinary course of business which are not subject to the decisions of the Board of Directors
- Implementing the resolutions of the Board of Directors
- Implementing the business and investment plans of the company
- Proposing the organizational structure and the internal management regulations of the company for decisions of the Board of Directors
- Appointing, dismissing or removing managers of the company, except for those who are within the power of the Board of Directors

- Determining the salary and other allowances for employees of the company, including those managers who are appointed by the General Director
- Recruiting employees
- Recommending the plan of dividend distribution or dealing with losses
- Other rights and obligations as stipulated in the Law on Enterprises, the company's charter and resolutions of the Board of Directors.[4]

2. The Authority and Qualifications of the External Manager

It is a comparatively widely accepted in international corporate governance practice that companies are allowed to employ an external manager, which is typically either a commercial organization (management organization) or an individual entrepreneur (manager), to fulfill the role of an executive body (the external manager). Vietnamese law does not allow a commercial organization to act as the General Director of a company. The position of a General Director must be held by an individual, not an organization. On this basis, a company can engage a commercial organization to provide them an individual to act as its General Director. However, it seems that this is not common practice in Vietnam. The most common practice amongst Vietnamese companies is to engage a recruitment service to seek a suitable person to act as the General Director.

In any event, the Law on Enterprises[5] allows a company to engage a natural person, who is not a member of the Board, to act as the General Director. This is commonly referred to as "hired General Director" (*"giám đốc thuê"* in Vietnamese) as opposed to an "appointed General Director", who is chosen amongst the members of the Board of Directors (*"giám đốc được bổ nhiệm"* in Vietnamese).

It seems that the only difference between the two is that the "hired General Director" is not a member of the Board of Directors and may seem an outsider to the company. However, a "hired General Director" is more independent and may not have "conflicts of interest" in having the power to issue decisions as a member of the Board of Directors and then carrying out such a Board decision.

4 LOE, Article 116, Clause 3.

5 LOE, Article 116, Clause 1.

Best Practices:

Before delegating the authority of the General Director to an external manager, the Board of Directors should have the clear justification for the use of an external manager. This particularly includes the:

- Reasons for employing the external manager
- Risks associated with that decision
- Company costs and benefits
- Information about other companies that have been managed by the external manager
- Relationship between the Board of Directors members, executive bodies and major shareholders with the external manager, as well as any and all information that may be required to identify potential conflicts of interest.

The external manager signs an employment contract with the company, fulfills the functions of the General Director and is accountable to the Board of Directors. Terms of the employment contract with the External Manager are negotiated and agreed by the Board of Directors on behalf of the company .

In relation to the external manager, the Board of Directors and the GMS should have access to documents that prove that the external manager has sufficient financial resources or adequate liability insurance in the event of failure to perform obligations in accordance with the contractual agreement with the company. The company and the external manager should also have clear understanding of who is responsible for the external manager's liability and whether the external manager or the Board of Directors should obtain director liability insurance for the external manager The Board of Directors and the GMS should have access to the employment contract concluded with the external manager including the:

- Goals that the external manager is asked to achieve
- Remuneration of the external manager
- Standards of liability applicable to the external manager
- Procedures for the removal of the external manager (contract termination clause)
- List of reports, which the external manager must submit to the Board of Directors, including the periodicity of these reports.

Furthermore, the external manager should not work for a competing company in any capacity or have any significant connections with such company.

The terms of the employment contract of the external manager should ensure that the Board of Directors might terminate the authority of the external manager at any time. If employment relations between the company and external manager also needs to be terminated when the external manager ceases to act as the General Director, (additional) compensation may be payable to the external manager for premature termination of his/her employment agreement.

B. The Composition of the Executive Bodies

1. Who Can Be a General Director or an Executive Board Member?

Any individual can be the General Director or an Executive Board member. Restrictions, however, do exist:

- The General Director must have sufficient capacity for civil acts and must not be prohibited from management of enterprises[6]
- The General Director must be either (i) an individual shareholder that owns 10% or more of total ordinary shares, or (ii) a person that has expertise and experience in business management or in any main business lines of the company, although the General Director is not required to be a shareholder of the company[7]
- The General Director cannot act as the General Director of another company[8]
- A legal entity cannot be an Executive Board member
- An Executive Board member cannot act as a member of the Supervisory Board[9]
- The General Director cannot serve concurrently as the Chairman of the company, unless this is expressly approved by the GMS annually.[10]

➔ *For more information on concepts of (i) persons who are prohibited from management of enterprises and (ii) related persons, see Chapter 4, Section C.2.*

6 LOE, Article 57.
7 LOE, Article 57.
8 LOE, Article 116, Clause 2.
9 LOE, Article 122, Clause 2.
10 LOE, Article 111, Clause 1 and Model Charter, Article 26.

Best Practices:

Best practices dictate that individuals should not be appointed to executive bodies when they are:

- Directors of a competing company
- Managers of a competing company; or
- Employees of a competing company.

The General Director should not be engaged in any business activities other than those related to the management of the company and the governance of its subsidiaries.

2. Qualifications of the General Director and Executive Board Members

The executive bodies can only be effective when they have adequate financial and human resources, as well as members with the necessary experience, knowledge, skills and time to exercise their duties.

Best Practices:

The charter or the internal regulations should specify the qualifications of members of the executive bodies as well as heads of major divisions. Members of the executive bodies, including the external manager, should generally satisfy the following requirements:

- To enjoy the trust of shareholders, directors, other managers and employees of the company
- To own the ability to relate to the interests of all stakeholders and to make well-reasoned decisions
- To possess the professional expertise, education and appropriate organizational skills
- To possess (international) business experience, knowledge of national economic, political, legal and social issues, as well as trends and knowledge of the market, products and competitors (national as well as international)

- To have the ability to translate knowledge and experience into practical solutions that can be applied to the company.

Moreover, a background check on candidates should be conducted for a possible record of criminal or administrative offenses. Evidence of such offenses would likely result in the rejection of a candidate.

3. The Composition of the Executive Board

The number of Executive Board members should be set forth in the company's charter, the internal regulations or a specific resolution from the Board of Directors.

Company Practices in Vietnam:

The size of the Executive Board will need to be adapted to the specific circumstances of the company and, consequently, will vary in composition. It will dominantly depend on the activities of the company, size (number of employees), level of development and other characteristics of the company. All this is important for determining the optimal number of executive directors, their qualifications and professional skills. The Executive Board might include the following persons:

- The General Director
- The Deputy General Director(s)
- The Chief Operating Officer
- The Chief Financial Officer (or the Chief Accountant)
- Chief Legal Counsel (or the General Legal Counsel)
- Marketing and Sales Director
- Head of Purchasing
- Head of Research and Development
- Head of Information Technology
- Head of Public/Investor Relations

- Heads of Business/Product Lines
- The General Director of a dependent company or subsidiary
- The Human Resources Director.

Except as otherwise noted in this chapter, members of the Executive Board can at the same time be members of the Board of Directors or any other persons allowed by the Law on Enterprises to act as members of the Board. The Model Charter and the CG Regulations limit the number of Executive Board members that can be Board of Directors members in listed companies, in a way that the Executive Board members can occupy less than two-thirds of the total number of Board of Directors seats.[11]

11 Model Charter, Article 24, Clause 1 and CG Regulations, Article 11, Clause 1.

C. The Formation and Termination of the Executive Bodies

1. The Election and Term of the Executive Board Members

The Board of Directors has the authority and obligation to appoint the General Director.[12] The charter of the company can also specify other members of the Executive Board which should be appointed by the Board of Directors.

Best Practices:

High-level personnel decisions, in general, and the selection of Executive Board members, more specifically, are best accomplished by the General Director, in tandem with the Board of Directors. Personnel decisions should not be political decisions. The assessment of the skills and qualifications of potential Executive Board members is best done by someone who works day in, day out with potential candidates. Shareholders or Board of Directors that insist on close control over this process may be better served by developing policies that specify outcomes rather than getting involved in the details of selection. Drafting precise and effective terms of reference for key executive positions is but one example. At the very least, proposals for membership on the Executive Board should be closely coordinated with the General Director, by having him/her nominate and the Board of Directors approve candidates.

Almost every corporate governance system has the Board of Directors elect the General Director and other Executive Board members. In Vietnam, although the Law on Enterprises only expressly requires that the Board of Directors elect the General Director and is silent on other Executive Board members, it is common for joint stock companies to require that the Board of Directors approve certain executive positions, such as Deputy General Director, Chief Operating Officer, or Chief Accountant. The Board of Directors is in a better position compared to shareholders to set the key criteria for what kind of General Director the company needs, organize proper succession planning and search for such a person. For this purpose, the Board of Directors may

12 LOE, Article 116, Clause 1.

set up an independent Human Resource Committee, which will be in charge of making a recommendation as to potential candidates for the position of General Director. Shareholder interests are not adversely affected, as Board of Directors members are bound by their duties of loyalty and care to act in the best interests of the company and its shareholders. It is especially advisable to delegate this power to the Board of Directors in countries in transition such as Vietnam, where Board of Directors are nascent in their development *vis-à-vis* controlling shareholders, and need to be strengthened. Finally, because management oversight is one of the Board of Directors' main authorities, the Board's authority to dismiss the General Director and other members of the Executive Board should coincide with its authority to elect these important individuals.

A public company may consider delegating the Human Resource Committee (if any) with the following duties in connection with the appointment of Executive Board members:

- Submit the proposal for an Executive Board member
- Give an opinion on proposals for the appointment of Executive Board members originating from shareholders or the Board of Directors
- Draft or evaluate the draft of appointment procedures for Executive Board members
- Periodically (at least twice a year) assess the size and composition of the Executive Board, conditions for the appointment and make recommendations with regard to any changes, which will be presented to the shareholders at the next GMS.

Shareholders should have the opportunity to receive sufficient information (in writing and/or electronic form) about candidates for the position of General Director and Executive Board before the GMS. Up-to-date information should also be made available to all shareholders during the GMS. The information about candidates for the executive bodies should include the:

- Identity of the candidate
- Age and educational background of the candidate
- Position(s) held by the candidate during the last five years
- Position(s) held by the candidate at the moment of his/her nomination
- Relationship(s) that the candidate has with the company
- Membership(s) of the candidate in the Board of Directors of other legal entities, or any other positions held in such entities

- Information on the nomination(s) of the candidate for a position in executive bodies and other positions of other legal persons
- Relationship(s) of the candidate with affiliated persons
- Relationship(s) that the candidate has with major business partners of the company
- Information related to the financial status of the candidate and other circumstances that may affect the duties of the candidate as a member of executive bodies
- Refusal of the candidate, if any, to provide information to the company.

It is recommended that candidates present a written statement to the Board of Directors that indicates their willingness to accept the position of General Director or Executive Board member, should they be elected for that position. In the absence of such a statement, candidates should verbally confirm that they are willing to accept the position.

The Law on Enterprises sets the maximum term of the General Director at five years and allows the re-election of the General Director for an unlimited number of terms.[13] On the other hand, legislation does not specify the minimum and maximum periods for which other members of the executive bodies are elected. The charter, internal regulations, or the employment agreement can specify the period for which Executive Board members other than the General Director are elected.

Best Practices:

It is recommended that the executive bodies be elected for a period that will enable them to become acquainted with the company's business and not to be constrained by short-term goals.

13 LOE, Article 116, Clause 2.

2. The Authority of the Interim General Director

An interim General Director can be an authorised Deputy General Director acting on the basis of a power of attorney from the General Director while the General Director is absent from the company.[14] An interim General Director can also be an "acting" General Director, chosen to act as the General Director while the General Director position is vacant. In either case, interim General Director has the same authority as the General Director unless the charter, the internal regulations, or the particular power of attorney or a resolution by the Board of Directors specifies otherwise.

Best Practices:

An example of a limitation of an interim General Director's authority could be a prohibition to conclude significant transactions without prior Board of Directors' approval, or to conclude transactions in excess of a certain monetary threshold. It is also good practice to limit the power of the interim General Director to make decisions regarding the hiring and firing of personnel.

3. The Termination of the Authority of the Executive Bodies

The authority of the executive bodies can be set out in the charter of the company, or be established by the Board of Directors. If it is the former, the authority of the executive bodies can only be terminated by amendments of the company charter, unless the charter allows the Board of Directors the power to decide to terminate such authority. If it is the latter, the Board of Directors can terminate the authority of executive bodies it has established.

14 This authorization could be voluntary or compulsory. If the General Director is the legal representative of the company, Article 95 of the LOE requires that when the General Director is absent for more than 30 days, the General Director has to authorize someone in writing to act on his/her behalf to resolve day-to-day issues of the company. In other cases, authorization of the General Director can be optional.

D. The Working Procedures of the Executive Bodies

1. The Chairman of the Executive Board

The Law on Enterprises does not provide for the structure and working procedures of the Executive Board. How the Executive Board should be structured and how it should work together depend entirely on the company's discretion. Such issues should be decided by the GMS and/or set out in the charter of the company. Practice suggests that it makes sense for the General Director, who is responsible for the day-to-day operation of the company, to act as the Chairman of the Executive Board. For Executive Board meetings, the General Director (or Chairman of the Executive Board) should have the authority to:

- Convene, organize and preside over Executive Board meetings
- Sign all documents, decisions and minutes of the Executive Board
- Perform any other duties as specified in the charter, internal regulations or a resolution of the Board of Directors.

Best Practices:

In addition, the Chairman of the Executive Board can:

- Facilitate discussions and decision-making and create a constructive atmosphere
- Take steps to ensure that all members are sufficiently prepared to contribute to the work of the Executive Board.

2. Executive Board Meetings

The charter, internal regulations or a specific resolution by the Board of Directors should establish:

- The frequency of Executive Board meetings
- The procedures for organizing and conducting Executive Board meetings
- The procedures for making decisions during Executive Board meetings.

Best Practices:

The precise frequency of meetings should, however, ultimately depend on the unique circumstances of each company.

3. The Right to Call an Executive Board Meeting

The charter, internal regulations or a specific resolution by the Board of Directors should establish who has the power to convene a meeting of the Executive Board. It is recommended that the General Director (or Chairman of the Executive Board) have this power.

Best Practices:

The Executive Board is a hands-on, problem-solving mechanism. Other Executive Board members should also have a voice in calling Executive Board meetings and setting the meeting agenda.

The charter, internal regulations or a specific resolution by the Board of Directors must specify the procedures for convening and conducting Executive Board meetings.

4. Meeting Notification

Since the Executive Board is a management tool, it will likely need to respond to the changing demands of the company and its external environment, and be prepared to act quickly. While rapid response is necessary, it may make careful and extensive preparation for meetings difficult and, in some cases, impossible. Obviously, Executive Board members should be as well-prepared as practical. They should be notified in advance to give them time to prepare and effectively participate in meetings.

Best Practices:

Executives should not vote on agenda items unless they are well informed. Whenever possible, materials should be sent to Executive Board members in advance, together with the notice and the meeting agenda, to give them sufficient time to explore all the questions that will be raised at the meeting and to decide how they will vote. This may, however, not always be the case and, under some circumstances, sound decision-making may not be possible. Decision-making may be postponed when members:

- Cannot be notified in a timely manner
- Have not received the required information on time
- Have not been provided with sufficient time to prepare for the meeting.

The internal regulations or other internal documents should determine the form in which notice and materials are to be delivered to Executive Board members in the most convenient and appropriate way.

5. The Quorum of Executive Board Meetings

The quorum of Executive Board meetings refers to the number of members that must participate in the meeting before it can make a valid decision. The charter, internal regulations or a specific resolution by the Board of Directors should specify the required quorum for Executive Board meetings. The quorum should not be less than one half of the total number of Executive Board members. An Executive Board meeting that lacks a quorum cannot make valid decisions.

6. Voting During Executive Board Meetings

A simple majority of Executive Board members who participate in the meeting should be sufficient to approve Executive Board decisions, unless the charter, internal regulations or a specific resolution by the Board of Directors require

a supermajority vote. Each Executive Board member should have one vote. The charter, internal regulations or a resolution by the Board of Directors can specify that the Chairman of the Executive Board can cast a deciding vote in the case of a tie.

7. The Minutes of Executive Board Meetings

The Executive Board should keep minutes of each of its meetings. The Corporate Secretary should be responsible for recording minutes of all Executive Board meetings. Although there is no legal requirement that minutes be kept in the company archives, as a matter of good corporate practice, all minutes of Executive Board meetings should be kept in the company archives or minutes book.

Best Practices:

The minutes of Executive Board meetings should include the following information:

- The location and time of the meeting
- The names of the persons present at the meeting
- The agenda of the meeting
- The issues on the agenda, as well as the voting results on an individual basis
- The decisions made by the Executive Board
- The rationale for the decisions.

The General Director (or the Chairman of the Executive Board, if they are two different persons) should sign the minutes.

Best Practices:

Although it is not legally compulsory, in order to practice good corporate governance and improve transparency, the minutes of the Executive Board meeting should be made available upon the request of:

- Board of Director or Audit Committee members
- The External Auditor
- The Supervisory Board and its members
- A shareholder (or a group of shareholders) possessing voting shares.

E. The Duties and Liabilities of the Members of the Executive Bodies

The members of the executive bodies have the same duties of care and loyalty as Board of Directors members, and are subject to the same liability standards as Board of Directors members, unless either the charter, internal regulations, other general internal documents, or employment contract provide for stricter standards.

➔ *For more information about the duties and liabilities of directors, see Chapter 4, Section F.*

F. Performance Evaluations

Periodic performance evaluations of the executive bodies are an important oversight tool. They can help create a system of constant performance management. The results of periodic evaluations can be a solid ground for defining measures for the work improvement of this corporate body.

Best Practices:

The charter or internal regulations of the company can stipulate that the performance of the executive bodies be evaluated by the Board of Directors at least annually, if not more frequently. The Board of Directors may also find it useful to receive evaluations on the performance of the executive bodies that are carried out by the General Director and Executive Board members themselves, through self-evaluation within the framework of the company's human resources performance evaluation and planning process.

➔ *For an example of a self-evaluation framework, see Chapter 4, Section G.*

G. The Remuneration and Reimbursement of the Executive Bodies

The Law on Enterprises explicitly specifies that the Board of Directors has the power and authority to determine the remuneration of the General Director and other important executive bodies whose appointment or dismissal fall within the powers of the Board of Directors.[15] The Model Charter requires the Board of Directors of listed companies to (i) set the remuneration for the General Director and (ii) set the remuneration for other executive bodies after taking into account the recommendation of the General Director.[16]

Best Practices:

Executive remuneration is an important aspect in attracting managerial talent. Excessive executive remuneration packages, on the other hand, are often perceived as an unjustified privilege of power. Consequently, it is of the utmost importance that executive compensation be competitive, yet stay within reasonable limits, ideally in relation to a peer group of companies.

The remuneration of executives should not be left to the sole discretion of the executive bodies themselves. This should fall under the Board of Directors' authority. Companies should state in their charters that the approval of executive remuneration is a prerogative of the Board of Directors. It is important that the Board of Directors take into consideration performance-related factors that are based on the company's key performance indicators when determining the remuneration of executives. Some of the issues that have a bearing on remuneration are:

- Scope of responsibilities
- Required type and level of qualifications
- Experience of the candidates
- Personal and business qualities of the candidates

15 LOE, Article 108, Clause 2(h).

16 Model Charter, Article 30, Clause 2.

- Typical level of remuneration in the company and in the industry in general
- The financial performance of the company.

Comparative corporate governance practice usually divides an executive director's remuneration into two parts, base salary and variable part (performance-related remuneration). An executive's base salary is usually a function of his/her background and experience, whereas variable compensation is generally based upon the executive's performance.

1. Remuneration Policy

As a matter of good corporate governance, the remuneration policy for executive directors generally and the remuneration of the individual executive directors should be disclosed in detail in the annual financial statements of the company. It should be an explicit item on the agenda of the AGM to give shareholders the opportunity to debate these matters.

The Remuneration Committee (if it is established) should draft a proposal to the Board of Directors for the remuneration policy or give an opinion on the remuneration policy proposal made by the Board of Directors.

The remuneration of managers can consist of a fixed and a variable component.

The fixed component typically consists of a base salary. The most important factor in determining an executive's base salary is compensation practice among a peer group of similar companies.

The most important factor in determining an executive's variable remuneration is his/her contribution towards the short and long-term financial performance of the company. The variable component often consists of an annual bonus and is based on key performance indicators. Variable compensation has come to represent a large part of an executive's remuneration package in many countries, to better motivate performance.

Best Practices:

The variable component of the remuneration should align the interests of the executive directors with the long-term interests of the company and its shareholders. There are many ways to link executive pay to individual and company performance. Some common financial indicators utilized in variable compensation plans are:

- Earnings before interest, taxes, depreciation and amortization (EBITDA)
- Operating profit
- Return on Assets (ROA)
- Return on Investment (ROI) or Equity (ROE)
- Return on Capital Employed (ROCE)
- Economic Value Added (EVA) and
- Achievement of specific individual objectives.

There are many other financial indicators. Non-financial indicators are equally important and valuable in managing executive performance, and can be organized around:

- **Customers:** For example, customer satisfaction levels, retention rates, customer loyalty and acquisitions
- **Operational Processes and Efficiency:** For example, quality, cycle time and cost measures, and after sales service
- **Internal Growth/Knowledge Management:** For example, training programs, employee satisfaction rates, absenteeism and turnover.

The Board of Directors will want to carefully develop key performance indicators and link executive remuneration to these indicators.

Although the form of joint stock company model only emerged in Vietnam more than 10 years ago, the practice of offering executives long-term incentives such as stock options quickly caught on in Vietnam. Currently, it is very common in Vietnam to offer a competitive compensation package, of which stock options or performance-related bonuses comprise a major part, to executives of public companies.

Best Practices:

While remuneration is generally considered a responsibility of the Board of Directors, stock-and option-based compensation is increasingly an issue for which shareholder approval is required. The reason is that equity compensation contains considerable hidden costs for shareholders. These costs are hidden since accounting practices do not generally reveal the true price-tag of option-based compensation plans. For this reason, more and more companies are attempting to disclose the true cost of option compensation. In addition, some exchanges such as the New York Stock Exchange and the NASDAQ now require shareholder approval of all equity-based compensation plans.[17]

While remuneration plans may serve to attract top executive talent and motivate better performance, the field of executive remuneration is both complex and a lightning rod for shareholder and public criticism. Companies that introduce such plans, in particular stock-option plans, should do so with a good deal of circumspection and a maximum level of transparency.

2. Employment Contracts for Executives

Under Vietnamese laws, a company must enter into employment contracts with the General Director and the Executive Board members.[18]

Best Practices:

In addition to the general data of contracting parties (the name of the General Director, or Executive Board member and the name of the company), these employment contracts must include:

- The starting date of the contract
- The rights and duties of the General Director, or Executive Board member
- The rights and duties of the company

17 New York Stock Exchange Corporate Accountability and Listing Standards Committee, June 6, 2002.

18 Labor Code, Article 27 and Model Charter, Article 30, Clause 2.

- Remuneration
- The term of the contract.

The company may consider including the following additional terms and conditions in the employment contracts with the General Director and Executive Board members:

- Sanctions to be applied for failing to carry out one's responsibilities
- Benefits and other privileges (e.g., discounts on purchases of company shares, health insurance, reimbursement for housing costs)
- Indemnification
- Confidentiality clauses during the term of the contract and after the executive leaves the company regardless of the reason for leaving
- Non-competition clauses during the service period and after the executive leaves the company for whatever reason
- A commitment to protect the interests of the company and its shareholders
- Ground for early termination

If a Remuneration Committee is established, the company (via the company's charter a resolution by the Board of Directors) should require the Remuneration Committee to draft a proposal for the remuneration of each individual member of the Executive Board, or give an opinion about the Board of Directors' proposal.

Best Practices:

The Board of Directors should negotiate the employment contracts with the General Director and Executive Board members. Good corporate governance practice would suggest that executives should never determine their own remuneration. The Board of Directors and, ideally, an independent Remuneration Committee should do so. To avoid potential conflicts of interest, executive directors who are also Board of Directors members should not vote on their own employment contracts. In summary, it is recommended that Board meetings deal with these issues:

- Executive directors be counted for the quorum of the Board of Directors
- The votes of executive directors not be counted when approving the terms and conditions of their own employment contracts

3. Severance Payments to the General Director and Executive Board Members

In many other countries, executives may, under certain circumstances, be dismissed without cause and yet receive severance payments. This may occur when a company has been acquired and the acquirer wishes to install new management. These severance plans are sometimes referred to as golden parachutes. Golden parachutes can be defined as a clause in an executive's employment contract specifying that he/she will receive large benefits in the event that the company is acquired and the executive's employment is terminated. These benefits can take the form of severance pay, a bonus, stock options or a combination thereof. Like other forms of compensation, golden parachutes are often the object of criticism.

In Vietnam, "golden parachutes" are not common, and executives will not receive severance payments unless (i) the law allows them to receive such payment, or (ii) they have specifically negotiated a severance payment clause in their employment contract, which to date does not seem to be common practice in the country.

Best Practices:

It is recommended that the employment contracts of the General Director and Executive Board members include a provision for severance payments when their employment contracts are terminated prematurely without justifiable reasons.

NOTES

6

Chapter

THE ROLE OF THE CORPORATE SECRETARY

6 | The Role of the Corporate Secretary

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The Chairman's Checklist

- ☑ Does the company have a Corporate Secretary? Does the company need a Corporate Secretary? What contributions can a Corporate Secretary make to the company's governing bodies?
- ☑ Is the position of Corporate Secretary filled on a full-time basis, or does the Corporate Secretary combine his/her functions with other duties?
- ☑ Does the Corporate Secretary have an adequate mix of professional and personal skills and competencies?
- ☑ How does the company regulate the activities of the Corporate Secretary? Has the company mentioned the position of Corporate Secretary in its charter or internal regulations, or even adopted internal regulations for the Corporate Secretary?
- ☑ Has the company determined the obligation of the Board of Directors and executive bodies to ensure that the Corporate Secretary has access to all information necessary to perform his/her duties? Are directors and managers obliged to provide the Corporate Secretary with all information requested or needed by the Secretary to properly fulfil his/her duties? Does the Corporate Secretary serve as an effective link between the Board of Directors and executive bodies of the company?
- ☑ What is the Corporate Secretary's role in ensuring timely and material disclosure to investors and the public? Does the Corporate Secretary work together with the company's legal and investor relations departments?
- ☑ What role does the Corporate Secretary play in planning and organizing the GMS?
- ☑ How does the Corporate Secretary assist the Board of Directors in preparing for and conducting Board meetings? Does the Corporate Secretary play a meaningful role in Board of Directors' training and evaluation?

From an international perspective, the work of the Corporate Secretary is essential to the governance and administration of a company. The Corporate Secretary helps the governing bodies perform their duties and execute their responsibilities. This chapter focuses on the functions, qualifications and authorities of the Corporate Secretary, and the role that the Corporate Secretary plays in implementing good corporate governance practices.

In Vietnam's regulatory framework, the Corporate Secretary is a relatively new concept introduced and recognized by the CG Regulations as obligatory for all listed companies. Considering the CG Regulations have been enforce only since April 2007, it is still too early to talk about effects and experience of domestic companies with the work of this corporate body. At the same time, the experiences of other countries, especially those that have gone through a transition period, can be very helpful in analyzing the role of the Corporate Secretary in the context of developing an efficient system of corporate governance. Therefore, this chapter will mostly include international best practices and corporate practice experiences in other more developed countries with the Corporate Secretary.

A. The Role of the Corporate Secretary

1. The Need for and Importance of the Corporate Secretary

Many Vietnamese companies have a Board of Directors' secretary[1] or office.[2] In contrast to the Board of Directors' secretary, the Corporate Secretary is a position relatively new to most Vietnamese companies.[3]

The CG Regulations and Model Charter, applicable to listed companies, each have one article on the Corporate Secretary's authority and responsibilities.[4]

The Corporate Secretary ensures that the governing bodies follow existing internal corporate rules and policies, changes them or institutes new ones, when appropriate. The Corporate Secretary can also assist in establishing and maintaining clear communication between the various governing bodies of the company in compliance with the company's charter, corporate governance code and other internal regulations. In addition, the Corporate Secretary helps to ensure that the governing bodies adhere to all relevant regulatory requirements, both domestic and possibly foreign. Accordingly, the Corporate Secretary often acts as an advisor to directors and senior executives on regulatory requirements, listing rules and legislation related to corporate governance. The Corporate Secretary may also identify gaps in corporate governance matters and propose ways to address such weaknesses.

Figures 1 and 2 below demonstrate the increasingly prevalent view that the Corporate Secretary can play an important role in companies and also indicate the types of companies that might benefit the most from the creation of such a position.

1 "Thư Ký Hội Đồng Quản Trị" in Vietnamese.

2 "Văn Phòng Hội Đồng Quản Trị" in Vietnamese. The main functions of the Board of Directors' secretary or office are to assist the Board of Directors in administrative formalities such as organizing the meetings of the Board of Directors or GMS, drafting meeting minutes or conducting other administrative procedures in relation to the functions of the Board of Directors (e.g. certifying the transfer of shares of shareholders and issuing new share certificates).

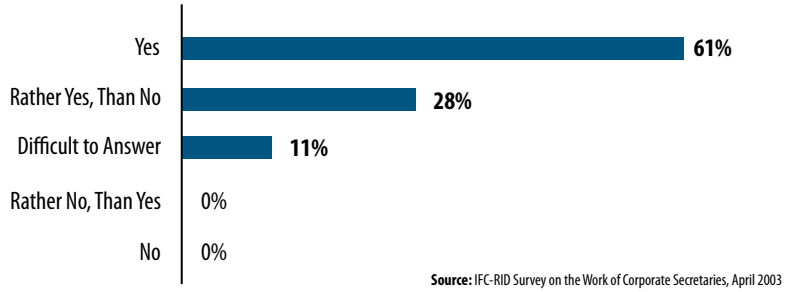
3 Although the Board of Directors' secretary or office may perform certain roles of a Corporate Secretary, some important functions of the Corporate Secretary such as developing corporate governance policies and practices of the company, providing legal and organizational support to the Board of Directors or assisting in resolving corporate conflicts have not been covered. A background in law as required for a Corporate Secretary has not been made a required qualification for a Board of Directors' secretary in most Vietnamese companies.

4 CG Regulations, Article 16 and Model Charter, Article 32.

Comparative Practices:

An increasing number of companies are introducing the position of Corporate Secretary. A number (47%) of surveyed companies in Russia state that they have a Corporate Secretary whose main function is to provide legal support to the Board of Directors. An increasing number of companies also understand that Corporate Secretaries contribute to improved corporate governance.

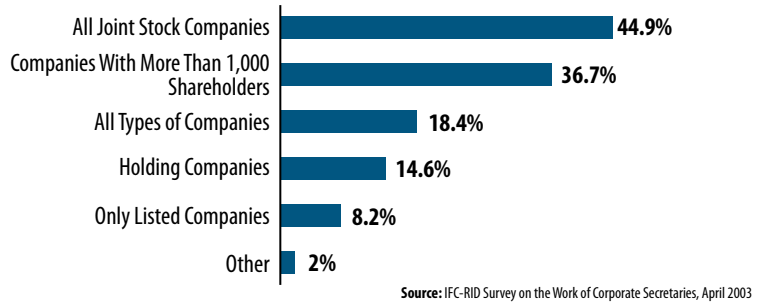
Figure 1: Does the Corporate Secretary's Work Improve Corporate Governance?



Source: IFC-RID Survey on the Work of Corporate Secretaries, April 2003

Most companies consider the position of Corporate Secretary of great importance for joint stock companies, especially for companies with more than 1,000 shareholders.

Figure 2: Types of Companies that Require a Corporate Secretary



Source: IFC-RID Survey on the Work of Corporate Secretaries, April 2003

In Vietnam, the appointment of the Corporate Secretary is not mandatory for all companies. Only listed companies must have a Corporate Secretary.[5] Public companies and private joint stock companies can have a Corporate Secretary, if they consider the establishment of this corporate body to be in their best interest. Best international practices indicate that the bigger companies, both public or private, appoint the Corporate Secretary as a part of good corporate practice.

2. The Qualifications of a Corporate Secretary

A full-time staff member, exclusively dedicated to this task, can best fulfil the functions of the Corporate Secretary.

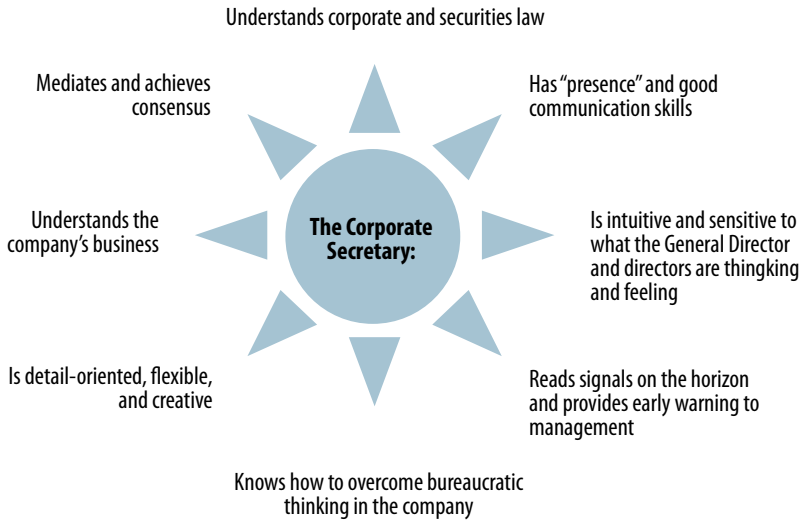
When selecting a Corporate Secretary, the Board of Directors should look for an individual with the highest qualifications and skills. According to the CG Regulations applicable to listed companies, one of the conditions of the Corporate Secretary is to have a good knowledge of the law.[6] The Board of Directors will need to assess the candidate's education, work experience, professional qualities and skills. The charter should outline the general requirements for candidates, while other general documents adopted by the Board of Directors should contain more detailed and specific criteria for evaluating such candidates (for example, the corporate governance code or the internal regulations for the Corporate Secretary). A detailed Corporate Secretary job description, including rights and duties that are not determined by the law, is the responsibility of the Board of Directors and needs to be developed in conjunction with the contract signed between the Corporate Secretary and the Board of Directors. At the same time it is important to note that the term of office of the Corporate Secretary has to be stipulated by the company charter.

The core qualifications for Corporate Secretaries are illustrated in Figure 3.

5 CG Regulations, Article 16.

6 CG Regulations, Article 16, Clause 1.

Figure 3: Qualifications and Skills of Corporate Secretaries



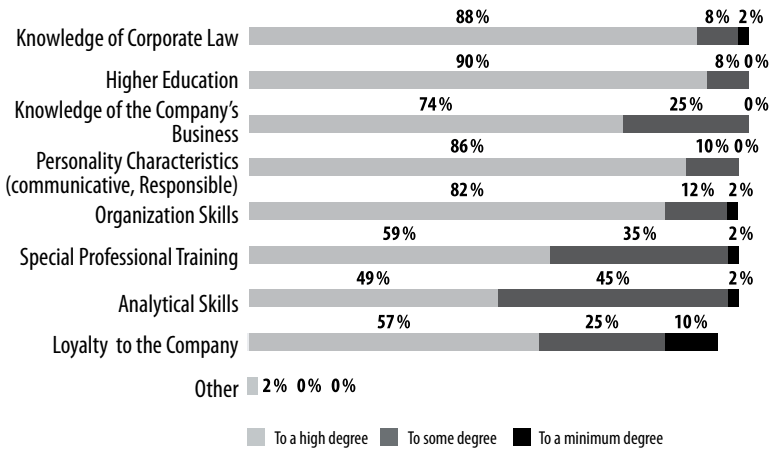
Source: IFC, March 2004

The Corporate Secretary needs to be a person with an impeccable reputation. A company should avoid appointing individuals with a criminal record or significant administrative offences.

Comparative Practices:

Many companies that have Corporate Secretaries appear to understand the required qualifications and mix-of-skills, as illustrated in Figure 4.[7]

Figure 4: The Skills and Qualifications Required of a Corporate Secretary



More than 93% of surveyed companies felt that the Corporate Secretary would benefit from specialized training to more effectively meet the requirements of the position. More than 79% of companies were confident that it was necessary to develop a professional set of standards for Corporate Secretaries to ensure the highest degree of professionalism.

Source: IFC-RID Survey on the Work of Corporate Secretaries, April 2003

3. The Independence of the Corporate Secretary

To act in the interests of the company and its shareholders at all times, the Corporate Secretary must be shielded from undue influence from management and other parties. The Corporate Secretary should, thus, be accountable to and controlled by the Board of Directors. He/she may not concurrently work for

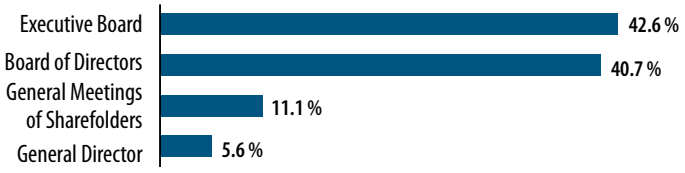
7 IFC-RID Survey on the Work of Corporate Secretaries in Russian Companies, April 2003.

the auditing company which currently audits the company[8] and should not be an affiliated person of the company or its officers, e.g. a family member of the General Director or a business partner of the company.

Comparative Practices:

Figure 5 shows that, in practice, most Corporate Secretaries surveyed have been subject to some degree of influence by executives that could compromise their independence. Approximately 43% reported directly to either the General Director or the Executive Board.[9]

Figure 5: The Corporate Secretary is Accountable to the:



Source: IFC-RID Survey on the Work of Corporate Secretaries, April 2003

The Corporate Secretary should devote sufficient time to his/her responsibilities and duties. Therefore, companies with a large number of shareholders, a large Board of Directors and/or numerous Board of Directors committees should prohibit the Corporate Secretary from concurrently holding other positions within the company or other legal entities. In smaller companies, the Legal Counsel or person holding a similar position, may carry out the duties of the Corporate Secretary, if there are no adverse effects on efficiency and quality of performing Corporate Secretary duties.

4. The Appointment of the Corporate Secretary

The procedure for selecting the Corporate Secretary can be set forth in the charter. The company's internal regulations are better suited to regulate this

8 CG Regulations, Article 16, Clause 1.

9 IFC-Russian Institute of Directors Survey on the Work of Corporate Secretaries in Russian Companies, April 2003.

issue in detail. The Corporate Secretary is designated by appointment. The CG Regulations delegate the authority to appoint a Corporate Secretary to the Board of Directors.[10] The Board of Directors should define the terms and conditions of the employment contract and specifically address the issues of remuneration and termination.

a) Information about Candidates for the Corporate Secretary

Before deciding who will be the Corporate Secretary, the Board of Directors should possess all necessary information about potential candidates, in order to adequately assess their qualifications, experience, personal capabilities and qualities for that job. Therefore, a nominee for the position of Corporate Secretary should provide the Board of Directors with sufficient information to evaluate his/her candidacy. Candidates should, at a minimum, be required to provide information on:

- Educational background
- Employment in other companies
- Any relationship they may have with affiliated persons and/or major business partners of the company
- The number and type of company shares they own, if any
- Declaration of non-conviction for criminal or significant administrative offences
- Any other aspects and circumstances that may influence their performance as Corporate Secretary, in accordance with general company documents and Board of Directors' requests.

This information may be supplemented by personal references and interviews with directors and, in particular, with the Chairman, since a good personal rapport between the Chairman and other directors and the Corporate Secretary will be important in maintaining effective working relationships. The Corporate Secretary should notify the Board of Directors immediately of any changes in circumstances that may influence his/her ability to effectively serve as the company's Corporate Secretary.

b) The Contract with the Corporate Secretary

Remuneration and other rights and duties of the Corporate Secretary are precisely defined by the contract concluded between the Board of Directors

10 CG Regulations, Article 16, Clause 1.

and the Corporate Secretary, in a form of an employment contract. The Board of Directors may offer an employment contract to the Corporate Secretary. An employment contract can be a fixed short-term contract. A fixed short-term employment contract should not be longer than five years. As mentioned above, large companies are well advised to employ the Corporate Secretary on a full-time basis to allow them to properly execute their duties.

The Chairman of the Board of Directors is authorized to make a draft of the contract that will be concluded with a Corporate Secretary.

c) The Office of the Corporate Secretary

Large companies may even find it necessary to establish an Office of the Corporate Secretary, staffed by several assistants. Additional staffing may be useful for companies with a large number of shareholders, a large Board of Directors and/or numerous Board of Directors committees.

Best Practices:

Many foreign companies, particularly publicly listed companies, have an Office of the Corporate Secretary with several staff members. Figure 6 shows the situation in U.K. companies.

Figure 6: Correlation Between the Company's Size and the Number of Staff in the Corporate Secretary's Office

	Company Turnover (in £m)						
	All	Under 10	10-49	50-99	100-499	500-1,000	Over 1,000
	%	%	%	%	%	%	%
	Number of Staff in the Corporate Secretary's Office						
1 Employee	25	58	50	10	20	5	5
2 Employees	23	23	21	43	27	18	8
3 Employees	23	16	26	24	22	32	19
4 Employees	11	3		13	19	14	14
5-10 Employees	16		3	10	11	27	49
Over 10 Employees	2				1	4	5

Source: Company Secretaries Responsibility and Salary Survey 2000/2001, Institute of Chartered Secretaries and Administrators

Should a company want to establish a Corporate Secretary office, it may wish to specify its responsibilities in the internal regulations or other internal documents.

B. The Authority of the Corporate Secretary

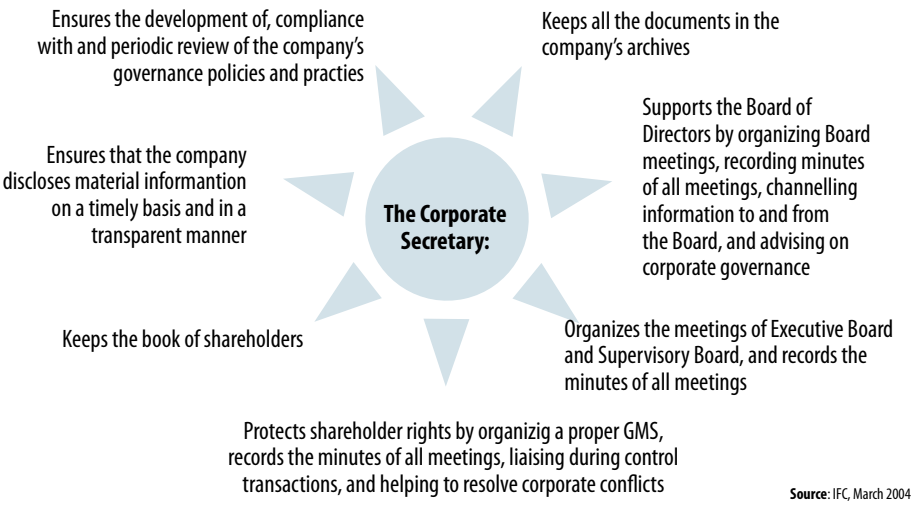
1. General Provisions

The CG Regulations and the Model Charter discuss the position and authority of the Corporate Secretary in listed companies. Main authorities of the Corporate Secretary include (i) organizing the meetings of GMS, Board of Directors and Supervisory Board, (ii) advising meeting procedures, (iii) preparing the meeting minutes, (iv) ensuring the conformity of the Board of Directors' resolutions with Vietnamese law and (v) providing financial information and a copy of meeting minutes of the Board of Directors and other information to the members of the Board of Directors and Supervisory Board.[11]

Best practices suggest that the charter or other internal documents should define in detail the Corporate Secretary's authority and the duty of all governing bodies to assist the Corporate Secretary in discharging his/her duties.

Figure 7 provides an overview of the Corporate Secretary's authorities, taking into consideration international best practices.

Figure 7: The Authorities of the Corporate Secretary



Source: IFC, March 2004

11 CG Regulations, Article 16, Clause 2 and Model Charter, Article 32.

2. Developing Corporate Governance Policies and Practices

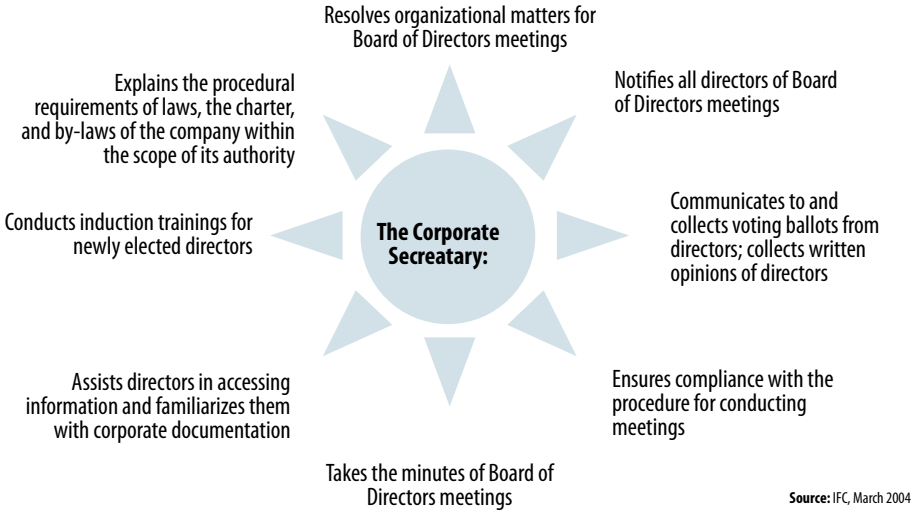
Taking into consideration the authority of the Corporate Secretary, as well as practical experiences in implementing corporate policies and practices, this corporate body is ideally suited to help the company and its Board of Directors develop a system of corporate governance. More specifically, the Corporate Secretary can play an important role in the development of, compliance with and periodic review of the company's governance policies and practices.

In developing an explicit and clearly stated plan to improve the company's corporate governance policies and practices, the Corporate Secretary lays the groundwork for reforms in this area. Perhaps more importantly, he/she can demonstrate the company's commitment to corporate governance by monitoring compliance with these policies and informing the Board of Directors of any breaches. Finally, by reviewing the company's policies on a regular basis (by keeping abreast of the latest developments in corporate governance, changes in the legal and regulatory framework, and international best practices), the Corporate Secretary ensures that the company's governance standards remain high and up-to-date.

3. Legal and Organizational Support of the Board of Directors

Most of the Corporate Secretary's time will be spent supporting the Board of Directors as depicted in Figure 8.

Figure 8: The Functions of the Corporate Secretary in Relation to the Board of Directors



Source: IFC, March 2004

a) Organizing Board of Directors Meetings[12]

The Corporate Secretary of listed companies is responsible for organizing Board of Directors meetings. Although Board of Directors meetings are ultimately the responsibility of the Chairman, the Corporate Secretary handles all administrative and organizational matters such as:

- Helping the Chairman prepare the agenda
- Developing presentations on substantive and procedural issues under discussion
- Preparing model briefs for boardroom discussions.

This is the reason why it is recommended that the Chairman organizes Board of Directors meetings together with the Corporate Secretary.

It is also advisable that the Corporate Secretary is responsible for communicating with other members of the Board of Directors connected with organizing and conducting Board meetings. These activities include:

- Giving notice of Board of Directors meetings to all directors
- Distributing voting ballots to directors

12 CG Regulations, Article 16, Clause 2 and Model Charter, Article 32(a).

- Collecting completed ballots and the written opinions of directors who are not physically present at the meeting
- Forwarding the ballots and written opinions to the Chairman
- Conducting other activities in order to organize mutual communication between members of the Board of Directors and the Chairman in the period between Board meetings.

In addition, the Corporate Secretary should help ensure that procedures for Board of Directors meetings are followed.

Along with the Chairman, the Corporate Secretary is responsible for drafting the minutes of Board of Directors meetings, as well as keeping them in the company's archives.[13]

The Corporate Secretary should brief newly elected directors on:

- The corporate procedures that regulate the operations of the Board of Directors and other governing bodies
- The organizational structure and officers of the company
- The company's internal documents
- The decisions of the GMS and the Board of Directors that are in effect
- The availability of information required by directors for the proper discharge of their duties.

b) Providing the Board of Directors with Access to Information[14]

The Corporate Secretary plays a key role in assisting directors in obtaining the information they need for sound decision-making. The Corporate Secretary provides directors with timely and full access to:

- The minutes of Executive Board meetings
- Decisions and documents approved by the General Director and the Executive Board
- The minutes of meetings and reports prepared by the Audit Committee, the Internal Auditor, the Supervisory Board and/or the External Auditor, or any other Committees established by the Board of Directors
- Financial documents.

13 CG Regulations, Article 16, Clause 2.

14 CG Regulations, Article 16, Clause 2 and Model Charter, Article 32(d).

It would be useful for a company to describe the role of the Corporate Secretary in the internal regulations or other internal documents of the company.

c) Providing Legal Assistance to Directors on Governance Issues

While Vietnamese law is silent on this authority of the Corporate Secretary, best practices recommend that the Corporate Secretary should assist directors with interpreting legal and regulatory acts related to corporate governance, including listing rules, corporate governance codes, and international regulations and developments. This also holds true for procedural issues regulated in the charter, internal regulations and/or other internal documents relating to preparing and conducting the GMS and Board of Directors meetings, and on information disclosure. The Corporate Secretary should not, however, render legal advice that falls outside the scope of his/her duties. The duties of the Corporate Secretary should be clearly defined in relation to those of the company's Legal Counsel.

The Corporate Secretary should directly notify the Chairman of any possible violations of corporate procedures, if and when he/she becomes aware of such violations. Such violations may include, among others:

- Alleged illegal acts or omissions of corporate officers or other corporate employees in fulfilling their legal duties and obligations
- Violations of procedures regulating the organization of the GMS, Board of Directors meetings, the disclosure of information and protection of shareholder rights.

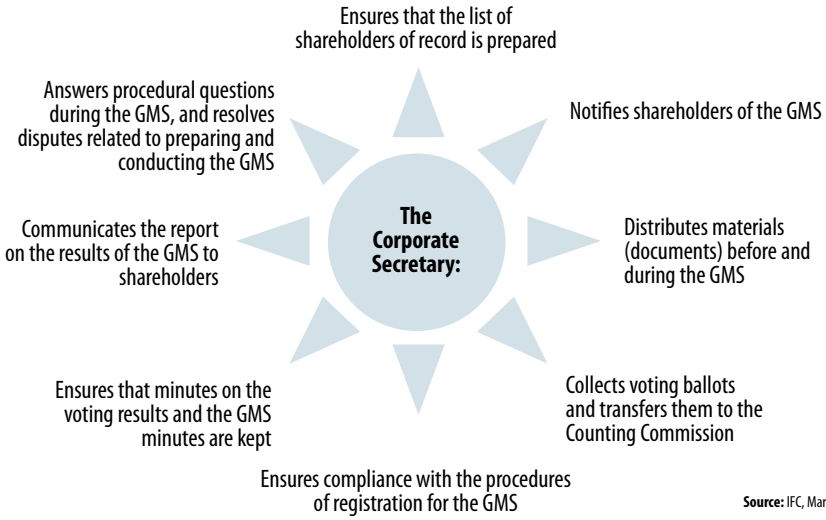
4. Protecting Shareholder Rights

a) Organizing the General Meeting of Shareholders[15]

The Corporate Secretary plays an important role in organizing the GMS. Figure 9, shows the functions of the Corporate Secretary according to best practices in this regard:

15 CG Regulations, Article 16, Clause 2 and Model Charter, Article 32(a).

Figure 9: The Functions of the Corporate Secretary in Relation to the GMS



Source: IFC, March 2004

b) Liaising between Shareholders during Control Transactions

Vietnamese regulations do not cover this role of the Corporate Secretary. However, according to best practices, the Corporate Secretary acts as a liaison between the controlling shareholder(s) in a buyout of common shares (and securities convertible into common shares) and the other shareholders of the company during a control transaction. The Corporate Secretary does this by ensuring that the mandatory offer is distributed to all shareholders. The Corporate Secretary should follow the procedures for the distribution of the mandatory offer to non-controlling shareholders. The same can be applied to squeeze-out and sell-out procedures. This role of the Corporate Secretary also includes active co-operation with external persons (like brokers, dealers and banks), specialized and authorized for the realization of those activities. The Corporate Secretary should also communicate with minority shareholders to inform them about their rights in the context of takeovers.

c) Assisting in Enforcing Shareholder Rights

Best practices suggest that the Corporate Secretary:

- Ensures that the company takes proper notice of all duly submitted shareholder petitions

- Channels all duly submitted shareholder inquiries to the appropriate governing bodies and departments of the company.

The Corporate Secretary should try to resolve any conflicts, especially those concerning the maintenance of the book of shareholders, promptly and fairly.

d) Assisting in Resolving Corporate Conflicts

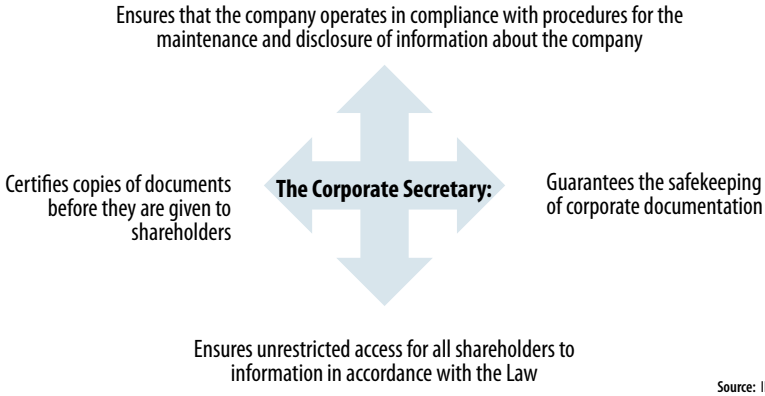
It is recommended from best practices that the Corporate Secretary should be responsible for recording corporate conflicts. The Corporate Secretary registers inquiries, letters, or demands filed by shareholders, reviews these and duly transmits them to the governing bodies that have the authority to resolve the conflict. The effectiveness of the company in preventing and resolving conflicts depends on its responsiveness to all legitimate complaints. The Corporate Secretary also needs to periodically follow up on the status of complaints in order to make sure that they have been properly and fully addressed, and either resolved or rejected.

Conflicts can arise among Board of Directors members, executives and shareholders. The Corporate Secretary should notify the Chairman of any potential or existing conflicts so that they can be dealt with appropriately. Best practices suggest that the Corporate Secretary acts as a liaison in case of conflicts among Board of Directors members and other corporate bodies or shareholders.

5. Providing for Information Disclosure and Transparency

The Corporate Secretary can play an important role in helping the Board of Directors and General Director fulfil their respective obligations to disclose material information on a timely basis to external institutions and company's shareholders, in accordance with the financial market regulations. According to best practices, the Corporate Secretary's authority related to information disclosure is shown in Figure 10.

Figure 10: The Authorities of the Corporate Secretary Related to Information Disclosure



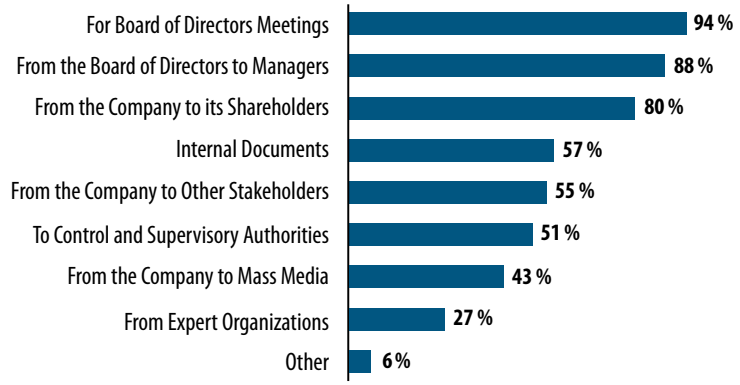
Source: IFC, March 2004

The Corporate Secretary also helps to ensure the transparent control procedures. More specifically, he/she acts as a liaison between the Supervisory Board and the Board of Directors.

Comparative Practices:

Figure 11 illustrates the views of some Russian companies on the role that the Corporate Secretary plays in providing information about the company.[16] Most companies agree that the Corporate Secretary should provide information in support of Board of Directors meetings, and to management and shareholders. There is, however, considerably less agreement with respect to the Corporate Secretary's role in providing other types of information to outsiders, for example, control and supervisory authorities.

Figure 11: Percentage of Companies Where the Corporate Secretary Coordinates Information Flows



16 IFC-Russian Institute of Directors Survey on the Work of Corporate Secretaries in Russian Companies, April 2003.

C. Professional Associations of Corporate Secretaries

The position of Corporate Secretary is fairly new in the Vietnamese market, although an increasing number of companies are establishing this position. This position requires a unique skills-set, as shown in Figure 3 above. Ad-hoc efforts are currently being implemented to promote the benefits of having a Corporate Secretary, training efforts are also being organized to train the nascent profession. In foreign markets, professional associations or Corporate Secretaries institutes often perform this role.[17] Typically, such organizations unite corporate secretaries and have several functions, such as to:

- Promote good governance, management, and efficient administration of companies
- Support and protect the character, status, and interests of member Corporate Secretaries
- Promote the efficiency and usefulness of the service and standard of professional conduct provided by Corporate Secretaries
- Train Corporate Secretaries
- Comment on proposed and existing laws, rules and regulations in areas of particular interest to members
- Promote and assist in the voluntary exchange of information and experience relating to the duties, problems and practices of Corporate Secretaries and their companies.

Establishing such a professional association in Vietnam would be an important step towards effectively promoting the introduction of Corporate Secretaries in Vietnamese companies.

17 For more information, see www.icsa.org.uk.

NOTES

NOTES

7

Chapter

AN INTRODUCTION TO SHAREHOLDER RIGHTS

7 | An Introduction to Shareholder Rights

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The Chairman's Checklist

- ☑ Does the company charter protect shareholder rights as stipulated by the Law on Enterprises, the Law on Securities, the Model Charter for listed companies (issued together with Decision 15 of the MOF dated 19 March 2007) and the CG Regulations for listed companies (Decision 12 of the MOF dated 13 March 2007) and other relevant regulations? Do all directors take appropriate measures to ensure that these rights are respected?
- ☑ Do all directors take measures to encourage shareholders to exercise their rights, in particular, the right to vote? Do shareholders exercise their rights collectively?
- ☑ Are shareholders provided with free access to company information beyond the requirements of the Law on Enterprises and the Law on Securities? Are shareholder requests processed properly and on time?
- ☑ Does the Board of Directors provide competent registers and institutions with timely, full and accurate information about the company, especially in relation to shareholders' rights?
- ☑ Does the Board of Directors encourage shareholders to protect their rights by using all the mechanisms provided by legislation and the CG Regulations?
- ☑ Does the Board of Directors ensure that the charter, internal regulations and other internal documents do not stipulate additional obligations of shareholders other than the ones that are clearly defined by law?

By investing in shares, investors become shareholders and receive a number of rights attached to these securities. Shareholders rely on the rights they receive in return for their investment. For most shareholders, this includes the right to participate in the profits of the company. Other rights are also important, especially from the perspective of the maintenance and increase of investment. These rights include, among others, the right to vote on the Board of Directors composition, approve charter amendments and capital changes, approve the annual report and financial statements, and the right to access information about the company and its activities. Through these rights, shareholders ensure that the managers of the company do not misappropriate their investment.

The quality of investor protection has several corporate governance implications, such as the depth of capital markets, ownership patterns, dividend policy, and the efficiency of allocating resources.[1] Where laws are protective of shareholders and well enforced, shareholders are willing to invest their capital, financial markets are broader and more valuable. In contrast, where laws do not adequately protect shareholders, the development of financial markets is stunted. When shareholder rights are protected by the law, and indeed by the company itself, outside investors are willing to pay more for financial assets such as equity. They pay more because they recognize that, with better legal protection, more of the firm's profit will return to them as dividends and/or capital gains as opposed to being expropriated by managers or controlling shareholders.

The mere "law on the books" is not necessarily sufficient to ensure that shareholder rights are adequately protected. Effective enforcement is also required. Tantamount to shareholder rights protection is the company's behavior itself, especially for Vietnamese companies that do not benefit from an effective enforcement regime and that have been blemished by the corporate governance scandals that have occurred during the transition years.

This chapter provides an overview of shareholder rights and the rules a public company must follow to protect these rights. Some specific rights, such as the participation in the GMS, are discussed in detail in other chapters of this Manual.

1 Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, Robert Vishny, Investor Protection and Corporate Valuation, National Bureau of Economic Research, Working Paper 7403, October 1999.

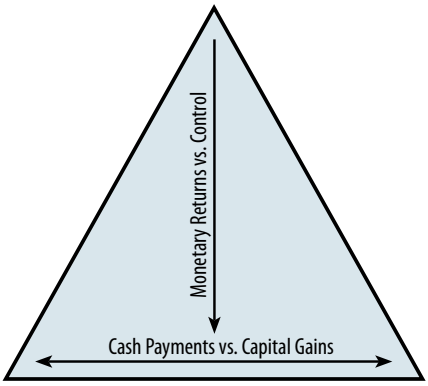
A. General Provisions on Shareholder Rights

1. Reasons for Being a Shareholder

Investors purchase company shares for a variety of reasons. The most common reasons are shown in Figure 1.

Figure 1: Common Reasons for Becoming a Shareholder

Control: Shares provide investors with the opportunity to legally control the company and influence decision-making by nominating directors and, possibly, management. The greater the number of voting shares a shareholder holds, the greater the influence he wields.



Dividends: Dividends play an important role in the decision to invest. Regular dividend payments, especially if an investor holds a portfolio of shares, can generate predictable cash flows.

Capital Gains: Investors purchase shares to benefit from capital growth. Unlike dividends, shares need to be sold to realize the gains represented by rising share prices

Source: IFC, March 2004

2. Types of Shares

Legislation specifies two types of shares, common and preferred.[2] A shareholding company must have common shares.[3] In addition, a company may also issue

2 LOE, Article 78.

3 LOE, Article 78, Clause 1.

preferred shares.[4] Certificates issued by the company or recorded in the book entry evidencing the ownership of one or more shares issued by the company are referred to as share certificates.[5] The face value of each share and the total face value of shares will be specified in the share certificate. A share certificate may be either a bearer share certificate or non-bearer certificate. Holders of bearer share certificates shall be responsible to manage their share certificates and the listed companies shall not be liable where such share certificates are stolen or used for fraudulent purposes.[6]

➔ *For more information on charter capital and shares, see Chapters 9 and 11.*

a) Common Shares

Owners of common shares have the right to participate in the decision-making process of the company, most commonly exercised by voting during the GMS. They also have the right to share in the profits of the company either through dividends or through capital gains.

Common shares have certain characteristics. They always represent one class of shares.[7] Each share will have the same nominal value or accountable par, which is a portion of the charter capital of the company.[8] The charter of listed companies defines the number, nominal value or accountable par, and rights attached to common shares.[9] Every common share carries the same rights, interests and obligations to their owners in accordance with the Law on Enterprises, the charter and the internal regulations regardless time of issuance.[10] Common shares cannot be divided into different classes, nor can they be converted into preferred shares or other securities of the company.[11]

b) Preferred Shares

A company has the right to issue various classes of preferred shares.[12] Those investors entitled to purchase preferred shares shall be stated in the

4 LOE, Article 78, Clause 2.
5 LOE, Article 85, Clause 1.
6 Model Charter, Article 6, Clause 6.
7 LOE, Article 78, Clause 1.
8 LOE, Article 77, Clause 1.
9 Model Charter, Article 5, Clause 1.
10 LOE, Article 78, Clause 5.
11 LOE, Article 78, Clause 6.
12 LOE, Article 78, Clause 2.

company's charter or decided by the GMS.[13] All preferred shares of the same class must have the same nominal value and must provide the same rights, interests and obligations to their owners.[14] In the case of listed companies that have various preferred stocks, the rights and obligations attached to those preferred stocks must be fully disclosed to shareholders and approved by the GMS.[15] In contrast to common shares, preferred shares can be converted into common shares subject to resolutions in the GMS.[16] Under the current Law on Enterprises, there is no specific regulation on whether preferred shares can be converted into other classes of preferred shares or the price at which the shares will be redeemed.

Preferred shares can give their owners preferential rights associated with the distribution of dividends, voting rights and liquidation value of shares.[17] For listed companies, the charter must specify the rights and obligations attached to each class of share, including preferred shares issued by the company.[18] Although there is no specific regulation, it is a good practice that the company charter specifies the amount of dividends and/or the liquidation value of preferred shares or, alternatively, the procedure for determining the amount of dividends and the liquidation value of preferred shares.

Shareholders with redeemable preferred shares have the right to sell such shares to the company at any time upon the holder's request or under circumstances as stated in the share certificate.[19]

The Law on Enterprises distinguishes preferred shares according to the specific rights they grant.[20] Preferred shares include shares of types as described hereunder:

- **Voting preferred shares:** Voting preferred shares are shares which carry more votes than common shares. The number of votes in a voting preferred share shall be determined in the company's charter.[21] Voting preferred shareholders shall have other rights as common

13 LOE, Article 78, Clause 4.
14 LOE, Article 78, Clause 5.
15 CG Regulations, Article 3, Clause 5.
16 LOE, Article 78, Clause 6.
17 LOE, Article 78, Clauses 2 & 3.
18 Model Charter, Article 5, Clause 3
19 LOE, Article 83, Clause 1.
20 LOE, Article 78, Clause 2.
21 LOE, Article 81, Clause 1.

shareholders except that they are not allowed to transfer their shares.[22] Voting preferred shares shall be held only by government-authorized organizations and founding shareholders. Voting preferred shares of founding shareholders shall be effective for three years from being granted the certificate of business registration. After that, voting preferred shares of founding shareholders shall be converted into common shares.[23]

- **Dividend preferred shares:** Dividend preferred shares are shares which give their holders an entitlement to a higher annual dividend than that of common shares, or to a fixed annual dividend. The annual dividend of such a share is comprised of a fixed dividend and bonus dividend. The fixed dividend is paid regardless of profit made by the company. The amount of the fixed dividend and the calculation method of the bonus dividend are stated on such dividend preferred shares.[24] Under Clause 4a, Article 30, Section 3, Decree 59/2009/ND-CP dated 16 July 2009 on the organization and operations of commercial banks, a fixed dividend shall be paid only when the bank makes a profit. In case of losses, the fixed dividend payable to dividend preferred shares shall be accumulated to the following years. The total face value of dividend preferred shares shall be no more than 20% of the bank's charter capital.
- **Redeemable preferred shares:** Redeemable preferred shares are shares that can be repurchased by the company at any time upon the holder's request or under circumstances as stated in the share certificate.[25]

Dividend preferred shareholders and redeemable preferred shareholders shall have the same rights as common shareholders except that they are not entitled to vote, to attend the GMS, or to nominate member candidates in the Board of Directors and the Supervisory Board.[26]

Under the Law on Enterprises, the principal comparisons between common and preferred shares of shareholding companies are summarized in Figure 2.

22 LOE, Article 81, Clauses 2 & 3.
23 LOE, Article 78, Clause 3.
24 LOE, Article 82, Clause 1.
25 LOE, Article 83, Clause 1.
26 LOE, Articles 82 & 83, Clause 3.

Figure 2: Comparison of Common and Preferred Shares

	Common Shares	Preferred Shares
Mandatory?	**Yes**, must always be issued	**No**, are optional
Can different classes of shares be issued?	**No**, only one class of common shares may be issued	**Yes**, different classes of shares can be issued
Can this type of share be converted into other securities?	**No**, common shares cannot be converted into preferred shares or other securities	**Yes**, preferred shares can be converted into common shares subject to resolutions of the Shareholders' General Meeting
Do shareholders have the right to vote, to attend the GMS to nominate candidates to the Board of Directors and the Supervisory Board?	**Yes**, with certain statutory exceptions	**No**, except for voting preferred shares[27] See Section B.1 of this Chapter
Do shareholders have the right to freely transfer their shares?	**Yes**, with certain statutory exceptions	**Yes**, except for voting preferred shares
Can the charter grant additional rights to shareholders?	**Yes**	**Yes**

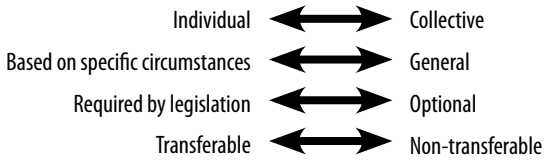
3. Types of Shareholder Rights

The Law on Enterprises distinguishes between the rights of individual shareholders and the rights held collectively by a group of shareholders. It is also possible to distinguish shareholder rights according to their nature. Some rights relate to the decision-making process and the organization of the company. Others relate to the capital and the return on shareholder investment.

27 For listed companies, a GMS resolution to change or waiver special rights attached to a class of shares shall be passed only when the written consent of the holders of at least 75% of the voting rights of the issued shares of such class is obtained; Model Charter, Article 16, Clause 1.

Figure 3 below illustrates the two-sided nature of the shareholder rights.

Figure 3: The Two-Sided Nature of Shareholder Rights



Source: IFC, March 2004

Figure 4 summarizes the rights of shareholders by types of shares, and by the percentage of shares held. Neither the company nor its shareholders can change these rights. The company charter can, however, provide additional rights to shareholders as long as they are not prohibited by legislation.

Figure 4: Shareholder Rights Under the Law on Enterprises

All Types of Shares

One Share

The Right to:

- Access the Charter, the By-laws, the book of minutes of meetings of shareholders meetings, and resolutions of shareholders meetings, annual reports and other company documents ➔ *See B.3 of this Chapter*
- Review the shareholder list ➔ *See B.8 of this Chapter*
- Receive dividends ➔ *See B.10 of this Chapter and Chapter 10*
- Freely transfer shares, except for voting preferred shares and shares owned by founding shareholders as subscribed at the establishment of the company ➔ *See B.4 of this Chapter*
- Obtain redemption rights ➔ *See B.6 of this Chapter*
- Receive part of the remaining assets corresponding to their shares in case the company is dissoluted or bankrupt ➔ *See B.7 of this Chapter*

Only Commom and Voting Preferred Shares

One Share

The Right to:

- Vote during the GMS in person or by proxy except in some special cases ➔ *See B.1 of this Chapter*
- Appeal GMS decisions ➔ *See B.2 of this Chapter*
- Obtain pre-emptive rights, except for voting preferred shares ➔ *See B.5 of this Chapter*

> 10% of Shares (*)

The Right to:

- Call an extra GMS and request the business registrar to supervise the convocation of the extra GMS ➔ *See B.11 of this Chapter and Chapter 8*
- Nominate Board of Directors and Supervisory Board members ➔ *See B.12 of this Chapter*
- Submit proposals to the GMS agenda ➔ *See Chapter 8*
- Review and extract the minutes' book and resolutions issued by the Board of Directors, semi-annual and annual financial reports and reports made by the Supervisory Board
- Request the Supervisory Board to examine detailed issues related to the business management and administration of the company

50% of Shares (**)

- File a request in court in order to cause dissolution of the company

(*) A shareholder or a group of shareholders holding more than 10% of the total common shares or a lower percentage as provided by the company's charter for a consecutive period of six months or more.[28] For listed companies, the Model Charter recommends only 5% of the total common shares.[29]

(**) For listed companies, shareholders holding 50% of the currently circulating shares with rights to vote in the election of members to the Board of Directors shall have the right to lodge a petition with a court requesting dissolution of the company.[30]

Shareholders of listed companies are entitled to be sufficiently notified about periodical and extraordinary disclosure of information on company activities.[31]

For listed companies, a GMS resolution to change or waiver special rights attached to a class of shares shall be passed only when the written consent of the holders of at least 75% of the voting rights of the issued shares of such class is obtained. Shareholders or authorized representatives participating in such meetings may request a secret ballot.[32]

A shareholder or a group of shareholders owning more than 20% of the common shares for at least six consecutive months are entitled to file applications for opening bankruptcy procedures against the company in case they realize that company falls into the state of bankruptcy.[33]

Shareholders holding shares of a company for at least one consecutive year shall have the right to review the company's reports, including the report on the business operations of the company, the financial statements, the evaluation report on the management and administration of the company, at an appropriate time by themselves or with their lawyers, certified auditors or accountants.[34]

28 LOE, Article 79, Clause 2.
29 Model Charter, Article 11, Clause 3.
30 Model Charter, Article 51.
31 CG Regulations, Article 3, Clause 1b.
32 Model Charter, Article 16, Clause 1.
33 LOB, 2004, Article 17, Clause 1.
34 LOE, Article 128, Clause 4.

Currently, in Vietnam, shareholders cannot file a suit against directors in the form of derivative actions.[35] Recently, Decree 102/2010/NĐ-CP issued by the Government on 1 October 2010 to replace Decree 139/2007/NĐ-CP "Guiding on implementation of the Law on Enterprises" has allowed shareholders to file a suit against directors. Article 25 of Decree 102 provides that a shareholder or a group of shareholders holding at least 1% of the total common shares for a consecutive period of six months or more can request the Supervisory Board to file suit against a member of the Board of Directors or the Director (General Director) in a number of cases.

Best Practices:

A shareholder should have the right to file suit against directors including derivative and class action law suits. The country's legal system should provide and enforce mechanisms for minority shareholders to bring lawsuits when they have reasonable grounds to believe that their rights have been violated (see *OECD Principles of Corporate Governance*, pages 40 & 42).

35 According to international practices, derivative action is a legal action brought by a shareholder on behalf of a company, when the company cannot itself decide to sue. A company will usually sue in its own name, but if those against whom it has a cause of action are in control of the company (e.g., directors or majority shareholders), a shareholder may bring a derivative action.

B. Specific Shareholder Rights

1. The Right to Vote

Shareholders can participate in the decision-making of the company through their right to vote during the GMS. Important matters that fall within the authority of voting at GMS include: i) amendments to company charter; ii) development strategy of the company; iii) authorization of additional shares; election or dismissal of the Board of Directors and Supervisory Board; iv) extraordinary transactions such as investment or sales of assets in equivalent to 50% or more of the company's total assets; vi) approval of dividend and annual financial statements; and vi) reorganization or resolution of the company.

Best Practices:

Shareholders should be able to make their views known on the remuneration policy for board members and key executives. The equity component of compensation schemes for board members and employees should be subject to shareholder approval (see *OECD Principles of Corporate Governance*, page 18).

The right to vote can be exercised personally or by proxy.[36] A proxy holder is authorized to act on behalf of the shareholder and to make any decision the shareholder could have made during the GMS. A listed company is not allowed to restrict the participation by its shareholders in the GMS and should facilitate its shareholders' authorization of their representatives to participate in the GMS when shareholders so request.[37] A standard form of letter of proxy must be attached to GMS' invitation and sent to shareholders prior to the GMS. Except for limitations provided by legislation, any individual can serve as a proxy so long as this person is given an appropriate written proxy. Letters of proxy shall be in writing in the form as prescribed by the company and need not be notarized.[38]

36 LOE, Article 79, Clause 1.a.

37 CG Regulations, Article 3, Clause 1.b.

38 LOE, Article 101, Clause 2.

Best Practices:

The corporate governance framework should ensure that proxies are voted in accordance with the direction of the proxy holder and that disclosure is provided in relation to how undirected proxies will be voted. It is important to disclose how the Chairperson of the meeting (as the usual recipient of shareholder proxies obtained by the company) will exercise the voting rights attached to undirected proxies. The objective of facilitating shareholder participation suggests that companies favorably consider the enlarged use of information technology in voting, including secure electronic voting in absentia (see *OECD Principles of Corporate Governance*, page 35). A common electronic voting system that helps shareholders to vote in absentia is the public network DRE (direct recording electronic) voting system which uses electronic ballots and transmits vote data from the polling place to another location over a public network. Voting data may be transmitted as individual ballots as they are casted, periodically as batches of ballots throughout the election day, or as one batch at the close of voting. This includes Internet voting as well as telephone voting. Some countries that use this system for voting include the Estonia, Ireland, Switzerland, the UK and the US.

➔ *For more information on the GMS, see Chapter 8.*

a) The Right to Vote Common Shares

Common shares grant voting rights to their holders. However, there are some circumstances when common shares become non-voting. These circumstances are summarized in Table 1.

Table 1: Non-Voting Common Shares	
Preconditions	**Legal Consequences**
Failure to fully pay for shares: When common shares placed to the company's founders are not fully paid for, unless the charter provides otherwise.	The Board of Directors can request withdrawal of such shares and shareholders shall be required to waive their shareholdership status with respect to such shares.[39]
Treasury shares:[40] When the company possesses issued common shares of the company.	Precludes voting on all issues during the GMS.
The approval of related party transactions: Common shares that are owned by a shareholder who is an interested party in a related party transaction.	Precludes voting on the approval of the related party transaction in which the shareholder is an interested party.[41]

Best Practices:

Current laws and regulations in Vietnam have not stipulated cases where voting rights are precluded. The following cases are considered good practices:

Preconditions	Legal Consequences
Violation of rules on the acquisition of shares in control transactions: When a person (or a group of affiliated persons) has not followed the procedures specified by the Law on Securities when acquiring these shares.	Precludes voting on all issues during the GMS

39 Model Charter, Article 9, Clause 5.

40 LOE, Articles 91 & 92 and Circular 18. Shares are commonly reacquired by a corporation to be retired or resold at a later date. Treasury shares are issued, but not outstanding, and are not taken into consideration when calculating earnings per share or dividends, or for voting purposes.

41 LOE, Article 120, Clause 3.

Violation of rules concerning a mandatory bid offer: When a person (or a group of affiliated persons): • Acquires common shares of the target company that exceed 25% of common shares (i.e. 25% of votes in the GMS of that company) or • Holding 25% or more of the shares with voting rights intends to buy more shares that leads to ownership of 51%, 65% or 75% of the total shares with voting rights of that company That person (or group of affiliated persons) will have to submit their public bid registration to the SSC. The public bid is conducted only after it is approved by the SSC and announced in advance by bid-making organizations or individuals on the mass media.	Common shares cannot be voted at the GMS
The right of squeeze-out: When the offeror following the tender offer holds at least 80% of shares of a target company, he/she can require all the holders of the remaining shares to sell him/her those shares under the conditions from the bid.	Precludes voting on the waiver of the controlling shareholder's obligation to squeeze-out the minority shareholders
Shares held by the subsidiary: When a subsidiary directly or indirectly acquires shares in a parent company.	The shares carry no voting rights at the GMS
Preclusion of voting rights: When the GMS is deciding the following issues: • Shareholders' relief from duties to the company or diminution of such duties • Whether to initiate or abandon legal proceedings against the shareholder.	The shareholder may not vote at a GMS when deciding these issues

Market practice in Vietnam:

Acquisition of Shares in Control Transactions: Thus far, there has been no recorded case of a hostile takeover in Vietnam. At present, there are limited rules and procedures governing corporate control. Under the Law on Enterprises, a shareholder holding 5% or more of the total share capital of a company must

register with relevant business registration body within seven working days from the day he/she reaches this threshold.[42] For a public company, that shareholder shall have to report to the company, the SSC and the stock exchange where that company's shares are listed.[43] Takeover bids in listed companies need to be registered with the SSC.[44]

Tender Rules/Mandatory Bid Rules: A mandatory tender offer is required by law when an acquirer attempts to acquire 25% or more of the voting shares of a public company. An organization, individual or related person holding 25% or more of the voting shares are also required to make a tender offer when they intend to buy more outstanding voting shares of the company which leads to ownership of 51%, 65% and 75%.[45] Before implementation of the public tender offer, the acquirer has to report to the SSC and disclose extraordinary information as required by law.[46] Within seven days from the date of receiving the SSC's opinion, the acquirer must announce the offer in a written or electronic newspaper for three consecutive issues.[47] Within 14 days from the date of receiving the bid registration materials, the Board of Directors of the target company must submit the SSC and inform the shareholders of the company's opinion on the public tender offer. If after 14 days, the Board of Directors do not have an opinion, it must make a request to the SSC for an extension.[48] The acquirer is not allowed to discriminate among sellers nor provide separate information to shareholders at different level or time nor refuse to buy shares of the target company during the tender offer. At the same time, the acquirer is not allowed to sell the shares he/she is making tender offer or buy the shares outside the public bid or with conditions contrary to those disclosed in the tender offer registration.[49] The duration of the execution of the offer is not less than 30 days and not more than 60 days from the date of announcement.[50]

Squeeze-Out Provisions: A provision for a squeeze-out right, by which a bidder who obtains sufficient shares of a target can compel the remaining

42 LOE, Article 86, Clause 4.
43 LOS, Article 29.
44 Circular 194, Part II, Article 3.
45 Circular 194, Part II, Article 1.
46 Circular 194, Part II, Article 2.
47 Circular 194, Part II, Article 8.2.
48 Circular 194, Part II, Article 4.1.
49 Circular 194, Part II, Article 9.1.
50 Circular 194, Part II, Article 8.4.

minority shareholders to sell their shares, is stipulated under Part II, Article 8.8 of Circular 194 and Article 32, Clause 9 of the Law on Securities. The threshold at which the minority can be squeezed out is 80%. However, no information is available on how it is practiced.

Violations of the regulations under those above cases will be fined according to Decree 85/2010/ND-CP dated 2 August 2010 on sanctioning of administrative violations in the domain of securities and the securities market. However, no regulations on voting rights of shareholders of the related shares are stipulated. Besides, there is no regulation on the voting rights of shares held by subsidiaries, nor the preclusion of voting rights of shareholders when deciding some issues related to them as under best practice.

b) The Right to Vote Preferred Shares

The Law on Enterprises specifically regulates three types of preferred shares, namely voting preferred shares, dividend preferred shares and redeemable preferred shares. Except for voting preferred shares which carry more votes than common shares, dividend preferred shares and redeemable preferred shares do not have voting rights at the GMS.[51]

However, under the Model Charter, shareholders of a class of preferred share can have the right to vote in case there is a change or waiver of special rights attached to that class of share. A GMS resolution to change or waiver special rights attached to a class of shares shall be passed only when the written consent of the holders of at least 75% of the voting rights of the issued shares of such class is obtained.[52] The organization of such a meeting shall be valid if at least two shareholders (or their authorized representatives) are presented and the attendees hold at least one-third of the par value of the issued shares of such class. Where the number of attendees as required above is insufficient, the meeting shall be reconvened within 30 days and the holders of shares of such class (not depending on the number of holders and the number of shares) who are presented directly or via an authorized representative shall be considered to be a sufficient number of attendees.[53]

51 LOE, Articles 82 & 83, Clause 3.

52 Model Charter, Article 16, Clause 1.

53 Model Charter, Article 16, Clause 2.

Best Practices:

All investors should be able to obtain information about the rights attached to all series and classes of shares before they purchase. Any changes in voting rights should be subject to approval by those classes of shares which are negatively affected. (see *OECD Principles of Corporate Governance*, page 41).

2. The Right to Appeal Decisions of the General Meeting of Shareholders

When a resolution of the GMS or the Board of Directors violates the law or infringes upon shareholders' fundamental benefits provided for by law, shareholders of listed companies may request non-implementation of such resolution according to the order and procedures prescribed by law.[54]

Within 90 days from the date of the receipt of the GMS minutes and/or receipt of the written results of the GMS voting count, shareholders shall be entitled to file a petition requesting the Court or an Arbitrator to consider and cancel such resolution on the following cases:[55]

- Order and procedures of the convocation of the concerned session of the GMS fail to comply with stipulations of the Law on Enterprises and the company's charter.
- Order and procedures for approving such resolution and one or more contents of such resolution of the GMS are in breach of laws or the company's charter.

➔*For more information on appealing decisions of the GMS, see Chapter 8, Section E.4.*

54 CG Regulations, Article 3, Clause 2.

55 LOE, Article 107.

3. The Right to Receive Information About the Company

Every shareholder shall have the right to review, refer, and extract the information in the list of shareholders who have voting rights, and request the amendment of the inaccurate information, and to review, refer, extract or copy the charter of the company, the minutes book of the GMS, and the resolutions of the GMS meetings.[56]

In Vietnam, shareholders of listed companies can obtain information about share classes from the company charter, the prospectus, and the annual and quarterly reports publicly available from the HNX, HOSE and SSC. Shareholders of listed companies are entitled to be sufficiently notified about periodical and extraordinary disclosures of information on the company's activities.[57]

Public companies are also required to submit approved financial statements to the business registrar. Every individual and organization has the right to see and make copies of the financial statement as kept by the business registrar. For unlisted companies, only a shareholder or a group of shareholders owning over 10% of the total common shares for a continuous period of at least six months or a smaller ratio as stipulated by the company charter shall have the right to review and extract the minutes' book and resolutions issued by the Board of Directors, semi-annual reports under the standard forms of the Vietnamese accounting system and reports made by the Supervisory Board.[58]

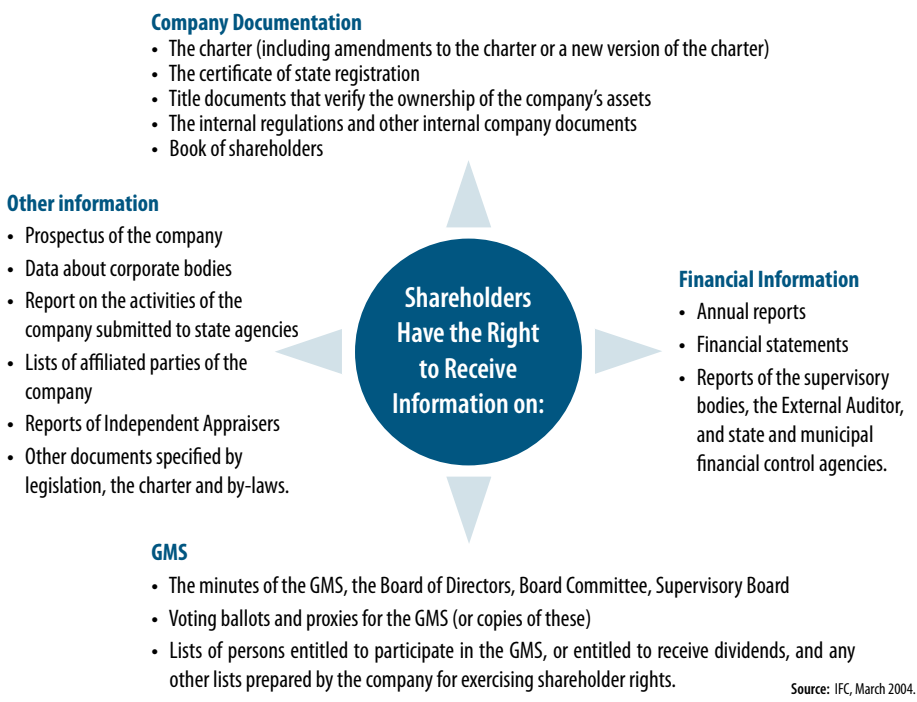
The charter and internal regulations should specify the procedures that the company and shareholders must follow for the distribution of information and documents. The information rights of common and preferred shareholders under best practices are depicted in Figure 5.

56 LOE, Article 79, Clause 1, Items d & e.

57 CG Regulations, Article 3, Clause 1d.

58 LOE, Article 79, Clause 2, Item b.

Figure 5: Shareholder Information Rights



Source: IFC, March 2004.

With such a large number and variety of documents and information, it is preferable for companies with large numbers of shareholders to define in the charter or the internal regulations the procedures for realization of shareholders' rights to receive all information. These procedures should ensure that shareholders are provided with all information within a reasonable timeframe and without disturbing the company's day-to-day activities.

Best Practices:

It is good practice to provide the requested documents to the shareholders for their examination at the company's premises within five days after the request is received. The company should not charge shareholders more than the actual cost of copying the requested documents.

➔ *For more information on information disclosure, see also Chapter 13.*

4. The Right to Freely Transfer Shares

Except for voting preferred shares and shares subscribed by founding shareholders at the establishment of the company, the owners of common and preferred shares of a company have the right to freely transfer their shares to other shareholders and other persons who are not shareholders of the company.[59] They can sell their shares at any time and at any price, without the consent of, or any pre-emptive right on the part of, the company and other shareholders.

Voting preferred shares are held by only government-authorized organizations and founding shareholders. The voting preference of founding shareholders shall be effective for three years from being granted a business registration license. After that, voting preferred shares of founding shareholders shall be converted into common shares when they can be freely transferred by the owners.[60]

There are some restrictions on the transfer of common shares subscribed by founding shareholders at the establishment of the company. Within three years from the date of being granted the business registration certificate, founding shareholders may freely transfer their common shares which are subscribed at the establishment of the company to other founding shareholders and only may transfer those shares to other non-founding shareholders upon the agreement of the GMS. After this three-year period, all restrictions imposed upon founding shareholders shall be abolished.[61]

➔ *For more information on the transfer of shares, see also Chapter 11.*

5. Pre-Emptive Rights

In certain circumstances, shareholders have pre-emptive rights that allow them to purchase shares or convertible securities on a priority basis before they are offered to third parties. Thus, a shareholder has the right to subscribe newly

59 LOE, Article 79, Clause 1.d.
60 LOE, Article 78, Clause 3.
61 LOE, Article 84, Clause 5.

issued shares in proportion to the par value of the shares or the book value of no par value shares he/she owns at the time the company decides to issue new shares.[62] For listed companies, it is regulated that eexisting shareholders shall be given priority to be offered ordinary shares for sale at the ratio corresponding to their ownership percentage of ordinary shares in the company, except where otherwise stipulated by the GMS.[63] However, there is no specific regulation or guidance in case the company issue additional preferred shares.

Shareholders can transfer their pre-emptive rights to others.[64]

a) The Purpose of Pre-Emptive Rights

Pre-emptive rights ensure that all shareholders of the same class are treated equally. They provide the opportunity to purchase new shares when the company wants to increase its charter capital. Pre-emptive rights help protect shareholders from dilution, which can result in losing some of their rights due to the decrease of the percentage of shares they hold.

b) When Pre-Emptive Rights Exist

Whenever the capital is increased by consideration in cash, the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares.

c) Pre-Emptive Rights and Fractional Shares

When shareholders exercise pre-emptive rights, fractions of shares (fractional shares) can result.[65] Currently, in Vietnam, there is no specific regulation on the treatment of fractional shares. However, market practice is that the number of additional shares issued will be rounded down to the unit of share. The Board of Directors can distribute the remaining shares due to rounding to shareholders of the company or to others in an appropriate way provided that the offering conditions of such remaining shares are not better than that offered to existing shareholders.

62 LOE, Article 79, Clause 1c.

63 Model Charter, Article 5, Clause 6.

64 LOE, Article 87, Clause 2c.

65 For example, shareholder A has 123 common shares out of 1,000 common shares, which represent 12.3% of all common shares. If the company is placing 250 additional common shares, shareholder A will be entitled to purchase 12.3% of 250 shares or 30.75 shares.

d) The Procedure for Exercising Pre-Emptive Rights

Issuing organizations must register the issuance of additional shares with the SSC.[66] Within seven working days after a certificate of public offering of securities becomes effective, the issuing organization shall publish an issuance announcement on an electronic or printed newspaper for three consecutive issues.[67] The issuing organization will send a notice to the Vietnam Securities Depository (VSD) to inform the record date for preparation of the list of shareholders who are entitled to pre-emptive rights with regards of the additional share issuance at least ten working days before the record date. The VSD shall have to inform its depository members who then inform each related investor of the record date within three working days from the notice date of the VSD and send the list of shareholders to the VSD as required.[68] Within six working days after the record date, the VSD shall send the list of shareholders with the right to buy additional shares to the issuing organization, who then shall have to reply if it accepts the list or not within eight working days from the record date. After receiving the detailed list of pre-emptive rights by each depository member, each respective depository member shall send a notice to shareholders of their right to buy additional shares. Shareholders can transfer their emptive-rights to others within a specific period. After that, if they do not transfer their emptive rights, they can register to buy additional shares within a specific period and make payments accordingly. For shares that have been registered at the VSD, the VSD shall then allocate the additional shares to the depository account of the depository member. For shares that have not been registered at the VSD, the issuing organization is responsible to grant shareholders with a share certificate.[69]

66 LOS, Article 13, Clause 1.
67 LOS, Article 20, Clause 3.
68 Decision 15/2008/QD-TTLK, Chapter III, Article 8, applicable to listed companies.
69 Decision 15/2008/QD-TTLK, Chapter III, Article 11, applicable to listed companies.

Best Practices:

A shareholder that has pre-emptive rights can exercise these rights fully or in part by submitting to the company:

- A written statement requesting the purchase of additionally issued shares or other convertible securities, must include:
    - The name of the shareholder
    - The place of residence (location) of the shareholder
    - The number of shares to be purchased by the shareholder
    - A document verifying the payment for shares.

6. The Right to Demand the Redemption of Shares

A shareholder has the right to have the company redeem all or a part of his/her shares when he/she has voted against or abstained from voting concerning the following:[70]

1) Alteration of his/her rights and obligations provided in the company charter, on which he/she had to vote against.
2) Restructuring of the company in the form of mergers or divisions or involving a change of its legal form (transformation), on which he/she had to vote against.

The shareholder will send a request to the company within 10 working days from the date of GMS resolutions on issues that he/she voted against. The request shall be in writing, specifying the name and address of such shareholder, the number of shares held under each type of class, the proposed price and the reason for such request.[71]

The Board of Directors must determine the redemption price, which can be the market price or a price as calculated by the net asset value method or the discounted cash flows method or any other method as stated in the company's charter. Where such price fails to be agreed, the shareholder can sell the shares to another person or the company and the shareholder can call for a professional valuation organization. The company can recommend at least

70 LOE, Article 90, Clause 1.

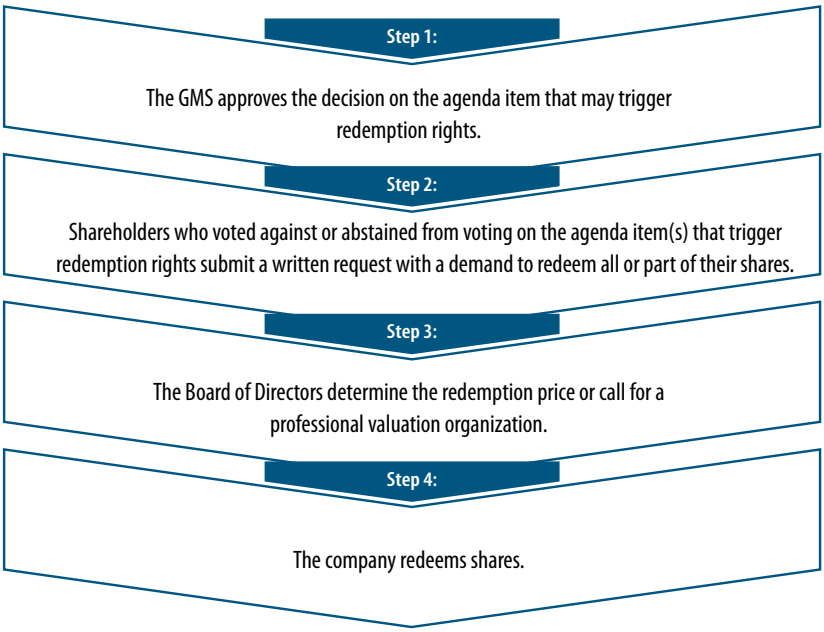
71 LOE, Article 90, Clause 1.

three professional valuation organizations so that the shareholder can choose and the decision of such valuation organization is final.[72]

The company must redeem the shares within 90 days from receipt of the request.[73]

The steps required to redeem shares are summarized in Figure 6.

Figure 6: Procedures for Redemption



7. Shareholder Rights during the Liquidation of the Company

Shareholders are residual claimants when a company is being liquidated, i.e. they will receive a portion of the assets remaining after creditor claims are satisfied. Owners of common shares have a right to receive a portion of the

72 LOE, Article 90, Clause 2.

73 LOE, Article 90, Clause 2.

company's property in proportion to their holdings in the company after the company has paid out its creditors and shareholders of other classes in accordance with law.[74]

During liquidation, a company must first satisfy its priority claimants (usually liquidation and administrative expenses, salaries, wages, employee benefits and taxes), and then obligations to creditors. Finally, the liquidator divides the remaining assets among the shareholders following a specific order of priority:[75]

1) Redeemable preferred shares
2) Dividend preferred shares
3) Voting preferred shares and common shares.

The company's assets must be distributed to each group in order of priority. For example, the company cannot pay the liquidation value of preferred shares until it has paid the full liquidation value of higher priority shares. If the company does not have sufficient assets to pay all shareholders of the same priority class, then the assets must be distributed in proportion to the number of shares in the class.

The Law on Enterprises stipulates that dividend preferred shareholders shall be entitled to receive part of the company's remaining assets corresponding to their paid-in shares after the company pay all debts and redeemable preference shares when the company is dissolved or bankrupt.[76]

8. The Right to Review the Shareholder List

The list of shareholders shall be made on the basis of the date of establishing the shareholders using an extract from the Register Book of Shareholders or the VSD.[77] The list of shareholders shall include the full name/registered name and address/registered office, nationality, ID, passport or other legal individual certification number, business registration number of each shareholder, the number of shares of each type, total shares and the date of registration under each type of each shareholder.[78]

Every shareholder shall have the right to check, search, extract and copy the list of shareholders, to request amendment of incorrect information or addition of necessary information.[79]

74 LOE, Article 79, Clause 1g and Model Charter, Article 11, Clause 2g.
75 LOE, Article 82, Clause 2b and Model Charter, Article 53, Clause 3.
76 LOE, Article 82, Clause 2b.
77 LOE, Article 98, Clause 1.
78 LOE, Article 98, Clause 2.
79 LOE, Article 98, Clause 3, Article 79, Clause 1d and Model Charter, Article 11, Clause 2e.

This right gives shareholders the opportunity to contact other shareholders and coordinate voting for collective action purposes. It is also important for verifying the information in the shareholder list, as well as exercising rights attached to shares.

The company is obliged to provide the following information:

- The shareholder list
- A document confirming that the inquiring shareholder is not included in the shareholder list.

9. The Right to File a Claim on Behalf of the Company

The Law on Enterprises introduced, in principle, the right of shareholders to request the economic court to overturn GMS decisions. Shareholders cannot directly file a suit against directors in the form of class action and derivative actions, as they have not yet been introduced in Vietnam.

Best Practices:

A shareholder should have the right to file suit against directors including derivative and class action law suits. The country's legal system should provide and enforce mechanisms for minority shareholders to bring lawsuits when they have reasonable grounds to believe that their rights have been violated (see *OECD Principles of Corporate Governance*, pages 40 & 42).

The new decree 102/2010/ND-CP issued by the Government on guiding the implementation of certain articles of the Law on Enterprises now introduces new regulations on the shareholders' rights to file a claim against the Board members or the Director (General Director) of the Company. According to this Decree, a shareholder or a group of shareholders holding at least 1% of common shares for a consecutive period of six months shall have the right to request the Supervisory Board to file suit against members of the Board of Directors, Director (or General Director) for their civil liability in the following cases:

- Members of the Board of Directors, Director (General Director) do not carry out rights and obligations as assigned adequately or appropriately or these rights and obligations are not conducted in compliance with laws and regulations, the company charter, or GMS resolutions.
- Members of the Board of Directors, Director (General Director) used the company's information, know-how or a business opportunity for their own interest or for other individual and/or another organization's interest.
- Members of the Board of Directors, Director (General Director) abused their position, title and the company's assets for their own interest or for other individual and/or another organization's interest.
- Chairman of the Board of Directors, Director (General Director) kept and used the company's seal for their own interest or for other individual and/or another organization's interest.
- Other cases as regulated by law and the company's charter.

In cases that the company does not have a Supervisory Board or the Supervisory Board did not take any actions according to current regulation, the above-mentioned shareholder or group of shareholders could file a suit against the Board members or the Director (General Director) directly. The order and procedures of the lawsuit are carried out in accordance the regulations on civil proceedings.

➔ *For more information on the liability of directors and managers, see Chapter 4, Section F, and Chapter 5, Section E, respectively.*

10. The Right to Receive Dividends

Dividends play an important role in the decision to invest in a company. One important right of shareholders is to receive dividends.[80] The Board of Directors shall make a proposal on the pay-out ratio for each class of shares and submit it to the GMS for approval.[81] For listed companies, the final decision is exclusively vested with the GMS which shall not be higher than the rate proposed by the Board.[82] Dividends can be made in cash or in the form of common shares. The Board of Directors may decide a mid-term payment of dividends when such

80 LOE, Article 79, Clause 1b and Model Charter, Article 11, Clause 2b.

81 LOE, Article 108, Clause 2n.

82 Model Charter, Article 14, Clause 2 and Article 40, Clause 1.

payment is considered to conform with the profitability of the company.[83]

➔ *For more information on the Right to Receive Dividends, see Chapter 10.*

11. The Right to Summon a General Meeting of Shareholders

This right is very important to shareholders to protect their rights. A shareholder or a group of shareholders who owns more than 10% of the total common shares for a continuous period of at least six months or a smaller ratio as stipulated in the company charter (5% as recommended by the Model Charter) shall have the right to summon a GMS in the following cases:[84]

- The Board of Directors is in breach of a serious violation of shareholders' rights, of the obligations of managers or issues any decision which exceeds the Board's delegation
- The office term of the Board has expired by more than six months, while the new Board has yet to be elected.

➔ *For more information on the Right to Summon a GMS, see Chapter 8.*

12. The Right to Nominate Candidates to be Elected as Members of the Board of Directors and Supervisory Board

A shareholder or a group of shareholders representing at least 10% of the voting rights, or a lower percentage as provided by the company's charter, for a consecutive period of six months or more have the right to nominate a member to the Board of Directors and Supervisory Board.[85]

In practice, the majority shareholders often control the election and removal of board members. For listed companies, the number of candidates that can be nominated by majority shareholders to the Board of Directors according to proportion of total shares with voting rights is shown in Table 2.[86]

83 LOE, Article 93, Clause 3 & Article 108, Clause 2n and Model Charter, Article 40, Clause 2

84 LOE, Article 79, Clause 3 and Model Charter, Article 13, Clause 3d.

85 LOE, Article 79, Clause 2a.

86 Model Charter, Article 24, Clause 3.

Table 2: Rights to nominate Board of Director member candidate	
Proportion of Total Shares with Voting Rights	Number of Candidates to be Nominated
From 5% to less than 10%	1
From 10% to less than 30%	2
From 30% to less than 50%	3
From 50% to less than 65%	4
65% or more	Full number of candidates

For the Supervisory Board, the proportion of total shares and the corresponding number of candidates is as show in Table 3:[87]

Table 3: Rights to nominate supervisory Board member candidates	
Proportion of Total Shares with Voting Rights	Number of Candidates to be Nominated
Less than 10%	1
From 10% to less than 30%	2
From 30% to less than 50%	3
From 50% to less than 65%	4
65% or more	Full number of candidates

13. Restrictions on Founding Shareholders

The transfer of ordinary shares held by the founding shareholders to other non-founding shareholders within the first three years is restricted unless approved by the shareholders' meeting. This restriction applies only to founding shareholders of new joint stock companies within the first three years from the date of company's formation.[88]

87 Model Charter, Article 36, Clause 2.

88 LOE, Article 84, Clause 5.

C. The State as a Shareholder

The State can become a shareholder in shareholding companies through buying shares or through the conversion of State companies into shareholding companies (i.e. this process is normally called as "equitization"). In Vietnam, the latter case is more common for the State to become a shareholder. Executing the annual conversion schedule, but no more than four years from the effective date of the Law on Enterprises (from 1 July 2006[89]), State companies established in accordance with the 2003 Law on State-Owned Enterprises must be converted into LLCs or joint stock companies as provided by the Law on Enterprises.[90] The percentage of State-held shares is based on the criteria for classification of State enterprises publicized by the Prime Minister for each period. For enterprises in which the State does not need to hold dominant shares, the equitization agency shall decide on the percentage of State-held shares as appropriate.[91] Therefore, the State can participate in a company either as an ordinary shareholder or as the holder of privileged rights.

1. The State as an Ordinary Shareholder

In this case, the influence of the State in a company is determined by the percentage of owned shares.

2. The State as the Holder of Privileged Rights

The privileged rights of the State are in the form of voting preferred shares[92] or majority shares. In some key areas as decided by the Government, the State shall be entitled to these privileged rights. These rights shall ensure the security of the State, or protect the morale, health, rights, and interests of its citizens.

89 LOE, Article 171, Clause 1.
90 LOE, Article 166, Clause 1.
91 Decree 109, Article 35, Clause 2.
92 LOE, Article 78, Clause 3

Comparative Practices:

Although enjoying the same rights as other shareholders in the company, with the majority of shares or voting preferred shares with more votes than common shares, the State in Vietnam may have the following rights:

- Propose items for the agenda of the GMS
- Request an Extraordinary GMS
- Veto the following decisions of the GMS:
  a) Amendments to the charter or approval of a new charter
  b) Reorganization of the company
  c) Liquidation of the company, appointment of the internal corporate body, or approval of the intermediary and final liquidation balance sheets
  d) Amendments to the charter capital
  e) Approval of extraordinary and related party transactions
  f) Access all corporate documents.

The State may appoint a representative to the Board of Directors and replace this representative at any time.

Recently, the State has gradually reduced its ownership in companies that do not need the comprehensive involvement and control of the State through a program of selling a part of its shares in these companies.

In addition, State corporations, holding companies, and the State Capital Investment Corporation (SCIC) can be shareholders without privileged rights. In this case, their rights are identical to the rights of the company's other shareholders.

Best Practices:

(Foreign) investors are usually cautious about investing in companies where shares are issued having privileged rights. Despite the fact that privileged rights arrangements can play a useful role in protecting the interests of the State and the public, it is recommended that State agencies carefully weigh all the pros and cons of implementing privileged rights arrangements for each company.

3. Exercising the Rights of the State as a Shareholder

State authorities that own shares often use their statutory powers to intervene in the business of the companies.

The State shall exercise the ownership rights of State investment capital with the following principles:[93]

- Exercise the ownership rights as a capital investor
- Preserve and develop the State capital's value
- Separate the function of exercise of the ownership rights from the function of State administrative management
- Separate the function of exercise of the ownership rights from the implementation of State social duties
- Separate the function of exercise of the ownership rights from enterprises' business autonomy, respect enterprises' rights to do business
- Exercise the rights and obligations of the owner of capital in the enterprises.

State corporations and holding companies shall appoint one or more persons to act as representatives for State capital amounts in equitized enterprises which are their subsidiaries or affiliates and take responsibility for discharging the rights and obligations of these representatives in accordance with law.[94]

93 LOE, Article 168, Clause 1.

94 Decree 109, Article 49, Clause 1.

For equitized enterprises with the ownership representative rights of State capital to be transferred to the SCIC, ministries, ministerial-level agencies, government-attached agencies or People's Committees of provinces and centrally run cities shall coordinate with the SCIC in appointing ownership representatives for State capital amounts in enterprises.[95]

95 Decree 109, Article 49, Clause 2.

D. The Shareholder Register

The shareholder register is an important document that identifies the shareholders and the owners of other registered securities of the company. It can be used to verify the number, nominal value, type, and class of shares and other registered securities held. The shareholder register is also maintained to secure shareholder rights and to monitor the circulation of shares and other registered securities.

1. The Company Share Register – Register Book of Shareholders

A company shall make and maintain a register book of shareholders from the date of being granted the certificate of business registration. Such a book may be in writing, in electronic files, or both.[96]

The register book of shareholder shall include the following contents:[97]

- Name and address of the company's head office
- Total number of authorized shares, types and amount of shares of each type
- Total number of paid-in shares of each type and value of paid-in equity capital
- Name, permanent residential address, nationality, ID, passport or other legal individual certification numbers, the number of the establishment decision or the business registration number
- Total shares of each type for each shareholder and date of subscribing shares.

A register book of shareholders shall be kept in the head office of the company or the VSD. All shareholders shall have the right to check, refer to, extract and copy the content of the register book of shareholders at any time during the working hours of the company or of the VSD.[98]

96 LOE, Article 86, Clause 1.
97 LOE, Article 86, Clause 2.
98 LOE, Article 86, Clause 3.

Although there are no specific regulations in the Law on Enterprises or the Model Charter and the CG Regulations protecting the shareholders' rights, it is a good practice that the Board of Directors should be liable for the proper and timely registration of company shares, as well as for the keeping of the register of shares and its accuracy, and the damage caused to any shareholder or third party by failure to perform this duty. There should be a clear regulation that states in case there is a discrepancy between data in the book of shareholders and data in the register of the VSD, the entry made in the VSD will prevail.

2. Registration with the Vietnam Securities Depository

The VSD is established and operated under the model of LLCs or joint stock companies in compliance with the Law on Securities and their charters. The VSD is under the SSC's supervision. It has the duty to organize and supervise securities registration, depository, clearing and payment activities.[99]

The VSD shall have the right to promulgate regulations on securities registration, depository, clearing and payment after such regulations are approved by the SSC.[100] It shall provide securities registration, depository, clearing and payment services and other services related to the securities depository at the request of customers.[101]

The registration of securities with the VSD is regulated as follows:[102]

1. Securities of public companies must be registered in a concentrated manner at the VSD
2. Securities of other issuing organizations, which authorize the VSD to act as their transfer agents, must be registered at the VSD
3. Public companies and issuing organizations as defined above shall register their types of securities and information on securities owners with the VSD.

99 LOS, Article 42.
100 LOS, Article 45, Clause 1.
101 LOS, Article 45, Clause 3.
102 LOS, Article 52.

The issuing organizations are required to register the following securities information with the VSD:[103]

1. Information on the issuing organization
2. Information on the securities issued
3. List of securities holders.

The transfer of securities already registered with the VSD shall be made through the VSD:[104]

From a practical point of view, it is important to emphasize the differences that exist between private and public joint stock companies. The registration of securities issued at the VSD is obligatory only to public, listed companies and other issuing organizations, which authorize the VSD to act as their transfer agents. A public company is a joint stock company that has already conducted the public offering of its share, has its shares listed at a stock exchange or the securities trading center or has its shares owned by at least 100 investors, excluding professional securities investors, and has a contributed charter capital of VND10 billion or more.[105]

Comparative Practices in Vietnam:

As guidance under the Official Letter 1044/UBCK-QLPH dated 4 June 2009 by the SSC, the registration of securities of public companies shall be conducted in three phases. The first phase (from 1 to 15 June 2009), consists of voluntary registration of public companies, the second phase (from 15 June to 30 September 2009), is for non-listed public companies whose register books of shareholders are maintained by a securities company and the third phase (from 30 September to 30 December 2009), is dedicated to remaining public companies. However, up to now, many public companies have not registered securities at the VSD. The main reason why companies do not want to register their securities is because currently, there is no clear and detailed procedure on management and transfer of securities issued for public, non-listed companies. Another reason is that companies will have to follow strict disclosure of information regulations. Currently, sanctions are not strong enough to make them register their securities and this is causing significant problems for the management of the securities market.

103 Decision 87, Article 15, Clause 1.

104 LOS, Article 54, Clause 1.

105 LOS, Article 25, Clause 1.

The VSD has the responsibility to supply information related to customers' securities ownership at the request of public companies and issuing organizations that register shares issued at the VSD.[106] However, data about the share ownership structure and a list of all shareholders of these companies are not publicly available on VSD's website. The VSD's website only provides data concerning the registered issue of shares. In addition, the Law on Securities gives regulations on the public offering of securities, securities listing, trading and investment, and provision of securities and securities market services only.

3. Registration with Business Registrar

Shareholders holding 5% or more of the total number of the shares shall be registered with a competent Business Registrar within seven working days from the date of owning such a ratio of shares.[107]

106 LOS, Article 46, Clause 8.

107 LOE, Article 86, Clause 4.

E. The Protection of Shareholder Rights

The protection of shareholder rights lies at the center of corporate governance and is of particular importance for companies operating in emerging markets or transition economies. This protection is realized both internally (i.e. through internal corporate procedures and other guarantees envisaged by the Law on Enterprises and other legislation), and externally (i.e. through outside parties).

1. Guarantees in the Law on Enterprises

The Law on Enterprises provides many guarantees to realize and protect shareholder rights. Some of these guarantees are procedural in nature and relate to the organization of the GMS. Others are reflected in the respective obligations of the governing bodies and officers of the company, i.e. members of the Board of Directors, the General Director and Executive Board members.

Best Practices:

It is important for the charter to ensure that shareholder rights, and the mechanisms designed to ensure and protect these rights, are clearly defined.

For example, the right of shareholders who own or represent a certain percentage of shares (10% as provided under Law on Enterprises and 5% as provided in the Model Charter for listed companies) to make proposals to the GMS agenda should be guaranteed by the following provision related to the authority and obligations of the Board of Directors:

- Directors cannot reject proposals on other than procedural grounds envisaged by the Law on Enterprises, thus preventing the removal from the agenda of questions that directors simply do not wish to address. A proposal can only be rejected in the following circumstances i)

The proposal is not sent within the time limit or does not contain all information required, ii) the proposed issues do not fall under the jurisdiction of the GMS or iii) other circumstances that are provided in the company's charter.

2. Judicial Protection

When shareholder rights are violated, shareholders have the right to judicial protection. This is a fundamental shareholder right guaranteed by law. In Vietnam, commercial courts are authorized to provide shareholders with judicial protection. Under the prevailing law, in principle, shareholders have the right to request the economic court to overturn GMS decisions. However, shareholders cannot sue directors of joint stock companies, based on the rule that the company shall bear the cost of the lawsuit. Shareholders cannot file suit against directors in the forms of class action and derivative actions, as these have not yet been introduced in Vietnam.

Depending on the nature and extent of the breaches made, those who break a provision of the Law on Enterprises shall be disciplined, either by receiving an administrative fine, or being subjected to criminal prosecution in accordance with law. When the breaches cause damages to the companies or the shareholders, the performers will be liable to make full compensation in accordance with law.[108]

Failing to convene an irregular meeting of the GMS as requested in accordance with the Law on Enterprises within a specific period of time, the Chairman of the Board of Directors shall be responsible to the law and compensate any damages and losses caused to the company.[109]

Shareholders can file a petition requesting the Court or an arbitrator to consider and/or cancel resolutions of the GMS in certain specific cases.[110]

In case of a dispute between a shareholder and the company, or between a shareholder and the Board of Directors, the Inspection Committee, the Managing Director or Chief Executive Officer cannot be resolved by way of negotiation and conciliation within a specific period of time, the shareholder may take the dispute to the economic arbitration or economic court.[111]

108 LOE, Article 165, Clause 1.
109 LOE, Article 97, Clause 4.
110 LOE, Article 107.
111 Model Charter, Article 54.

Shareholders holding half of the currently circulating shares with rights to vote in the election of members to the Board of Directors shall have the right to lodge a petition with a court requesting dissolution of the company in certain specific circumstances.[112]

In Vietnam, the courts still lack of jurisprudent expertise in securities market disputes and experienced magistrates. Courts are generally considered less efficient in comparison to the international benchmark with numerous and complicated procedures. These make it difficult for the protection of shareholders' rights through the court system.

3. Protection by the State Securities Commission

According to the Law on Securities, the SSC has the following tasks and powers:[113]

- To grant, extend, and withdraw licenses and certificates related to securities activities and securities market, to approve changes related to securities activities and securities market
- To manage and supervise operations of stock exchanges, securities trading centers, the VSD and assistant organizations. To suspend trading or depositing activities of stock exchanges, securities trading centers, VSD in cases where they show signs of affecting the legitimate rights and benefits of investors
- To inspect, supervise and handle administrative violations and settle complaints and denunciations in securities activities and securities market
- To organize and coordinate with concerned agencies and organizations in training and retraining the contingent of securities officials, civil servants and staff. To raise public awareness of securities and securities market
- To guide professional procedures for securities and securities market and relevant set forms.

The SSC shall accept written complaints and denunciations of organizations and individuals that fall under its settling competence. When receiving complaints or denunciations which fall outside its settling competence,

112 Model Charter, Article 51.

113 LOS, Article 8.

it shall promptly forward them to competent agencies, organizations or individuals for settlement and notify such in writing to complainants or denouncers.[114]

The SSC Chairman shall develop the programs or plans for inspections of securities activities and securities market. Extraordinary inspections may also be conducted upon detection of signs of violation of the Law on Securities and the securities market by organizations or individuals participating in investment and conducting activities on the securities market according to the requirements of the settlement of complaints and denunciations, or under assignment by the SSC Chairman.[115]

The legal consequences for not observing disclosure and reporting rules may include fines or delisting.[116] Accordingly, the SSC may impose administrative fines, suspension of trading, administrative warnings and delisting.

4. Non-Governmental Organizations for the Protection of Shareholder Rights

Shareholders may seek assistance from associations, institutes, or other non-governmental organizations (NGOs) dedicated to the protection of shareholder rights.

In Vietnam, the Vietnam Association of Financial Investors (VAFI) was established under the Decision No.74/2003/QD-BNV of the Ministry of Home Affairs dated November 5, 2003 and began operations in January 2004 with the goal of creating a bridge between businesses, stock companies, investors, and management agencies. The VAFI proposes suggestions for the improvement of the investment environment. It provides training, consulting and guidance for investment in the capital market. It also serves as a platform for discussion and makes contributions to the drafting of legislation. One of VAFI's objectives is to "protect the rights of investors by helping investors attain a thorough knowledge of laws and feel confidence in investing in businesses".

114 LOS, Article 133, Clause 3.

115 LOS, Article 110.

116 LOS, Articles 118-129.

However, one of VAFI's sources of funds is from the State Budget and VAFI has very close links with the Government. This, in combination with the lack of detail as to which investors are actually represented by VAFI, creates doubt as to whether it is a truly effective representative of shareholder rights for investors.

Comparative Practices:

In some countries, NGOs play an important role in exerting pressure on companies, particularly those companies that wantonly disregard shareholder interests. NGOs may do this in a number of different ways. They may become shareholders themselves and participate in the GMS. They may also conduct letter or media campaigns to exert pressure on companies and draw public attention to the issue of shareholder rights protection. NGOs have the right to assist shareholders with:

- Providing legal help for filing a claim in court to protect shareholder rights
- Establishing special funds for the protection of shareholders' interests.

5. Company Charter and Internal Regulations

A listed company shall build a rational corporate governance apparatus and an effective system of communication with shareholders in order to ensure that:

- Shareholders can fully exercise the rights provided for by law and the company's charter
- Shareholders are fairly treated.

A listed company shall elaborate its charter according to the model charter promulgated by the MOF.

A listed company shall elaborate and promulgate internal regulations on corporate governance. Internal regulations on corporate governance contains the following principal details:[117]

- Order and procedures for convening and voting at the GMS
- Order and procedures for nomination, self-nomination, election, removal from office and dismissal of members of the Board of Directors
- Order and procedures for organization of meetings of the Board of Directors
- Order and procedures for selection, appointment and removal from office of senior managerial staff
- Process and procedures for coordination of operations among the Board of Directors, the Supervisory Board and the Executive Board
- Regulations on performance assessments, commendation and disciplining of members of the Board of Directors, the Supervisory Board and the Directorate and Executive Board.

6. Shareholder Activism and Collective Action

The protection of shareholder rights begins with good corporate behaviour, an appropriate legal and regulatory framework and appropriate enforcement procedures. Shareholders themselves must also play a role in this process. Shareholders are often the only parties aware of violations to their rights and are in the best position to either file a complaint with the company or, ultimately, with the regulatory and judicial bodies.

117 CG Regulations, Chapter II, Article 4, Clause 2.

Comparative Practices in Vietnam:

The protection of minority shareholder rights remains a key concern for many (international) investors considering investing in Vietnamese companies. Powerful owners/managers often pay little or no heed to minority shareholders. On the other hand, shareholders themselves are often passive, reflecting the lack of a shareholder culture among Vietnamese investors. In fact, minority shareholders seldom participate in shareholder meetings unless they are employees. This comes as no surprise since citizens (often former employees of plants and factories) became shareholders practically overnight during the equitization phase, typically without having invested (material) funds before or having been educated about their rights. This makes the role of regulatory and supervisory bodies even more important in ensuring that proper attention is paid to the protection of shareholder rights.

Another aspect of shareholder rights protection is collective action. Collective action is when a group of shareholders, unable to attain a right on an individual basis combine their votes to reach a threshold (10% for joint stock companies or 5% for listed companies) to obtain the right collectively. Moreover, the Law on Enterprises also provides shareholders with access to shareholder lists that help them contact other shareholders to solicit their cooperation.

7. Shareholder Agreements

Shareholder agreements can be an important device for exercising collective action among shareholders. In fact, such agreements can enable minority shareholders to make use of minority rights (e.g. acquiring the 10% necessary to elect a fiduciary to examine the financial statements). The situation is more complex if agreements are concluded between shareholders and the company (or one of its governing bodies). In those circumstances, shareholders may be "locked in" in a variety of ways, e.g. by obliging themselves to always vote in favor of proposals by directors or to always follow the instructions of management in matters relating to essential shareholder rights (the right to sell their shares, the right to receive dividends and other rights).

Best Practices:

Shareholder agreements can often be used to abuse shareholder rights and force (minority) shareholders to act in a way that is suitable for directors, managers and/or controlling shareholders. Therefore, such agreements must be carefully regulated. For example, in the U.K., shareholder agreements cannot require a shareholder to vote in one of the following ways:

- Always to follow the instructions of the company or one of its bodies
- Always approve the proposals of the company or one of its bodies
- To vote in a specified manner or abstain in consideration of special advantages.

Shareholder agreements are, in principle, a form of private, civil law contract. Yet, because of their corporate governance implications, it is necessary to make certain provisions.

First, shareholder agreements cannot substitute (or contradict) the founding documents of the company. It is the founding document (charter) that is mandatory, publicly regulated, and subject to disclosure (according to the State registration regime and/or securities regime).

Second, it is necessary to prevent the above-mentioned forms of abuse to the ability to control the voting power of minority shareholders by prohibiting the inclusion of certain terms in such agreements.

Lastly, it is necessary (particularly for publicly traded companies) to provide for greater transparency of voting control by requiring the disclosure of such arrangements. Accordingly, shareholders are required to inform GMS about the concluded contract on the next meeting of shareholders.

Under prevailing laws, there is no specific regulation on the terms of shareholder agreements or on the disclosure of shareholder agreements.

F. Responsibilities of Shareholders

1. Obligation to Make Full Payment for their Subscribed Shares

In addition to rights, shareholders also have responsibilities. The main legal responsibility of shareholders is to make full payment for shares for their subscribed shares.[118] Founding shareholders shall collectively subscribe at least 20% of the total common shares issued by the company and have to pay in full for the subscribed shares within 90 days of the issuance date of the company's business registration license.[119]

2. Obligation to be Liable to Debts and other Liabilities of the Company

The shareholders shall be liable for debts and other liabilities of the company to the extent of the paid-in capital. No withdrawal of the contributed capital for common shares from the company is allowed in any form except the company or other persons repurchasing the shares. If a shareholder withdraws a part or the entire contributed capital which is contrary to this stipulation, all members of the Board of Directors and the legal representative of the company shall be jointly liable for all debts and other asset obligations of the company within the amount of the withdrawn shares.[120]

3. Other Obligations

Other responsibilities may exist. Shareholders are responsible to comply with the charter and the other internal regulations of the company, to observe resolutions of the GMS and the Board of Management, to provide the correct

118 LOE, Article 80, Clause 1 and Model Charter, Article 12, Clause 2.
119 LOE, Article 84, Clause 1.
120 LOE, Article 80, Clause 1.

address when he/she registers subscription for shares and to perform other obligations in accordance with current law.[121]

Besides, a shareholder shall be personally liable when he/she performs one of the following acts in any form in the name of the company:

- Breaches the law
- Conducts business and other transactions for personal benefit or for the benefit of other organizations or individuals
- Pays undue debts prior to a time when the company could face financial danger.[122]

Other obligations may include disclosure obligations when certain thresholds of ownership are passed, or disclosure of the intent to acquire further shares or gain control of a company. These additional responsibilities generally apply to larger shareholders and are described throughout the Manual.

➔*For a discussion on the disclosure of beneficial ownership, see Chapter 13, Section B.3.*

Under certain conditions, shareholders may be held liable despite their limited liability. In particular, this refers to controlling shareholders who have the opportunity to determine the actions of or give mandatory instructions to the company.

Finally, in some countries, shareholders (especially institutional investors) may be required to vote their shares. In other countries, there is no legal requirement but it may be considered a moral imperative. While no legal requirements for voting exist in Vietnam, good corporate governance depends heavily on the active participation of shareholders in the governance of the company.

Best Practices:

Institutional investors acting in a fiduciary capacity should disclose their overall corporate governance and voting policies with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights. They should also disclose how they manage material conflicts of interest that may affect the exercise of key ownership rights regarding their investments (see *OECD Principles of Corporate Governance*, page 19).

121 LOE, Article 80, Clauses 2, 3 & 4 and Model Charter, Article 12, Clauses 1, 3 & 4.

122 LOE, Article 80, Clause 5 and Model Charter, Article 12, Clause 5.

NOTES

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8

Chapter

THE GENERAL MEETING OF SHAREHOLDERS

8 | The General Meeting of Shareholders

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The Chairman's Checklist

The Authority of the General Meeting of Shareholders:

- ☑ Are the powers of the GMS clearly set forth in the charter?
- ☑ Are there any powers of the GMS that the charter explicitly delegates to the Board of Directors?

The Preparation for the General Meeting of Shareholders:

- ☑ Does the Board of Directors provide workable and timely mechanisms to include all legitimate shareholder proposals on the agenda?
- ☑ Does the Board of Directors have a clear duty to ensure that the agenda is not changed after it has been sent to all shareholders?
- ☑ Are all shareholders properly notified of the GMS?
- ☑ Is sufficient information available for all shareholders to take well-informed decisions on agenda items?
- ☑ Does the charter require the company to provide additional information to shareholders (or others having recognized interests) on specific agenda items?
- ☑ Does the company properly inform all shareholders of the GMS on its website?

Conducting the General Meeting of Shareholders:

- ☑ Is the venue of the GMS convenient and easily accessible for all company shareholders?
- ☑ Are shareholders (or their representatives) who attend the GMS properly registered and do they have the opportunity to participate in the GMS?
- ☑ Does the company ensure that the quorum of the GMS is properly verified and properly recorded?
- ☑ Are members of the Board of Directors, Executive and Supervisory Board, as well as the External Auditor, present during the GMS? Do shareholders have the right and opportunity to ask questions to executives and other presenters?

- ☑ Does the Board of Directors or other authorized corporate bodies or persons in accordance with company's general documents ensure that effective and independent vote counting mechanisms are in place during the GMS and that the voting results are properly recorded? Does the Board of Directors ensure that all decisions are valid and that all applicable legal requirements are met?
- ☑ Are the voting results and decisions properly communicated to shareholders?

The Extraordinary General Meeting of Shareholders:

- ☑ Does the Board of Directors convene an EGM when circumstances require in conformity with the law?
- ☑ Does the Board of Directors convene an EGM when the shareholder (or a group of shareholders) owning at least 10% or less of voting shares as stipulated in the company charter (5% as under the Model Charter for listed companies) for a consecutive period of six months requests an EGM?

Shareholders are the main contributors of equity capital. However, shareholders do not always wish to participate in the day-to-day management of the company's affairs. Most shareholders lack the necessary time or skills to run a company. Thus, shareholders entrust professional managers to run the company's day-to-day operations, and elect directors to supervise and guide the work of these managers. However, this does not mean that shareholders completely give up their governance rights. Shareholders most commonly exercise their governance rights through the GMS.

The GMS is the highest governing body of a company. It is through the GMS that shareholders express their will with respect to such important company matters as the approval of annual reports and financial statements, the election and dismissal of directors, the payment of dividends and distribution of company profits, reorganization, major corporate transactions and the appointment of the External Auditor. The GMS also provides shareholders with the opportunity to, at least once a year, discuss these and other important matters, meet in person with their directors and managers, ask questions and

determine the future of the company. Hence, shareholders exercise their rights to participate in the decision-making of the company through the GMS.

Preparing for and conducting the GMS is subject to detailed procedural requirements as determined by law, corporate policies and procedures. This chapter describes the authorities of the GMS, its organization and legal requirements for adopting valid decisions.

A. General Provisions

1. Types of General Meetings of Shareholders

There are two types of GMS, the AGM and the EGM.

a) The Annual General Meeting of Shareholders

The Law on Enterprises requires companies to hold a GMS once a year.[1] This meeting is called the AGM. The AGM must be held within four months from the end of the fiscal year, but can be extended to six months subject to approval of the authorized business registration body.[2]

The Board of Directors shall convene the AGM and shall choose an appropriate place for the AGM. For listed companies, the AGM may not be held merely by written consent.[3]

The AGM must provide shareholders with the opportunity to attend.

b) The Extraordinary General Meeting of Shareholders

Besides the AGM, the company can hold more meetings of this corporate body. All GMS other than the AGM are called the EGM. They are convened in response to specific company or shareholder needs, such as the issuance of additional shares beyond the authority of the Board of Directors as regulated in the charter, a corporate reorganization or for the election of directors. The EGM may be conducted under the company's decision. However, under certain circumstances, the company may be required by law to call an EGM.

There are no limitations on the number of EGMs that a company can conduct during the year, between two AGMs.

1 LOE, Article 97, Clause 1 and Model Charter, Article 13, Clause 1 and Model Charter, Article 19, Clause 12.

2 LOE, Article 97, Clause 2.

3 CG Regulations, Article 6, Clause 6 and Model Charter, Article 19, Clause 12.

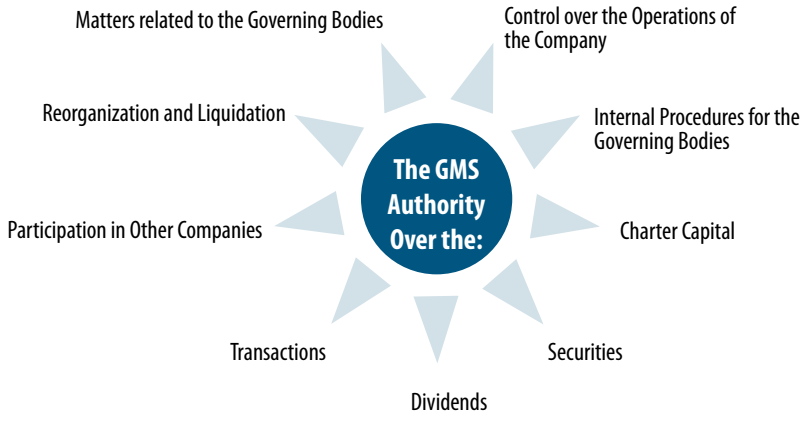
2. The Authority of the General Meeting of Shareholders

The authorities of the GMS are set forth in the Law on Enterprises.[4] The charter may, however, provide additional authorities to the GMS (for example, adoption of the internal regulations), unless otherwise determined by the law.[5] The Model Charter, which is applicable to companies listed on the stock exchange, sets forth more authority to the GMS than stipulated by the Law on Enterprises.

➔ *For more information on the separation of authorities between the GMS and the Board of Directors, see Chapter 4, Section A.4.a.*

The authority of the GMS is summarized in Figure 1:

Figure 1: The Authority of the General Meeting of Shareholders



More specifically, the GMS has the authority related to:[6]

a) Decisions on Matters Relating to Governing Bodies:

- Appointment, dismissal and replacement of members of the Board of Directors and of the Supervisory Board

4 LOE, Article 96.
5 LOE, Article 96, Clause 2k.
6 Model Charter, Article 14 and LOE, Articles 96 & 97

- Inspection of and dealing with breaches by the Board of Directors or the Supervisory Board which cause losses to the company and shareholders.

The Law on Enterprises is silent on which body should have the authority to decide the number of members of the Board of Directors and on whether the GMS should approve Board of Directors members' total remuneration and remuneration reports. For listed companies, these matters are under the decision of the GMS.[7] Besides, a listed company's GMS shall have the authority to approve the appointment of the managing director or General Director proposed by the Board of Directors.[8] Whereas, under the Law on Enterprises, for public, non-listed companies, the Board of Directors shall have full rights in appointing and dismissing the managing director or General Director.[9]

Best Practices:

The GMS should approve the remuneration policy for Board of Directors members.

b) Control over the Operations of the Company:

- Approve annual reports and annual financial statements
- Discuss and approve the Supervisory Board report
- Discuss and approve the Board of Directors report
- Business lines, short-term and long-term developmental plans of the company.

For listed companies, the CG Regulations stipulate the minimum contents that must be included in the Board of Directors and of the Supervisory Board reports to be presented at the GMS.

An operation report of the Board of Directors to the GMS must contain at least the following:[10]

7 Model Charter, Article 14, Clauses 2c & f.
8 Model Charter, Article 14, Clause 2e.
9 LOE, Article 108, Clause 2h.
10 CG Regulations, Article 7.

- Assessment of the company's operations in the fiscal year
- Operations of the Board of Directors
- Review of meetings and decisions of the Board of Directors
- Results of supervision of the director or the General Director
- Results of supervision of managerial staff
- Plans for future activities.

A Supervisory Board operations report to the GMS must contain at least the following:[11]

- Operations of the Supervisory Board
- Review of meetings and decisions of the Supervisory Board
- Results of supervision of the company's operation and financial status
- Results of supervision of members of the Board of Directors and the Management Board and managerial staff
- Assessment of the coordination between the Supervisory Board with the Board of Directors, the executives and shareholders.

For public, non-listed companies, there is no specific regulation on the format and contents of these reports to be presented in the GMS.

Under the Law on Enterprises, there is no regulation on the authority to appoint and dismiss the External Auditor of a public company. Whereas for listed companies, the Model Charter stipulates that the GMS shall approve the selection of the External Auditor of the company.[12]

➔ *For more information on internal and external control structures, see Chapter 14.*

c) Decisions on the Internal Procedures for Governing Bodies:

- Approve a new version of the charter or amend the charter, except the case where the charter capital is increased as a result of selling new shares within the total amount of shares the company is authorized to issue as stipulated in the company's charter[13]

11 CG Regulations, Article 8.

12 Model Charter, Article 14, Clause 2d.

13 For public, non-listed companies, in case the charter capital is increased as a result of selling new shares within the total amount of shares the company is authorized to issue as stipulated in the company's charter, the amendment to the charter does not need GMS approval (LOE, Article 96, Clause 2d). For listed companies, this will not happen as the GMS shall approve the issue of new shares (Model Charter, Article 14, Clause 2h).

- Approve if the managing director or General Director concurrently holds the post of Board's Chairman.

The principal formalities and procedures for conducting the GMS and voting have been provided for in the Law on Enterprises for shareholding companies and in the Model Charter for listed companies.[14] The CG Regulations also require that a listed company has to issue regulations on the order and procedures for convening and voting at the GMS which need to cover principal and necessary contents for conducting the GMS.[15] However, the CG Regulations do not mention the body to establish these regulations and the authority to approve these regulations.

d) Decisions on the Charter Capital:

For a listed company, under the Model Charter, the GMS shall make decisions on the increase in the company's charter capital as it has the authority to decide classes of shares and number of new shares to be issued for each class of shares.[16] However, for public, non-listed companies as regulated under the Law on Enterprises, the Board of Directors shall have this authority as long as the selling of new shares to increase the charter capital is within the number of shares authorized to be offered for each type.[17] The Law on Enterprises is silent on the time and other limits imposed on the Board of Directors in this case.

The GMS shall a make decision with regard to the repurchase of more than 10% (but no more than 30% of any one class of issued shares).[18] Share repurchases of less than 10% of issued shares shall be decided by the Board of Directors.

For public companies in general, the GMS shall also have the authority to increase the charter capital by issuing shares for payment of dividends or by issuing bonus shares to current shareholders from internal sources.[19]

Under the Law on Enterprises, there is no regulation or guidance on the procedures and the authority for the decrease of the company's charter capital. However, it is required by the Ministry of Planning and Investment (MPI) that the written decision and the meeting minutes of the GMS on the amendment of the charter capital is needed for the registration of the amendment of the

14 LOE, Article 103 and Model Charter, Article 19.
15 CG Regulations, Article 6, Clause 1.
16 Model Charter, Article 14, Clause 2h.
17 LOE, Article 108, Clause 2c .
18 LOE, Article 91& Article 96, Clause 2g and Model Charter, Article 14, Clause 2m.
19 Circular 18, Section IV, Articles 1 & 2.

company's charter capital.[20] This means that the GMS shall have the authority to decide the change in the company's charter capital, including the decrease of the charter capital. Besides, Circular 19 also regulates some cases where a company can decrease its charter capital and the methods for the decrease.

For joint stock banks, the GMS shall not have the full authority to decide the change in the bank's charter capital. Instead, the increase or decrease in joint stock banks' charter capital needs to be approved by the SBV. The process and procedures as well as the application dossiers for the approval of the change in joint stock banks' charter capital are regulated under Article 26 to Article 29, Section 2, Chapter III of Circular 06/2010/TT – NHNN dated 26 February 2010 giving guidance on matters related to the organization, management, charter capital, transferring of shares, amendment and supplement of the business license and charter of joint stock banks.

➔ *For more information on the charter capital, see Chapter 9.*

e) Decisions on Reorganization and Liquidation of a Company:

- Approve the mergers, divisions, separation, consolidation or conversion of the company
- Approve the re-organization of the company
- Approve the liquidation the company (decision to terminate the company).

Further regulations are given in case the company is liquidated. For listed companies, a Liquidation Committee must be established, of which two members are appointed by the GMS and one member is appointed by the Board of Directors from an independent auditing firm.[21] For public, non-listed companies, the Board of Directors shall directly organize the liquidation of the company's assets unless the company's charter stipulates that it should set up a Liquidation Committee.[22]

f) Decisions on Matters relating to Securities:

- Approve the transfer of shares by founding members within the first three years of the date of establishment
- Approve the buy-back of company shares in cases specified by the Law on Enterprises *(please see Item d. for more details).*

20 Decree 43, Chapter V, Article 40, Clause 1.

21 Model Charter, Article 53, Clause 1.

22 LOE, Article 158, Clause 2.

Under the Law on Enterprises, the Board of Directors shall report the issuance of bonds to the GMS at an earliest GMS meeting in case it has this issuing authority as stipulated in the company charter.[23] The report must consist of documents supporting the Board of Directors' decision. However, no further regulations or guidelines are given in case the GMS does not agree with the issuance of bonds by the Board of Directors.

For listed companies, although the Model Charter does not mention the authority to approve the issuance of bonds, convertible bonds and other securities rights, it can be understood that the GMS shall reserve this right as the Board of Directors shall only propose the issuance of bonds, convertible bonds and other securities rights.[24]

➔ *For more information on securities, see Chapter 11.*

g) Decisions on Dividends:

The GMS has the right to decide the annual dividend per share.[25] The Board of Directors may decide on the timing of dividend payment and how dividends shall be paid to shareholders.[26]

For listed companies, the authority of the GMS is restricted as it is stipulated that the rate of dividends as approved by the GMS shall not be higher than the rate proposed by the Board of Directors.[27]

➔ *For more information on dividends, see Chapter 10.*

h) Approval of Special Transactions:

- Approve material transactions:

The GMS shall approve contracts and transactions with a value of 50% or more of the company's total asset value as stated in the latest financial statements or the company charter may stipulate a smaller rate that will lead to the requirement for the Board of Directors to approve such contracts and transactions. The Board of Directors shall submit draft contracts or explain the main content of intended transactions during the GMS or to collect written opinion of shareholders. In this case, shareholders related to such contracts

23 LOE, Article 88, Clause 3.
24 Model Charter, Article 25, Clause 3g.
25 LOE, Article 96, Clause 2b.
26 LOE, Article 108, Clause 2n.
27 Model Charter, Article 14, Clause 2b.

or transactions cannot vote and the contract or transactions will be approved when shareholders representing 65% of the remaining votes approve.[28]

- Approve related party transactions:

According to the Law on Enterprises for public, non-listed companies, all contracts and transactions between the company and the following entities shall be approved by the GMS or Board of Directors:[29]

- Shareholders, authorized representatives of shareholders owning more than 35% of the company's common shares and related persons
- Members of the Board of Directors, the director or the General Director and related persons
- Enterprises in which members of the Board of Directors, the Supervisory Board, the director, the General Director have capital contribution or shares
- Enterprises in which related persons of members of the Board of Directors, the Supervisory Board, the director and General Director individually or collectively hold capital contributions or shares greater than 35% of the charter capital.

For listed companies, the GMS shall approve the above-mentioned related party contracts or transactions only when their value is 20% or more of the total value of the company's assets and its branches recorded in the most recent financial statements.[30] For public and non-listed companies, the GMS shall approve the above-mentioned related party contracts or transactions only when their value is 50% or more of the total value of the company's assets recorded in the most recent financial statements. Other transactions with a value less than 50% shall be approved by the Board of Directors. Shareholders and directors related to such contracts or transactions cannot vote and the contracts or transactions will be approved when shareholders representing 65% or more of the remaining votes approve.[31]

➔ *For more information on these transactions, see Chapter 12, Section B.*

28 LOE, Article 120, Clauses 2 & 3

29 LOE, Article 120, Clause 1.

30 Model Charter, Article 14, Clause 2o.

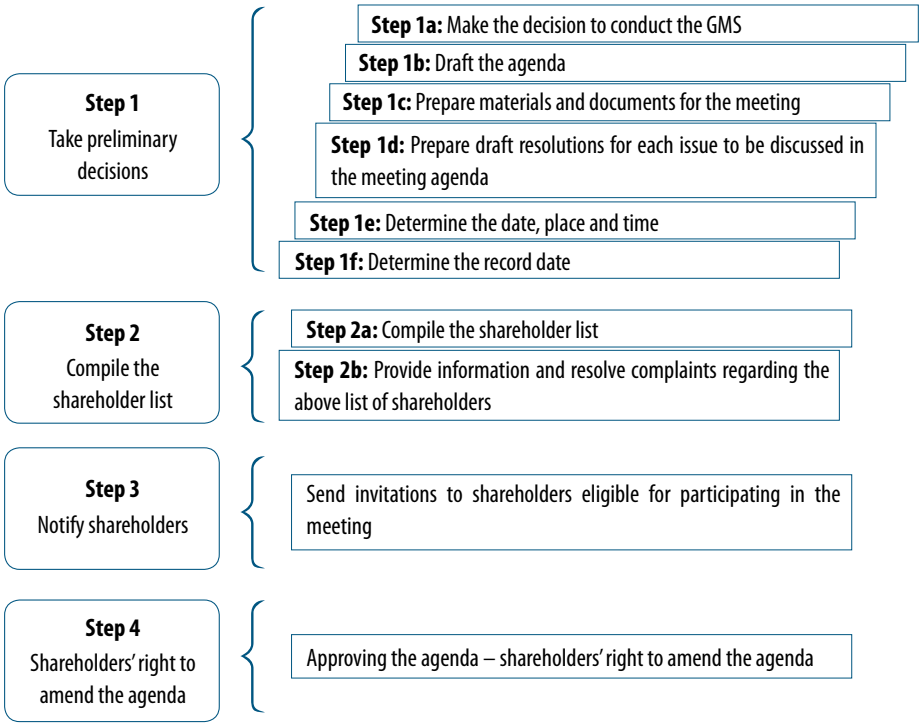
31 LOE, Article 120, Clause 3.

B. Preparing for the Annual General Meeting of Shareholders

Preparing for the AGM requires careful planning and adherence to procedural requirements. The procedures are set out in the Law on Enterprises and detailed in the Model Charter.

The steps that must be followed are summarized in Figure 2.

Figure 2: Preparation for the GMS



1. Drafting the Agenda

The first step in preparing for an AGM is to draft an agenda. The agenda structures the AGM, and lists issues that must be addressed. Only the items properly included in the agenda in conformity with the Law on Enterprises may be decided on at general meetings. Other issues, not included in the agenda may only be discussed. However, in the case where all shareholders representing 100% of the voting shares attend the GMS directly or via an authorized representative, the resolutions which are unanimously approved by the GMS shall be deemed to be effective even if the items voted on were not included on the agenda.[32]

For a public, non-listed company, the GMS shall have the right to alter the meeting agenda being enclosed with the invitations sent to all shareholders.[33] For listed companies, it is stipulated that all resolutions and issues included in the agenda must be discussed and voted at the GMS.[34]

Best Practices:

In the period preceding the decision to conduct the AGM, the Board of Directors should review all the proposals, formal and informal, made by shareholders to include specific items on the agenda. Mutual understanding and cooperation between the Board of Directors and shareholders is very important in the corporate governance framework. In that respect, good practice would be to notify shareholders about rejected agenda items. This by no means precludes the shareholders' legal right to include items on the agenda after the decision to conduct the GMS.

2. Making Preliminary Decisions

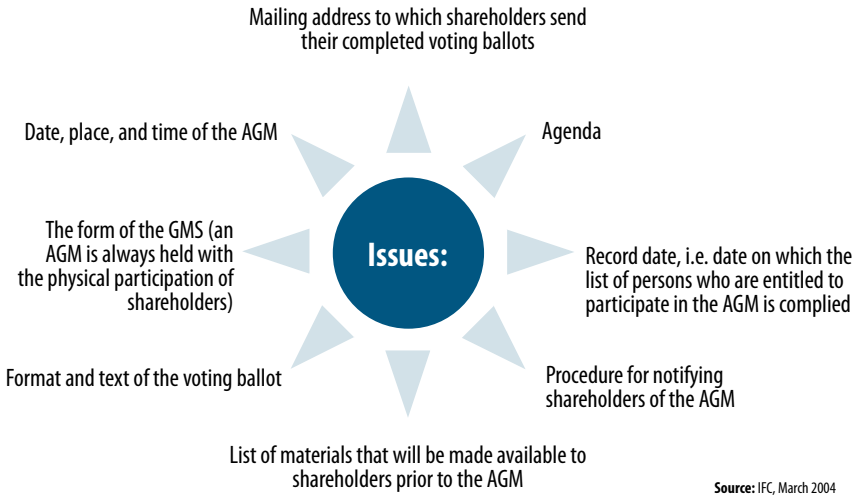
As depicted in Figure 3, the Board of Directors must make a number of key decisions in preparing for the GMS.

32 LOE, Article 104, Clause 4 and Model Charter, Article 17, Clause 7.

33 LOE, Article 102, Clause 4.

34 Model Charter, Article 14, Clause 4.

Figure 3: Issues that the Board of Directors Must Decide



Source: IFC, March 2004

a) The Decision to Conduct the GMS

The Board of Directors must decide to conduct the GMS before its preparation may start. As part of this decision, the Board of Directors decides the final agenda, date, place and time, address to which completed ballots must be sent; notification procedures, list of materials and record date.

b) The Date of the GMS

A distinction has to be made between the AGM and the EGM. The Law on Enterprises and the Model Charter regulate that the AGM shall be conducted within four months from the end of the financial year, but can be extended to six months subject to approval of the authorized business registration body.[35] The Board of Directors then determines the exact date for each AGM, within the period stipulated by the charter.

On the other hand, the date of the EGM is determined by the decision to conduct the GMS or within 30 days from the date the circumstances as required by law arising or from the date of receipt of the request *(For more information, see Section D.2 below).*

35 LOE, Article 97, Clause 2 and Model Charter, Article 13, Clause 1.

c) The Place of the GMS

According to the Law on Enterprises and the Model Charter, the convenors of the GMS will determine the venue of the GMS.[36] The venue of the GMS must be in the territory of Vietnam.[37] Although there are no specific rules for the place of the GMS, it should be held in a place that offers the optimal conditions for the presence of shareholders.

Comparative Practices:

Comparative corporate governance practices recommend that:

- The GMS should be held at a location and time that allows shareholders to participate and does not impose undue expenses upon them
- The GMS should be held where the company is located or at a location defined by the charter
- Companies that are located where access is difficult should choose a venue that is easy to access, for example by public transport. This location should be specified in the charter
- The premises should be able to accommodate all shareholders who want to participate
- Companies should estimate how many participants are likely to attend the GMS and plan accordingly.

d) The Record Date

The record date, sometimes referred to as the fixing date, is the date used to determine who is entitled to participate in the GMS. The Law on Enterprises and the Model Charter stipulate that the convenor of the GMS shall make the list of shareholders entitled to participate in the GMS sessions based on the register book of shareholders. Listed company will have to send a notice together with related documents to the stock exchange and VSD to inform the record date for preparation of the list of shareholders who are entitled to participate in the GMS at least ten working days before the record date.[38] According to Law on Enterprises, such list shall be made when

36 LOE, Article 97, Clause 7 and Model Charter, Article 17, Clause 2b.

37 LOE, Article 97, Clause 1.

38 Circular 09, Section IV, Article 5.

there is a resolution to make convocation of the GMS and must be completed no later than 30 days prior to the date of opening the GMS.[39] However, for listed companies, the Model Charter stipulates that the list of shareholders be compiled within 30 days before the date of opening the GMS.[40] For listed companies to be in compliance with the Law on Enterprises, this means that the record date must be exactly 30 days before the date of the GMS.

3. Preparing the Shareholder List

The next step in preparing for the GMS is to compile the list of shareholders who are entitled to participate in the GMS.

Once the Board of Directors has set the record date, the next step is to compile the shareholder list according to data from the register book of shareholders at the company or from the VSD for securities which have been registered at the VSD. In the latter case, the depository members of the VSD shall be responsible for the preparation of the list of shareholders entitled to participate in the GMS based on the information in the register book of shareholders on the record date.[41]

The shareholder list is prepared to:

- Determine which shareholders are entitled to participate in the GMS
- Notify shareholders of the GMS
- Determine which shareholders have the right to amend the agenda
- Give shareholders the opportunity to verify that their rights are registered properly.

a) Who Should be Included on the Shareholder List

Only persons included on the shareholder list are entitled to participate in the GMS. The distinction has to be made between right to participate in the meeting and the right to vote. Under the Law on Enterprises, owners of dividend preferred shares and redeemable preferred shares are not entitled to attend and to vote at the GMS. However, for listed companies, the Model Charter stipulates that shareholders of these types of preferred shares shall have the authority to vote in case of a GMS resolution on the change or waiver of special rights attached to a class of shares.[42]

39 LOE, Article 98, Clause 1.

40 Model Charter, Article 17, Clause 2a.

41 Decision 87, Article 20, Clause 2 and Decision 15, Article 5, Clause 2.

42 Model Charter, Article 16, Clause 1.

Best Practices:

The right to participate in the GMS is a fundamental shareholder right. Processes and procedures for the GMS should allow for equitable treatment of all shareholders. (See OECD Principles, page 44). Therefore, the shareholder list should encompass all registered shareholders on the record date.

b) Nominal Shareholders and the Shareholder List

Best Practices:

To ensure that all shareholders are included in the shareholder list, nominal shareholders are required to provide the company with information on the ultimate or beneficial owners they represent.

➔ *See Chapter 13, Section B.3 for more information on the disclosure of beneficial ownership.*

c) Information in the Shareholder List

The shareholder list must contain information on each individual and legal entity including:[43]

- Full name
- Identification details (address/registered office, ID, passport or legal individual certification number, business registration number and nationality)
- The number, type and class of shares held
- The date of registration under each type.

Best Practices:

It would be considered a good corporate practice to include the email addresses of each shareholder in the shareholder list.

43 LOE, Article 98, Clause 2.

d) Disclosure of Information in the Shareholder List

All shareholders shall have the right to check, refer to, extract and copy the contents of the register book of shareholders at any time during the working hours of the company or of the VSD.[44] In some countries, information regarding physical persons, including their mailing address, may only be disclosed with their permission.

Shareholders are entitled to verify the accuracy of the information in the register about themselves and their holdings. They are entitled to make objections to any irregularity on the list and request the amendment of incorrect information or addition of necessary information.[45] It would be a good corporate practice for a company to issue a statement within a couple of days highlighting any objection.

The Board of Directors may amend the shareholder list after the record date only to restore the rights of persons who were omitted or to correct other errors.

e) Shareholder Obligations when Selling Shares after the Record date but Prior to the Annual General Meeting of Shareholders

Shareholders lose voting rights when they sell their shares, as voting rights are transferred automatically to the new owner. The Law on Enterprises stipulates that in this case, the transferee shall have the right to participate in the GMS in place of the transferor with respect to such shares.[46] However, no procedures are given to ensure that right of the new shareholder.

In practice, if the shareholder list is not updated after the record date, the selling shareholder still has the right to attend the meeting and vote. This shareholder must ensure that the new shareholder may vote at the GMS. There are two ways for the selling shareholder to fulfil this obligation:

- Grant a power of attorney to the new owner; or
- Participate in the GMS and vote in accordance with the instructions of the new owner.

In practice, these two options only work when the shareholder knows:

44 LOE, Article 86, Clause 3.

45 LOE, Article 98, Clause 3.

46 LOE, Article 101, Clause 5.

- **The identity of the buyer:** Shares are generally sold anonymously through intermediaries, thus making it impossible for the seller to identify and contact the buyer. It gets more complicated when shares are sold to multiple shareholders or during multiple and sequential transactions.
- **The record date:** In practice, shareholders are not notified about the record date before they are notified of the GMS. This makes it difficult for the seller to know if he/she is obliged to act in order to allow the new shareholder to participate in the GMS.

Best Practices:

There are some ways to ensure the right of the new shareholders as follows:

- If the instructions of the new owners coincide, their votes must be combined
- If the instructions of new owners do not coincide, the seller must vote in accordance with the instructions of new owners
- If the new owners receive power of attorney from the seller, the new shareholders must be registered in order to participate in the GMS and they must be given new voting ballots
- If voting shares are being circulated in foreign markets in the form of depositary receipts, voting must be based on the instructions of the depositary receipt holders.

➔ *For more information on depositary receipts, see Chapter 11, Section G.*

4. Providing Proper Notice

Once the procedures set out in Section B.3 are completed, all shareholders eligible for participation in the GMS must be notified of the GMS no later than seven working days prior to the opening date of the GMS.[47] For listed companies, the Model Charter requires the notice of the GMS must be sent at least 15 days before the date of the meeting.[48]

Best Practices:

It is good practice that notification of the GMS:

- Allows sufficient time for all shareholders to prepare for the GMS
- Is given to all shareholders
- Allows sufficient time for shareholders to contact other shareholders
- Occurs at least 30 days in advance.

a) How to Notify

Shareholders must be notified of the AGM by registered mail to the permanent address of the shareholder.[49] If the company has a website, the company shall publish the notice of the general meeting on the company website together with the dispatch of the notice to shareholders.[50]

For listed companies, under the Model Charter, the GMS notice may be:[51]

- For owners of shares which have been deposited, sent to the VSD and at the same time shall be announced on the information network of the Stock Exchange, on the website of the company, in a national newspaper or a local newspaper where the company's office is based
- For owners of shares which have not been deposited, sent to such

47 LOE, Article 100, Clause 1.
48 Model Charter, Article 17, Clause 3.
49 LOE, Article 100, Clause 1.
50 LOE, Article 100, Clause 2.
51 Model Charter, Article 17, Clause 3.

shareholders by direct delivery or by registered courier to the registered address of the shareholders or to the address provided by such shareholders in order to receive information

- For shareholders who have notified the company in writing of their fax number or email address, sent to such fax number or email address
- For shareholders who are employees of the company, the notice of the meeting may be placed in a sealed envelope and sent directly to them at their work place.

The company may also notify shareholders of a GMS by television or radio, or other methods such as the internet. These other methods may not, however, replace those required by the Law on Enterprises and those specified in the charter.

Best Practices:

Every reasonable effort should be made to inform shareholders of an upcoming GMS. A broader reach may be achieved by:

- Permitting the use of email and the internet
- Using widely read print media to disseminate notice
- Using no less than two and, ideally, several publications to give notice.

b) Information Included in the AGM Notification

The AGM notification should contain sufficient information to enable shareholders to participate and tell them how they will participate. It must include information required by the Law on Enterprises.[52] Legal requirements and recommendations for this notification are summarized in Table 1.

52 LOE, Article 100, Clause 1.

Table 1: Information to Include in the GMS Notification

Information	Required	Recommended by the Comparative CG practice
1. Full name and location of the company	✔	✔
2. Number and date of the business registration certificate	✔	
3. Date, place, and time of the GMS	✔	✔
4. Name and address of shareholders or of the shareholders' authorized person	✔	
5. Record date of the GMS		✔
6. Agenda	✔	✔
7. Proxy form	✔	
8. Voting ballot and discussion materials, draft resolutions	✔	
9. Information about place and time where shareholders can inform themselves and take materials for the meeting (when the GMS notification was public)		✔
10. Procedures for receiving background information		✔
11. The time when the registration of participants starts (*)		✔
12. The place where registration takes place		✔
13. The person to whom shareholders may report violations of the registration procedure		✔
14. Mailing address and identity of a person to whom shareholders are sending written voting instructions		✔

(*) There is a difference between the Law on Enterprises and the Model Charter regarding the time when the registration of participants starts. Under the Law on Enterprises, registration of participants shall be conducted on the day prior to the date of opening the GMS.[53] However, the Model Charter stipulates that the registration take place on the same day of the GMS, right before the opening of the GMS.[54]

53 LOE, Article 103, Clause 1

54 Model Charter, Article 19, Clause 1.

c) Information and Materials for the GMS

The Law on Enterprises and Circular 09 do not list the specific background materials that must be made available to shareholders before the GMS. It only stipulates that discussion materials must be enclosed with the meeting invitation.

Comparative Practices in Vietnam:

In most cases, the invitation merely includes instructions on where and when shareholders may get documentation for the meeting. In some companies, copies of documentation and handouts are provided at the meeting.

Best Practices:

Companies should identify materials that need to be provided to shareholders in their charter.

Recommended materials that should be made available to shareholders before the GMS by comparative corporate governance practices are summarized in Table 2.

Table 2: GMS Materials
1. The annual report and financial statements
2. The report of the External Auditor
3. The report of the supervisory body (Supervisory Board, Internal Auditor)
4. The operation report of the Board of Directors
5. Draft charter amendments, draft of the new version of the charter, if any
6. Drafts of resolutions of the AGM
7. Information on proposed candidates for members of the Board of Directors and Supervisory Board
8. Consent of nominees to accept the position if they are elected
9. The position of the Board of Directors on each agenda item and any dissenting opinions
10. Materials that must be made available when the agenda includes the reorganization of the company: • The justification of the terms and procedures of the reorganization, contained in the decision on the division, separation, or transformation, or in the contract on merger or accession approved by the Board of Directors (the Board of Directors report) • The annual reports and financial statements of all companies involved in the reorganization for the last three fiscal years or for all completed fiscal years if the company was established less than three years ago • The quarterly accounting documents for the quarter that precedes the decision • The report of the External Auditor • The report of the Supervisory Board, if exists.

d) When and Where Materials Must Be Made Available

GMS materials are delivered with written notice to every shareholder. For public, non listed companies, if the company has a website, the GMS materials should be posted on the website at the same time of sending the GMS notice.[55] For listed companies, it is required that the GMS materials, including meeting notice, proxy form, meeting agenda, voting ballots, discussion materials and draft resolution for each item in the agenda be posted on the website at least seven working days before the date of the GMS.[56]

55 LOE, Article 100, Clause 2.

56 Circular 09, Section IV, Article 1.4.

Best Practices:

It would be good corporate practice to determine in the company's charter the deadline for making all the materials for the AGM available to shareholders. Thirty days prior to the AGM could be an appropriate solution. Although it is stipulated under the Law on Enterprises that the GMS materials must be delivered together with written notice to every shareholder, it is advisable that these materials be posted on the internet, preferably on the company's website as electronic dissemination is a simple and cost effective method of allowing broad public access. Besides, the GMS materials should also be made available at the company's headquarters during its working hours. Information and materials may also be made available at other places, preferably in an area where a significant number of shareholders reside, as long as the address is specified in the GMS notification.

Each shareholder of record has the right to receive copies of GMS materials. The charter or internal regulations can specify a short period, for example three days after the request, when copies must be provided to the shareholder.

e) When and How Voting Ballots Are Sent to Shareholders

Under Article 100 of the Law on Enterprises, the voting ballots must be sent together with notice of the GMS to shareholders. However, Article 103 stipulates that prior to the opening of the GMS, registration must be undertaken and upon registration, participants shall be provided with voting ballots corresponding with the number of issues to be voted in the meeting agenda. This same procedure is also stipulated in the Model Charter.[57] The voting ballots will state the registration number, full name of the shareholder, full name of the authorized representative and the number of votes of such shareholder.

57 Model Charter, Article 19, Clause 2.

Comparative Practices:

Voting ballots must be distributed to all shareholders of record:

- No later than 20 days prior to the AGM
- By registered mail, if the charter does not provide otherwise; or
- By hand with a delivery receipt.

In some countries, for companies with more than certain number of shareholders (for example, 500,000) with voting rights, the charter may allow for the publication of voting ballots in the print media.

f) When and How to Use an Option of Written Voting

Although there are no guidelines under current law and regulations, the company should allow its shareholders and their proxies to use a written voting option. Written voting consists of giving written instructions to a person delegated by the company to vote in his/her name in his/her absence. When the company allows written voting, shareholders should be notified about the possibility of written voting and the identity of a person who is in charge of receiving written instructions.

Best Practices:

When the company allows written voting, the Voting Committee should adopt the written voting manual. This manual should be applicable for every shareholders meeting where written voting is allowed. The company should publish the manual on its website and make available written copies to shareholders without charge.

g) Nominal Shareholders and Shareholder Notification

If instead of data about beneficial shareholders, in a register of shareholders there is only data about a person or organization that represents his/her nominal shareholder, the GMS notification must be sent to nominal shareholders if the mailing address of the beneficial owner is unknown. In

Vietnam, for shares which have been deposited at the VSD, the VSD and its depository members shall be the nominal shareholders. The GMS notification shall be sent to the VSD which then informs its depository members to conduct necessary procedures for the exercise of beneficial owners' rights. The depository members must inform the beneficial owner of the AGM. The depository members must give notice in accordance with the procedure and time specified by legislation.[58]

5. Approving the Agenda – Shareholders' Rights to Amend the Agenda

For a public, non-listed company, it is stipulated that the GMS shall have the right to alter the meeting agenda being enclosed with the invitations sent to all shareholders.[59]

The agenda is composed of items that are:

- Included upon the Board of Directors' initiative
- Proposed by shareholders.

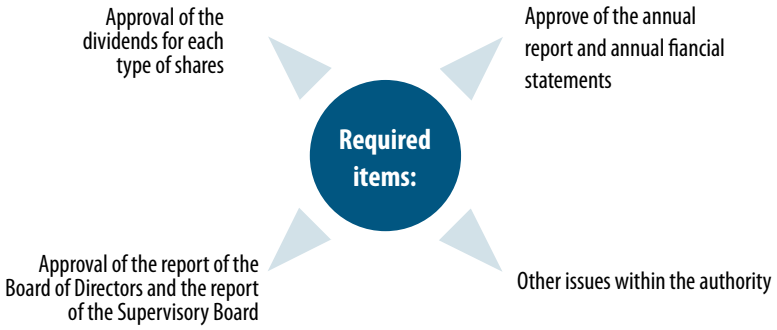
The Board of Directors may include:

- Items in addition to those required by the law or those proposed by shareholders.

In addition to the meeting agenda, a shareholder or a group of shareholders may have the right to nominate candidates for governing bodies of the company.[60] Figure 4 shows the items that the AGM agenda must include under the Law on Enterprises.[61]

58 Decision 15/QĐ-TTLK, Article 5.
59 LOE, Article 102, Clause 4.
60 LOE, Article 79, Clause 2a.
61 LOE, Article 97, Clause 2.

Figure 4: Required AGM Agenda Items



Source: IFC, March 2004

For listed companies, the AGM shall also discuss and approve the short-term and long-term developmental plans of the company.[62]

The GMS is bound by the determined agenda, so the Law on Enterprises specifies the conditions for amending it. Shareholders have the right to propose issues to be included in the GMS meeting agenda.[63]

a) Who May Submit Agenda Items

A shareholder (or a group of shareholders) holding at least 10% or a smaller ratio as stipulated in the company charter of common shares of a public, non-listed company for a continuous period of six months may propose agenda items, including the nomination of candidates to the Board of Directors or the Supervisory Board.[64] For a listed company, the ratio required for a shareholder or a group of shareholders to have this right is at least 5% of common shares.[65]

The signatory of the proposal is considered the individual who submits the proposal. The date on which a shareholder's ownership should be verified is the date of legal submission.

62 Model Charter, Article 14, Clause 1d.
63 LOE, Article 99, Clause 2 and Model Charter, Article 17, Clause 4
64 LOE, Article 99, Clause 2.
65 Model Charter, Article 17, Clause 4.

b) How and When to Submit Agenda Proposals

The Law on Enterprises stipulates that shareholders must submit proposals in writing to the company no later than three days prior to the opening date of the GMS if the company charter does not stipulate otherwise.[66] There is no specific regulation on the way of submission, to whom the proposal is submitted or how to determine the date of submission. It is good practice that the company charter stipulates these matters in detail.

Comparative Practices:

Shareholders may submit the proposals of agenda items in writing:

- By regular mail to the Chairman of the Board of Directors. Proposals are considered submitted as of the postmark date
- By hand to the Chairman of the Board of Directors (or to the Corporate Secretary, or any other person entitled to receive mail on behalf of the company). The delivery must be verified by dated receipt. The date of receipt of such a proposal is deemed to be the date of submission
- By other means, such as email or fax (if allowed by the charter and/or internal regulations). In this case, the charter or internal regulations determine the date of submission.

c) Required Proposal Information

Each proposal of agenda items from shareholders must contain:[67]

- The name of the submitting shareholder(s)
- The number, types, and classes of shares held by the shareholder(s)
- Number and date of shareholder registration in the company
- The issues proposed to be included in the agenda.

66 LOE, Article 99, Clause 2.
67 LOE, Article 99, Clause 2.

It is good practice that the proposal also includes the following items:

- The signature(s) of the submitting shareholder(s)
- The reasons for making that proposal.

If a shareholder representative signs the proposal, a valid power of attorney must be attached.

Best Practices:

Shareholder proposals should be included as separate items on the agenda. However, certain agenda items should be grouped together. For example, a decision on reorganization through spin-off may only be approved if the GMS also approves the following related issues:

- The spin-off procedure
- Terms and conditions of the spin-off
- The establishment of new companies as a result of reorganization
- The procedure to convert the reorganized company's shares into shares of new companies
- The approval of a transfer balance sheet.

d) Information to be Included in Candidate Proposals

A shareholder (or a group of shareholders) owning at least 10% of common shares of a public, non-listed company or at least 5% of common shares of a listed company for a continuous period of six months may propose candidates for:

- The Board of Directors
- The Supervisory Board.

The number of candidates that may be proposed is limited to the size of the body specified in the charter or internal regulations.

In practice, the majority shareholders often control the election and removal of board members. The number of candidates that can be nominated by majority shareholders to the Board of Directors or Supervisory Board

according to proportion of total shares with voting rights shown in the following table if the company charter does not stipulate otherwise:

Table 3: For non-listed companies:[68]

Proportion of Total Shares with Voting Rights	Number of Candidates to be Nominated
From 10% to less than 20%	1
From 20% to less than 30%	2
From 30% to less than 40%	3
From 40% to less than 50%	4
From 50% to less than 60%	5
From 60% to less than 70%	6
From 70% to less than 80%	7
From 80% to less than 90%	8

Table 4: For listed companies:[69]

Proportion of Total Shares with Voting Rights	Number of Candidates to the BOD or Supervisory Board to be Nominated
From 5% to less than 10%	1
From 10% to less than 30%	2
From 30% to less than 50%	3
From 50% to less than 65%	4
65% or more	Full number of candidates

68 Decree 102, Article 29, Clause 3.

69 Model Charter, Article 24, Clause 3 and Model Charter, Article 36, Clause 2.

Although there is no regulation under current law, candidate proposals should contain the:

- Name of candidates
- Name of the body for which candidates are nominated
- Name(s) of the shareholder(s) submitting the proposal
- Number, types and classes of shares held by the submitting shareholder(s)
- Signature(s) of the shareholder(s)
- Candidate's CV
- Evaluation of his/her prior work, in case of proposal for the re-election
- All other information that can be of importance for shareholders when they are deciding who will be elected such as professional experience, information relevant for his/her independence, etc.

The charter or other internal regulations of the company may require additional information.

If a shareholder representative signs the proposal, a valid power of attorney must be attached.

Best Practices:

Candidates should be informed of their nomination. In addition, the GMS documents should contain an agreement that, if elected, candidates will accept the position. In the absence of such an agreement, it is recommended that the candidate physically attend the GMS and verbally confirm his/her acceptance if elected, before shareholders vote on his/her candidacy.

e) Proposal Review by the Board of Directors

The Board of Directors must decide whether to accept or reject shareholder proposals. It may reject a proposal only when:[70]

70 LOE, Article 99, Clause 3.

- The proposal is not submitted within the period determined by law and the charter
- The proposal is incomplete or is in relation to an irrelevant matter
- The items proposed do not fall within the authority of the GMS for discussion and approval.

The Law on Enterprises allows the company charter to stipulate other cases when the Board of Directors are entitled to refuse such proposal.

For listed companies, the Board of Directors may also reject a proposal when the shareholder (or a group of shareholders) submitting the proposal does not possess at least 5% of common shares for a consecutive period of six months.[71]

It is a good practice that the Board of Directors is entitled to refuse if the proposal does not otherwise comply with legislation, such as if the shareholder proposes to declare dividends when this recommendation may only be made by the Board of Directors.

The convenors of the GMS shall put all shareholder proposals that were not rejected in the proposed meeting agenda and contents. The proposed items will be officially added to the agenda upon the approval of the GMS.[72] For listed companies, any decision of the GMS Chairman on the order and procedures or on events arising outside the agenda of the GMS shall be final.[73]

f) The Notification of Shareholders of Rejected Proposals

The Board of Directors should notify shareholders if their proposals are rejected or accepted. The Law on Enterprises does not specify when this decision has to be made and how shareholders should be notified.

71 Model Charter, Article 17, Clause 5.

72 LOE, Article 99, Clause 4.

73 Model Charter, Article 19, Clause 5.

Best Practices:

The Board of Directors should notify shareholders within three days of making the decision if their proposals are rejected. It must provide them with the text of its decision stating the reasons for the rejection. Shareholders should be notified by registered mail.

In Vietnam, it is difficult to apply the above best practice as shareholders' proposals can be sent to the Board of Directors only three days prior to the GMS. Therefore, in practice, shareholders only know if their proposal is rejected or accepted once they attend the GMS.

The Law on Enterprises does not stipulate if shareholders can appeal to a court in case the Board of Directors rejects or fails to make a decision on shareholder proposals.

Comparative Practices:

The rejection of or failure to make a decision on shareholder proposals may be appealed to a court. The court is authorized to issue an order, at request of such shareholders, and render a decision to that effect within 48 hours from receipt of the request.

6. Preparing Draft Resolutions on Each of the Items on the Agenda

The Board of Directors must prepare draft resolutions on each of the items on the agenda.[74] These draft resolutions shall be sent to shareholders together with notice of the GMS meeting.

74 LOE, Article 99, Clause 1 and Model Charter, Article 17, Clause 6.

Approving the annual report and financial statements are some of the most important decisions made by the AGM. Therefore, it is a good practice that the Board of Directors preliminarily approves the annual report and financial statements. Before it does so, the company's Supervisory Board should verify the annual report and financial statements.

C. Conducting the General Meeting of Shareholders

The company may conduct the GMS once all the preparatory steps have been completed. The GMS is a key corporate governance event and its proper implementation thus takes on added importance.

Best Practices:

The GMS should be used to inform shareholders about company activities, achievements, plans and to involve shareholders in important decisions. For a minority shareholder, the GMS is often the only chance to obtain detailed information about the company's operations, and to meet management and directors.

Convening and conducting the GMS is a complex task and a number of steps must be followed to ensure that the GMS meets legal requirements and good corporate governance recommendations.

Clearly, one should steer away from a marathon GMS in order to avoid exhausting participants. This may pose considerable organizational challenges when the issues to be decided are either complex, contentious and/or numerous. The overriding principle for organizing the GMS is that it should be conducted in such a manner so as to facilitate effective shareholder participation and decision-making.

An overview of the steps necessary to organize the GMS is provided in Figure 5.

Figure 5: Steps for Conducting the GMS

Step 1:
Registration of persons attending the GMS. **C.2**

Step 2:
Verifying and announcing the quorum. **C.3**

Step 3:
The Chairman of the Board of Directors or the convenor of the GMS opens the GMS, except in special cases. **C.4**

Step 4:
Shareholders elect the GMS Chairman, if the charter or other company documents do not define who will preside. **C.4**

Step 5:
The GMS Chairman appoints the GMS secretary, who will take minutes of the GMS. **C.4**

Step 6:
Shareholders elect a Voting Committee. **C.5**

Step 7:
The GMS Chairman presents the proposed agenda and the rules of order and the GMS approve the agenda. **C.7**

Step 8:
The GMS Chairman opens the discussion on agenda items. **C.8**

Step 9:
Shareholders vote on agenda items. **C.9**

Step 10:
The Voting Committee counts votes and prepares the minutes on the voting results. **C.10**

Step 11:
The GMS Chairman announces voting results and decisions. **C.11**

Step 12:
The GMS Chairman closes the GMS. **C.12**

Step 13:
The Voting Committee archives voting ballots and voting instructions. **C.13**

Step 14:
The company secretary prepares and archives the GMS minutes. **C.14**

1. Shareholder Participation Options

Shareholders may attend the GMS in person or grant a power of attorney to a representative (proxy) who attends the GMS on the shareholder's behalf.[75] Besides, shareholders may also attend the GMS by sending completed voting ballots to the Board of Directors by registered mail at least one day before the GMS.[76] For listed companies, in case where more than one authorized representative is appointed, the specific number of shares and the specific number of votes of each representative must be specified.[77]

If participation is by proxy, letters of proxy shall be in writing in the form as prescribed by the company with adequate signatures and need not be notarized.[78] Any person authorized to attend a GMS must submit his/her written authorization prior to entering the meeting room. In case the authorizer is dead or his/her capability of civil acts is either lost or restricted or the authorizer has cancelled such authorization, such authorization is still effective unless the company receives a written notice of one of these events no less than 24 hours prior to the opening of the GMS.[79] For listed companies, the time period required for such notification is 48 hours prior to the opening of the GMS.[80]

The current law and other related regulations are silent on the case where an individual shareholder dies or a legal entity shareholder reorganizes after the record date. Comparative practice suggests that in this case the legal heir or the new shareholder should be entitled to attend the GMS.

75 LOE, Article 101, Clause 1.
76 Decree 102, Article 26, Clause 1b.
77 Model Charter, Article 15, Clause 1.
78 LOE, Article 101, Clause 2.
79 LOE, Article 101, Clauses 3 & 4.
80 Model Charter, Article 15, Clause 4.

2. Shareholder Registration

The company registers shareholders and shareholder representatives before the GMS may begin. Participants must be registered to verify the quorum. Under prevailing regulations, shareholders are considered as participating in the GMS in case they send the completed voting ballots to the Board of Directors at least one day before the opening of the GMS.[81] However, there is no specific guidance on how these shareholders shall be registered as those directly participate in the GMS.

Best Practices:

To avoid company officials preventing shareholders from participating in the GMS, e.g. by blocking registration, the registration procedure should be described in detail in the internal regulations of the company and in the GMS notification.

a) Who Registers Shareholders

Under the Law on Enterprises for shareholding companies or the Model Charter for listed companies, there is no guideline on how the registration will be conducted and who is responsible for these actions. They only regulate that on the date of the GMS, the company must carry out procedures to register its shareholders and such registration shall continue until all shareholders entitled to attend the meeting and who are present have been registered.[82] It is stipulated by the CG Regulations that a listed company issue regulations on the order and procedures for convening and voting at the GMS, including the method of registration of participants at the GMS.[83]

81 Decree 102, Article 26, Clause 1b.

82 LOE, Article 103, Clause 1 and Model Charter, Article 19, Clause 1.

83 CG Regulations, Article 6, Clause 1b.

Best Practices:

The charter, the internal regulations or other internal corporate documents should specify the body or the person who is responsible to conduct the registration of participants of GMS. Registering shareholders can be seen as a Corporate Secretary authority, because this corporate body is responsible for GMS preparations.

b) What Documents Must Be Verified for the Registration

The Board of Directors or those who convene the GMS may require shareholders or authorized representatives entitled to attend the GMS to be checked or subject to other security measures which it considers appropriate. They may also ask competent agencies to maintain the order of the meeting, expel those who do not comply with the Chairman's instructions or intentionally cause disorder and hinder the smooth progress of the GMS or refuse to comply with the security checking requirement.[84] However, no specific regulations on how to check and what documents must be verified are given.

It is a normal practice in Vietnam that in the notification of the GMS, a company usually states the documents that a shareholders or authorized person need to bring to and present for the registration at the GMS, including ID card, passport or copy of business registration certificate, invitation letter and letter of proxy (in case of being authorized).

c) Registration of Participants and Voting Ballots

Where a shareholder is registered, the company shall grant such shareholder with voting rights or his/her authorized representative a voting card which states the number of registration, full name of the shareholder, full name of the authorized representative and the number of votes of such shareholder.[85]

d) The Time for the Registration of Participants

The registration of participants of the GMS officially starts at the time stated in the notice of the GMS and ends after the discussion of the last

84 LOE, Article 103, Clause 7 and Model Charter, Article 19, Clause 9.

85 LOE, Article 103, Clause 1 and Model Charter, Article 19, Clause 2.

agenda item. Any shareholder or authorized representative who comes after the opening of the GMS shall be entitled to register and shall have the right to vote after registration. The effectiveness of votes that have already been made shall not be affected.[86]

For public companies, the Law on Enterprises stipulates that the registration be conducted on the day prior to the opening of the GMS.[87] For listed companies, it is required that the registration be taken on the date of the GMS.[88]

Best Practices:

The registration of participants should be carried out on the same day just prior to conducting the GMS. Poorly organized registration may result in shareholders having to wait in line while the GMS starts. Accordingly, companies should make every effort to ensure that the registration process is quick and efficient, and that participants are not prevented from participating in the GMS due to administrative delays. This means that the registration desk needs to be adequately staffed and open well in advance of the GMS.

e) Where Participants Must Be Registered

Registration must take place where the GMS is held.

3. Verifying and Announcing the Quorum

There is no regulation or guideline under the Law on Enterprises or Model Charter for these activities. It is best practice that the charter, the internal regulations or other internal corporate documents should specify the body or the person who is responsible to verify and announce the quorum. The quorum should be announced after the registration completed and before shareholders may vote.

Owners of at least 65% of voting shares must participate in the GMS for

86 LOE, Article 103, Clause 6 and Model Charter, Article 19, Clause 3.

87 LOE, Article 103, Clause 1.

88 Model Charter, Article 19, Clause 1.

it to commence and its decisions to be valid.[89] The shareholders participating in the GMS are those who are registered (in person or by proxy). Shareholders who send the completed voting ballots to the Board of Directors at least one day before the opening of the GMS are also considered as participating in the GMS.[90]

When the number of attendees required is insufficient within 30 minutes from the time set to open the meeting, the meeting shall be reconvened within a period of 30 days from the scheduled date for holding the first GMS. The second called GMS shall be conducted when the number of attending shareholders and authorized representatives represent at least 51% of the voting shares.[91]

When the second GMS cannot take place, the GMS may be convened for a third time within 20 days from the scheduled date for holding the second GMS. In such a case, the GMS shall be conducted irrespective of the number of attending shareholders or authorized representatives and shall be deemed valid. This third-called GMS shall have the right to make decisions on issues which may have been approved at the first GMS.[92]

Even if sufficient attendees as required are present, the Chairman of the GMS may adjourn the GMS to another time or change the location of the meeting with or without obtaining opinions of the GMS if the GMS Chairman considers that (a) the location of the GMS fails to provide suitable seating for all attendees, (b) there is an attendee who disrupts or is likely to disrupt order at the meeting, or (c) an adjournment is necessary so that the work of the GMS will be carried out validly. The maximum time for any meeting adjournment shall be three days as from the date of the proposed opening of the meeting. The GMS which is reconvened shall review the work which should have been legally carried out at the previous adjourned meeting.[93]

For listed companies, the quorum for a resolution of the GMS on the change or waiver of special rights attached to a class of shares is at least two shareholders (or their authorized representatives) and each of them holds at least one-third of the par value of the issued shares of such class.[94] When the

89 LOE, Article 102, Clause 1 and Model Charter, Article 18, Clause 1.
90 Decree 102, Article 26, Clause 1b.
91 LOE, Article 102, Clause 2 and Model Charter, Article 18, Clause 2.
92 LOE, Article 102, Clause 3 and Model Charter, Article 18, Clause 3.
93 LOE, Article 103, Clause 8 and Model Charter, Article 19, Clause 6.
94 Model Charter, Article 16, Clause 2.

number of attendees as required above is insufficient, the meeting shall be reconvened within 30 days and the holders of shares of such class who are present directly or via an authorized representative shall be considered to be a sufficient number of attendees.[95]

4. Opening the General Meeting of Shareholders

A GMS session shall be deemed valid where it is attended by a number of shareholders that own at least 65% of the voting shares.[96]

For a GMS convened by the Board of Directors, the Chairman of the Board of Directors shall chair the meeting. When the Chairman is absent or temporarily lost the ability to work, the remaining members shall select one of them to be the GMS Chairman of the meeting. In case none of the Board of Directors members can be the GMS Chairman, the highest ranking member of the Board shall guide the GMS to vote for a GMS Chairman.[97] In other cases, the person who signs the decision to convene the meeting shall guide the GMS to vote for a GMS Chairman.[98]

For listed companies, in every case, the Chairman of the Board of Directors shall preside over the GMS. In a case where the Chairman of the Board of Directors is absent, the deputy chairman of the Board of Directors or the person elected by the GMS shall preside over the GMS. Where none of such persons is able to preside over the GMS, the member of the Board of Directors holding the highest position and who is present at the GMS shall organize a meeting to elect the GMS Chairman who need not necessarily be a member of the Board of Directors.[99]

The Chairman of the GMS shall nominate a person to be the secretary of the meeting.[100]

The GMS Chairman and the secretary shall have the right to perform activities that they find relevant in order to chair the meeting properly, in order and in compliance with the approved agenda, or to make the meeting reflect

95 Model Charter, Article 16, Clause 2.
96 LOE, Article 102, Clause 1 and Model Charter, Article 18, Clause 1.
97 LOE, Article 103, Clause 2a.
98 LOE, Article 103, Clause 2b.
99 Model Charter, Article 19, Clause 4.
100 LOE, Article 103, Clause 2c and Model Charter, Article 19, Clause 4.

the opinions of the majority participants.[101]

In the case of electing a GMS Chairman, the names of the nominees and the number of votes for each nominee shall be announced. The person receiving the highest number of votes shall chair the meeting.[102]

5. Electing the Voting Committee

The Chairman of the GMS must request the GMS elect Voting Committee members at each GMS.[103] It is recommended that the company establish a Voting Committee, conditions and method for the election of its members and to determine its authority and procedures in the charter, the internal regulations or some other general internal documents of the company. The Voting Committee must have at least three members and it is advisable that one of them is a graduated lawyer.

Best Practices:

It is recommended that at least one member of the Voting Committee is the representative of the minority shareholders.

To ensure that the Voting Committee performs its functions independently of the General Director, the Executive Board, and the Board of Directors, it is recommended that the following individuals may not be its members:

- Board of Directors members and candidates for the Board of Directors
- Executive Board members and candidates for the Executive Board
- Persons connected with the above mentioned members or candidates.

101 LOE, Article 103, Clause 4.

102 LOE, Article 103, Clause 2a and Model Charter, Article 19, Clause 4.

103 LOE, Article 103, Clause 2d and Model Charter, Article 19, Clause 2.

Under the current law and regulations, the Voting Committee is responsible to count the votes or to supervise the counting of the votes. In the case of a physical GMS, the current law does not give regulations or guidance on how the Voting Committee minutes its work of counting the votes and how the minutes of counting is filed. It is recommended that after the GMS, the Voting Committee prepares a written report about its work. The company will make this report available to shareholders electronically on the company's website and in written form at the General Director's headquarters. The report has to be signed by all members of the Voting Committee. Any member who refuses to sign the report is obliged to give his/her explanation, which will be in the annex of the report.

6. Inviting Outside Guests as Observers

As a practical matter, the company may invite creditors, potential investors, employees, government officials, journalists, experts and other individuals and organizations that do not own company shares to the GMS. The charter and internal regulations may specify procedures on inviting guests to the GMS. For listed companies, the CG Regulations recommend that auditors or representatives of audit companies may be invited to attend and express their opinions on audit issues at meetings of the GMS.[104] This is further clearly stated in the Model Charter that independent auditors shall be invited to attend the GMS to give their opinions on the annual financial statements.[105]

7. Presenting the Agenda and the Rules of Order

The Chairman of the GMS presents the agenda to the GMS participants. In addition, the GMS Chairman explains the rules of order as specified either in the charter and internal regulations or in a decision of the GMS. The meeting agenda must define details and timing for each of the issues to be discussed. The meeting agenda and contents must be approved by the GMS in the opening session.[106] Only the GMS has the right to amend the agenda which has been

104 CG Regulations, Article 6, Clause 4.
105 Model Charter, Article 13, Clause 2.
106 LOE, Article 103, Clause 3.

sent to shareholders together with the GMS invitation.[107]

For listed companies, any decisions by the GMS Chairman on the order and procedures or on events arising outside the agenda of the GMS shall be final.[108]

8. Discussing Agenda Items

Although there is no regulation under current law, beside shareholders, the Chairman of the Board of Directors should invite Board of Directors and Supervisory Board members to the GMS. The CG Regulations for listed companies suggests that auditors or representatives of audit companies be invited to attend and express their opinions on audit issues at GMS meetings.

The invited experts are supposed to comment on agenda items before the shareholders vote. The GMS Chairman may also ask invited experts to explain agenda items to shareholders. The presence of the above mentioned experts is very important for an AGM, because of the nature of decisions it has to adopt.

107 LOE, Article 102, Clause 4.

108 Model Charter, Article 19, Clause 5.

Best Practices:

It is good practice that:

- Shareholders have the opportunity to question members of the Board of Directors, the Supervisory Board and the External Auditor
- Shareholders receive clear answers to questions
- Questions from shareholders are answered immediately. If a question cannot be answered immediately, a written response should be given as soon as possible after the GMS
- The GMS be conducted so that all shareholders have an opportunity to make balanced and informed decisions on all agenda items
- The External Auditor, the General Director, and members of the Board of Directors, the Supervisory Board, other subcommittees of the Board of Directors (if any) and members of the Management Board are present at the GMS. If they are not, the GMS Chairman should explain their absence
- Key officers of the company, including the Chairmen of Board of Directors committees, speak at the GMS
- To set aside some time for presentations by shareholders
- The Chairman of the GMS interrupts speakers only to maintain order or comply with procedural requirements.

9. Voting

After one or several agenda items have been thoroughly discussed, the Chairman of the GMS invites shareholders to vote. Voting is based upon the principle of "one voting share — one vote," except for voting preferred shares and cumulative voting. The voting for electing members of the Board of Directors and the Supervisory Board shall be implemented by the method of accumulatively calculating the votes, by which each shareholder shall have the total votes equal to the votes acquired as a result of his/her shares ownership multiplied by the number of members of the Board of Directors or of the Supervisory Board to be elected and that shareholder may decide to use all of his/her votes for one or several candidates.[109]

109 LOE, Article 104, Clause 3c.

Any shareholder who comes late shall be registered and shall have the right to immediately participate in voting at the GMS. The effectiveness of any voting which has already been conducted before the late shareholders attended shall not be affected.[110]

The voting at a GMS can be public or secret. The public voting is presumed, unless the secret voting is determined for a concrete decision.

Each shareholder with voting rights or his/her authorized representative shall be granted with voting ballots corresponding with the number of issues to be voted in the meeting after being registered.[111] Under the Law on Enterprises, there is no regulation on whether the vote shall be public or secret and no regulation on the specific format and details to be included in the voting ballots. However, under the Model Charter, for listed companies, the voting ballots shall include the number of registrations, full name of the shareholder, full name of the authorized representative and the number of votes of such shareholder.[112] This means that, for listed companies, voting shall be public except when holders of shares of a class or their authorized representatives request a secret ballot to pass a resolution on change or waiver of special rights attached to such class.[113]

Information recommended to be included in the voting ballots is summarized in Table 5.

110 LOE, Article 103, Clause 6 and Model Charter, Article 19, Clause 3.

111 LOE, Article 103, Clause 1 and Model Charter, Article 19, Clause 2.

112 Model Charter, Article 19, Clause 2.

113 Model Charter, Article 16, Clause 2.

Table 5: Information That Must or Should Be Included on the Voting Ballot
1. The full name and location of the company
2. The form of the GMS
3. The date, place and time of the GMS
4. Issues to be voted on in the order given in the agenda
5. Voting options "for", "against" or "abstained" on each issue
6. In the case of the appointment of Board of Directors or Supervisory Board members, the name of each candidate
7. Deadline prior to which completed ballots must be sent to the company (if they have to be sent to the company)
8. The mailing address to which completed ballots must be sent (if they have to be sent to the company)
9. The instruction that the ballot must be signed by the shareholder, unless the voting ballots are used as a method of secret voting
10. An explanation of cumulative voting with the following text: "When Board of Directors members are elected with cumulative voting, the shareholder may cast all his/her votes for one candidate or for several candidates"
11. The ballot must have a designated area where shareholders must insert the number of votes they cast for each candidate
12. The ballot must show the number of votes each shareholder may cast to decide on each decision based on information from the shareholder list
13. Instructions on how to complete the ballot
14. The instruction that an individual who completes the ballot on behalf of a shareholder that is a legal entity must indicate his/her name and position and the full name of the legal entity which he/she represents
15. The instruction that a copy of the power of attorney must be attached to the ballot, and that the representative of the shareholder must sign the voting ballot (if the voting is by proxy).

A ballot is valid if a shareholder marks only one of the possible options for a particular item. A failure to do so invalidates the ballot with regard to that item. Improperly completed voting ballots with respect to one or more items do not cause the voting ballot to be invalid for other agenda items.

Best Practices:

The procedure for counting votes should be transparent. To avoid any perception that the voting results have been manipulated, the Voting Committee should be independently monitored when counting votes. The charter and other internal regulations should provide for such monitoring and, additionally, define the authority of those persons appointed to monitor the counting process.

10. Counting and Documenting Votes

The votes which agree with the resolution shall be collected first, thereafter the votes which do not agree with the resolution shall be collected, and finally the overall number of votes which agree and do not agree with the resolution shall be counted for a final decision.[114]

Comparative Practices:

The Voting Committee must summarize voting results in its minutes. The Voting Committee minutes should contain specific information. All Voting Committee members must sign the minutes of the voting results.

➔ *See Section C.15 of this Chapter.*

11. Announcing the Voting Results and Decisions

For public, non-listed companies, the voting results shall be announced by the GMS Chairman before the meeting is closed.[115] For a listed company, the overall numbers of votes which agree, do not agree and abstentions shall be announced immediately after an issue is voted on.[116]

114 LOE, Article 103, Clause 5 and Model Charter, Article 19, Clause 2

115 LOE, Article 103, Clause 5.

116 Model Charter, Article 19, Clause 2

12. Closing the General Meeting of Shareholders

The GMS Chairman closes the GMS when:

- All agenda items have been discussed and voted upon
- The voting results have been announced.

Best Practices:

The company should close the GMS on the same day to avoid unnecessary expenses for shareholders. If the GMS cannot be completed within one day, the company should continue the meeting on the next day.

13. Archiving Voting Ballots

After the GMS, the Voting Committee must ensure that the voting ballots and written voting instructions are sealed and transferred to the archives.

14. Preparing the General Meeting of Shareholders Minutes

The minutes of the GMS must be completed and approved before closing the meeting.[117] The GMS Chairman and the secretary shall be jointly responsible for the honesty and accuracy of the minutes.[118] The minutes of the GMS shall be sent to all shareholders within 15 days from the closing of the meeting.[119] The GMS Chairman and the GMS secretary must sign the minutes of the meeting.[120]

Best Practices:

The GMS should appoint two shareholders to verify the minutes. These two shareholders should also sign the minutes.

117 LOE, Article 106, Clause 2.
118 LOE, Article 106, Clause 3.
119 LOE, Article 106, Clause 3.
120 LOE, Article 106, Clause 1k.

➔ *For more information on the information that must be contained in the GMS minutes, see Section C.15 of this Chapter.*

The GMS minutes are inserted in the minute book. The company must provide a copy of the GMS minutes to shareholders upon request. Shareholders may be asked to reimburse the company for reasonable copying costs.

The GMS minutes can be in Vietnamese or a foreign language with equal value and must include specific information.[121] For listed companies, it is required that the minutes be prepared in Vietnamese.[122]

The following documents must be attached to the GMS minutes:[123]

- List of shareholders registration
- Documents approved and decisions adopted by the GMS
- All materials attached with the meeting invitation.

For listed companies, it is required that the written authorization letter to attend the GMS be archived at the head office of the company together with the GMS minutes.[124]

15. Documents of the General Meeting of Shareholders

Table 6 presents a summary of information that must be included in the GMS minutes and information that is recommended to be included in the minutes on the voting results.

121 LOE, Article 106, Clause 1.
122 Model Charter, Article 22.
123 LOE, Article 106, Clause 3.
124 Model Charter, Article 22.

Table 6: Information Related to the Results of the GMS

Information	Must be Included in the GMS Minutes[125]	Recommended to be Included in the Minutes on the Voting Results
1. Full name and location of the company	✓	✓
2. GMS address, i.e. location where it was held	✓	✓
3. Date of the GMS	✓	✓
4. Number of votes cast on each agenda item	✓	✓
5. Number of votes on each agenda item and the required quorum	✓	✓
6. Agenda	✓	✓
7. Voting results (number of votes "for", "against", and "abstained" on each agenda item with a quorum)	✓	✓
8. Type of GMS (AGM or EGM)		✓
9. Time when registration of participants started and ended		✓
10. Number of votes on each agenda item that were not counted because they were invalid		✓
11. Method of voting	Recommended	✓
12. Names of Voting Committee members	Recommended	✓
13. Date of writing the Voting Committee minutes on the voting results of the GMS		✓
14. Name of the GMS Chairman and Secretary	✓	

125 LOE, Article 106, Clause 1.

15. Name of the two appointed shareholders (verifiers of the minutes)	recommended	
16. Text of approved decisions	✓	
17. Summary of speeches and discussions	✓	
18. Time when the GMS was opened and closed	Recommended	
19. Time when the calculation of votes started, if the decisions approved by the GMS and the voting results were announced during the meeting	Recommended	✓
20. Mailing address of the company to which the completed voting ballots were submitted by shareholders, if the company distributed ballots prior to the GMS	Recommended	
21. Date when the GMS minutes were prepared	Recommended	

D. An Overview of the Extraordinary General Meeting of Shareholders

An EGM may be convened for the company to make important decisions between two AGMs. The organization of an EGM is mostly the same as the procedure for preparing and conducting the GMS explained in Parts B and C. The particularities in the organization of an EGM are the focus of this section.

1. When to Conduct an Extraordinary General Meeting of Shareholders

An EGM may be called under a number of different circumstances:

a) When Required by Law

The Board of Directors is required by law to conduct an EGM when the number of members of the Board of Directors is less than the number of members required by law or less than half of the number of members required by the charter.[126]

For listed companies, it is also required by law that the Board of Directors conducts an EGM when the annual balance sheet, six-monthly or quarterly statements or audited reports of a financial year reflect that half of the charter capital has been lost.[127]

b) When Requested by Certain Corporate Bodies or Persons

A number of parties have the right to request an EGM, including:[128]

- The Board of Directors
- The Supervisory Board

126 LOE, Article 97, Clause 3b and Model Charter, Article 13, Clause 3c.

127 Model Charter, Article 13, Clause 3b.

128 LOE, Article 97, Clause 3 and Model Charter, Article 13, Clause 3.

- A shareholder or a group of shareholders owning at least 5% (for listed companies) or 10% (for public companies) of total common shares for a consecutive period of six months.

The power to request an EGM is an important shareholder right. Though rarely exercised in practice, it allows the controlling bodies of the company to convene an EGM when they deem it necessary and appropriate.

2. Preparatory Procedures

Under the Law on Enterprises and the Model Charter, there is no difference in preparing and conducting the EGM and AGM except for the timing of the meeting.

a) Initiating Preparation

The Board of Directors initiates preparations if required by the Law on Enterprises or at its own discretion.

It is stipulated that the Board of Directors must convene the EGM within 30 days from the date of the arising circumstances as required by law, or from the date of receipt of the request.[129] If the Board of Directors fails to convene the meeting within this time period, the Supervisory Board shall convene the meeting within the following 30 days. [130] If the meeting is still not convened, the shareholder or group of shareholders making the request shall have the right to convene the meeting within the following 30 days. In this case, the shareholder or group of shareholders may request the business registrar to supervise the convening and conduct of the meeting if they consider it necessary.[131]

If the Board of Directors or the Supervisory Board fails to convene the meeting, the Chairman of the Board of Directors and the head of the Supervisory Board shall be responsible to law and to compensate damages and losses caused to the company.[132]

The Board of Directors has the right to reject the request when:

- The request to conduct the EGM is inconsistent with the requirements of the Law on Enterprises

129 LOE, Article 97, Clause 4 and Model Charter, Article 13, Clause 4a.
130 LOE, Article 97, Clause 5 and Model Charter, Article 13, Clause 4b.
131 LOE, Article 97, Clause 6 and Model Charter, Article 13, Clause 4c.
132 LOE, Article 97, Clauses 4 & 5.

- A shareholder (or a group of shareholders) do not own or do not represent the required percentage of votes (at least 5% of shares giving them the right to vote on the issue put before the EGM for a consecutive period of six months)
- The proposed agenda items do not fall within the authority of the EGM.

Comparative Practices:

Rejection may be appealed to the courts. The court should be obliged to render a decision, in extra-judiciary proceedings within a regulated period of time from receipt of the request.

All expenses arising from the convocation and process of the GMS as mentioned above shall be reimbursed by the company.[123]

b) Drafting the Agenda

The convenors of the EGM shall draft the EGM agenda.[134]

A shareholder or shareholders having at least 5% (for listed companies) or 10% (for public, non-listed companies) of voting shares for a consecutive period of six months shall be entitled to make proposal as to matters to be included in the meeting agenda.[135] The proposal has to be made in writing and forwarded to the company no later than three working days prior to the opening date of such meeting.

Best Practices:

The agenda may contain different items, including the election of directors. However, in the event that the number of directors becomes less than the quorum as specified by the charter, the EGM agenda may only include a single item, that is to elect the new Board of Directors. For another mandatory EGM, the agenda may include additional items.

133 LOE, Article 97, Clause 8.

134 LOE, Article 97, Clause 7.

135 LOE, Article 99, Clause 2 and Model Charter, Article 17, Clause 4.

c) Specific Requirements Depending on the Agenda Item

In Vietnam, all time periods for procedural steps in connection with the EGM convocation are equal. The specific agenda issue does not change this rule.

Comparative Practices:

Different time periods can exist for different procedural steps, depending on whether the election of Board of Directors members, which must be conducted by cumulative voting, is on the agenda. Time periods are longer in case of cumulative voting. These differences are connected with the following procedural steps:

- Maximum period between the decision to conduct a mandatory EGM and the meeting
- Maximum period between the request to conduct a voluntary EGM and the meeting
- The record date
- The notification of shareholders.

3. Conducting the Extraordinary General Meeting of Shareholders by Written Consent

The Board of Directors shall have the right to collect written opinions in order to pass a GMS resolution at any time, if considered necessary in the interests of the company.[136]

An EGM held by written consent may decide all issues that fall within the GMS' authority except for the following which must be voted during physical sessions of the GMS:[137]

- Supplements and amendments to the company charter
- Approval of the company's development directions
- Decision of share types and the total authorized shares of each type
- Election and dismissal of Board of Directors and the Supervisory Board members

136 LOE, Article 105, Clause 1 and Model Charter, Article 21, Clause 1.

137 LOE, Article 104, Clause 2.

- Decisions on the investment and sales of property with the value equal to or more than 50% of the total property value as stated in the company's most recent financial statements unless otherwise stipulated by the company's charter
- Approval of the annual financial report
- Reorganization or liquidation of the company.

The procedures for conducting the EGM by written consent are as follows:[138]

The Board of Directors must prepare written opinion forms, a draft of the GMS resolution and other documents explaining the draft resolution. The written opinion form together with the draft resolution and documents explaining it must be sent by registered mail to the permanent address of each shareholder.

The written opinion form must contain the following basic particulars:

- Name, head office address, number and date of issuance of the business registration certificate and place of business registration of the company
- Purpose of collecting written opinions
- Full name, permanent address, nationality and the numbers of the people's identity cards or passports or other lawful personal identification, business registration number, number of shares of each class and number of votes of the shareholder
- Issue on which it is necessary to obtain opinions in order to pass a resolution
- Voting options comprising agreement, non agreement, or no opinion [abstention]
- Time-limit within which the completed written opinion form must be returned to the company
- Full name and signature of the Chairman of the Board of Directors and of the legal representative of the company.

138 LOE, Article 105 and Model Charter, Article 21.

Any completed written opinion form must bear the signature of a shareholder or of the authorized representative or of the legal representative of a shareholder being an organization.

Written opinion forms which are returned to the company must be placed in a sealed envelope and no one shall be permitted to open the envelope prior to counting of the votes. Any completed written form which is returned to the company after the expiry of the time-limit stipulated in the written opinion form, or any form which has been opened, shall be invalid.

The Board of Directors shall conduct counting of the votes and shall prepare minutes of the counting of the votes in the presence of the Supervisory Board or of a shareholder who does not hold a managerial position in the company. The minutes of counting of votes shall contain the following basic particulars:

- Name, head office address, number and date of issuance of the business registration certificate and place of business registration of the company
- Purpose of collection of written opinions and issues on which it is necessary to obtain written opinions in order to pass a resolution
- Number of shareholders with total numbers of votes who have participated in the voting, classifying the votes into valid and invalid, and including an appendix being a list of the shareholders who participated in the voting
- Total number of votes for, against and abstentions on each matter voted upon
- Resolutions which have been passed
- Full name and signature of the Chairman of the Board of Directors, of the legal representative of the company and of the person who supervised the counting of votes.

The Board of Directors members and the person who supervised the vote counting shall be jointly liable for the truthfulness and accuracy of the vote counting minutes and shall be jointly liable for any loss arising from a resolution which is passed due to an untruthful or inaccurate counting of votes.

The minutes of the vote counting results must be sent to the shareholders within 15 days as from the date the counting of votes ended.

Written opinion forms which were returned, the minutes of counting of votes, the full text of the resolution which was passed and related documents sent with all of the written opinion forms must be archived at the head office of the company.

A resolution which is passed by the form of collecting written opinions of shareholders shall have the same validity as a resolution passed by the GMS.

E. Decisions of the General Meeting of Shareholders

It is important to follow procedures for preparing and conducting the GMS to ensure the validity and lawfulness of decisions reached by this governing body. However, resolutions approved during GMS sessions by shareholders and their authorized representatives representing 100% of the voting shares shall be lawful and take immediate effect even in the case where the order and procedures of convention, the meeting agenda and the conducting procedures are not in accordance with regulations.[139]

1. Decisions Requiring a Simple Majority Vote

Under the Law on Enterprises and the Model Charter, all decisions of the GMS must be approved by a supermajority vote of participating shareholders.

Comparative Practices:

In some countries such as Serbia, most GMS decisions can be approved by a simple majority vote of participating shareholders.

2. Decisions Requiring a Supermajority Vote

All resolutions of the GMS shall require approval by no less than 65% of total votes of participating shareholders,[140] except vital resolutions which require at least 75% of the total vote.

Resolutions of the GMS that require approval of at least 75% of total votes of participating shareholders include:[141]

139 LOE, Article 104, Clause 4.

140 LOE, Article 104, Clause 3a and Model Charter, Article 20, Clause 1.

141 LOE, Article 104, Clause 3b and Model Charter, Article 20, Clause 2.

- The amendment of and addition to the company charter
- Classes of shares and number of shares offered for sale
- Merger, re-organization and dissolution of the company
- Sale of assets of the company or its branches or purchase of assets by the company or its branches valued at 50% or more of the total value of assets of the company and its branches determined on the basis of the most recent audited accounting books.

In the case where a GMS resolution is approved by collecting written opinions, such a resolution shall be passed if approved by no less than 75% of the total votes or otherwise stipulated in the company charter.[142]

For listed companies, a GMS resolution on the change or waiver of special rights attached to a class of shares shall be passed only when the written consent of the holders of at least 75% of the voting rights of the issued shares of such class is obtained.[143]

3. Decisions Requiring a Unanimous Vote

Under the Law on Enterprises, unanimous voting is required when evaluating the capital contributions of shareholders, at the time of incorporation.[144]

For listed companies, the issue of other classes of securities must be passed through by the GMS with unanimous approval in writing in accordance with the law on securities and the securities market.[145]

4. Appealing Decisions

Under certain circumstances, GMS decisions may be appealed to (and potentially invalidated by) the courts. Decisions may be appealed when legal and/or charter requirements have not been met. GMS decisions may be appealed by:[146]

142 LOE, Article 104, Clause 5.
143 Model Charter, Article 16, Clause 1.
144 LOE, Article 30, Clause 2.
145 Model Charter, Article 5, Clause 8.
146 LOE, Article 107.

- A shareholder (or a group of shareholders)
- Any member of the Board of Directors
- Any member of the Supervisory Board
- The (General) Director.

Decisions by the GMS may be appealed in the following cases:

- Order and procedures of the convocation of the concerned GMS session fail to comply with stipulation in the Law on Enterprises and the company's charter
- Such resolution of the GMS contains one or more contents in breach of laws or the company's charter.

A GMS decision may be appealed within 90 days from the date of receipt of the GMS minutes or minutes of the vote counting results being written opinions from the GMS.[147]

Under the prevailing laws, there is no specific rule on whether the court may leave the contested decision intact or be revoked

Comparative Practices:

Any of the following violations are significant enough to revoke a decision taken by the GMS:

- Failure to provide timely notice of the GMS to all shareholders
- Depriving a shareholder the opportunity to familiarize him/herself with materials for the GMS
- The GMS lacked a quorum
- The decision has been approved in violation of the GMS' authority
- The issue in question was not included in the agenda.

The court may leave the contested decision intact when the:

- Violation of the charter or internal regulations requirements results in the minor infringement of a claimant's rights or some other person or if such a violation has no substantial legal consequences
- Contestation substantially restricts the rights of third parties acquired in good faith
- The grounds for contesting the GMS decision were contrary to law, charter or internal regulations, remedied in conformity with the law.

147 LOE, Article 107 and Model Charter, Article 23.

NOTES

NOTES

9

Chapter

CORPORATE GOVERNANCE IMPLICATIONS OF THE CHARTER CAPITAL

9 | Corporate Governance Implications of the Charter Capital

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The Chairman's Checklist

- ☑ Has the founding GMS established whether shares have been subscribed and paid in properly and whether the contributions in kind have been brought in conformity with the law? Whether the founding GMS has decided that the company's founders have paid their initial contributions and that in-kind contributions have been properly valued?
- ☑ Does the Board of Directors understand the financial needs of the company and the different techniques of corporate finance? Is the Board of Directors authorized to increase the charter capital? Is the Board of Directors careful not to dilute the ownership of shareholders when deciding to restrict or preclude pre-emptive rights of shareholders?
- ☑ Are capital increases justified?
- ☑ Does the Board of Directors ensure that the charter capital and consequently the creditors are adequately protected in cases of charter capital decreases? Does the Board of Directors make decisions regarding the buyback of company shares? Has the Board of Directors ensured that all shareholders who submit their shares are treated equitably?
- ☑ How does the Board of Directors ensure that the reserve fund is utilized in the best interests of the company? What other funds has the company established?

The Law on Enterprises and other related regulations attach certain protective functions to charter capital, protecting shareholders from dilution and providing a minimum guarantee that obligations toward company creditors will be fulfilled. Although the charter capital *per se* cannot fulfil that role, it is still considered one of the elements guaranteeing the interests of creditors. Regarding shareholders, the charter capital plays an important role since many

shareholder rights are directly linked to the size of their investment in the charter capital.

Charter capital has a legal, rather than economic meaning. It only exists in accounting terms, as fixed in the balance sheet. For this reason, its protective function is often criticized as a formality. Regardless, it is a legal requirement when establishing and operating a company. Legislation provides for certain rules that govern both increases and decreases in the charter capital. In addition, there are other procedural guarantees of shareholder and creditor rights, such as the buyback by the company of its own shares, the redemption of shares, reciprocal shareholdings and the maintenance of statutory reserves, all of which are discussed in this chapter.

A. General Provisions Related to the Charter Capital

The charter capital is an important element of the legal definition of a joint stock company, which is defined as a commercial entity, whose charter capital is determined and divided into a specified number of shares, certifying the company shareholders' rights in relation to the company. The charter capital has important legal implications for:

- Determining the minimum amount of a shareholder's liability
- Determining shareholder rights in relation to their proportionate share in the charter capital
- Offering support to protect creditor rights by setting the minimum amount of assets a company must have. This is one of the legal instruments upon which creditors can rely when seeking to ensure that the company will fulfil its contractual obligations.

1. The Definition of Charter Capital

The charter capital is defined as the amount of capital that is contributed or committed within a specific period by all shareholders and is recorded in the company's charter.[1] For a joint stock company, the charter capital is divided into several equal proportions being called shares.[2] Only shares that have been issued comprise the charter capital. This includes treasury shares, i.e. shares repurchased by the company for re-sale or for retirement that are issued but not outstanding. Bonds and other credit instruments are not part of the charter capital.

2. Legal Capital or Minimum Charter Capital

Legal capital means the minimum level of capital as stipulated by law to establish a company.[3] In Vietnam, the legal capital is regulated separately for each kind

1 LOE, Article 4, Clause 6.
2 LOE, Article 77, Clause 1a.
3 LOE, Article 4, Clause 7.

of business and industry by the Government under specialized legislation and is different among different industries. Not all kinds of businesses are required to have the minimum charter capital to be entitled to establish a company. Some kinds of businesses required to meet legal capital requirements are those in the banking, securities, insurance, travel and tourism, labor services and gold trading sectors. For these businesses, the business registration dossiers need to include the certification of the legal capital of the authorized state body in charge.[4] Companies doing business in industries that require legal capital need to maintain their charter capital at no less than this level of capital during their operations.

The legal capital requirement is to protect the benefits of consumers and creditors of companies operating in an industry.

3. Charter Capital and Authorized Shares

Authorized shares are the maximum number of shares that a company can issue. This number is specified initially in the company's charter, but it can be changed with shareholder approval. Authorized shares are defined as the total shares that the GMS decides to issue to raise additional capital. The authorized shares at the time of business registration are the total shares subscribed by founding shareholders and other common shareholders at the time of business registration and shares that shall be issued within three years since the date of the business registration license and are recorded in the company charter.[5]

The company is not required to issue all shares it has authorized. Generally a much greater number of shares are authorized than required, to give the company flexibility to issue more shares as needed. If the company chooses not to issue authorized shares, these shares are referred to as authorized, but not issued.

Only those shares that are issued and fully paid constitute the charter capital. However, according to the Law on Enterprises, the charter capital is defined as the amount of capital that is contributed or committed within a specific period by all shareholders and is recorded in the company's charter.[6] Decree 102 regulates that the charter capital of a joint stock company is the

4 Decree 102, Article 10, Clause 3.

5 Decree 102, Article 6, Clause 5.

6 LOE, Article 4, Clause 6.

total nominal value of shares that have been issued. Shares issued are shares that have been fully paid. However, this Decree also states that the company's charter capital at the time of business registration is the total par value of shares subscribed by founding shareholders and other shareholders and is recorded in the company charter; these shares must be paid in full within 90 days since the date of the business registration.[7] This helps companies to disclose a huge amount of charter capital in its business registration license, while the paid in capital may be very small. This may lead to a misunderstanding of the company's financial capability.

The total authorized capital that a company sets forth in its charter is based upon the amount of money that the company requires at its establishment for further financial development. In addition, this decision is conditioned by the percentage of dilution its founders are willing to accept in the future.

During its business operation, the company may decide to issue additional shares to increase the charter capital. One of the purposes of authorized shares is to avoid costly and time-consuming GMS organization procedures every time the company seeks additional capital. However, in Vietnam, this is only true for a non-listed company when the Board of Directors is given the authority to decide the issue of new shares limited to the number of shares authorized to offer for each type.[8] For listed companies, the Model Charter requires that the GMS approve classes of shares and number of new shares to be issued for each class of shares.[9]

Best Practices:

Good corporate governance practices stipulate that the charter should authorize the Board of Directors to increase the charter capital by issuing authorized shares. When doing so, the charter should include the following information:

- Maximum number of authorized shares. In general, the maximum amount must not exceed 50% of the charter capital at the moment of the authorization for the Board of Directors to issue authorized shares.
- Types and classes of authorized shares
- Form of payment for additionally issued shares.

7 Decree 102, Article 6, Clause 4.

8 LOE, Article 108, Clause 2c.

9 Model Charter, Article 14, Clause 2h.

4. Full Payment for Shares

Founding shareholders shall subscribe together at least 20% of the total common shares issued by the company. Shares issued and subscribed during the establishment of the company must be paid in full within 90 days since the issuance date of the business license.[10]

If any founding shareholder does not pay in full for his/her subscribed shares, the uncontributed shares shall be resolved by one of the following methods:[11]

- All of the other founding shareholders will buy the unpaid subscribed shares corresponding to their share proportion owned in the company
- One or a number of founding shareholders agree to fully contribute the unpaid shares
- Call for other persons who are not shareholders to contribute the unpaid shares and that person shall become the founding shareholders of the company.

When all subscribed shares of all founding shareholders are not paid in full, all founding shareholders shall jointly responsible for all the debts and other obligations of the company to the extent of the value of the unpaid shares.

For other cases, the Law on Enterprises stipulates that shares of the company must be paid in full in lump sum.[12]

For listed companies, the Model Charter stipulates that where a shareholder fails to pay in full and on time the committed amount to purchase shares, the Board of Directors shall notify and have the right to request such shareholder to pay the unpaid amount together with interest on such sum, plus costs arising from failure to pay in full to the company within a specified period of time (at least seven days from the date on which the announcement is sent). If the shareholders still do not pay for the shares purchased within this time period, the Board of Directors shall have the right to withdraw the relevant number of shares before all amounts payable including interest and relevant costs are paid for in full. Any withdrawn shares shall be the assets of

10 LOE, Article 84, Clause 1.
11 LOE, Article 84, Clause 3.
12 LOE, Article 89.

the company. The Board of Directors may directly sell or authorize to sell or re-distribute such shares to, or resolve them in favor of, the individuals who owned such withdrawn shares or to other entities, on conditions and in the manner the Board of Directors considers appropriate.[13]

Shareholders holding withdrawn shares shall be required to waive their shareholdership status with respect to such shares, but shall still be required to pay all relevant amounts plus proportional interest at the rate stipulated at the time of withdrawal, from the date of withdrawal up to the date of payment, in accordance with a Board of Directors decision. The Board of Directors shall have full power to make a decision on enforcement of payment of amounts payable as at the time of withdrawal, or may make a decision on remission of part or all of such amounts.[14]

Comparative Practices:

Penalties or obligations in cases of non-payment or failure to pay in full should be stipulated in the company's charter or shareholder agreement.

5. Contributions to the Charter Capital

In general, shares issued during the establishment of the company and in the course of business can be paid in Vietnamese Dong, freely convertible foreign currency or contributions in-kind, including gold, land use rights, intellectual property rights, technology and technical know-how and other types of assets as stated in the company's charter.[15] In-kind contributions are, however, subject to certain rules. In-kind contributions upon the establishment of the company shall be appraised by founding shareholders under unanimous principles. If the value of assets is appraised higher than their actual value at the time of capital contribution, shareholders shall jointly assume their liability with respect to the company's debts and other obligations by the difference

13 Model Charter, Article 9.

14 Model Charter, Article 9, Clause 5.

15 LOE, Article 4, Clause 4.

between the value determined and the actual value of the assets at the time the valuation is completed.[16]

The assets used for capital contributions during the course of business need to be evaluated either as agreed upon between the company and the contributors or by a professional appraiser, in which case, the value of the assets should be accepted by both the company and the contributors. If the value of assets is appraised higher than their actual value at the time of capital contribution, the contributors or the appraiser and the legal representative of the company shall jointly assume their liability with respect to the company's debts and other obligations by the difference between the value determined and the actual value of the assets at the time the valuation is completed.[17] For a listed company, valuation of in-kind assets contributed to the company must be approved by the Board of Directors.[18]

Best Practices:

Any individual (or a legal entity) needs a license to be an Independent Appraiser. An Independent Appraiser cannot be a founder, an owner, shareholder, employee, contractor, or any other person affiliated with the company.

A company should use a licensed Independent Appraiser to determine the market value of property, value debts and assess liabilities. An Independent Appraiser can also play an important role in assisting management and shareholders during the company reorganization.

It is a good comparative corporate practice to insure an Independent Appraiser against civil liability.

16 LOE, Article 30, Clause 2.

17 LOE, Article 30, Clause 3.

18 Model Charter, Article 25, Clause 4h.

B. Increasing the Charter Capital

A number of different factors, such as market conditions, reorganizations, development programs and growth, may necessitate an increase in charter capital. The charter capital can be increased from:

- Utilizing external sources, such as when the company attracts financial resources from existing shareholders or third parties
- From internal sources when the company uses its own funds to capitalize its internal reserves.

As discussed further in this subchapter, the most important questions when considering increasing the charter capital will be evaluated mostly from the public companies' point of view. In that respect, these questions will be observed through relevant legislature that regulates the organization and operation of companies, as well as the securities market.

1. Methods of Increasing the Charter Capital

Increases in charter capital are regulated under Circular 19/2003/TT-BTC dated 20 March 2003 by the MOF giving guidance on the increase and reduction of charter capital and management of treasury shares in joint stock companies ("Circular 19"). This circular is still in effect although the current Law on Enterprises was issued later in 2005 and there are some opinions on whether this circular is in accordance with the new regulations in the Law on Enterprises. The MOF is now drafting the new circular on the increase and reduction of the charter capital and is receiving opinions from organizations, experts and companies to improve it before officially issued for implementation. Therefore, companies in Vietnam are still following Circular 19 for the increase or reduction of a company's charter capital.

Under this circular, the Board of Directors has to prepare plans on increasing the charter capital and then submit to the GMS for approval.

Also according to this circular, the charter capital of a company shall be increased in the following cases:[19]

19 Circular 19, Section II, Part A, Article 1.

- Issuance of new shares to mobilize capital, including the restructuring of the company's debts by ways of converting the debts into shares as agreed between the company and the creditors
- Conversion of issued convertible bonds into shares
- Payment of dividends in the form of shares
- Issuance of new shares for merging part or whole of another enterprise into the company
- Increase charter capital out of a capital surplus.

Regarding the conversion of issued convertible bonds into shares, the increase of charter capital shall be affected only when the conditions for converting bonds into shares as prescribed by law and stated in the plan on issuance of convertible bonds are fully met.

In general, the increase in the charter capital can be conducted under three methods as follows:

1) A capital increase against contribution
2) A conditional capital increase
3) A capital increase out of a capital surplus, retained earnings and other funds available from internal sources.

Technically, every method of increasing the charter capital can be done by issuance of additional shares. In many countries, companies can increase their charter capital by issuing shares with a higher nominal value.

All methods to increase the charter capital are summarized in Table 1.

Table 1: Increasing the Charter Capital

	Capital Increase Against Contributions	Conditional Capital Increase	Capital Increase out of a Capital Surplus, Retained Earnings and Other Funds
Source	External	External	Internal
Contributors	Shareholders and third parties	The owners of convertible bonds	The company (using funds available from internal sources as defined by legislation)
Purpose	To attract additional funding. It will, however, dilute the holdings of existing shareholders if they are unwilling/unable to make use of their pre-emptive rights	To allow owners of convertible bonds to use their rights of conversion into shares	To increase the company's equity and to decrease the company's funds and reserves available for distribution
Recipients	Existing shareholders and third parties	The owners of convertible bonds	Only existing shareholders
Changing the Company's Ownership Structure	Possibly	Yes	No
Method of Capital Increase	Issue of additional shares	Issue of additional shares	Issue of additional shares
Method of Placement	Subscription (open or closed)	Conversion	Distribution
Approving Governing Bodies	The GMS, unless delegated to the Board of Directors	The GMS	The GMS
Pre-emptive Rights	Yes	No	No

2. Methods of Placement

There are three methods of placing shares:

1) Distribution among existing shareholders
2) Conversion of convertible bonds
3) Subscription by shareholders and third parties.

Under Circular 19, the new shares can be distributed to the company's creditors for the purpose of converting the debts into shares as agreed between the company and the creditors.

3. Internal Sources for Increasing the Charter Capital

Depending on the method chosen to increase the charter capital, the company can use the funds of shareholders and/or third parties. It can also choose to capitalize using its internal resources. The company may use the following internal resources for capitalization purposes:[20]

- The capital surplus
- Funds for investment and development
- Retained earnings
- Other reserve funds as defined by specialized law and regulation.

The right to gratis shares based on an increase in the share capital of a company from internal sources that are available for such purposes is reserved exclusively for company shareholders as of the date specified in the decision to issue new shares out of internal sources. The shareholder has that right in proportion to their shares in the existing company share capital.

Under Circular 19, there are some rules for the increase of charter capital out of a capital surplus. For a capital surplus from treasury shares, the company can use the whole surplus to increase the charter capital. For a surplus from newly issued shares for new investment projects, the surplus can be used to increase the charter capital only three years after the new project is put into use. For a surplus from newly issued shares for restructuring debts, the surplus can be used to increase the charter capital one year after the issuance.[21]

20 Circular 18, Part IV, Articles 1 & 2.

21 Circular 19, Section II, Part A, Article 2.

Public companies that wish to issue shares for payment of dividends to current shareholders to increase charter capital must have that issuance adopted by the GMS and have sufficient sources for issuance from after-tax profits which are reflected on their latest audited financial statements.[22]

Public companies that wish to issue bonus shares to current shareholders to increase charter capital must have that issuance adopted by the GMS and have sufficient sources for issuance from the internal resources.[23]

Companies are not allowed to use the increased fixed assets value due to self-revaluation of assets (without the State's policies) to increase the charter capital.[24]

The issuance of shares for payment of dividends or issuance of bonus shares must be supported by the GMS decision approving the issuance plan and the latest audited financial statements or other necessary documents proving lawful capital sources to be used for issuance of additional shares.[25]

4. Ownership Rights Protection When Increasing the Charter Capital

The company's ownership structure will likely change if the charter capital is increased from external sources. As previously mentioned, issuing additional shares results in the dilution of the ownership rights of existing shareholders. Therefore, the default rule is that the existing shareholders have pre-emptive rights to protect them from dilution.[26]

➔ *For a more detailed discussion on pre-emptive rights, see Chapter 7, Section B.5.*

When increasing the charter capital from internal sources, additional shares must be distributed to all owners of shares of each type and class. In addition, the number of new shares of each type and class that are distributed to each shareholder must be pro rated to the number of shares already held by him/her. Currently, in Vietnam, there is no specific regulation on the treatment of fractional shares. However, market practice is that the number of additional

22 Circular 18, Section IV, Article 1.
23 Circular 18, Section IV, Article 2.
24 Circular 19, Section II, Part A, Article 4.
25 Circular 18, Section IV, Article 3.
26 LOE, Article 79, Clause 1c and Model Charter, Article 5, Clause 6.

shares issued will be rounded down to a unit of share. The Board of Directors shall decide on how to treat the remaining shares due to rounding. Some companies may transfer the face value of those shares to fund for investment and development, some may repurchase those shares for treasury shares.

5. Procedural Guarantees for Increasing the Charter Capital

The Law on Enterprises and securities legislation provide detailed procedures that public companies must follow to increase charter capital. These procedures are aimed at guaranteeing that shareholder rights are protected. The SSC, by giving approval and registering share issues, plays an important role in overseeing the legality of the increase, thus enforcing proper corporate governance practices in such cases.

For joint stock banks, the increase in charter capital needs to be approved by the SBV. The process and procedures as well as the application dossiers for the approval of the change in joint stock banks' charter capital are regulated under Article 26 to Article 29, Section 2, Chapter III of Circular 06/2010/TT–NHNN dated 26 February 2010 giving guidance on matters related to the organization, management, charter capital, transferring of shares, amendment and supplement of the business license and charter of joint stock banks.

Under Decree 01/2010/ND-CP on private placement of shares (Decree 01) by the Government dated 4 January 2010, the private placement of shares shall be managed by the following State authorities:[27]

- SBV: in case the issuing organization is a credit institution
- MOF: in case the issuing organization is a joint stock insurance company.
- SSC: for other public companies (except for credit institutions and joint stock insurance companies).

At a company level, the GMS or the Board of Directors play the leading role in increasing the charter capital, depending on the method chosen and the authority for decision-making in the procedure for increasing the charter capital.

27 Decree 01, Article 6.

a) The GMS Makes the Decision to Increase Capital

The Law on Enterprises stipulates that the Board of Directors shall make a decision on the issuance of new shares within the number of authorized shares which have been approved by the GMS.

However, for public companies, it is required that the GMS approve the issuance of shares for payment of dividends and the issuance of bonus shares.[28] There is no specific regulation on the issuance of additional shares for capital increases against contributions.

For listed companies, shareholders' approval for the issuance of additional shares is needed. Under the Model Charter applicable to a company listed on the Stock Exchange, the GMS shall make a decision on classes of shares and number of new shares to be issued for each class of shares.[29] It is required that the Board of Directors propose the classes of shares which may be issued and the total number of shares of each class to be issued to the GMS.[30] A shareholder (or a group of shareholders) holding at least 5% of voting shares for a consecutive period of six months may propose the item for the agenda.[31]

➔ *For a more detailed discussion of shareholders right to amend the agenda, see Chapter 8, Section B.5.*

The decision to increase the charter capital of a joint stock company entails the making amendments to its charter. In Vietnam, in the GMS meeting minutes, the GMS often authorize the Board of Directors to amend the company charter regarding the article on charter capital to reflect the new charter capital increased from the issuance of additional shares.

b) The Board of Directors' Involvements in the Decisions to Increase Capital

In public companies, unless otherwise provided in the charter, the power to decide private placement of shares rests with the board. The current law is silent on the time and other limits imposed on the board in this case. Under the Law on Enterprises, the GMS shall decide the type and total amount

28 Circular 18, Section IV, Article 3.
29 Model Charter, Article 14, Clause 2h.
30 Model Charter, Article 25, Clause 3f.
31 Model Charter, Article 17, Clause 4.

of shares under each type the company is authorized to issue.[32] The Board of Directors shall decide the issue of new shares limited to the number of shares authorized to offer for each type and has the right to determine the raising of additional capital for the company through other means.[33] The Board of Directors has the right to decide the time, method and offer price of shares within the shares to be offered.[34] In general, the purpose of authorized shares is to enable the company to attract additional capital in an uncomplicated manner. Procedural requirements for increasing the charter capital by a GMS decision are cumbersome, time consuming and costly. This may make it harder for the company to attract financing quickly in a rapidly changing business environment. For this purpose, the Law on Enterprises permits companies to empower the Board of Directors to issue authorized shares against contributions. However, the Law on Securities limits this authority of the Board of Directors by allowing it to make decision on the issuance of new shares by ways of private placement only. A simple majority vote of directors participating in the Board of Directors meeting must approve the decision. In the event there is equality in the numbers of contradicting votes, the Chairman's decision shall be final.[35]

Best Practices:

The Board of Directors should conduct a meeting where directors are physically present to approve the decision to place shares. The Board of Directors may only approve the decision to place shares if the number of additional shares of each type and class to be issued does not exceed the total number of authorized shares of each type and class as set forth in the charter.

c) Information that Must Be Included in the Decision to Place Shares

The Law on Enterprises stipulates that the Board of Directors shall decide the time, method and offer prices of shares within the shares to be

32 LOE, Article 96, Clause 2b.
33 LOE, Article 108, Clause 2c.
34 LOE, Article 87, Clause 1.
35 LOE, Article 112, Clause 8.

offered. However, there is no requirement on what information needs to be included in the decision to place shares.

The public offering of shares shall need to be registered with the SSC which will then grant the company a public offering of shares certificate. For the registration of the public offering of shares, the issuing organization must submit the SSC with the following documents:[36]

- A written registration of public offering of shares
- A prospectus
- The issuing organization's charter
- The GMS decision adopting the issuance plan and the capital usage plan generated from the public offering of shares
- An issuance underwriting commitment (if any).

Public offering of shares registration dossiers must be accompanied with Boards of Directors' decisions approving those dossiers. For the public offering of credit institution securities those dossiers must be approved in writing by the SBV.[37]

Within seven days after a public offering of securities certificate becomes effective, the issuing organization shall publish an issuance announcement in an electronic or printed newspaper for three consecutive issues.[38]

36 LOS, Article 14, Clause 1.

37 LOS, Article 14, Clause 4.

38 LOS, Article 20, Clause 3.

Company Practices in Vietnam:

Practically in Vietnam, depending on the method of placement, the announcement to place shares shall include the information presented in Table 2.

Table 2: Information Included in the Announcement to Place Shares

Information	Subscription	Conversion	Distribution
The amount of increase	✓	✓	✓
The method of placement (subscription, conversion or distribution)	✓	✓	✓
Time of paying or contributing the consideration to the company	✓	✓	✓
Purpose of increasing the share capital			✓
Date of conversion		✓	
Record date for holders of convertible bonds who may exercise the rights of preferential subscriptions to shares		✓	
Rate of conversion		✓	
Record date for preparing the shareholders' list	✓		✓
To whom the shares are issued	✓		✓
Sources of the issuance	✓		
Distribution period	✓		✓
Price at which the shares are issued or methods by which it may be fixed for the purpose of allowing the shareholders to exercise their rights	✓		✓
Class of shares			✓
Time for transferring purchase rights			✓
Place for registration of buying shares, transferring purchasing rights and receiving prospectus			✓
Bank where account is opened for receiving money from shares issued.			✓

For the private placement of shares, issuing organizations have to register with State authorities as required at least 20 days before the placement date. In the share placement plan, it must be clearly stated those entitled to buying shares, the number of investors must be less than 100 and those shares shall not be entitled to be sold within one year from the completion of the placement.[39] In case shares are sold to strategic partners, criteria for determination and selection of strategic partners must be established.[40] The following documents shall need to be submitted to State authorities:[41]

- Report on private placement of shares
- The decision of the GMS or Board of Directors adopting the issuance plan and the plan on use of capital generated from the offering of shares
- Resolution of the GMS or Board of Directors or the delegation of authority by the GMS on approving the criteria for the strategic partners or employees
- The decision of the Board of Directors on the approval of the list of strategic partners or employees
- Materials for information disclosures on the private placement as required
- Other documents as required.

Materials for information disclosures on the private placement shall include:[42]

- Name, address of the company
- Industry
- Major goods and services
- Major assets
- List of parent companies and subsidiaries
- Business operation status and results before the private placement
- The company's position as compared with other companies in the same industry
- Some major information on the investment plan and development strategy

39 Decree 01, Article 8, Clause 3.
40 Decree 01, Article 8, Clause 2.
41 Decree 01, Article 9.
42 Decree 01, Appendix II.

- Information on the private placement:
  - o Type of share
  - o Par value
  - o Outstanding shares
  - o Number of shares intended for private placement
  - o Intended offering price
  - o Pricing method
  - o Distribution method
  - o Time of placement
  - o Registration for buying shares
  - o Plan for the use of money from the placement
  - o Limit on the holdings of foreign investors
  - o Other information on the limitation on the transfer of shares.

d) Issue of Shares for In-Kind Contributions

Shares of a joint stock company can be paid in either Vietnamese Dong, freely convertible foreign currencies, gold, value of land use rights, value of intellectual property rights, technology and know-how or other assets as stipulated in the company's charter.[43] Although the Law on Enterprises allows a company to issue shares for in-kind contributions, there is no specific regulation or guidance relating to procedures or the information to be included in the decision to place shares.

It is good practice that if the decision to place shares allows shareholders to pay for additional shares with other securities, or with other assets having monetary value, such a decision should include the:

- Detailed description of the in kind contribution
- Person from which they are to be acquired
- Number and nominal value (or accountable par in case of shares without nominal value) of shares which are to be acquired by such contribution.

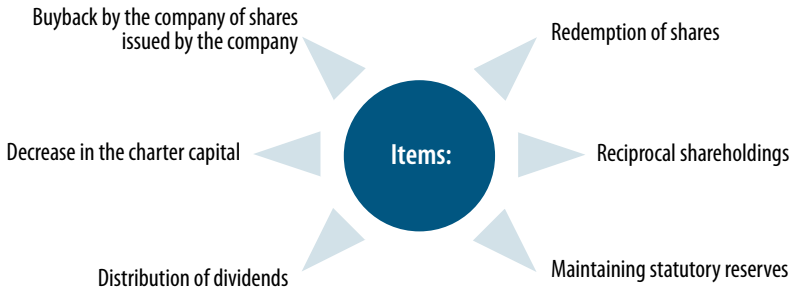
43 LOE, Article 89.

C. Protecting the Charter Capital

One of the purposes of the charter capital is to provide a minimum guarantee that the company will fulfil its obligations toward creditors. However, this function will only exist in theory if it is not linked to preserving a minimum level of company assets. The company has to send a notice of the decision to reduce the company's charter capital to the authorized business registration body. The company has to commit that it will make payments to all debts and other obligations after the reduction of the charter capital.[44] Where the company operates in an industry that requires legal capital, the company can only register to reduce the charter capital if the registered capital after reduction is not lower than the applicable legal capital.[45]

There are other actions that may, in one way or another, affect the charter capital and net assets. Such actions and mechanisms, which protect against the distribution of the company's assets to shareholders or other parties to the detriment of creditors, are listed in Figure 1.

Figure 1: Protection of the Charter Capital



Source: IFC, March 2004.

44 Decree 43, Chapter V, Article 31, Clause 1.

45 Decree 43, Chapter V, Article 40, Clause 3.

1. Overview of Decreasing the Charter Capital

The question of decreasing the charter capital is of great importance because of the potential for abuse in practice, because it can be used as a tool to create returns for shareholders without paying dividends. A decrease in the charter capital can favor some shareholders at the expense of others. It is essential to ensure the equitable treatment of all shareholders. This holds particularly true if the company has several classes of shareholders with different rights or holders of other securities. At the same time, a decrease in the charter capital reduces the level of shareholders' liability and the minimum amount of assets intended to serve as a guarantee that the company will fulfil its obligations toward creditors.

Thus, any decrease in the charter capital can be:

- **Real** when it involves a share buyback from shareholders; or
- **Nominal** when the charter capital is decreased by writing off losses, intended to reorganize the company's financial position, or when the charter capital is transformed into reserves that can be used for future distribution.

a) Methods of Decreasing the Charter Capital

The charter capital of joint stock companies shall be reduced in the following cases:

- Reduction of charter capital upon the lessening of the companies' capital demands due to changes in their business lines and trades or their down-sized reorganization.[46]
- Mandatory cancellation of their treasury shares.[47]
- Reduction of charter capital after companies have conducted business operations at a loss for three consecutive years and suffer an accumulative loss equal to 50% or more of shareholders' capital, but they have not yet lost their capability to repay due debts.[48]

46 Circular 19, Section II, Part B, Article 1.
47 Circular 19, Section II, Part B, Article 1.
48 Circular 19, Section II, Part B, Article 2.

The charter capital can be decreased using the following methods:[49]

- The company shall purchase and cancel a number of treasury stocks with par value equal to the amount of capital planned to be reduced as approved by the GMS, or the company cancels the treasury shares which must be cancelled. By this mode, companies shall not have to return money to their shareholders.
- Companies shall withdraw and cancel a quantity of shares from shareholders with a total par value equal to the amount of capital reduced. By this mode, the company shall buy back a number of shares from each shareholder in accordance with his/her equity proportion in the company. The company shall have to pay their shareholders an amount of money equal to the number of shares withdrawn times the par value of shares.
- Reducing the nominal value of shares without changing the number of shares. By this mode, the company shall withdraw shares from shareholders and issue new shares with reduced par value. The company shall have to pay to their shareholders an amount of money equal to the number of shares of each shareholder times the difference between old and new par values.
- Combination of the above methods based on the actual situation, joint stock companies may apply the above-mentioned methods in combination in reducing the charter capital.

For listed companies, in case a shareholder does not pay the full amount of shares purchased on time, these shares can be withdrawn under the request of the Board of Directors.[50] Any withdrawn shares shall be assets of the company. The Board of Directors may directly sell or authorize to sell or re-distribute such shares to, or resolve them in favor of, the individuals who owned such withdrawn shares or to other entities, on conditions and in the manner the Board of Directors considers appropriate.[51] It is not clear whether the Board of Directors can decide not to issue those shares.

49 Circular 19, Section II, Part B, Article 1.

50 Model Charter, Article 9, Clause 3.

51 Model Charter, Article 9, Clause 4.

b) Mandatory and Voluntary Decreases of the Charter Capital

A decrease in the charter capital is required by legislation where the companies have purchased treasury shares, but not used them for three years and the capital contributed by their shareholders is smaller than the charter capital. In this case, they shall have to cancel treasury shares and at the same time reduce their charter capital.[52]

In all other cases, decreasing the charter capital is voluntary.

c) Procedures for Decreasing the Charter Capital

It is regulated by the MPI regarding the registration of amendment of charter capital that the company has to send a notice to the MPI. Together with this notice are the written decision and the meeting minutes of the GMS on the amendment of the charter capital.[53] However, under the Law on Enterprises and Decree 139 giving guidance on the implementation of some articles of the Law on Enterprises, there is no regulation or guidance on the procedures in case the company decide to decrease the charter capital. In fact, the Law on Enterprises and its sub-regulation regulate only one case that the company can decrease the charter capital. That is, after three years from the date of the business license, if the shares to be offered are not sold out, the company shall register the decrease of its equity capital to a level equal to the quantity of issued shares.[54] In the official Letter No. 5625/BKH-PTDN dated 1 August 2008 by the MPI replying to Letter 03922/KHĐT-ĐKKD dated 27 June 2008 of the Ho Chi Minh City Department of Planning and Investment, it is confirmed that "The decrease of the capital of joint stock companies is conducted in accordance with Clause 3, Article 15 of Decree 139 dated 5 September 2007 by the Government giving guidance on the implementation of some articles in the Law on Enterprises." (Decree 102 that replaced Decree 139 does not have different regulation in terms of this matter).

However, under Circular 19, it is stipulated that the charter capital can be decreased in some cases as mentioned above. It is good practice that the Law on Enterprises regulates in more specific detail and gives more conditions under which a joint stock company can decrease its charter capital to be relevant with the current situation of the company's operations.

52 Circular 19, Section V, Article 5.

53 Decree 43, Chapter V, Article 40, Clause 1.

54 Decree 102, Article 23, Clause 9.

Comparative Practices:

The decision to decrease the charter capital must be taken by a simple majority vote of shareholders participating in the GMS.

The Board of Directors can make the following decisions in connection with the capital decrease:

- First, the decision to retire treasury shares, unless otherwise provided by the charter or the internal regulations. Therefore, the Board of Directors is presumed to decrease the charter capital in the described manner.
- Second, the decision to decrease the charter capital using other ways (for example, by decreasing the nominal value of issued shares), if the charter or the internal regulations authorize the Board of Directors for such a procedure.

If the GMS is authorized to decide on decreasing the charter capital, that is the legal presumption except for retiring treasury shares, the proposal to decrease the charter capital can be placed on the GMS agenda either by a shareholder proposal or a Board of Directors' initiative.

If the proposal to decrease the charter capital is submitted by the Board of Directors, a simple majority vote of its members participating in the Board of Directors meeting is required, unless the charter or internal regulations require a higher percentage of votes.

Best Practices:

The quorum for the Board of Directors meeting proposing or deciding to decrease the charter capital should be defined as two-thirds of all directors.

d) Information Included in the Decision to Decrease the Charter Capital

Under the Law on Enterprises and related regulations, there are no specific requirements on the information that must be included in the decision to decrease the charter capital.

Comparative Practices:

The decision to decrease the charter capital must include information on:

- The amount of decrease
- The purpose of decrease
- The procedure for decreasing the charter capital
- The method of decreasing the charter capital.

e) Decreases in the Charter Capital and Creditor Protection

A decrease in charter capital typically affects creditor rights since it decreases the minimum amount of the company's assets serving as a guarantee that the company can meet its obligations toward creditors. Under the Law on Enterprises and related regulations, there is no regulation on whether the company has to notify creditors of a reduction in the charter capital. It is only required that where a full payment of shares to be bought back causes a decline in the total value of the company assets by more than 10%, the company shall notify all its creditors within 15 days from the date of such payment.[55] There is no further regulation or guidance on the procedures on how to protect creditors' rights. The company only has to commit that it will make payments to all debts and other obligations after the reduction of the charter capital when it registers the charter capital decrease with the MPI.[56]

Best Practices:

The company should notify creditors of a reduction in the charter capital. The announcement duties fall under the authority of the General Director who will commonly assign this task to the Corporate Secretary or another person.

55 LOE, Article 92, Clause 4.

56 Decree 43, Chapter V, Article 40, Clause 1.

Creditors are protected through the Civil Code and through the Law on Bankruptcy. Under the Law on Bankruptcy, when realizing that a company falls into the state of bankruptcy, the unguaranteed or partially guaranteed creditors shall all have the right to submit applications for the opening of bankruptcy procedures applicable to such company.[57] Companies, which are incapable of repaying their due debts at creditors' requests, shall be regarded as falling into the state of bankruptcy.[58]

2. Share Buybacks

Under certain circumstances and conditions, companies have the right to repurchase their own shares. This is called a share buyback. Share buybacks may have a number of corporate governance implications. First, there may be a financial planning concern, since cash is used to purchase shares, fewer funds may be available for further business development. Second, shareholder rights can be abused if the company does not provide equal opportunities to all shareholders to sell their shares back to the company. In this respect, the Law on Enterprises stipulates that a company is entitled to buy back a number of shares from each shareholder in accordance with his/her equity proportion in the company and a notice of such decision shall be sent by registered mail to all shareholders within 30 days from the date of approval of such decision.[59] Third, the company distributes cash directly to selling shareholders and may, therefore, diminish the company's ability to service its debts or otherwise meet its obligations to creditors.

Certain rules specify how to conduct a share buyback and are summarized in Table 3. They differ depending on whether the buyback is to decrease the charter capital (specific buyback) or for any other reason (general buyback).

57 LOB, Chapter II, Article 13, Clause 1.

58 LOB, Chapter II, Article 3.

59 LOE, Article 91, Clause 3.

Table 3: Types of Buybacks

Specific	General
The shares issued by the company are repurchased and retired to decrease the charter capital	The shares issued by the company are repurchased for any reason
The decision to decrease charter capital by retiring treasury shares is made by the GMS, unless otherwise provided by the charter or by-laws	The decision to purchase is carried out by the GMS. Under specific legal circumstances this decision can be made by the Board of Directors
Shares must be retired upon the buyback.	Purchased shares must be re-placed or retired within a certain period.

➔*For a more detailed discussion on the specific buyback of shares see previous section of this chapter.*

a) Buyback Procedures

To repurchase its own shares, a company must follow the steps summarized in Table 4.

Table 4: General Buyback Procedure

Procedural steps	Buyback
Initiation	At the discretion of the Board of Directors or a shareholder proposal
Decision-making	The Board of Directors shall have the right to decide a buyback of 10% or less of each type of shares offered for every 12 months. In other cases, buyback of shares shall be decided by the GMS[60]
Limitations	A joint stock company is entitled to buy back no more than 30% of its issued common shares, a portion or all of its sold preferred shares[61]
Share retiring	Must be retired within a certain period (three years) or re-placed in case the capital contributed by shareholders is smaller than the charter capital.[62]

60 LOE, Article 91, Clause 1.
61 LOE, Article 91.
62 Circular 19, Section V, Article 5.

The company must have a plan on redemption clearly stating the redemption time and pricing principles.[63]

The decision to buy back shares issued by the company must be approved by either:

- No less than 65% of total votes of shareholders participating in the GMS[64]
- A simple majority vote of directors participating in the Board of Directors meeting in case the share repurchase is 10% or less of each type of outstanding shares. If the number of contradicting votes is equal, the Chairman's decision shall be final.[65]

The repurchase of its own shares by joint stok banks that leads to a reduction in the charter capital must be approved by the SBV.[66]

The company must have sufficient capital from the following sources for redemption of treasury shares, a capital surplus, retained earnings and other sources stipulated by law.[67]

Where a public company redeems its own shares, thus increasing the amount of its treasury shares to 25% or more of total outstanding shares, it shall conduct public bids according to the Law on Securities.[68]

Where a full payment of shares to be bought back causes a decline in the total value of the company assets by more than 10%, the company shall notify all its creditors within 15 days from the date of such payment.[69]

Public companies shall complete the redemption of shares within the time limit stated in their written information disclosures which must not exceed 90 days after the date of starting transactions.[70]

b) Information Included in the Buyback Decision

There is no specific regulation regarding the required information to be included in the decision to buy back shares. The Law on Enterprises only

63 Circular 18, Section II, Article 1, Clause 1.3.
64 LOE, Article 104, Clause 3a.
65 LOE, Article 112, Clause 8.
66 Circular 06, Chapter III, Section 2, Article 29
67 Circular 18, Section II, Article 1, Clause 1.2.
68 Circular 18, Section II, Article 1, Clause 1.1.
69 LOE, Article 92, Clause 4.
70 Circular 18, Section II, Article 5, Clause 5.3.

stipulates information that must be included in the notice of such decision to be sent to all shareholders as follows:[71]

- Name and head office's address of the company
- Total number and type of shares to be repurchased
- Price of such repurchase
- Procedures and time-limit for payment
- Procedures and time-limit for a shareholder to offer his/her shares to the company.

Under the Law on Enterprises, the Board of Directors shall determine the price of the repurchase. With respect to common shares, the determined price shall not exceed their market price at the time of the repurchase. The repurchase price of other types of shares shall not be lower than their market price, unless otherwise stipulated by the company's charter or otherwise agreed between the company and related shareholders.[72]

c) Limitations on Share Buybacks

A joint stock company is entitled to buy back no more than 30% of its issued common shares, a portion or all of its sold preferred shares.[73]

A joint stock company shall only be entitled to make full payment for the shares repurchased where subsequent to such payment, the company shall still be able to pay its mature debts and other liabilities.[74]

A company is not allowed to repurchase its own shares in the following cases:[75]

- It is conducting business operations at a loss or owes overdue debts
- It is offering shares to mobilize more capital
- It is splitting up or splitting down shares
- Its shares are subject to public bids.

A company is not allowed to purchase shares from the following entities for use as treasury shares:[76]

71 LOE, Article 91, Clause 3.
72 LOE, Article 91, Clause 2.
73 LOE, Article 91.
74 LOE, Article 92, Clause 1.
75 Circular 18, Section II, Article 2, Clause 2.1.
76 Circular 18, Section II, Article 2, Clause 2.2.

- Its manager and spouse, parents, adopted parents, children, adopted children or blood siblings of that individual
- Share owners subject to transfer restrictions according to law and its charter
- Shareholders holding controlling shares, except for cases where the State sells its shares to reduce its ownership percentage.

d) Implementing a Share Buyback Pro-Rata

A company must notify all shareholders in writing about its decision to buy back shares by registered mail within 30 days from the date of approval of such decision.[77] The shareholder notification must contain necessary information including the company's name and head office address, total number and type of shares to be repurchased, price of such repurchase, procedures and time-limit for payment, procedures and time-limit for a shareholder to offer his/her shares to the company.[78]

Any shareholder who owns shares of the type and class to be repurchased by the company has the right to sell shares to the company within the specified period. The company must pay for these shares within the period that has been specified in the decision and communicated to shareholders in the notice.

Shareholders who agree to resell their shares must send their offers to the company within 30 days from the notice date by registered mail. The offer shall include the following information:[79]

- Full name, permanent address, nationality
- ID or passport number, business license number
- Total shares owned and the number of shares for sale
- Payment method
- Signature of shareholder or of his/her legal representative.

Under the Law on Enterprises, there is no specific regulation or guidance in case shareholders offer more shares for sale than the company intends to buy.

77 LOE, Article 91, Clause 3.
78 LOE, Article 91, Clause 3.
79 LOE, Article 91, Clause 3.

In the case where a share repurchase public bid is required, when the amount of shares put on sale is larger than the amount of bid shares, shares shall be purchased proportionately.[80] It is not clear whether this is proportionate to the number of shares that each shareholder has or proportionate to the number of shares that have been offered by shareholders for sale.

Comparative Practices:

In other countries, the company shall purchase shares from all shareholders in a number that is proportionate to the number of shares that have been offered by shareholders for sale.

e) Reporting and Information Disclosure on Share Buybacks:

A public company that repurchases its own shares shall report such in writing to the SSC and concurrently disclose information via the mass media at least seven days before the date of redemption or sale. A report and written information disclosure must contain the following principal contents:[81]

- Purpose of shares redemption
- Maximum amount of shares expected to be redeemed
- Capital sources for redemption
- Pricing principles
- Transaction time
- Name of the securities company designated to conduct the transaction
- Price quoted in the written information disclosure (if any).

If the company announces the redeeming price, that price shall be clearly stated as a projected price. The redeeming price shall be determined and announced before the date of redemption.[82] Upon completion of the redemption, public companies have to report the results of the redemption to the SSC and the Stock Exchange within ten days.[83]

80 Circular 18, Section III, Article 3, Clause 3.7.

81 Circular 18, Section II, Article 4, Clause 4.1 ; Circular 09, Section II, Article 5, Clause 5.1.

82 Circular 18, Section II, Article 4, Clause 4.2.

83 Circular 09, Section II, Article 5, Clause 5.2.

When repurchasing their own shares, public companies that have their shares listed on the Stock Exchange shall concurrently report such to the Stock Exchange and disclose information via the disclosure media mechanisms of the Stock Exchange.[84]

3. Reciprocal Shareholdings

Reciprocal or cross-shareholdings are quite common between different companies and may be set up to establish mutual influence or diversify portfolios. Such shareholding structures between two or more companies often cause governance problems. For example:

- If companies increase their charter capital by means of reciprocal subscriptions to shares, the same initial contribution serves to cause two capital increases
- When two companies create a reciprocal shareholding by acquiring issued shares of each other, they are causing, at least partially, an indirect distribution or repayment to shareholders whose shares are purchased
- Reciprocal shareholdings can decrease the normal influence of independent directors in both companies, and replace the normal control exercised by the shareholders over directors and officers, with a self-controlling system.

Vietnamese legislation, however, does not provide any specific rules regarding reciprocal shareholdings. Recently, the MOF issued Circular 242/2009/TT-BTC dated 30 December 2009 giving guidance on the financial management of State enterprises and management of State capital invested into enterprises. This circular stipulates that subsidiaries are not allowed to make capital contributions to a parent company. Subsidiaries and dependent enterprises are not allowed to buy shares of companies in the same group, corporation.

For commercial banks, Article 103, Clause 6 of the new 2010 Law on Credit Institutions only allow commercial banks and its subsidiaries to make capital contributions or buy shares of other credit institutions within conditions and limitation provided by the State Bank of Vietnam.

84 Circular 18, Section II, Article 4, Clause 4.3.

D. Statutory and Voluntary Reserves

Protecting the charter capital to safeguard creditor rights is further extended by the possibility of creating certain additional reserves. As with the charter capital, such reserves only exist in accounting terms.

1. The Statutory Reserve

The Law on Enterprises does not require companies to have a mandatory reserve fund (statutory reserve). On the other hand, statutory reserves can be stipulated by specialized legislation. Usually, financial organizations (for example, banks or insurance companies) must have statutory funds. Its main purpose is to protect creditors by ensuring that part of the company's assets, in addition to the charter capital, cannot be distributed among shareholders.

For listed companies, irrespective of what kind of industry the companies are in, it is regulated that each year the company shall take an amount from its after-tax profit and transfer it into a reserve fund to supplement charter capital in accordance with law. Such amount shall not exceed 5% of the after-tax profit of the company and shall be taken until the reserve fund is equivalent to 10% of the charter capital of the company.[85]

2. Other Funds

Beside statutory reserves, a company may also establish other funds (voluntary, non-obligatory reserves). The Law on Enterprises does not regulate the distribution of profits. Currently, only the distribution of profits in State enterprises is regulated by the Government under Decree 09/2009/ND-CP dated 5 February 2009 on the Regulations on Financial Management of State Enterprises and State Funds invested in other companies. For joint stock companies, other funds can be established under the company's charter or according to a GMS resolution.

85 Model Charter, Article 43.

a) Employees' Fund

The GMS can establish a special fund from its net profits for company employees. The Law on Enterprises does not require or define specific requirements for such a fund. Its establishment is, therefore, optional and all provisions governing such a fund should be specified in the charter or in the internal regulations. For example, this fund can be used for acquiring shares, provided that such shares are to be transferred to the company's employees.

b) Other Funds of a Company

The charter, internal regulations or a GMS decision may establish other internal funds, such as financial reserve, investment and development funds. Such internal funds are financed through a deduction from the company's net profits.

3. Additional Paid-In Capital

Additional paid-in capital is part of the company's equity and is typically composed of the following sources:

- Any increase resulting from the re-valuation of non-current assets
- The positive difference between the nominal value and the placement value of the company's shares.

Additional paid-in capital has an accounting meaning only and there is no actual accumulation of funds. Additional paid-in capital can be used, for example, to:

- Offset the losses as the result of re-valuating non-current assets
- Increase the charter capital from internal resources of the company.

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10 Chapter

DIVIDENDS

10 | Dividends

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- ☑ Does the Board of Directors propose intermediary dividends? How does the Board of Directors ensure that this is done in the best interests of the company?
- ☑ How does the company calculate its dividends? Does the Board of Directors ensure that preferred and common shareholders are treated equitably when distributing dividends?
- ☑ Does the Board of Directors ensure that creditor rights are protected when it declares and pays dividends to shareholders?

Successful companies produce profits that can either be retained in the company or distributed to shareholders as dividends. In Vietnam there is an expectation, in particular among minority shareholders with small holdings, for companies to make (a reasonable amount of) dividend payments and not exclusively retain its earnings. The vast majority of Vietnamese companies need additional capital, for which there is no immediate alternate source other than company earnings. Since internally generated financing is one of the few viable sources of funding, the decision of dividend payment is often difficult for many Vietnamese companies.

This chapter discusses dividends from the shareholder and creditor protection perspectives, the procedure for declaring and paying dividends, as well as a company's dividend policy.

A. General Provisions on Dividends

1. The Definition of Dividends

Shareholders have a right to share in the profits of a company. They may do so by enjoying capital gains (an increase in the market value of shares they hold in the company) and/or through receiving dividend payments. From this perspective, dividends are an important shareholder right, which play a very important role in the decision to invest in a company.

Dividend is defined as the amount of net profit distributed to each share by cash or other assets from the company's remaining profit after all financial obligations have been completed.[1]

On the contrary, the payment of dividends by means of paying out cash to shareholders may decrease the company's cash and assets needed to service debt on a timely basis. From this vantage point, dividends are also viewed in the light of preserving creditor rights by following certain rules. To protect creditor rights, legislation imposes certain limitations on the types and payment of dividends.

2. Distributable Profit

The accounting treatment of dividend payments is determined both by the Law on Enterprises and accounting standards. Dividends paid on common shares shall be based on the net profit and the dividend payment shall be made out of the retained earnings of the company.[2] Besides profits from the previous fiscal year, the retained earnings of the company include other undistributed profits as well. In Vietnam, there is no regulation or guidance on whether companies can establish separate funds for making dividend payments on preferred shares. Whereas, under common practices, dividends on preferred shares can be paid out of funds that are specifically established for that purpose. Under no circumstances can dividends be paid out of the charter capital.

1 LOE, Article 4, Clause 9.

2 LOE, Article 93, Clause 2.

3. Dividend Rights

Owners of common and dividend preferred shares have different dividend rights. Distributing dividends on common shares is solely at the discretion of the company. On the other hand, owners of preferred shares have a right to receive dividend payments in accordance with specific conditions applicable to each type of preferred shares. The annual dividend on preferred shares may comprise fixed and bonus dividends. A fixed dividend is paid regardless of profits made by the company. The specific rate of fixed dividend and calculation method of bonus dividend shall be in accordance with the terms of issue of such shares as stated on the preferred share certificates.[3]

Company Practices in the United States:[4]

Fama and French, who have studied dividend payments in the United States, found that only about a fifth of public companies pay a dividend. Others paid dividends in the past, but then fell on hard times and were forced to conserve cash. The other non-dividend-payers are mostly growth companies. They also found that the proportion of dividend payers had declined sharply from a peak of 67% in 1978 to only 20.7% in 1998.

Shareholders paying only a portion of subscribed shares shall be entitled to receive a dividend corresponding to the number of shares that have been paid.[5]

For listed companies, it is clearly stated that the owners of shares which have not been fully paid shall not be entitled to receive a dividend.[6] Although there is no specific regulation on the treatment of dividend rights regarding treasury shares, it is common practice that the company's treasury shares do not carry the right to receive dividends.

3 LOE, Article 82, Clause 1.

4 E.F.Fama and K.R.French, "Disappearing Dividends: Changing Firm Characteristics or Lower Propensity to Pay?", Journal of Financial Economics 60 (2001), pp.3-43.

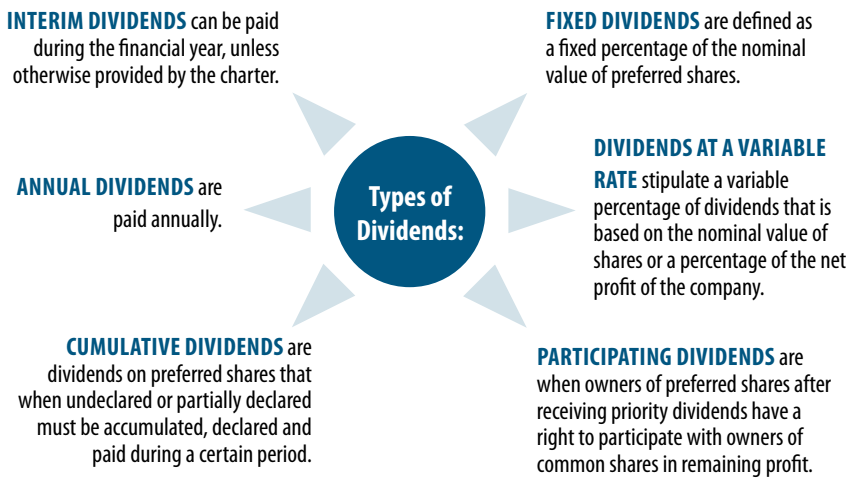
5 Decree 102, Article 23, Clause 5b.

6 Model Charter, Article 8, Clause 2.

4. Types of Dividends

Under common practice, a company may declare dividends for common and preferred shares as shown in Figure 1.

Figure 1: Types of Dividends



In Vietnam, like in other countries, for common shares and voting preferred shares, dividends are often paid at a variable rate based on the nominal value of shares.

Preferred share dividends consist of fixed and bonus dividends. A bonus dividend is often paid at a variable rate based on the nominal value of shares. For commercial joint stock banks, it is clearly stated that if the bank cannot pay fixed dividends for preferred shares (in case of making losses), this fixed dividend shall be accumulated in the following years.[7] For public companies in general, there is no specific regulation on whether the dividends shall be cumulative or not. Each company makes this decision based on its own dividend policy.

7 Decree 59, Section 3, Article 30, Clause 4.

5. Forms of Dividend Payments

It is the most common practice to pay dividends in cash. Besides, dividends can be paid in company shares or by other assets as stipulated in the company's charter. In the case of cash dividends, the payments are made in Vietnamese Dong (this can also be done by check, or by money order sent to permanent residential addresses of the shareholders).[8] In the case of dividend share payments, the GMS must approve the shares' issuance. The company is also required to submit the GMS' resolution on the issuance to the SSC together with the latest audited financial statements as well as to make a public announcement at least 10 working days before the issuance.[9]

Company Practices in Vietnam:

According to a study and analysis by VAFI, during 1994 to 2003, cash dividends were the most common form of dividend payments adopted by Vietnamese companies. Stock dividends only came into existence in Vietnam from 2001. During 2004-2007, stock dividends became a popular form of dividend payment. However, due to the financial crisis, in 2008, the payment of cash dividends increased with a number of companies paying cash dividends at a rate of 20% to 30% of charter capital or 40% to 50% of net profit after tax.[10] Up to now, Masan Food Company is the only example of a company paying dividends using its assets, which were corporate bonds issued by Masan Group, the holding company of Masan Food. The dividend payments using its assets were made in June, 2009.[11]

8 LOE, Article 93, Clause 2.

9 Circular 18, Section IV, Articles 3 & 6.

10 VAFI's assessment on the dividend policy of public companies over the last 15 years, Source: VAFI at http://vafi.org.vn.

11 http://www.masanfood.com/masan_info.php?id=192

Best Practices:

Companies should pay dividends in cash, since non-cash transactions are generally unsuited and unpopular for dividend payments.

6. Decision-Making Authority Regarding Dividends

The Board of Directors has the authority to propose the amounts of dividends to be paid, to the GMS.[12] Then the GMS shall discuss and approve dividends for each type of shares.[13] The GMS shall decide the annual dividend only.[14] Based on this decision, the Board of Directors shall determine the amount of dividend per share, the time and form in which such payment is made.[15] The Board of Directors has the authority to determine the temporary dividend payments.[16]

The GMS approves or disapproves the Board of Directors' dividend payment proposal with no less than 65% of total votes of participating shareholders.

For a listed company, the GMS' authority regarding this issue is limited as it is stipulated that the GMS approved dividends shall not exceed the levels proposed by the Board of Directors.[17]

7. The Amount of Dividends

The Board of Directors should seek to maximize shareholder value when formulating its recommendation on the amount of dividends to be distributed. The target payout ratio, defined as the percentage of net income to be paid out as cash dividends, should be based on shareholder preferences. More specifically, the Board of Directors will want to determine shareholder preferences for

12 LOE, Article 108, Clause 2n.
13 LOE, Article 97, Clause 2d.
14 LOE, Article 96, Clause 2b.
15 LOE, Article 93, Clause 3 and LOE, Article 108, Clause 2n.
16 Model Charter, Article 25, Clause 3j.
17 Model Charter, Article 40, Clause 1.

capital gains (for example, using excess cash to buy back shares or re-invest in the company) versus receiving dividends. The Board of Directors will then need to define its optimal dividend policy, which ideally should strike a balance between current dividends and future growth. For any given company, the optimal payout ratio is determined by four factors:

1) Investor preference for capital gains versus dividends
2) The company's investment opportunities (for example, companies with excess cash, but limited investment opportunities, would typically distribute a large percentage of their income to shareholders via dividends, while companies in high-growth sectors typically reinvest their earnings in the business)
3) The company's target capital structure
4) The availability and cost of external capital.

Company Practices in the United States:

A study by Harry DeAngelo, Linda DeAngelo and Douglas Skinner[18] shows that even though fewer corporations were paying dividends, the largest 100 companies in the United States increased their inflation-adjusted dividends by 23% from 1978 to 2000. According to their study, approximately 100 large, extremely profitable companies had a fairly stable payout ratio of around 42%. Whereas, two types of non-dividend payers included financially troubled marginally profitable or money-losing companies and/or companies related to technology where companies typically used share repurchasing as a substitute for dividends.

8. The Importance of Receiving Stable Dividends

The stability of dividends is important to shareholders. Dividend payments tend to vary over time, since company cash flows can fluctuate. Many shareholders rely on dividends to meet expenses and would consequently suffer from unstable dividend streams. A company needs to carefully balance the stability and dependability of its dividend policy.

18 Harry DeAngelo, Linda DeAngelo, and Douglas Skinner, "Are dividends disappearing? Dividend Concentration and the Consolidation of Earnings", Journal of Financial Economics, 2004.

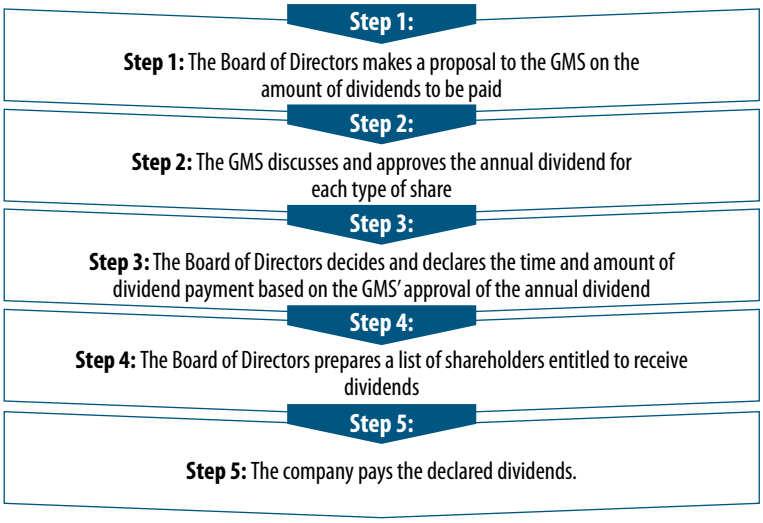
Best Practices:

Ideally, the company should formulate and communicate a dividend policy to its shareholders. For example, to "pay approximately 30% of its current year's earnings as dividends, which will permit the company to retain sufficient capital to provide for future growth."

B. Procedures for Declaring and Paying Dividends

To declare and pay dividends, a company must follow specific steps, summarized in Figure 2.

Figure 2: The Usual Procedure for Declaring and Paying Dividends



For an interim dividend payment, the procedures start from Step 3 when the Board of Directors decides and declares the time and amount of dividend payment based on the financial targets and the year–to-date actual results.

1. How Are Dividends Declared?

A public company may declare dividends annually, or at any time between AGMs. The decision to declare dividends is made by the Board of Directors based on the decision regarding the distribution of profits (losses) of the company approved by the AGM.

A company needs to address two basic issues in deciding to declare dividends:

1) The percentage of profits to be distributed or the dividend rate as per the nominal value of each share
2) The frequency of payments, i.e. should the dividends vary from year-to-year, or remain stable over time.

The public company decision to pay interim dividends can be made on condition that:

1) It can be seen from the interim accounts drawn up for such purposes that the available funds are sufficient for making such payments
2) The amount to be paid out is not greater than the total profit at the end of the previous year, for which the financial statement has been drawn up. Also, the non-distributed profit and amounts drawn from the reserves that can be used for such purposes, and less the amount that has to be put into the reserves, is in conformity with applicable regulations, the company charter or internal regulations.

Best Practices:

In order to help shareholders properly assess a company's capacity to make dividend payments, companies are advised to:

- Establish a transparent and shareholder-friendly mechanism for evaluating the payment of dividends
- Provide sufficient information to shareholders to enable them to understand the conditions that must be met before the company will pay dividends
- Provide sufficient information to shareholders to enable them to understand the procedures for the payment of dividends
- Prevent the dissemination of any misleading information about the company that might influence shareholders' assessment of policies governing dividend payments
- Provide simple dividend payment procedures
- Impose (financial) sanctions on the General Director and Executive Board members for incomplete or delayed payments of declared dividends.

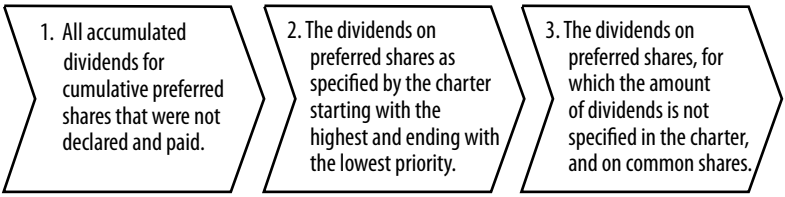
Dividend reports are a useful tool for assessing a company's dividend policy and its dividend payment record. Dividend reports are published by commercial firms that track the dividend performance of companies. These reports are usually available for a fee.

In Vietnam, although it is stipulated that the company can issue shares of different types and classes, currently there is no regulation on the sequence for declaring dividends for these types and classes.

Best Practices:

A certain sequence for declaring dividends for different types and classes of shares should be established. The order for declaring and paying dividends can be as shown in Figure 3.

Figure 3: Order of Declaring and Paying Dividends



In other words, until the company has declared and paid all dividends (including accumulated dividends) for preferred shares in full, as specified by the charter, it cannot declare and pay dividends for other preferred or common shares. Furthermore, the company cannot declare dividends if the claims of a higher priority shareholder are not satisfied in full.

2. The Shareholder List for Dividends

Upon and for the purpose of making a dividend payment, the Board of Directors shall make a list of shareholders who will get paid. This list must be prepared at least 30 days prior to the date on which the payment is proposed to be made.[19] The list of shareholders entitled to receive dividends is determined from the record of shareholders in the register book of shareholders kept at the company's headquarters or kept by VSD on a specific date. This date, upon

19 LOE, Article 93, Clause 3.

which such record is to be compiled is called the "ex-dividend date".

There is no specific regulation or guidance on the determination of the ex-dividend date. Company practice is that the Board of Directors shall decide the ex-dividend date for the payment of dividends.

Shareholders included on the list as of the ex-dividend date are entitled to receive any dividends that the company pays out to shareholders. Consequently, shareholders who own shares on the ex-dividend date and sell them after that date, but before the dividend payment, retain the right to receive dividends.[20] Shareholders who purchase shares after the ex-dividend date are not entitled to receive dividends until the next declaration of dividends.

In the event that dividends on shares of a specified type and class are declared, each shareholder must receive dividends in accordance with the number of shares of the type and class he/she owns.

3. When Are Declared Dividends Paid?

A company is obliged to pay dividends after they have been declared. In case of dividend payments in cash to individual investors, the company has to withhold personal income tax, which is equal to five percent of the total dividend to be paid before making the payment.[21] For individuals who are entitled to dividends in cash but do not receive them and wish to record an increase in their investment capital, they will not have to pay personal income tax upon the increase in their investment capital.[22] Therefore, the company will not have to withhold personal income tax in this case.

Best Practices:

The period for paying dividends can be established either in the charter or by a GMS decision. If not specified, companies are required to pay declared dividends within 60 days after they are declared.

To gain trust from investors, companies need to make dividend payments once dividends have been declared. Besides, to protect shareholders'

20 LOE, Article 93, Clause 4.

21 Circular 84, Part D, Section II, Article 1, Clause.2.2.

22 Circular 62, Article 7, Clause 2.

rights, companies are obliged to pay dividends after they have been declared. However, under prevailing law and related documents, there is no specific regulation on how to deal with cases where the company cannot pay declared dividends in full and/or on time.

Best Practices:

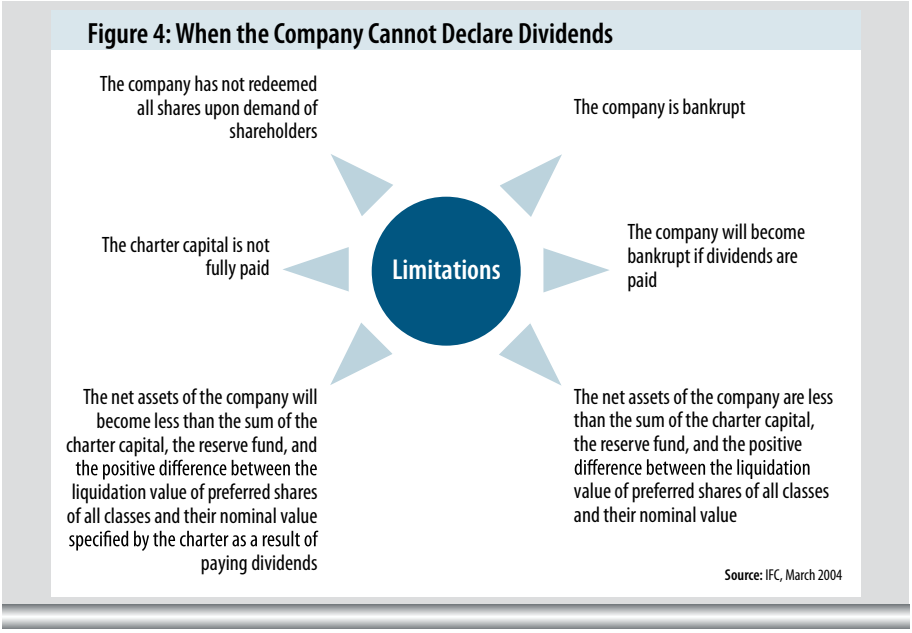
It is recommended that companies penalize the General Director or Executive Board members when dividend payments are incomplete or in arrears. In particular, it is recommended that the Board of Directors have the authority to reduce the remuneration of the General Director and/or Executive Board members, or to terminate their authority, when the company fails to pay declared dividends in full and/or on time.

4. When the Company Cannot Declare Dividends?

In Vietnam, there are no limitations on declaring dividends.

Best Practices:

The company should be prohibited from declaring dividends under the circumstances illustrated in Figure 4



5. When the Company Cannot Pay Declared Dividends?

A shareholding company is entitled to pay dividends to its shareholders only if:[23]

- Its tax and other financial obligations have been fulfilled in accordance with the law
- Contributions to the company's funds and coverage of losses carried over from previous years have been made in accordance with the law and the company's charter
- Immediately after settling dividends, the company must be able to assure the settlement of other due debts and obligations.

The company is not allowed to pay a declared dividend if the above mentioned circumstances are not met. If the dividends are paid contrary to the above requirements, all shareholders shall have to pay back the company the paid money or assets taken. If a shareholder is not able to do so, that shareholder and members of the Board of Directors shall be jointly liable for all the debts and other obligations of the company to the extent of the amount of money and the value of assets paid to the shareholder which have not been returned.[24]

23 LOE, Article 93, Clause 2.
24 LOE, Article 94.

C. The Disclosure of Information on Dividends

Legislation usually regulates information disclosure pertaining to dividends. A company must make available to all its shareholders the GMS or Board of Directors resolution regarding the amount of dividends to be paid.[25] In Vietnam, this resolution usually includes information on the type of shares, the rate of dividends, the ex-dividend date, the time for payment and procedure for the payment of such dividends.

It is also regulated that the annual dividends paid to shareholders need to be disclosed in the annual report.[26] It is good practice that the company provides a summary of its dividend payment record in its annual report so that shareholders can have a better understanding of the company's dividend payment history. However, currently in Vietnam, there is no such disclosure requirement.

Best Practices:

It is recommended that the company adopt an internal regulation on information disclosure and that this internal regulation include a list of information, documents and materials that must be submitted to shareholders to enable them to make decisions regarding dividends. The information should refer to agenda items for the GMS, such as:

- Recommendations of the Board of Directors regarding the distribution of profits
- Recommendations of the Board of Directors on the payment of dividends
- Reasons for each recommendation.

Companies should also disclose information on dividend payments, or when dividends have not been paid and the reasons for dividend non-payment.

Companies are required to include the following information on dividends in the prospectus and quarterly reports:

- The amount of dividends declared within the last five years or, if the company has been in operation for less than five years, during each year of operation
- The procedure for dividend payment.

25 Circular 09, Section II, Article 2g.

26 Circular 09, Appendix II – Annual Report.

D. Dividend Policy

Companies are best served by adopting a clearly stated and rational dividend policy.

Best Practices:

Companies should inform the markets of their dividend policy, for example through the print media. This disclosure should be in the same publication specified by the charter for publishing the GMS notice. The company should also consider using the internet for this purpose.

It is essential that shareholders receive information, at a very minimum, on the following issues:

- The method the company uses in determining the portion of profits that may be paid as dividends
- The conditions under which dividends may be paid
- The minimum amount of dividends payable for shares of each type and class
- The criteria the Board of Directors use in deciding on the recommendation to declare dividends
- The procedure for dividend payment, including the time, place and form of payment.

Companies should further implement a transparent and easy-to-understand mechanism for determining dividends. To do so, the company should approve an internal regulation on dividends that includes information on:

- The percentage of net profits for dividend payments
- The terms and conditions for dividend payments
- The amount of dividends payable for shares of a specific type and class if this amount is not specified by the charter
- The minimum amount of dividends payable for shares of each type and class
- The procedure for the payment of dividends, including the schedule, place, and methods
- Circumstances when dividends will not be declared, or when dividends may be partially declared on preferred shares.

Companies are free to change their dividend policies at any time. However, corporate officers should be aware that this may cause inconveniences to their shareholders and send adverse, if unintended, signals to the markets.

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Chapter

CORPORATE GOVERNANCE IMPLICATIONS OF CORPORATE SECURITIES

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- ☑ What is the most appropriate financing method for the company and why?
- ☑ Has the company explored international financing options?
- ☑ What are the advantages and disadvantages of accessing capital in foreign markets? What are the corporate governance implications of listing on foreign exchanges?
- ☑ What are the disadvantages and advantages of stock options?

Companies have a number of financing options. They may fund their investment needs from internally generated capital or seek external financing. Among external sources of funding, they may borrow from banks or issue securities.

Financing decisions are usually quite complex. The method(s) that a company chooses to finance its operations will depend upon a large number of internal and external factors. Some of the company specific factors include the intended use of the funds (whether for short-term working capital needs or long-term capital investment), the capacity to service interest payments and repay the principal, and the nature (and the degree of risk) of the business. Important external factors include the level of a country's economic development, political stability, its banking system and financial markets.

Each financing option, whether bank lending or the sale of shares or bonds, has different financial and legal characteristics and will have different

corporate governance implications. In addition, each form of capital has a different cost. Equity finance has some important advantages for companies. Although it is not the cheapest source of funding, equity finance has the advantage of permitting companies to access large amounts of capital that do not need to be paid back in the same manner as debt financing.

However, access to the enormous potential of securities markets, with its millions of potential investors, comes at a price. Securities markets are traditionally tightly regulated to limit the manifest potential for abuse. Regulators, therefore, make significant demands on companies. They require that investors receive complete information on the risks of investment and they also go to great lengths to protect investor rights. While market regulators are often criticized for the burdens they impose on companies, real and potential abuses are, ultimately, the reason for the imposition of regulations and of corporate governance standards.

This chapter discusses the different types of securities that companies may issue and their corporate governance implications.

A. An Overview of Corporate Securities

1. Basic Types of Securities - Shares and Bonds

There are two basic types of securities that companies use to raise capital, shares (also referred to as stocks or equities) and corporate bonds.[1] Shares represent an ownership position in the company and come with certain ownership rights. Bonds, on the other hand, represent a creditor relationship with the company.

Unlike shareholders, bondholders have no corporate ownership rights, although they may be accorded a significant degree of control over (certain) corporate activities during the life of the creditor/debtor relationship.

Bonds envisage the repayment of the principal as well as periodic interest payments until the bond reaches maturity and the obligation of the borrower (the company) to make any further payments of principal/interest is terminated. Corporate bonds come in many different forms and may be structured in a number of ways. For example, there is no provision for interest payments on "zero coupon" bonds.[2] The bondholder, in such a case, is compensated by a discounted purchase price and the gradual appreciation in the price of the bond, which is then redeemed at its face value on its maturity date. Despite the many differences, bonds have one element in common in that they come with a predictable and contractually fixed repayment.

Shares function differently. Companies can use share capital for an unlimited period and are under no immediate obligation to repay investors. Investors are compensated for their investment either through the possibility of receiving capital gains (an increase in the value of their shares) and/or the possibility of receiving dividend payments in addition to governance rights. From an investor's point of view, shares as an investment class, are normally riskier than bonds. Capital gains are never guaranteed (share prices go up and down) and companies are not obligated to make any dividend payments to holders of common shares.

1 LOS, Article 6, Clauses 2 & 3.

2 In Vietnam, a corporate "zero coupon" bond has not been defined clearly in a legal document. However, this term may refer to bonds which will be repaid by a one-off payment of interest together with principal upon maturity, see Decree 52, Article 9, Clause 3, Paragraph (c).

An important implication of the difference in risk is that share capital is often more expensive than bonds or bank lending. One of the most fundamental rules of finance is the higher the level of risk, the greater the level of return that investors will expect for taking such risk. Given, as mentioned, that the risk of receiving a return on one's investment is higher for equities than for bonds or other types of loan transactions, investors will demand a higher price for the use of their capital by the company and will charge what is referred to as a "risk premium".

One of the methods to manage equity risk is by granting shareholders governance rights, a full set of rights in the case of common shares and a limited set of rights in the case of preferred shares. Another method of managing risk and, by extension, of reducing the cost of capital is to ensure that these rights are uniformly respected and adequately protected. This, from a financial perspective, is what helps to define good corporate governance.

Shares and bonds offer different advantages and disadvantages for investors and companies as outlined in Table 1.

Table 1: Comparison of Shares and Bonds

	Shares	Bonds
Duration of Investment	Unlimited. The company does not repay the investment. The company is not restricted in how it may invest funds.	Bonds have a maturity date. While bonds differ, the principal is generally repaid with interest. Repayment is predictable and regular, which reduces bondholder risks.
Obligations in Return for the Investment	Investors may expect dividend payments when the company generates sufficient cash flow. However, dividend payments are made at the discretion of the company.	The company must repay the principal and generally makes coupon payments.
Governance Rights	If common shares are issued, the investor is granted governance rights. If preferred shares are issued, the investor holds governance rights only in specific circumstances (in case of voting preferred shares). Governance rights and their enforcement reduce the equity investment risk.	No governance rights are granted to bondholders.

Ease of Securing the Investment	The ease of securing equity investment depends on numerous external and internal factors. Ultimately, the attractiveness of a share offering depends on the company's future prospects and its ability to assure investors that good governance and, in particular, investor rights to the company's free cash flow will be observed. In addition, the company's health, including compliance with good corporate governance practices, influences the price it pays for equity capital.	Bonds are attractive to investors interested in predictable, secure returns. The company's health, including compliance with good corporate governance practices, is important for the credit rating of the company and will influence the price at which it may borrow.
Cost	From the company's perspective, shares can be more expensive than bonds. Investors charge a risk premium for the higher risk associated with equities.	Bonds are less risky, and investors charge a lower risk premium. Bonds are, consequently, less expensive for the company than equities.
Advantages	Most investors are compensated through capital gains (the increase in share prices on the equities markets). If the company generates sufficient free cash flow, the shareholder may receive a dividend. The potential long-term returns on equities as an investment class are higher than bonds.	The bondholder receives his/her principal back with some compensation for the investment, usually in the form of interest. Generally, interest payments are fixed in advance and predictable. If the company defaults, the bond may, under certain circumstances, still be sold on the market at a discount, meaning that the bondholder may not lose the full amount of his/her investment.
Risks	The higher returns on equities are in exchange for a higher level of risk. Share prices go up and down, at times quite dramatically. Capital gains on shares are uncertain and dividend payments are not guaranteed. If the company becomes insolvent, shareholders are typically last in line to receive compensation. In practice, shareholders may lose the full value of their investment in case of bankruptcy or liquidation.	Once the company has the cash, it may use the money for riskier activities than those foreseen by the bondholder. In this case, the bondholder may have little recourse. In case of default, the bondholder is granted a set of legal mechanisms to enforce his/her contractual rights, including seeking the insolvency of the company. However, seeking insolvency is not generally in the interest of the bondholder. If the bond is secured, the risk of the bondholder may be minimized.

2. Securities in Paper and Paperless Forms

Securities must be issued in certain forms and comply with legal requirements. Securities may take two main forms, tangible securities issued in paper form and intangible securities (also known as "paperless" or "dematerialized securities").

In Vietnam, shares and other securities (warrants, bonds) may be issued in both types of paper and paperless forms.[3] In other countries, the rights of the holders of paper securities are usually embodied in a certificate. However, in the case of Vietnam, even though the holders have tangible shares which are in paper form, they still have to fully and correctly register their information into the company's shareholder book to allow their shareholders' rights to become effective.[4] The rights of the holders of paperless securities are based upon an entry into a bond or shareholder register (similar to an entry in a bank account reflecting the depositor's rights to funds). The electronic trading of securities is allowed for. Therefore, securities can also be defined as transferable electronic documents.[5]

Securities of public companies must be registered in the VSD's information system regardless of what form they take.[6]

3. Domestic Issuers on International Markets

Companies may choose to raise capital in domestic as well as international capital markets. In doing so, they may issue shares and bonds directly on international capital markets, i.e. foreign stock exchanges. When issuing bonds on foreign stock exchanges, there are two forms of bonds that a company can issue which are government guaranteed corporate bonds and non-government guaranteed corporate bonds.[7]

Although, it was mentioned in the Law on Securities that the MOF would issue specific regulations on issuance of shares on foreign stock exchanges,[8] the draft circular on issuing and listing shares on foreign exchanges

3 LOS, Article 6, Clause 1: "Securities take the forms of certificates, book entries or electronic data".
4 LOE, Article 87, Clause 3.
5 Decree 27, Article 11 and Circular 50, Part I, Paragraph 1.
6 LOS, Article 52, Clause 1.
7 Decree 53, Article 16.
8 LOS, Article 14, Clause 7.

had not been approved as of the time this manual was printed. As a result, at the moment there are technical difficulties for Vietnamese companies in issuing securities on foreign stock exchanges including the recognition of foreign currency denominated securities into the Vietnamese accounting system, securities registration and depository. Besides, due to the lack of strict corporate governance practices, the ratings of Vietnamese companies on foreign stock exchanges can be very low compared to other listed companies and therefore Vietnamese securities on foreign stock exchanges are less competitive. It may be also difficult for Vietnamese companies to be listed on large foreign stock exchanges due to stricter financial reporting requirements and requirements for financial indicators such as capitalization size, capital and profit.

Another way for companies to raise international market capital is to issue shares indirectly through depositary receipts. Depositary receipts require the registration of the original security in the name of a foreign trust company or, more commonly, a bank. The bank holds the share in safekeeping and issues receipts against shares. These receipts are referred to as "depositary receipts." This system was developed because investors in the world's largest capital markets discovered it could take several months to have their foreign share purchases registered in their name. The system is also attractive for companies, since it allows them to establish a presence in foreign markets without having to go through the process of a complete issue. The corporate governance implications of this system are that Vietnamese issuers of depositary receipts must comply, to varying degrees, with foreign standards of corporate governance.

➔ *Raising capital in foreign markets is discussed at slightly greater length in Section G of this Chapter.*

B. Types of Securities

1. Shares

Shares (stocks or equities) entitle their holder to a set of property and governance rights. Shares mean a type of securities that certify their holders' legitimate rights and benefits to a portion of equity of an issuing organization/company[9] and have several fundamental characteristics:

- **Name of the holder:** Article 85 of the Law on Enterprises stipulates that a share certificate may be either a bearer share certificate or non-bearer certificate.[10] For listed companies, the Model Charter makes it clear that holders of bearer share certificates shall be responsible to manage their share certificates and the listed companies shall not be liable where such share certificates are stolen or used for fraudulent purposes.[11] However, Article 86 of the Law on Enterprises requires that a shareholding company shall have to make and maintain a registry book of shareholders with some required contents including information about the shareholders.[12] The shareholder identification and/or the register book of shareholders are stored at the headquarters of the issuing company, and may be entered into the information system at a custodian center, namely the VSD.[13]Article 87 of the Law of Enterprises regulates that a buyer of shares shall become a shareholder of the company only after he/she makes full payment for the shares and the information of the buyer is accurately and sufficiently recorded in the registry book of shareholders.[14] In fact, in Vietnam, there is no share in bearer form. Registered securities help to make the company's ownership structure more transparent and assist in protecting shareholder rights.

9 LOS, Article 6, Clause 2.
10 LOE, Article 85, Clause 1.
11 Model Charter, Article 6, Clause 6.
12 LOE, Article 86.
13 LOE, Article 86, Article 3.
14 LOE, Article 87, Clause 3.

- **Rights of the holder:** Shares can be common or preferred shares. Rights pertaining to particular shares are specified in the Law on Enterprises and the company charter.[15]
- **Nominal value:** Each common share has a nominal value (also referred to as "par value" or "face value") or accountable par,[16] and each preferred share also has a nominal value. The nominal value or accountable par of shares is established in the charter and is used to calculate the charter capital. The par value of all shares issued by the company must be the same.[17] Vietnamese law specifies that the nominal value of each share at the company's IPO is VND10,000.[18]

In most cases of an SOE converting into a joint stock company, at the time of its accomplished transformation, the company must issue shares at a price no lower than its nominal value.[19]

The company may issue shares after its formation to attract new investors. The Board of Directors may decide the offer price of the shares, but the share price to be offered must not be lower than the book value or the market price of the share at the time of offer, except in the following cases:[20]

- Initial offering of shares to persons other than founding shareholders
- Shares offered to all shareholders in proportion to their current respective percentage of shares in the company
- Shares offered to brokers or underwriters. In this case, the specific amount of discount or rate of discount must be approved by the shareholders representing at least 75% of the total number of shares with voting rights
- Other cases and the rates of discount in such cases shall be stipulated in the charter of the company.

In some special cases, such as the issuance of shares to employees or strategic partners, the GMS can directly approve the issued price of shares which may be lower than the nominal or book values.

15 LOE, Articles 79, 81 & 82.
16 LOE, Article 85, Clause 1, Paragraph d.
17 LOE, Article 77, Clause 1a.
18 LOS, Article 10, Clause 2.
19 Decree 109, Article 17, Clause 3 & Article 43, Clause 2.
20 LOE, Article 87, Clause 5.

The nominal value of shares rarely reflects the market value of the company. The differences between the nominal value of shares and the price at which they trade on the market can be enormous. In addition, market prices constantly fluctuate and depend on a number of factors influencing the scope and prices of supply and demand.

The value of shares may be determined by investors and other professionals using different analytical methods, taking into consideration a great number of factors that can influence the investment decision, like the current performance and future prospects of the company, its dividend policy, the reputation of the company and its management, the macroeconomic situation and government support for, or interference in, business development. In that respect, one of the most important factors that has great influence on a potential investor's decision to invest in company shares is the quality of the company's governance, because it is directly connected with the investor's possibility to protect ownership rights in the company.

2. Bonds

Bonds (corporate bonds) are securities through which companies raise debt capital. A bond has the following legal characteristics:

a) Registered and Bearer Bonds

As with shares, bonds can be issued as registered securities with the name of the bondholder.[21] In such cases, the bondholder is identified in a bondholder register, maintained by an authorized depository body, such as the VSD.[22]

Companies can also issue bonds as bearer securities.[23] Bearer bonds have the advantage of privacy for the bondholder.[24] Bearer bonds are issued with certificates, which contain certain legal requirements. Bearer bonds may facilitate the transfer of bonds and reduce for the company the administrative costs of maintaining a bond register.

21 Decree 52, Article 6.

22 Decree 52, Article 2, Clause 20.

23 Decree 52, Article 15.

24 A bearer corporate bond is a debt security issued by a corporation as an unregistered bond, i.e. no records are kept of the owner, or the transactions involving ownership. Whoever physically holds the paper on which the bond is issued owns the instrument.

Despite these advantages, the use of bearer bonds may result in violations of securities and tax laws. Because they are easy to transfer, owners of bearer bonds may not be as precise about adhering to the laws when they sell bearer bonds to another person as they would need to be in the event of registered bonds. Thus, for example, bearer instruments have the great disadvantage that they may conceal assets from creditors or the tax authorities.

b) Nominal Value

Bonds are issued at a certain nominal value. The nominal value of bonds is most often referred to as their "face value". The face value of bonds can be any value that the issuing companies find suitable, but for bonds in public offerings, the face value of corporate bonds is a minimum amount of VND100,000 or multiples of VND100,000.[25]

Best Practices:

In the interests of bondholders and, one could argue, of shareholders as well, the face value of all bonds issued by the company must not exceed the value of the charter capital, or the value of a guarantee submitted to the company by a third party for the purposes of the bond issue. In any event, bonds may not be issued before the charter capital has been paid in full.

c) Rights of Bondholders

The bondholder has the rights of a creditor and is entitled to:

- **Redeem the bond at maturity for its face value.** A company can issue bonds with different redemption alternatives. It can issue bonds that have the same payment period or a series of bonds with different payment periods. The company can also envisage the possibility of early payment at the request of the holder.
- **Receive interest payable on the bond.** Interest payments on bonds are generally referred to as coupons. Historically, bonds were issued with detachable coupons that were submitted in exchange for payment.
- **Convert into shares (for bondholders of convertible bonds).** There are two types of bonds, convertible bonds and non-convertible bonds.

25 Decree 52, Article 7.

Convertible bonds can be converted into shares, in accordance with the term of issue of such bonds and stipulations in the charter of the company, whilst non-convertible bonds cannot be converted into shares.[26]

Since bonds are freely transferable, the bondholder can sell his/her bonds to another investor. As with equities, bonds are subject to a market pricing mechanism. This means that bond prices are constantly fluctuating and that bondholders can both make and lose money from buying and selling bonds.

d) Secured and Unsecured Bonds

Companies may issue both secured and unsecured bonds.[27]

Comparative Practices:

In some countries, companies may not issue unsecured bonds during the first couple of years of their existence. This rule is intended to protect bondholders from the risks associated with a new business.

Secured bonds provide additional protections to bondholders in case the company defaults on its obligations. The following guarantees can be applied:[28]

- **Pledges of property.** Securities can be the subject of the pledge. All secured bondholders of the same issue have equal rights with regard to the pledged property.
- **A third party guarantee** can be submitted to the company for the purposes of the bond issue. This can be a bank guarantee or a

26 Decree 52, Article 2, Clauses 2 & 3.
27 Decree 52, Article 2, Clauses 4 & 5.
28 Decree 52, Article 2, Clause 2.

corporate (for example, submitted by a parent company for bonds issued by a subsidiary) or personal guarantee. The guarantor is jointly and severally liable for the redemption of the bond.

The issue of secured bonds means that guarantee requirements must be fulfilled (pledges, mortgages or bank guarantees) in addition to the normal requirements associated with a bond issue.

e) Convertible Bonds

Companies can also issue bonds that can be converted into shares.[29] Convertible bonds may be secured or unsecured.[30]

The total volume of bonds issued shall not exceed the approved limit of issuance.[31] The time-limit for conversion of bonds shall be fixed by the issuing organization and publicly announced to investors upon issuance of bonds.[32] The bond conversion ratio shall be fixed by the issuing organization at the time of issuance. If at the time of bond conversion, the share price fluctuation exceeds the share price fluctuation range announced at the time of issuance of the bonds, the company's owner shall have the right to make an appropriate adjustment to the bond conversion ratio.[33]

f) Differences between Bondholder and Shareholder Interests

Both shareholders and bondholders are interested in the profitability and health of the company. For shareholders, a healthy company generates free cash flows that generally lead to a higher market valuation. Healthy companies are also more likely to pay dividends than unhealthy ones. For bondholders, a healthy company reduces the risk of default on its obligation to repay the bond principal and interest. In short, for both, a successful and profitable company can lead to an increase in the market value of its respective securities.

There are, however, some important differences between the interests of these two types of investors.

- **Interests diverge most distinctly during insolvency.** During

29 Decree 52, Article 19, Clause 1 and Article 20.
30 Decree 52, Article 24, Clause 1.
31 Decree 52, Article 21, Clause 3.
32 Decree 52, Article 22.
33 Decree 52, Article 23.

insolvency proceedings, different priorities are assigned to different types of claimants. In general, creditor claims (including those of bondholders) are always satisfied before those of shareholders.

- **Another difference is in the conversion of bonds.** Shareholders are always interested in minimizing the dilution of their holdings. It is, in part, for this reason that they enjoy certain governance rights and that decisions that would result in the dilution of share ownership are always subject to the approval of the company's governing bodies.[34] Similarly, holders of convertible bonds are interested in preventing the reduction of capital or the redemption of shares when this conflicts with the exercise of their conversion rights.
- **The interests of shareholders and bondholders also diverge with respect to risk.** Shareholders generally accept a higher level of risk than bondholders in exchange for potentially higher returns. If a company successfully takes greater risks, returns to shareholders will be higher. If a company fails in its risk-taking, the losses will be greater. Bondholders will, on the other hand, always receive the same contractually stipulated return regardless of the level of risk in projects the company undertakes. Bondholders only stand to lose if the level of risk to the enterprise ultimately results in corporate insolvency. This holds particularly true for holders of unsecured bonds. Bondholders always hope to see a predictable, stable cash flow and if possible, a reduction in the company's risk profile.

Bond issuances in Vietnam are not common due to a lack of detailed regulations. According to law, a company cannot issue bonds if the company's average after-tax profit rate in three consecutive years is less than the nominal yield written on the bond. This regulation means that if a company is established and operates for less than three years it cannot issue bonds. Besides, the average after-tax profit rate is also a problem because it does not identify which profit rate must be used since in financial terms, there are several profit rates, including net profit over revenue, net profit over total assets or net profit over equity. Due to these unclear regulations, companies still prefer issuing shares than bonds.

34 Shareholders are not necessarily always opposed to dilution. They may accept some level of dilution as a necessary cost to achieving the goals of the enterprise. A common example in comparative company practices is the issue of stock options as part of incentive compensation programs. The cost of share dilution is, arguably, less than the benefits achieved by a highly motivated workforce.

Best Practices:

In some countries, company laws incorporate special measures for balancing the conflicting interests of shareholders and bondholders by:

- Granting bondholders consultation rights. In France, for example, bondholders meetings must be consulted with in a number of circumstances, such as the reorganization or issuance of bonds that are secured by significant company assets
- Allowing bondholders to inspect documents during the GMS, as is the case in Germany
- Prohibiting the redemption of shares or reduction of capital while bonds are open for conversion or offering, for example in France.

As in France, information can also be sent to bondholders on issues that may be of special concern to them. Companies may wish to develop specific policies with respect to bondholders and are encouraged to integrate them into their overall programs on corporate governance. The holders of convertible bonds and share warrants have the same rights as the shareholders with regard to information and inspection of the company books and documents, unless otherwise provided by the decision on the issuance of such securities or agreed otherwise.

C. Issuing Securities

Issuing securities is a complex process involving a transfer of funds in exchange for specific control and cash flow rights, all subject to different levels of assurances and guarantees. Efficient capital markets help companies raise capital for productive uses. They also allow investors to reap returns on capital that might otherwise lie dormant and to select investments that correspond to their desired level of risk and return.

Capital markets cannot bring users and providers of capital together efficiently if the markets are subject to misuse. Unfortunately, the history of international financial markets is rife with such examples. Securities legislation has developed largely in response to abuses and market failures. Its purpose is to protect the interests of companies and investors, and to enhance the function and efficiency of capital markets.[35]

In Vietnam, securities legislation determines the conditions and methods of the issuance of securities. During this proceeding, powers to ensure the transparency and legality of the issuance are delegated to the SSC. It is also important to take into consideration that the regulation is focused on the obligations to issue shares of the public companies and practically it means that conditions and methods for the private offer are different in comparison with private companies.[36]

Legal requirements for issuing shares differ according to the method of placement, which are public placement and private placement. Every joint stock company can issue shares through public offer (public placement).[37]

All public offerings must be registered with the SSC. However, for companies operating under special business conditions such as financial institutions or insurance companies, charter capital changes must be preliminary approved by relevant authorities (the SBV or MOF) before they can register the public offering with the SSC to implement changes in charter capital.[38]

35 At the same time, market regulators must make sure they do not strangle entrepreneurial drive or company growth. Companies are wealth generators in every economy and elaborate regulation usually entails costs. The challenge for regulators is to develop intelligent regulations that meet required goals, while imposing the minimum level of costs upon the economy and society.

36 Decree 01, Article 4.

37 LOE, Article 87, Clause 6 and Decree 01, Article 2.

38 Circular 17, Part II, Paragraph 4.dd.

Table 2 summarizes private and public offering issuing method legal requirements for different types of joint stock companies.

Table 2: Overview of Legal Requirements for Securities Issue Methods

	Private Offering	Public Offering
Private Joint Stock Company (non-public)	• Both shares and bonds can be issued. • In case of bond issuance, if the issuer is a state shareholding company, the bond issuance plan must be approved by the MOF.[39] • The decision to issue shares, and the report on the results thereof, are subject to registration with a business registration agency. • The register book of shareholders shall be retained at the head office of the company.	• Both shares and bonds can be issued. • For shares issuance, an initial public offering (IPO), is subject to specific legal requirements for an IPO. • After the IPO, the private joint stock company will become the public company and must fulfill the obligations of a public company as required by the Law on Securities.[40] • Dossiers for registration of public offering of securities shall be regarded as public company dossiers.[41]
Public (non-listed) Company	• Both shares and bonds can be issued. • The decision to issue shares, and the report on the results thereof, are subject to registration with the state authorities (SSC, SBV or MOF depending on the business nature of the company).[42] • The private issuance of shares has to be registered with the SSC and the shares must be registered with VSD. • The change in the charter capital for shares issued must be registered with the business registration agency.	• Both shares and bonds can be issued. • The dossiers of registration of the public offering of securities must be prepared and submitted to the SSC. • The securities must be registered with VSD. • The change in the charter capital for shares issued must be registered with the business registration agency.

39 Decree 52, Article 19, Clause 3.
40 LOS, Article 24, Clause 1.
41 LOS, Article 24, Clause 1.
42 Decree 01, Article 6.

Listed Company	• Both shares and bonds can be issued. • The decision to issue shares, and the report on the results thereof, are subject to registration with the state authorities (SSC, SBV or MOF depending on the business nature the company).[43] • The private issuance of shares has to be registered with the SSC and the shares must be registered with the VSD. • The change in the charter capital for shares issued must be registered with the business registration agency.	• Both shares and bonds can be issued. • The dossiers of registration of the public offering of securities must be prepared and submitted to the SSC. • The securities must be registered with the VSD. • The change in the charter capital for shares issued must be registered with the business registration agency. • The shares issued must be admitted to stock exchanges.

The process of issuing securities involves a number of steps. They depend on the issuer, type of securities involved and the method used for the issuance. Figure 1 below only illustrates steps for the issuance of shares for a public company and they are divided into Option A and B. Option A illustrates the procedure for private offering and Option B for public offering.

43 Decree 01, Article 6.

Figure 1: Share Issue Procedures for a Public Company

Step 1:
Make the decision to place shares

Step 2:
Prepare for the issuance of shares. This process involves a number of parties such as a consulting company, underwriter, the Auditing Company as well as a legal consulting firm

Step 3:
Register the decision with state authorities (SSC, SBV or MOF) (For exceptions of authorized bodies, see Decree 01, Article 6)

Option A

Step 4.1:
State authorities' decision to approve the issuance of shares without public offer

Option B

Step 4.2:
SSC examines the public offering dossiers (including the prospectus) of the company

Step 5.2:
SSC grants the certificate for public offering of shares

Step 6.2:
Public announcement of the public offering of shares

Step 5.1, 7.2
Placing shares

Step 6.1, 8.2:
Report on the results of the issuance to state authorities

Step 7.1
Registration of the change in charter capital with the business registration agency

Step 9.2
Registration of the change in charter capital with the business registration agency, registration of shares with the VSD

Step 10.2
Acceptance to the organized market (stock exchanges)

Bonds have to be issued in conformity with the laws governing the securities market and the company charter.[44]

The following section discusses the above-mentioned steps in greater detail and highlights the differences between shares and bonds.

1. Making the Decision to Place Securities

The decision to place securities is made by different governing bodies, depending on the type of issue and the charter requirements, as summarized in Table 3.

Table 3: The Decision to Place Different Types of Securities

Shares	The GMS generally makes the decision. For more information on the decision to place shares, see Chapter 9, Section B.
Convertible and Non-Convertible Bonds	It is regulated under Decree 52 that the right to make a decision for issuing convertible bonds under a private offering belongs to the GMS.[45] However, under the Law on Enterprises and the Law on Securities, there is no regulation on who shall have the right to make decision on the issuance of convertible bonds. Since convertible bonds will be converted into shares after expiry and make changes to the charter capital in the future, in practice the GMS will make the convertible bond issuance decision. The Board of Directors makes the non-convertible bond issuance decision.[46] Besides, if the issuing company is aState shareholding company, the private offering bond issuance plan needs to be approved by the MOF.[47]

Comparative Practices:

The decision-making procedure for issuing bonds is simpler than for other securities, which may serve as an additional incentive for their use. However, the charter can provide for stricter approval requirements, for example, with regard to specific types of bonds.

44 LOE, Article 88, Clause 1.
45 Decree 52, Article 19, Clauses 1 & 2.
46 Decree 52, Article 19, Clauses 1 & 2.
47 Decree 52, Article 19, Clause 3.

The decision to issue securities is made by the GMS or the Board of Directors. The decision to issue securities becomes the main document certifying the rights of the holders of securities and of the company.

Although the contents of the decision depend on the circumstances of each issue, it must generally include information on the:

- Issuing company, i.e. full name, place of business and postal address
- Decision to issue securities, i.e. date and the decision-making body
- Securities to be issued, i.e. type and class, their nominal value, the rights of the holders of securities and number to be issued
- Conditions of the placement.

In the case of bonds, the decision must include additional information on the:

- Form of bond redemption (monetary or in-kind)
- Maturity date (and details regarding early redemption, where applicable)
- Other terms of redemption, i.e. the value of the payment, if early redemption is possible
- If convertible bonds are issued, the procedure for their conversion into shares
- If secured bonds are issued, information on the security or the person submitting the guarantee and the conditions of the guarantee (in the latter case, the decision must also be signed by the guarantor).

The SSC closely monitors the mandatory content of the company decision to issue securities, if their lawful issuance is conditioned upon *ex-ante* SSC approval. Copies of the decision to issue shares are kept with the registration authority and the company.

2. Registering the Decision to Issue Securities

An issuing organization making the public offering of shares must register its decision with the SSC except for the following cases:[48]

48 LOS, Article 13.

- The public offering of state enterprises stocks transformed into joint stock companies
- The sale of securities under court judgments or rulings, or sale of securities of property managers or recipients in the case of bankruptcy or insolvency.

Vietnamese law does not specify the expiration of the decision. The best practice is that the decision to increase the share capital may not be registered upon the expiration of six months from the date of its adoption.

A public offering of shares registration dossier comprises:[49]

- A written registration of public offering of stocks
- A prospectus
- The issuing organization's charter
- The decision of the shareholders' general assembly adopting the issuance plan and the plan on the use of capital generated from the public offering of stocks
- An issuance underwriting commitment (if any).

3. Granting the Certificate for Public Offering of Securities

The public offering of securities can only be made after the SSC grants the company with the public offering of securities certificate which serves as written certification that the public offering of securities registration dossier fully satisfies the conditions and procedures required by law.[50] Included in the dossiers submitted to the SSC, the prospectus is an important document through which investors obtain information about the issuer of securities, rights and duties deriving from those securities, including the risks, returns and any other relevant information associated with the investment.[51] For this reason, legislation requires that a prospectus be prepared and published in the case of any public offering.[52]

There are costs attached to the preparation of a prospectus that some companies may wish to avoid. However, the short-term costs of preparing the

49 LOS, Article 14, Clause 1.
50 LOS, Article 20, Clause 2.
51 Circular 17, Part II, Paragraph 1.2.
52 Circular 17, Part I, Paragraph 6.

prospectus are likely to be greatly outweighed by the long-term benefits (e.g. lower cost of capital) that can be achieved by clarifying the risks and returns of the company to investors.

Investor interests are protected by the information that must be included in the prospectus, the liability attached to those who have signed it and the requirement for its registration.

a) The Contents of the Prospectus

A prospectus is a document or electronic data disclosing accurate, truthful and objective information related to the offering or the listing of securities for issuing.[53] Securities legislation contains detailed provisions outlining what must be disclosed in the prospectus. These provisions are summarized in the introductory part of the prospectus and the main part of prospectus.[54]

1) The introductory part of the prospectus consists of:

- General information on the issuing company
- Information on the securities intended to be issued
- Information on the purpose for which the contributions for the securities will be used by the company.

2) The main part of prospectus consists of:

- Detailed information on the issuing company (for example, information about members of the company's governing bodies, the bank accounts of the company, the bodies controlling its financial and economic activities, the External Auditor, essential information about the financial health of the company including risk factors, information on the financial and economic activities of the issuing company, information on the company's shareholders, related parties and related party transactions and all other information that can influence investors' decisions).
- Detailed information about issued and non redeemed securities.

There is no regulation on the disclosure of a full prospectus via the mass media. However, the disclosure of the full prospectus on the company's website is encouraged.

53 LOS, Article 6, Clause 16.

54 Circular 17, Part II, Paragraph 1.2.

Best Practices:

It is good practice to disclose all material information about the company in the prospectus. The company should seek to provide shareholders and potential investors with all information that may be important in valuing the company.

Besides, it is also good if in the IPO prospectus, the issuer gives information about the company's ratings to help investors make investment decisions. Ratings companies exist to help the issuer make the ratings and at the same time, help investors know about the credit worthiness of the company and the level of risk associated with their targeted investments through independent opinions.

The three top companies dealing with credit ratings for the investment industry are Standard and Poor's (S&P's), Moody's and Fitch ICBA. Each of them has different ratings systems, but share the same objective which is to help investors know about a company's ability and willingness to repay debt, hence to evaluate risks associated with the money investors intend to put into a company. An important note is that the ratings are just for reference, not equal to buy, sell or hold recommendations.

At the moment, there are no such local credit ratings companies in Vietnam. However, Vietnamese corporations which intend to undergo IPOs have become more concerned with professional credit rating activities to facilitate IPOs, especially when they want to issue securities on foreign stock exchanges. In the case of Vietnam, low level IT infrastructure, statistics gathering and a lack of professionals, mean that the reliability of credit ratings locally cannot be ensured. Despite the aforementioned limitations, credit ratings activities are still critical in Vietnam for investors to have more indicators about their investments and for the market to evaluate the abilities of credit ratings companies to help them with future investments.

b) Prospectus Approval by the Company

The Board of Directors must approve the prospectus.

The company (issuer) is responsible for the truthfulness and completeness of the information included therein.[55] Beside all other people who participated in the preparation of the prospectus, including consulting

55 Circular 17, Part II, Paragraph 1.2.d.

companies, underwriter, appointed External Auditor, persons who signed the auditor's reports and any organizations or individuals who certified dossiers of registration, are liable for the damage caused by the publication of incomplete and inaccurate information in the prospectus and summarized prospectus.[56] The additional condition of their responsibility is that they knew, or by the nature of their work, had to know that the information was inaccurate or incomplete (for example the General Director, the Chief Accountant or the person fulfilling this function, the External Auditor). They are jointly and severally liable with the issuer for any damage caused to investors because of untruthful, incomplete, and/or misleading information. In some countries, if investors believe that they have suffered damages, they can file claims with a court.

The Penal Code of Vietnam regulates that those who intentionally make publication of inaccurate information or try to hide the truth related to the offering of securities that results in significant consequences shall be subject to a fine, non-custodial reform or sentenced to some years of imprisonment, be prohibited to take the position nor to do specific work.[57]

c) Registration Dossiers Approval and Certificate Granting by the SSC

Examining and approving the public offering of securities dossiers by the SSC is an important investor protection mechanism. This is a form of state control over the securities issuing process. Without proper approval and registration, securities cannot be issued and sold to investors.

In the course of examining the public offering of securities registration dossiers, the SSC may request issuing organizations to modify or supplement such dossiers in order to ensure that the disclosed information is accurate, truthful and complete and able to help protect legitimate rights and benefits of investors.[58]

Within 30 days of receiving the valid dossiers, the SSC shall consider and grant a public offering of securities certificate. In case of refusal, the SSC shall reply in writing, clearly stating the reasons for the refusal.[59] It may take

56 LOS, Article 17 and Circular 17, Part I, Paragraph 3.

57 Law No. 37/2009/QH12 amending and supplementing some articles of the Penal Code, Article 14.58

58 LOS, Article 18.

59 LOS, Article 20, Clause 1.

a company a lot longer time than the 30-day period to get approval and the certificate if it cannot provide the SSC with valid information and documents as required. Therefore, the company should carefully prepare the public offering of securities registration dossiers. The company should select competent consulting company, underwriter and accredited auditing company, auditors to sign the audit reports and any organizations and individuals that certify the public offering of the securities registration dossiers that will be involved in this process.

4. Public Offer of Securities

Upon receiving the SSC's approval of the prospectus and the certificate of the public offer, the issuer can begin placing securities after a public announcement of the securities issuance (i.e. within seven days from effective date of the certificate).[60]

The placement is the actual transaction between the company and the investor. This transaction is subject to a number of legal requirements and only takes effect upon the registration of its results, as discussed hereinafter.

a) Number of Securities Placed

The number of securities placed should be no more than indicated in the decision to issue securities.

The number of securities placed may, however, be less than the number indicated in the prospectus. In practice, the ability of a company to sell securities depends on investor demand. The actual number of securities placed must be disclosed in the report on the results of the issue.

b) The Timing of the Public Offer for the Offering and Payment of Securities

- **The Publication of the Announcement:** Within seven days from the effective date of the issuance certificate, the issuer is obliged to announce the public offer for offering and payment of securities on an electronic or printed newspaper for three consecutive issues.[61]

60 LOS, Article 20, Clauses 3 & 4.

61 LOS, Article 20, Clause 3 and Circular 17, Part I, Paragraph 11.

- **Beginning of the Offering:** The beginning of the offering of securities is determined by the public offer. The distribution of securities shall only be made after the issuing organization assures that securities buyers have accessed the prospectus in the public offering of securities registration dossier posted at places indicated in the issuance announcement. The issuing organization, the issuance underwriting organization or the issuance agent shall distribute securities in a fair and open manner and ensure a period of at least 20 days for investors to register to buy securities. Such a period must be stated in the issuance announcement.[62]
- **End of the Offering:** The placement must be completed no later than 90 days after the date determined in the public offer as the beginning date for the offering, with possible extension subject to prior approval by the SSC.[63] This requirement aims to provide a minimum period for investors to effectively acquaint themselves with the conditions of the investment.

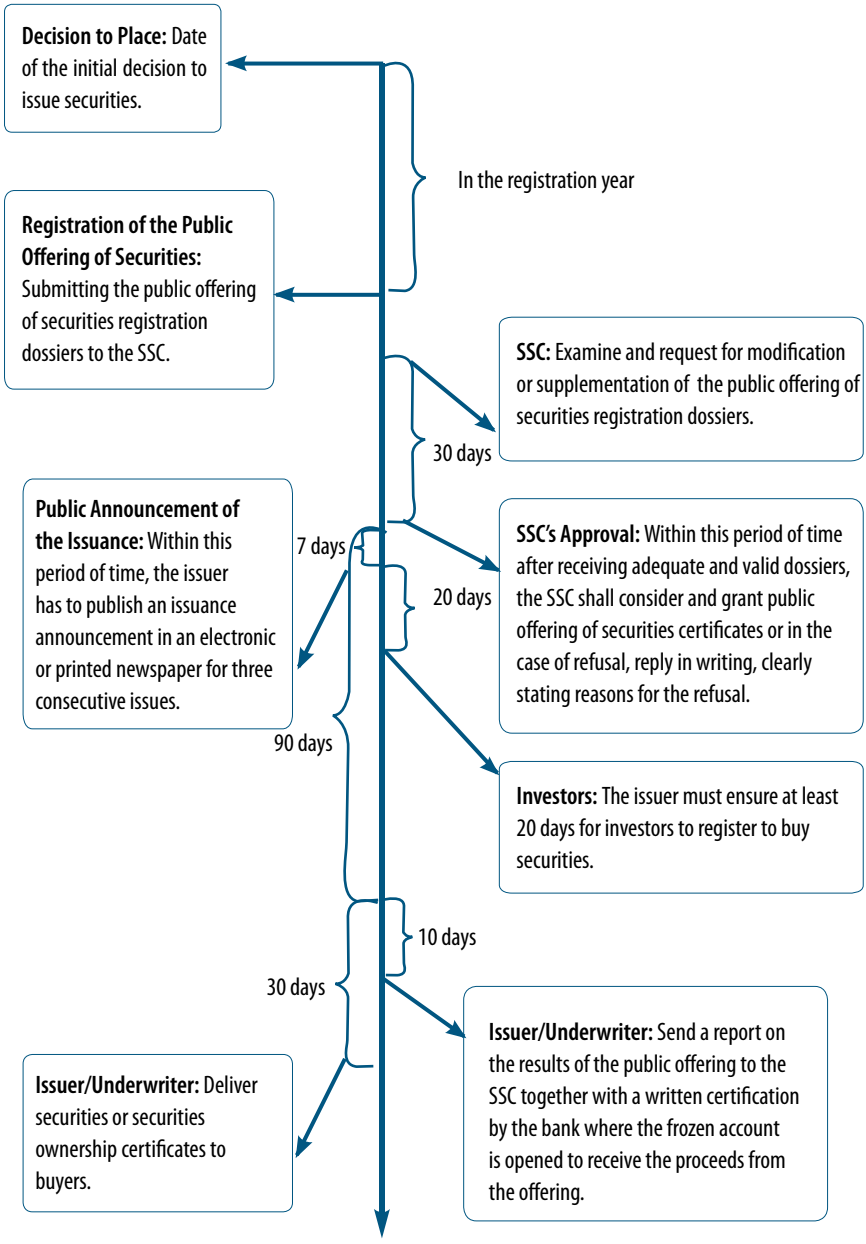
To carry out a legally valid securities issuance several deadlines need to be met, as illustrated in Figure 2.[64]

62 LOS, Article 21, Clauses 1 & 2.

63 LOS, Article 21, Clause 4.

64 Recommended timing (international practices) and based upon specific time limits of steps/processes regulated in the LOE and Circular 17.

Figure 2: Securities Issue Time Chart



c) The Issue Price of Securities

The GMS or the Board of Directors has the right to determine the issue price of securities. The discretionary powers are limited to prevent directors or large shareholders from acquiring securities below market price when the issue is made by offering (see Table 4).

Table 4: Issue Price

Security	Price
Shares	The issue price must correspond to the market value. The issue price cannot be lower than the nominal value (only applied for companies transformed from SOEs).[65] The issue price must not be lower than the market price at the time of offering or the most recent book value recorded of the shares, except in the following cases:[66] • Initial offering of shares to persons other than founding shareholders • Shares offered to all shareholders in proportion to their current respective percentage of shares in the company • Shares offered to brokers or underwriters. In this case, the specific amount of discount or rate of discount must be approved by the shareholders representing at least 75% of the total number of shares with voting rightst • Other cases and the rates of discount in such cases shall be stipulated in the company charter.
Convertible Bonds and Warrants[67]	The issue price must correspond to the market value. Current Vietnamese regulations do not provide details on the issue price of convertible bonds and warrants. Reference can be made by companies to the following comparable practices in Russia and Serbia: • *The issue price cannot be lower than the nominal value or book value of shares into which they are to be converted.* • *When exercising their pre-emptive rights, shareholders can acquire convertible bonds or warrants at a price no more than 10% lower than the price determined for other investors.*
Bonds (non-convertible)[68]	The value of bond is reflected by the bond yield. Depending on the nominal yield on the bond, compared with the market bond rates, the issue price of bond can vary quite flexible. Comparable practices in Russia and Serbia also indicate that the issue price does not have to correspond to the nominal value of bonds.

65 Decree 109, Article 43, Clause 2.

66 LOE, Article 87, Clause 1.

67 Convertible bonds and warrants are regulated in Decree 52, Articles 20 to 25.

68 Non-convertible bonds are regulated in Decree 52, Articles 26 to 29.

d) The Amendment to the Business Registration

After the securities are issued, the company is required to register the increase in the charter capital with an authorized business registration agency within 10 days from the date of the decision on the increase in the company's charter capital.[69] It is regulated by the MPI regarding the charter capital amendment registration that the company must send notice to the MPI together with the written decision and the GMS meeting minutes on the amendment of the charter capital.[70] The current practice in Vietnam is that the GMS shall authorize the Board of Directors to conduct necessary procedures regarding the amendment of the business registration after the issuance of new shares.

69 LOE, Article 26, Clause 1.

70 Decree 43, Chapter V, Article 40, Clause 1.

D. The Conversion of Securities

Companies not only issue securities when seeking to raise capital, but also when existing securities or rights embodied in them must be restructured. A conversion of securities occurs in the following circumstances:

- Decreasing the charter capital by decreasing the nominal value of shares without changing the number of shares. By this mode, the company shall withdraw shares from shareholders and issue new shares with reduced par value. The company shall have to pay its shareholders an amount of money equal to the number of shares of each shareholder times the difference between old and new par values.[71] Currently, there is no specific regulation or guidance on increasing the charter capital by increasing the nominal value or accountable par of shares.
- Splitting shares: Splitting share to reduce the nominal value of share is not allowed in Vietnam.
- Converting one type and class of shares into another type and class of shares.
- Converting bonds into shares.
- Reorganizing the company.

In these cases, new investors are not involved. Shares are placed with existing shareholders or other investors hold securities that grant them conversion rights. The procedure for converting existing shares is simpler and quicker than for issuing additional shares, because it does not change the charter capital of the company. The conversion of convertible bonds into shares does increase the charter capital of the issuing company, however, the change is anticipated beforehand.

71 Circular 19, Section II, Part B, Article 1.

E. Derivatives

Shares and bonds can be described as primary securities, which directly certify a set of rights. Companies can also issue derivative instruments that embody rights dependent on the performance of underlying or primary securities, assets or other property. Such instruments can, in international practice, relate to both equities and debt securities.

According to the Law on Securities, derivatives shall include rights, warrants, call options, put options, futures, securities classes or indexes.[72]

For the purpose of fund raising, the company shall issue:

- **Rights:** A type of securities issued by a joint stock company along with an additional issuance of stocks to ensure that its existing shareholders can buy new stocks under specified conditions. Shareholders can transfer their rights to others within a specified period of time.[73]
- **Warrants:** A type of securities issued along with the issuance of bonds or preferred stocks, entitling securities holders to buy a stated amount of common stocks at a designated price within a given period.
- **Stock Options:** A call option on the common stock of a company, issued as a form of non-cash compensation. In practice, stock options can play an important role in the context of executive remuneration programs and may have important corporate governance implications. Therefore, it is useful to make an overview of the comparative practice of using stock options as a method of compensating directors.

In the corporate governance context, a relatively mundane form of option - the incentive stock option - is used to provide performance-enhancing incentives to management and employees. In some countries, options are the primary component of remuneration packages for top executives. They are popular because the returns to executives can be large. They ostensibly align the interests of management and shareholders, and because the true cost of options (the dilution of other shareholders) is not readily apparent under

72 LOS, Article 6, Clause 1.

73 LOE, Article 87, Clause 2c.

current accounting standards. In Vietnam, some companies issued options to their employees to ensure their rights in buying the company's shares at a prioritized price. However, up to now this practice has not been so common as many companies still issue shares directly to their employees.

Best Practices:

Stock option compensation is a complex and contentious remuneration technique that requires close examination by the governing bodies of the company, GMS approval and disclosure in detail in the annual financial statements of the company. Board of Directors and shareholders need to be aware of the company's use of these tools since they could potentially expose companies to unexpected and significant risks.

F. Raising Capital in International Markets

A company can also raise capital in international markets through the issuance of either bonds or shares providing it satisfies the conditions as regulated by the Vietnamese Government, including:[74]

- Not being on the list of business lines in which the participation of foreign parties is banned and ensuring participation ratios of foreign parties as specified by law
- Having the overseas offering of securities and the plan on the use of mobilized capital approved under its Board of Directors or GMS decision
- Satisfying the offering conditions specified by a competent authority of the country where it registers the offering.
- In compliance with regulations on foreign exchange management.

At least 10 days before sending its registration dossier for the overseas offering of securities, the issuing organization must send the SSC a copy of the offering registration dossier, sent to the competent authority of the country where the issuing organization registers the offering and other supporting documents illustrating that the conditions for the overseas offering of securities have been satisfied.[75]

Within 10 days after its registration dossier for the overseas offering of securities takes effect, the issuing organization has to send the SSC a copy of that dossier which has been approved overseas and disclose information on the offering to the public.[76] Within 15 days after the end of the offering, the issuing organization shall send to the SSC a report on the offering results.[77]

An issuing organization that conducts the overseas offering of securities must disclose information according to the provisions of foreign and Vietnamese laws as well as have its periodical financial statements

74 Decree 14, Article 6, Clause 1 & Decree 84, Article 5.
75 Decree 14, Article 6, Clause 2.
76 Decree 14, Article 6, Clause 3.
77 Decree 14, Article 6, Clause 5.

prepared according to the international accounting standards or according to international and Vietnamese accounting standards, enclosed with a written explanation of differences between those accounting standards.[78]

Listing on foreign stock exchanges brings advantages to listed companies such as a lower cost of capital, higher liquidity and greater prestige. The world's largest foreign markets tend to have much higher standards of corporate governance than Vietnamese markets. The most popular markets are in the U.S., Hong Kong, and Singapore, which arguably have some of the most rigorous governance standards in the world. Therefore, Vietnamese companies need to fulfil much higher corporate governance standards in order to enter or remain strong on these markets.

Cavico Corporation offers an example of raising funds on a foreign stock exchange. It was the first Vietnamese company to list stocks on a foreign stock exchange (the NASDAQ). From its first year of listing on the US stock exchange (2006), the company faced considerable difficulties in raising capital due to differences in corporate governance and accounting practices between Vietnam and the international market. It could not tap the potential level of the funds due to Vietnam's restrictions on foreign investors' percentage of shareholding in Vietnamese companies, which is capped at 49%. At that time, it decided to set up a US subsidiary to avoid the above restrictions. However, for subsidiaries which are less than 50% owned by the holding company, the holding company must prepare consolidated financial statements for both the holding company and those subsidiaries in accordance with the US' accounting and reporting standards. The fact that the holding company's financial statements must be consolidated is not necessarily complicated in practice, but authorities can sometimes have doubts about fraudulence in these statements' preparation. Despite the above difficulties, Cavico Corporation still confessed that raising funds and listing on the international market was beneficial for it since international market investors were more focussed on the company's efficiency, rather than the dividend pay-out that Vietnamese investors are often concerned with. Bonds can be issued in international markets either with government guarantee or non-government guarantee types.[79] The issuer must prepare the issuance plan which is approved by the GMS detailing the use of offering proceeds and

78 Decree 14, Article 6, Clause 4.

79 Decree 53, Article 16.

details of the bond price, coupon, volume and term. If the bond is a convertible bond or is secured by assets in Vietnam, the issuer must comply with current laws. This will mean that any conversion to equity will need to comply with current foreign ownership restrictions and the security arrangements may require registration. The amount of bonds issued in international markets must be within the total national borrowing limit approved by the Prime Minister each year. Besides, the issuer must have an issuance file (including a prospectus, underwriting agreement, subscription agreement, legal consultancy agreement, legal opinion and other agency agreements) compliant with Vietnamese law and the law of the foreign jurisdiction in which the bonds are offered.[80] To ensure that the international bond offering is within the borrowing limit, the issuer must provide the issuance plan to the SBV to confirm this. The SBV must work with the MOF to provide the confirmation to the issuer within 15 days of the submission of the issuance plan.[81] Those issuers who wish to issue bonds in non-government guarantee type must have a company credit rating equal to or higher than the nation's credit ratings, rated by an international recognized credit rating company.[82]

For a government guarantee bond offer, the guarantee must be approved by the Prime Minister. There are also other conditions on the offer, including that the issuer must be rated and its rating is equal to or a grade lower than the Vietnamese Government's credit rating. The value of the bonds for each offering tranche must not be less than US$100 million. The issuer must also have audited accounts for the past three years and must not have incurred any loss or have outstanding debts.[83]

For a bond issuance in international markets, this option seems to be favorable since international market interest rates are considerably lower than market interest rates in Vietnam. However, as with debt securities, bonds' liquidity relies on the abilities and character of the issuers and expresses the issuers' abilities and willingness to repay the principal and interests. As a result, as long as the international investors cannot have adequate information to evaluate the bond issuers, it is anticipated that Vietnamese bonds are less preferable on international stock exchanges, hence the difficulty in raising

80 Decree 53, Article 6.

81 Decree 53, Article 20, Clause 2b.

82 Decree 53, Article 17, Clause 2.

83 Decree 53, Article 8, Clause 2 and Article 17, Clause 3.

capital through issuing bonds on international stock exchanges.

A solution for the above difficulty is an internationally recognized credit ratings company. The ratings company will evaluate the bond issuers' ability and willingness to pay interest, repay the principal and release a rating for issuers. The fact that the ratings company must be an internationally recognized one to gain the trust of international investors is critical. Foreign investors will then see the rating as an indicator for investment decision making.

Due to its advantages, there are growing numbers of Vietnamese companies hoping to seek capital in international markets. However, in conformity with stringent regulations on corporate governance in foreign markets, companies must internally address complicated issues before looking for capital in these markets. Besides, the issuers also have to comply with Vietnamese regulations on foreign debt management and foreign exchange management.[84] To achieve this, a company wishing to raise funds on international exchanges should consult with professional consulting firms, including auditing and law firms for solutions.

84 Decree 53, Article 5, Clause 4.

NOTES

NOTES

12 Chapter

MATERIAL CORPORATE TRANSACTIONS

12 | Material Corporate Transactions

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The Chairman's Checklist

Extraordinary Transactions:

- ☑ Do all directors understand the concept of extraordinary transactions? Does the company charter specify additional criteria for identifying transactions that are to be treated as extraordinary beyond the minimum criteria mandated by law? Does the Board of Directors distinguish between extraordinary transactions and those entered into in the ordinary course of business?
- ☑ How does the Board of Directors ensure that extraordinary transactions are properly evaluated and approved by the Board of Directors and shareholders?
- ☑ Does the Board of Directors ensure an Independent Appraiser is engaged to ascertain the market value of assets involved in the transaction?
- ☑ What steps are taken to protect the rights of shareholders who do not approve of extraordinary transactions?
- ☑ Does the company properly disclose information on completed extraordinary transactions?

Related Party Transactions:

- ☑ Does the Board of Directors ensure that related parties properly disclose their interest in transactions? Do related parties abstain from participating in discussing and voting on such transactions?
- ☑ Does the Board of Directors ensure that all legal requirements for the approval of related party transactions are adhered to? What role do independent directors play in related party transactions?
- ☑ Does the Board of Directors take adequate measures to disclose information on related party transactions and related parties?
- ☑ Do all directors understand their liability for violating procedures while approving related party transactions?

Shareholders should be legally protected when the company is involved in extraordinary and/or related party transactions. Such protection is essential because of the impact that these transactions can have on the value of the company, the price of its shares and the property rights of shareholders. Nevertheless, corporate governance abuses in these types of transactions continue to take place. For example, beneficial ownership structures typically remain non-transparent, making it nearly impossible to identify related parties in a transaction. In the meantime, insiders continue to develop complex structures and sophisticated techniques that allow them to tunnel assets, profits, and corporate opportunities away from the company and its shareholders.

Current Vietnamese laws are still inconsistent in the ways they regulate extraordinary transactions. For example, the current Law on Enterprises almost says nothing about these transactions, while the Law on Securities and subordinated regulations require detailed disclosures on extraordinary transactions.

In this chapter, we have illustrated some international practices on extraordinary transactions and have also discussed all relevant situations implied by Vietnamese laws and regulations as extraordinary transactions.

A. Extraordinary Transactions

1. Definition

Under Vietnamese Law, there is no specific definition of extraordinary transactions. The Law on Enterprises only regulates certain material transactions that need to be approved by the GMS or the Board of Directors. Of which, all transactions related to investment or sale of assets with value equal to or more than 50% of the total value of assets recorded in the most recent financial statement of the company, if the company's charter does not stipulate another percentage,[1] must be approved by the GMS.

Comparative Practices:

In Russia, a transaction (or several related transactions) is extraordinary when it meets all five of the following criteria:

a) The Nature of the Transaction

- The transaction directly or indirectly involves the acquisition, sale, or the possibility of sale of corporate assets
- The transaction is a credit, pledge, or guarantee transaction
- The transaction is not related to the issue of additional common shares or securities convertible into common shares.

b) The Value of the Transaction

The assets involved have a value of 25% or more of the book value of the company's assets as determined by financial statements as of the most recent reporting date.

1 LOE, Article 96, Clause 2d and Article 104, Clause 2đ.

c) The Relation of the Transaction to the Business of the Company

The transaction is not carried out in the "ordinary course of business" of the company.

d) Related Transactions

Two or more related transactions involving the company's assets totaling 25% or more of the book value of the company's assets are considered a single extraordinary transaction. Factors that determine whether several transactions must be considered as a single extraordinary transaction include:

- The purpose of the transactions
- The market conditions under which the transactions have been concluded
- The sphere of activities of the company
- The duration of relationships between the company and its transactional counterparts.

e) Additional Charter Criteria

The charter may define additional transactions that should be treated as extraordinary transactions. For example, the charter may specify that transactions involving assets with a lower percentage of the book value be considered extraordinary transactions. The charter can also provide that certain types of contracts (e.g. all loan agreements or all pledges of company shares) must be treated as extraordinary transactions, regardless of their nature. However, the company has no right to change the legal definition of an extraordinary transaction to limit cases of extraordinary transactions. For example, the company cannot provide that only transactions involving assets with a value in excess of 30% of the book value of the company's assets will be considered as extraordinary transactions.

Best Practices:

There are many cases when transactions should be subject to special procedures for extraordinary transactions, even though they fall well below the legislated threshold. For example, the sale of a subsidiary of a large petroleum company that holds significant oil drilling rights may be of such size and strategic importance that it should be considered as an acquisition or disposal of high-value assets regardless of the percentage of asset value it represents.

Legislation establishes a minimum standard of behavior and there is some room for various interpretations regarding what is extraordinary and what is not. For this reason, it is good practice for charters to include provisions that "transactions that may have a significant effect on the company" be treated as extraordinary (except for transactions that are concluded in the ordinary course of business).

It is also recommended that the sale of shares of a subsidiary where the company would lose its majority stake be considered extraordinary transactions.

When two companies are engaged in a transaction, each company must separately apply the criteria for an extraordinary transaction. This means that the same transaction may conceivably be an extraordinary transaction for one company, but not for the other.

2. Valuing Extraordinary Transactions

An important aspect in determining whether a transaction is an extraordinary transaction is to value the assets involved in the transaction. The value of these assets must be determined to ascertain which governing body approves the transaction before the company can conclude the transaction.

Comparative Practices:

In Russia and Serbia, the basis of valuation for sales of assets is the value of assets involved in the transaction as determined by reference to the company's financial statements as of the most recent reporting date before the transaction. For the acquisition of assets, the acquisition price of assets involved in the transaction shall be used. The Board of Directors has the authority to determine the value of assets or services. In doing so, the Board of Directors must compare the book value of the assets involved in the transaction with the book value of the company's assets as a whole. This comparison depends on the nature of the transaction (whether it is an acquisition or a sale), as illustrated in Table 1.

Table 1: Determining a Transaction's Value

Type of Transaction	Basis of Valuation
Sale of Assets	The value of assets involved in the transaction as determined by reference to the company's financial statements as of the most recent reporting date before the transaction.
Acquisition of Assets	The acquisition price of assets involved in the transaction.

Best Practices:

An Independent Appraiser should assist the Board of Directors in determining the value of assets.

3. Procedure for Approving Extraordinary Transactions

The Law on Enterprises does not specifically mention extraordinary transactions and therefore the procedures for approving extraordinary transactions are not clearly stated in Vietnamese laws. There are only two articles of the Law on Enterprises which mention governing bodies for approving material transactions as follows.

All transactions related to (i) re-organization or dissolution of the company and (ii) investment or sale of assets with value equal to or more than 50% of the total value of assets recorded in the most recent financial statement of the company, if the company's charter does not stipulate another percentage, must be approved by the GMS.[2]

Comparative Practices:

In Russia, the laws define extraordinary transactions very clearly as well as the procedures for approving them. Extraordinary transactions must be approved by different governing bodies depending on the value of assets of the transactions as illustrated in Table 2.

Table 2: The Approval of Extraordinary Transactions

Value of Assets	Approving Governing Body
Between 25% and 50% of the book value of the company's assets	The Board of Directors
More than 50% of the book value of the company's assets	The General Meeting of Shareholders

The Board of Directors has the authority to approve extraordinary transactions that are defined as such by the charter.

2 LOE, Article 96, Clause 2d and Article 104, Clause 2đ&g

a) Transactions Involving Between 25% and 50% of the Book Value of Company Assets

Unanimous approval of all Board of Directors members is required to approve an extraordinary transaction involving assets with a value between 25% and 50% of the book value of the company's assets.

If the Board of Directors is not able to reach a unanimous decision, it can request that the GMS approve the transaction. The Board can do this by a simple majority vote of directors participating in the Board meeting, unless the charter or internal regulations require a higher percentage of votes. The GMS can then approve the transaction with a simple majority vote of participating shareholders.

b) Transactions Involving More Than 50% of the Book Value of Company Assets

The GMS must decide on whether to approve transactions involving more than 50% of the book value of company assets by a three-fourths-majority vote of participating shareholders.

c) Required Information for the Decision to Approve an Extraordinary Transaction

The decisions of the Board of Directors or the GMS must include information on:

- The parties that are involved in the transaction
- Other beneficiaries of the transaction (if any)
- The price of the transaction
- The object of the transaction
- Any other significant terms and conditions related to the extraordinary transaction.

4. How Shareholders Can Protest Extraordinary Transactions

As already mentioned, extraordinary transactions are not regulated clearly by Vietnamese laws. The Law on Enterprises has one article referring to how shareholders can protest if the transactions result in the company's re-organization or changes in the rights and duties of shareholders.

The Law on Enterprises refers to:[3]

3 LOE, Article 90.

- A shareholder voting against the re-organization of the company, or against a change to the rights and obligations of shareholders stipulated in the charter of the company, may demand the company redeem his/her shares. Such a demand must be made in writing and specify the name and address of the shareholder, the number of shares of each class, the intended selling price and the reason for demanding redemption by the company. Such a demand must be sent to the company within 10 working days from the date on which the GMS passed a resolution on a matter as mentioned above.
- The company must redeem shares upon demand by the shareholder as at the market price or the price determined on the basis of the principles stipulated in the charter of the company within a period of 90 days from the date of receipt of the demand. Where there is disagreement relating to the price, such shareholder may sell shares to other persons or the parties may request valuation by a professional valuation organization. The company shall recommend at least three professional valuation organizations for the shareholder to select from and such selection shall be the final decision.

Best Practices:

If a shareholder does not agree with an extraordinary transaction conducted in full compliance with procedural requirements and the law, he/she may:

- *Sell his/her shares:* Practically, this is only possible if the company's shares are liquid, i.e. there are interested buyers and shareholders are able to sell their shares at a fair price; or
- *Demand redemption of shares in part or whole:* Taking into consideration the GMS decision to approve acquisitions and disposal of the high-value assets of the company is one of the issues which gives shareholders with voting shares the right to dissent and the right to have shares redeemed by the company.

5. Disclosure Requirements

Although extraordinary transactions are not defined and clearly stated by the Law on Enterprises, disclosure requirements are mentioned in detail by

other laws and regulations. However, please note that nature of extraordinary transactions implied in these regulations is different from international practices.

For reference purposes for readers, public and listed companies are required to disclose extraordinary transactions in accordance with the Law on Securities and Circular 09.[4]

A public company shall disclose extraordinary information within 24 hours of any of the following events:

- A bank account is frozen or is permitted to resume after a freezing period
- Temporarily ceases of business operations
- Having new business/operation license(s) or revocation of business/operation license(s)
- There are Board of Directors' decisions on redemption of its own stocks or resale of bought stocks
- There are decisions to initiate lawsuits against Board of Directors members or other senior executive management members, court judgments or rulings concerning its operation or violations
- There are Board of Directors' resolutions on the payment of dividends
- Changes of significant executive members (i.e. members of Board of Directors, Board of Supervisors, Board of Management or Chief Accountant).

A public company shall disclose extraordinary information within 72 hours of any of the following events:

- Borrowing a loan or issuing bonds valued at 30% or more of its owned equity
- There are decisions made by the Board of Directors on the company's development strategy, medium-term development plans and business plans or decisions on the alteration of applied accounting methods
- Application for bankruptcy filings is approved
- Decisions of establishment, acquisitions, sales or liquidations of subsidiaries or investments in affiliates.

Disclosure of extraordinary transactions must be made via publications

4 LOS, Article 101, Clauses 2 & 3 and Circular 09, Section II, Article 2 & Section IV, Article 2.

and the website of the company as well as on information channels of the SSC or exchanges.[5] Furthermore, in Circular 09, it is also stipulated that when disclosing extraordinary information, public companies shall clearly state the occurred event, its cause, plan and solutions (if any).[6]

Best Practices:

Companies are required to include the following information about extraordinary transactions in their annual reports:

- A list of all extraordinary transactions concluded by the company during the reporting year
- A list of transactions that are considered extraordinary based on the definition in the charter
- Key terms of each extraordinary transaction.

5 Circular 09, Section II, Article 2, Paragraph 2.2.

6 Circular 09, Section II, Article 2, Paragraph 2.3.

B. Related Party Transactions

Related party transactions involve insiders, such as directors, managers, large shareholders, or parties related to them. Some related party transactions have legitimate purposes and can be conducted fairly, others cannot. Regardless, they are easily abused and warrant particular attention since they may reduce the value of the company and expropriate shareholder rights. Legislation contains detailed procedures to discourage insiders from entering into related party transactions and to help ensure fairness when a related party transaction does take place.

Related party transactions not only occur between the company and its directors, managers, and large shareholders, but more importantly, within groups of companies (holding structures), where transactions between the parent and subsidiary companies frequently occur. In other words, related party transactions are traded amongst related parties of the company.

1. Definition

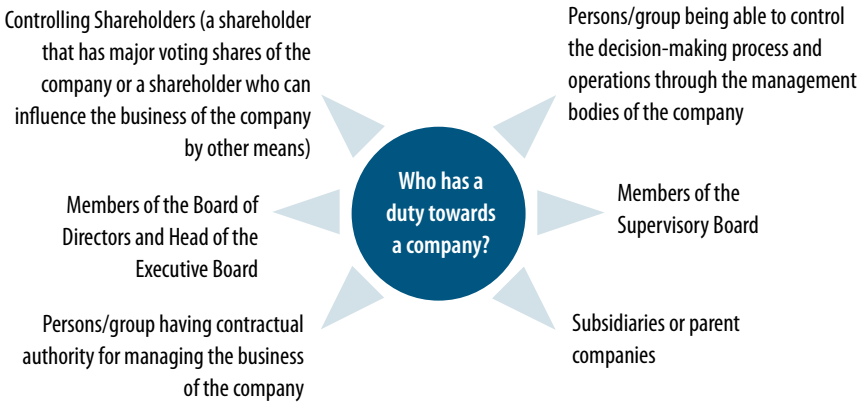
For a transaction to be considered a related party transaction, each party involved in the transaction must check whether two conditions are met.

a) Potential Related Parties-Persons that Have a Duty Towards a Company and Connected Persons

A number of parties can be defined as related if they play a role in a transaction. In Vietnam, related parties encompass all those parties/persons that have duties towards the company.[7] Such parties are presented in Figure 1.

7 LOE, Article 4, Clause 17.

Figure 1: Persons That Have Duties Towards the Company



Besides persons who have duties towards the company, a potentially related party can be also a member of their family (the connected persons). Family members of a person that has a duty towards a company include his/her spouse, father, adoptive father, mother, adoptive mother, child, adopted child or sibling.[8]

Best Practices:

The OECD Principles of Corporate Governance provide a general definition of related parties, including entities under common control, significant shareholders including members of their families and business associates and key management personnel.[9]

International Accounting Standard (IAS) Number 24 provides a more detailed definition and thus parties are considered to be related if one party has the ability to control the other party or to exercise significant influence or joint

8 LOE, Article 4, Clause 17đ.

9 See 2004 OECD Principles of Corporate Governance on http://www.oecd.org/dataoecd/32/18/31557724.pdf.

control over the other party in making financial and operating decisions.[10] A party is related to an entity if:

1. Directly, or indirectly through one or more intermediaries, the party:
   - Controls, is controlled by, or is under common control with, the entity (this includes parents, subsidiaries, and fellow subsidiaries)
   - Has an interest in the entity that gives it significant influence over the entity; or
   - Has joint control over the entity.
2. The party is an associate (as defined in IAS 28 Investments in Associates) of the entity[11]
3. The party is a joint venture in which the entity is a venture (see IAS 31 Interests in Joint Ventures)[12]
4. The party is a member of the key management personnel of the entity or its parent
5. The party is a close member of the family of any individual referred to in (1) or (4)
6. The party is an entity that is controlled, jointly controlled, or significantly influenced by or for which significant voting power in such entity resides with, directly or indirectly, any individual referred to in (4) or (5); or
7. The party has a post-employment benefit plan for the benefit of employees of the entity, or of any entity that is a related party of the entity.

At the same time, IAS 24 specifies which parties are not deemed to be related:

- Two enterprises simply because they have a director or key manager in common
- Two parties who share joint control over a joint venture
- Providers of finance, trade unions, public utilities, government departments and agencies in the course of their normal dealings with an enterprise
- A single customer, supplier, franchisor, distributor, or general agent with whom an enterprise transacts a significant volume of business merely by virtue of the resulting economic dependence.

10 See also: the International Accounting Standard Plus' website under http://www.iasplus.com/standard/ias24.htm.

11 See also: the International Accounting Standard Plus' website under http://www.iasb.org/NR/rdonlyres/8E1664C6-AD47-4B84-A8D7-88476F1D83AC/0/IAS28.pdf.

12 See also: the International Accounting Standard Plus' website under http://www.iasb.org/NR/rdonlyres/13E1409D-1100-4AF5-A7D9-B5AC69E40CB1/0/IAS31.pdf.

The Financial Accounting Standards Board's (FASB) Statement No. 57 finally defines a related party as affiliates of an enterprise, trusts for the benefit of employees, owners and their family members, investment entities accounted for by the equity method by the firm, management and other large shareholders or parties that influence a firm's policy.

b) Related Parties Are Involved in the Transactions

For the purposes of defining related party transactions, the parties specified in the previous section must be involved in the transaction in one of the following capacities:

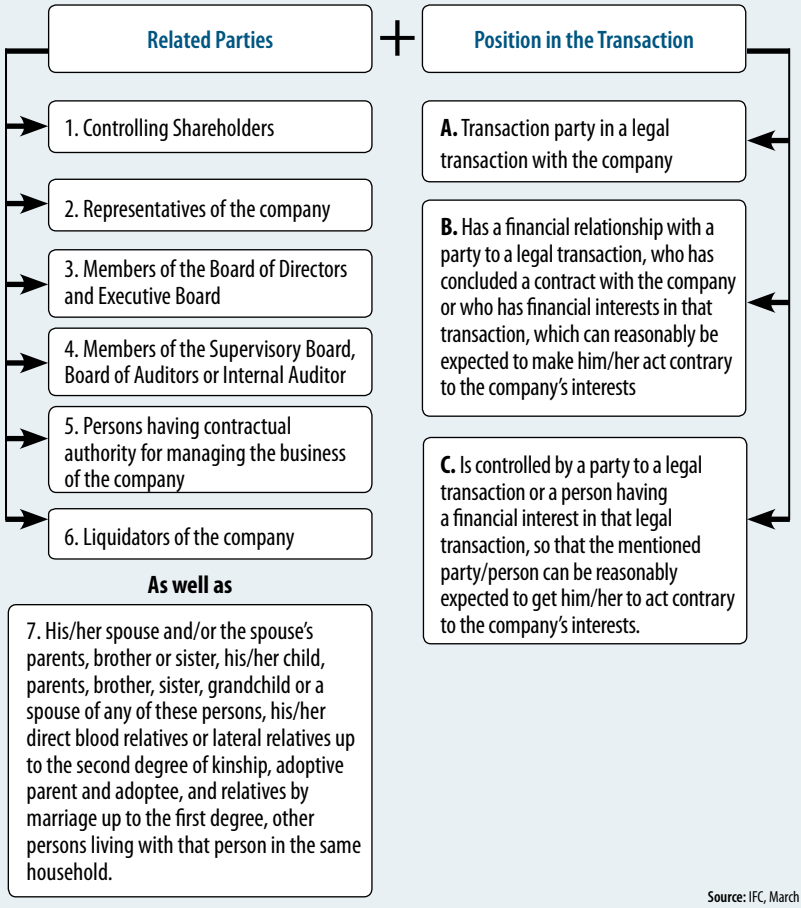
- Act as a transaction party in a legal transaction with the company
- Has a financial relationship with a party to a legal transaction, who has concluded a contract with the company or who has financial interests in that transaction, which can reasonably be expected to make him/her act contrary to the company's interests
- Is controlled by a party to a legal transaction or a person having a financial interest in that legal transaction, so that the mentioned party/person can be reasonably expected to get him/her to act contrary to the company's interests.

Mini-Case 1

Company (X) concludes a contract with Company (Y) that Company (Y) will sell products of Company (X) on-line. Mr. (A) is a member of the Board of Directors of Company (X) and is also the General Director of Company (Z), which will receive a special discount on products of Company (Y) sold to Company (Z) if the transaction between Company (X) and Company (Y) is concluded. In such a transaction between Company (X) and Company (Y), Mr. (A) is considered a related party who is a beneficiary of the transaction. The transaction will be a related party transaction for Company (X) and will require approval. At the same time, it is not a related party transaction for Company (Y).

As illustrated in Mini-Case 1, it is important to note that the same transaction can be a related party transaction for one company but not for another. In this case, only one company needs to approve the transaction as a related party transaction. Figure 2 depicts components of related party transactions, which must be present in a transaction.

Figure 2: Components of Related Party Transactions



Source: IFC, March 2004.

To determine whether a transaction is a related party transaction, it is necessary for an interested party from the left column of Figure 2, to be involved in the transaction as indicated in the right column of Figure 2. In practice, this means that a company must create a list of related parties and always check whether any of these parties (1–6 of the left column) or their affiliated persons (7 of the left column) is involved in each and every transaction carried out by the company, as mentioned in A-C of the right column.

Comparative Practices:

Related party transactions are common in the context of groups of companies, e.g. in parent-subsidiary relations. If one company dominates another, there is a risk that the parent will utilize the subsidiary for its own business objectives, without care for the subsidiary's long-term financial viability. In these cases, the creditors and shareholders of both the subsidiary and parent may be put at risk often unknowingly.

- The risk for creditors at the subsidiary level is obvious. But the risk is present at the parent level as well, as the subsidiary's insolvency can greatly damage the surviving parent.
- Shareholders are also put at risk, although the position of shareholders at the subsidiary level is weaker. On the one hand, shareholders at the subsidiary level often benefit from being part of the parent's business. On the other hand, they may have to contribute to the parent's welfare to their own detriment.

2. Approving Related Party Transactions

Best Practices:

There are different means of regulating related party transactions. Prohibitions of specific types of transactions are found in the U.K., where the U.K. Companies' Act prohibits directors from entering into

certain transactions that are deemed detrimental to the company.[13] The advantage of this first approach is clear, all practitioners know where the boundaries are. There is no definitive analysis on the possibilities to circumvent the prohibition. The disadvantage is the rule's lack of flexibility, even economically useful transactions may not come into being when the law contains a flat prohibition. Additionally, parties may also make great efforts to circumvent the rule.

In some jurisdictions there have been calls to change the approach and foster more substantive criteria of fairness. Transactions with conflicting interests should always be open to challenge on the basis of unfairness, at least gross unfairness. This second approach is frequently found in U.S. law and in the U.K.[14]

According to the Law on Enterprises, related party transactions which are contracts and transactions between the company and the following parties have to be approved by either the Board of Directors or the GMS:[15]

- Shareholders or authorized representative of shareholders holding more than 35% of the ordinary shares of the company and their related persons
- Members of the Board of Directors, the director or General Director
- Related persons of members of the Board of Directors, director or General Director of the company.
- Any companies which have the following relationships with members of the Board of Directors, director or General Director and other members of the executive board:[16]
  - Owned by them (i.e. currently holding shares or have contributed capital)
  - Having shares or contributed capital of more than 35% of that company's charter capital.

13 Section 330(2), U.K. Companies' Act.

14 Commonly seen in the U.K. See The Law Commission and The Scottish Law Commission's report "Regulating Conflicts of Interests and Formulating a Statement of Duties", September 1999, p.282, document Law Com. No. 261.

15 LOE, Article 120.

16 LOE, Article 118.

a) Approval by the Board of Directors

Article 120 of the Law on Enterprise regulates the related party transactions that need approval by either the Board of Directors or the GMS. Accordingly, all related party transactions with a value of less than 50% (or a smaller percentage as stipulated in the charter of the company) of the total value of assets recorded in the most recent financial statement of the company shall be approved by the Board of Directors.[17]

More guidance on resolving a conflict of interest in related party transactions is further provided in the Law on Securities. A person who has conducted a legal transaction with a company will not be deemed to have violated the conflict of interest regulation and will not be liable for any damage resulting from the conflict of interest, if the legal transaction is approved in good faith by the majority voting of members of the Board of Directors having no interest in that transaction. This means that directors who are related parties:

- Must inform the Board of Directors about their interest in the transaction
- Must abstain from participating in the Board of Directors decision on the transaction.

Interested members are not counted for the quorum.[18]

b) Approval by the GMS

Any related party transactions with value over or equal to 50% (or a smaller percentage as stipulated in the charter of the company) of the total value of assets recorded in the most recent financial statement of the company shall be approved by the GMS. The Board of Directors shall submit the draft contract or explain the main contents of the transaction at the GMS or collect written opinions from shareholders. In this case, as aforementioned, shareholders with related interests shall not have the right to vote, contracts and transactions shall be approved where shareholders representing 65% of the total remaining votes agree.

For transactions within the authority of the Board of Directors, if the number of disinterested members of the Board of Directors is insufficient to meet the quorum (i.e. company does not have a majority of disinterested

17 LOE, Article 120, Clause 2.

18 LOE, Article 120, Clauses 1 & 3.

directors), a legal transaction has to be approved by the GMS. A simple majority vote of shareholders participating in the GMS (excluding votes of related parties) is required to approve a related party transaction.[19] As with the Board of Directors, the approval is valid only if all relevant facts associated with personal interest are disclosed to, or are already known to the shareholders.

c) Required Information for the Decision to Approve Related Party Transactions

According to Circular 09, related parties involved in these type of transactions are insiders, including major shareholders, members of the Board of Directors, members of the Supervisory Board, General Director or director, deputy director/deputy general director, Chief Accountant and any persons authorized by listing companies to make disclosure of information and any affiliated persons of those subjects as per regulation of Item 34, Article 6 of the Law on Securities.[20] Such insiders before conducting purchases/sales of securities of the listing companies including the off-exchange transactions (present, inheritance, transfer or receipt of subscription rights) must report to the SSC and the stock exchange in three working days or more prior to the transaction dates. The expected trade dates must not exceed two months from the date that the transaction is registered and are only allowed to launch in 24 hours after such information is disclosed by the stock exchange. The contents of the report must follow Circular 09, with detailed information on:[21]

- The parties that are involved in the transaction
- Other beneficiaries of the transaction (if any)
- The value of the transaction
- The assets and services involved in the transaction
- Any other significant terms and conditions related to the transaction.

3. Identifying Related Party Transactions

Any related party transaction should be properly approved before it can be concluded. However, in practice not all transactions follow such procedures.

19 LOE, Article 120, Clauses 1 & 2.

20 Circular 9, Section IV, Article 4.1.

21 Circular 9, Section IV, Article 4.2, and the sample/template of report enclosed in the Circular.

There are different reasons for this, including the fact that the Board of Directors and shareholders may not always know whether the transaction involves related parties, in particular when insiders concealed their affiliation and personal interest. In such cases, non-executive and independent directors will need to play the lead role in identifying and disclosing related party transactions. Creating the list of related parties and their position in the transaction is but one aspect, made difficult by the fact that most ownership structures remain opaque. The materiality of these transactions is another important issue. Indeed, while the nature of some related party transactions is easily identifiable, others are structured in an elaborate manner, involving complicated off-shore schemes.

Best Practices:

The Board of Directors' composition and experience will largely determine the success of identifying such related party transactions. Non-executive, independent directors who enjoy an arms-length relationship with managers will certainly play a key role in this respect. The External Auditor also plays a key supporting role, and the Board of Directors and its Audit Committee will want to ensure that the company's External Auditor uses the full range of audit procedures to evaluate managerial self-dealings. For example, the American Institute of Certified Public Accountants' (AICPA) Statement of Auditing Standard No. 45, AU Sec. 334 (2001) sets forth criteria for identifying material transactions, such as interest free borrowing, asset sales that diverge from appraisal value, in-kind transactions, and loans made without scheduled terms.

4. Disclosure Requirements

Board of Directors and Supervisory Board members, the General Director or director and other managers of the company must declare their relevant interests to the company, including:

- Name and address of the head office, field of business, number and date of the issuance of the business registration certificate, place of business registration of any enterprise in which they own contributed capital or shares, ratio and period of such ownership of contributed capital or shares

- Name and address of the head office, field of business, number and date of the issuance of business registration certificate, place of business registration of any enterprise in which their related persons jointly own or separately own shares or contributed capital of more than 35% of the charter capital.

The declarations must be reported to the GMS and must be filed at the head office of the company. Shareholders have the right to review the contents declared at any time considered necessary.[22]

In addition, public companies must follow disclosure requirements on related party transactions as stated in Article 29 of the Law on Securities and Article 4, Part II of Circular 09. Furthermore, companies are required to follow VAS number 26 – on related party disclosures.

Best Practices:

Company laws of many countries require persons who are related parties to disclose information to the Board of Directors, the Audit Committee, internal supervisory body and the External Auditor regarding:

- Legal entities in which they, either independently or together with affiliated persons, own a certain percentage of voting shares
- Legal entities in which they hold managerial positions
- Pending or planned transactions in which they may be considered a related party.

Moreover, the disclosure of beneficial ownership is an important aspect in detecting related party transactions. If the identity of the company's true owners is hidden, then it is difficult, if not impossible, to establish whether the parties in the transaction are related (as mentioned in Section C.1.a of this Chapter).

To protect shareholder interests, the Board of Directors members (especially independent directors) should demand that all owners of 5% and more of common shares comply with the relevant disclosure requirements.

The companies should be required to include the following information regarding related party transactions in their annual report:

22 LOE, Article 118, Clauses 1 & 3.

- A list of related party transactions concluded by the company during the reporting year
- Significant terms and conditions of each related party transaction
- The governing body that approved related party transactions.

In addition, securities regulations should require that companies disclose the following information on related party transactions:

- Copies of the minutes of the meeting of the approving body, including information on the quorum and the voting results
- The list of persons, with whom transactions may be qualified as related party transactions and the list of those persons with whom transactions have already been approved by the company
- Information on related parties before the placement starts, in case of an open subscription
- The prospectus and quarterly reports must provide information on related party transactions.

Finally, accounting legislation requires companies to disclose information on operations with related parties in their accounting documents.

5. Invalidation of Related Party Transactions

A related party transaction which has not been approved in conformity with the law or for which the proof of being in the company's best interests at the time of its conclusion or at the time of its execution has not been presented, is null and void. In practice this has to be determined by the court in a legal action filed by the company or a shareholder.[23]

23 LOE, Article 120, Clause 4.

Best Practices:

Vietnamese legislation seems to fall short in protecting the interests of the company's counterparts in related party transactions. If the company can seek to invalidate a transaction that was not concluded in accordance with its internal approval procedures then this may create undue problems for the counterpart. It is recommended to follow the example of some western jurisdictions where the company needs to prove that the counterpart in the transaction knew or must have known of the irregularity in its approval.

6. Liability for the Violation of Procedural Requirements

Related parties can be held liable for losses caused to the company because of a transaction that was concluded in violation of procedural requirements. If several persons are held responsible for losses, they are jointly and severally liable.[24]

Best Practices:

A company may wish to codify its policy regarding related party transactions in its company-level corporate governance code, charter, or internal regulations. More importantly, the company may codify a director's duty to properly handle related party transactions, i.e. not to authorize, or permit the company to enter into a transaction if he/she has an interest in the transaction and has not disclosed this interest.

24 LOE, Article 108, Clause 4.

NOTES

13

Chapter

INFORMATION DISCLOSURE

13 | Information Disclosure

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The Chairman's Checklist

- ☑ Does the company have a written disclosure policy? Does the policy fully express the company's commitment to transparency? Is the disclosure policy easily available to market participants and other interested parties?
- ☑ Does the company fully comply with its legal disclosure obligations? What systems are in place to ensure that full and timely disclosure of material information occurs?
- ☑ Are executives and directors fully aware of the personal and corporate repercussions of false or incomplete disclosure? Do executives and directors act accordingly to ensure good disclosure?
- ☑ Is the company's ownership structure transparent?
- ☑ What steps are being taken to ensure that the company's financial position is communicated clearly to the markets?
- ☑ Is the disclosure fair? For example, does the company ensure that all investors receive information at the same time, not giving special access to a privileged few individuals or institutional investors?
- ☑ Does the company have a policy on insider trading and does it enforce this policy? What systems are in place to manage the flow of insider and other sensitive information?
- ☑ Does the company appreciate that it is in its own interest to make voluntary disclosures to the market? If so, how does it ensure the veracity of this information and that its disclosure is not merely for marketing or public relations purposes?
- ☑ Does the company truly understand the definition of commercially sensitive information? Or, does the company hide behind protections provided for sensitive information in order to withhold important material facts from the markets?
- ☑ In the case of joint stock companies with the capital participation of foreign shareholders, how does the company's disclosure compare to international disclosure requirements, for example, the OECD Principles of Corporate Governance?

There are two basic forms of market regulations, substantive rules-based regulations and disclosure-based regulations. Both regulatory approaches seek to protect shareholders and provide for fair and stable financial markets. Rules-based regulations set down what companies can and cannot do and seek to establish a wide-reaching set of regulations that cover a number of potential circumstances. Disclosure-based regulations rely more heavily upon market mechanisms to punish and reward certain types of corporate behaviour, and shifts part of the responsibility for protecting investors to market participants, according to the motto *caveat emptor* or buyer beware. Disclosure-based regulations are partly predicated upon the faith that markets are better at policing corporate misconduct than regulatory agencies, and that disclosure is an effective and inexpensive substitute for substantive regulations. In practice, the two approaches are almost always used in combination with one another, though some countries rely more heavily on disclosure than others.

For disclosure-based regulations to work effectively, a number of elements and incentives need to work together. These include a proper legal and regulatory environment, combined with effective enforcement mechanisms such as regulators that screen financial information for misstatements and courts that provide effective redress. Independent External Auditors also play an important role, providing assurance to the markets, as does an active and interested medium that questions company strategies and communications. Finally, a competent and vigilant Board of Directors is crucial. It is broadly accepted that even the best disclosure system cannot thwart individuals who are intent upon defrauding a company and its shareholders. Without a Board of Directors that is uniformly intolerant of obfuscation, disclosure cannot be fully effective.

While disclosure based-regulations may function imperfectly in an emerging financial market such as in Vietnam, disclosure is, nevertheless, important and is only likely to grow in importance as Vietnam's financial markets mature. Among the broad palette of disclosures, particular importance must be attached to financial and operating results, related party transactions and ownership structures.

A. An Introduction to Information Disclosure

1. Definition and Rationale

Disclosure is defined as ensuring access to information for all interested parties, regardless of the purpose of obtaining the information, through a transparent procedure that guarantees information is easily found and obtained.

Timely and accurate disclosure is essential for shareholders, potential investors, regulatory authorities and other stakeholders. Access to material information helps shareholders protect their rights and improves the market participants' ability to make sound economic decisions. Disclosure makes it possible to assess and oversee management, as well as to keep management accountable for the company and shareholders. Disclosure benefits companies since it allows them to demonstrate accountability towards shareholders, act transparently towards the markets, and maintain public confidence and trust. Good disclosure policies should also reduce the cost of capital. Finally, information is also useful for creditors, suppliers, customers and employees to assess their position, respond to changes and shape their relations with companies.

The power of a sound disclosure regime is expressed clearly and eloquently in the following quote:

> *"Requiring disclosure of information can be a powerful regulatory tool in company law. It enhances the accountability for and the transparency of the company's governance and its affairs. The mere fact that, for example, governance structures or particular actions or facts have to be disclosed, and therefore will have to be explained, creates an incentive to renounce structures outside what is considered to be best practice, and to avoid actions that are in breach of fiduciary duties or regulatory requirements, or could be criticized as being outside best practice. For those who participate in or do business with companies, information is a necessary element in order to be able to assess their position and respond to changes that are relevant to them."*[1]

1 Report by the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels, 4 November 2002. (See also: http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf).

2. Principles of Disclosure

On January 15, 2010, the MOF issued Circular No. 09/2010/TT-BTC governing the disclosure of information on the securities market.[2] Under this circular, the following general disclosure principles are required for public companies (including listed companies):[3]

- Information must be provided adequately, in timely fashion and with accuracy in accordance with current regulations.
- Information disclosure must be announced by a legal representative or an authorized person of the company. The legal representative of the company must be fully liable for the correct content of the disclosed information.
- Information disclosure must be carried out in parallel with reporting to the SSC and the stock exchange in accordance with current provisions on reporting information.
- In case there are subsequent changes to the disclosed information, companies are required to report and provide detailed explanations to the SSC.

Circular 09 also stipulates that companies are required to report to the SSC and the stock exchange in cases that the disclosure of information cannot be conducted in time due to *force majeure* conditions. The postponement of information disclosure must be announced via the information disclosure channels of the SSC, the stock exchange and the companies with clear explanations for the reason of the postponement.[4]

Best Practices:

A more practical expression of what constitutes good disclosure follows in these four basic principles:

1. Provided on a regular and timely basis
2. Easily and broadly available
3. Correct and complete
4. Consistent, relevant and documented.

2 Circular 09/2010/TT-BTC replaced Circular 38/2007/TT-BTC dated 18 April, 2007.

3 Circular 09, Section I, Clause 2.

4 Circular 09, Section I, Clause 5.

3. Confidential Information (Business Secret)

Securities legislation requires publicly held companies to disclose a broad range of financial and non-financial information. At times, information disclosure required by regulations can adversely affect a company's business and financial condition because of the competitive harm that could result from the disclosure. Despite the fact that many Vietnamese companies often consider business related information commercially sensitive, in reality competitive harm only arises in a limited number of circumstances. Some examples of truly sensitive information include pricing terms, technical specifications and milestone payments. To address potential disclosure hardship, legislators and regulators develop systems for allowing companies to request confidential treatment of information.

In Vietnam, confidential information is regulated by the Law on Competition under the term "business secret." Business secret means information which satisfies all the following conditions:[5]

- It is not common knowledge
- It is able to be applied in business and when used will create an advantage for the information holder over an entity which does not have or use such knowledge
- It is protected by its owner by necessary means in order that such information will not be disclosed and will be difficult to access.

However, if left to the interpretation of the company, this definition could yield a never-ending number of exceptions. No piece of information, the publication of which is obligatory under the law or which is to do with the violation of law, good business practices or business ethic principles and information on the reasonable suspicion of the existence of corruption, may be deemed a company business secret and its publication will be deemed lawful if its purpose is to protect public interests. Exceptionally, when it comes to information of which the publication is mandatory under the regulations governing the securities market, departure from this obligation may be possible when there are justified reasons to believe that making specific information publicly known would endanger the company's operations, but with prior approval of the SSC and the stock exchange on exemption from the mentioned obligation.[6]

5 LOC, Article 3, Clause 10.

6 Circular 09, Section I, Clause 5.

Best Practices:

Companies should be clear on what truly constitutes confidential information and should not interpret the broad definitions provided for by law so widely as to withhold relevant information from investors. To guide practices with respect to commercially sensitive information, companies are well advised to develop written policies and procedures, and define what should be considered confidential in their internal regulations. For example, they can consider personal data as confidential information, and forbid the collection, storage, usage and dissemination of private information without the person's consent, unless otherwise provided by a court decision.

4. Inside Information and Insider Dealing

Insider trading encompasses both legal and prohibited activity. Insider trading takes place legally, every day, when corporate insiders[7] buy or sell shares in their own companies within the confines of company policy, law and regulations.

There is also an illegal variety of insider dealing. It is the dealing that takes place when those with access to insider information use their knowledge to reap profits or avoid losses on the stock market. Investors lacking access to insider information often pay the costs of insider dealing.

Another, and far greater, cost of insider dealing is the damage done to the credibility of securities markets. One of the main reasons that capital is easily available in the world's most successful stock markets is that investors largely trust them to be fair. The common belief in some countries that privileged investors should be allowed to profit from their access to insider information may explain, in part, relatively low public share ownership in these countries. Governments cannot afford to ignore insider dealing if they hope to promote an active securities market and attract international investment. The same holds true for a Board of Directors that wish to protect shareholders and attract investment.

7 LOS, Article 6, Clause 33 defines corporate insiders as including members of the Board of Directors, members of the Supervisory Board, General Director, Deputy General Directors, major shareholders, auditors, securities companies, external business entities or individuals who have inside information.

In Vietnam, insider information is defined as any information of a precise nature relating to a public company, which is not made public, and which can, directly or indirectly, have significant influence on the trade of the securities or on the prices of the company on the market.[8] An insider is a person who possesses inside information knowing, or ought to have known, that it is inside information. Individuals with access to insider information particularly include:[9]

- Members of the company's governing bodies (Board of Directors, Executive and Supervisory Boards)
- Majority shareholders of the company
- Securities market professionals with a contractual agreement with the company (for example, External Auditor, portfolio manager, accountant and lawyer)
- Securities companies, securities investment fund management companies and their securities practitioners
- Organizations or individuals which have business cooperation or service provision relations with the company and its employees
- All other persons who acquired insider information and knew or could have known that they acquired it from persons considered to be insiders according to the law.

Insiders are prohibited from:[10]

- Buying, selling or disposing of securities to which that information relates
- Disclosing inside information to any other person unless such disclosure is made in the normal course of the exercise of his/her employment, profession or duties
- Recommending or inducing another person, on the basis of inside information, to acquire or dispose of securities to which that information relates.

Vietnamese legislation also recognises criminal responsibility for insider information abuses. Namely, the persons who may be considered

8 LOS, Article 6, Clause 32.

9 LOS, Article 6, Clause 33.

10 LOS, Article 9, Clause 3 and Article 126, Clause 1.

insiders have an obligation to keep the insider information as a business secret and its disclosure is sanctioned as a criminal offence.[11]

Best Practices:

Disclosure of insider information may substantially affect the market value of shares and other securities of a company. Therefore, persons who have access to insider information may not use it to execute transactions, nor may they transfer insider information to a third party. Illegal use of insider information can damage shareholder interests and adversely affect the financial position and reputation of the company as well as securities markets overall. The company should have a written insider dealing policy in place and vigorously enforce it. The Internal Auditor of the company should monitor whether directors, managers and other officers comply with the law, regulations and internal rules on insider dealing.

5. Disclosure in Listed and Public Non-listed Companies

Disclosure requirements are different for publically listed companies, public (non-listed) companies and private joint stock companies. Private joint stock companies usually need only to comply with minimal disclosure requirements and are not subject to the reporting obligations determined by regulations governing the securities market. More stringent rules apply to listed and public companies. Tight regulation of information disclosure among listed companies is needed because of the greater impact of potential fraud when a company may have many thousands of shareholders. Given the importance of capital markets in a modern economy, governments are, understandably, keen on ensuring the integrity of the financial system. The increased number of disclosure obligations for listed companies is the price to be paid to access the large funds available on capital markets.

Vietnamese regulations require public companies to disclose information in accordance with section II of Circular 09, which include following types of disclosure:

11 LOS, Article 9, Clause 3 and Decree 36, Article 27.

- Regular information: audited financial statements and an annual report
- Extra ordinary information
- On-demand information requested by the SSC
- Major shareholder trading information
- Trading of treasury shares
- Share trading by founding shareholders during restricted periods
- Public trading and offers
- Public offer for sale of securities and scheduled use of capital received from the offer.

As already mentioned, listed companies' reporting obligations are greater than for public non-listed companies. Chapter VII of the CG Regulations[12] and Section IV of Circular 09 provide detailed requirements of information disclosure by listed companies. In addition, Vietnam's two listing stock exchanges, the HOSE and HNX, also have specific listing rules for listed companies.[13]

➔ *For more general information on the differences between forms of joint stock companies, see Chapter 2, Section A.2.*

6. Disclosure Versus Transparency

Disclosure is sometimes confused with transparency. Unfortunately, these two terms are frequently and erroneously used interchangeably. While disclosure and transparency would, at first glance, appear to be the same, they are not. Companies may disclose an enormous amount of information that is of no particular value to the users of such information. Important pieces can be withheld. Disclosure can be irrelevant or, worse, manipulated in such a way as to conceal the true picture of the state of the enterprise. For example, while many companies may disclose their ownership as required by law, the true owners and the extent of their control often remain hidden behind complex

12 Decision 12, Chapter VII, Articles 27, 28, 29 & 30 discuss the information disclosure obligations of listed companies in detail.

13 Decision 168 issued by the General Director of the HOSE on 7 December 2007 regulates listing securities on the HOSE (together with Decision 04/QĐ-SGDHCM amending Article 19 and Section II, Appendix 2 of Decision 168) and Decision 324 issued by the Director of HNX on 4 June 2010 regulates listing securities on the HNX.

legal structures such as special purpose entities, off-shore holding companies and trusts.

A strong disclosure regime that promotes real transparency is a pivotal feature of market-based monitoring of companies and is central to shareholders' ability to exercise their ownership rights on an informed basis.

7. Personal Liability for Non-Disclosure

As a rule, companies are liable for damages caused to shareholders and third parties by providing false, incomplete or distorted information. Beside the company, all other people who participated in the preparation of disclosed information are liable for the damage caused by the publication of incomplete and inaccurate information.[14] The additional condition of their responsibility is that they knew or by the nature of their work had to know that information was inaccurate or incomplete (for example, the General Director, the Chief Accountant or the person fulfilling this function, the External Auditor). They are jointly and severally liable with the issuer for any damage caused to investors because of untruthful, incomplete, and/or misleading information. If investors believe that they have suffered damages, they can file claims with a court. Organizations and individuals who violate provisions of the law on information disclosure shall, depending on the nature and severity of their violation, be disciplined, administratively sanctioned or examined for penal liability. If damage is caused, they shall pay compensation in accordance with the law.[15]

Regarding violations of information disclosure regulations, violating individuals and organizations shall be subject to either of the following two principal sanctioning forms cautions and fines.[16] In Vietnam, if institutional or individual securities investors commit a violation by directly taking part in the disclosure of misleading information to instigate or provoke the securities purchase or sale, or failing to promptly and sufficiently disclose information on events that affect market prices of securities, they will be fined up to VND70 million.[17]

14 LOS, Articles 128 & 129 and Decree 14, Article 11 (as amended by Decree 84).

15 Decree 36, Articles 17, 26, 32, 33 and Circular 09, Section I, Clause 7.

16 Decree 36, Article 7.

17 Decree 36, Article 26.

In the case of a very dangerous violation when a person who has provided false, incomplete, or distorted information or has not disclosed all legally required information is subject to criminal prosecution. From January 1, 2010 according to an amendment to the Penal Code, there are three offences relating to securities trading.[18]

18 Penal Code, Article 181, Clauses b & c.

B. Disclosure Items

The OECD Principles suggest that:

> *"…timely and accurate disclosure be made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company."*[19]

The key concept that underlies the OECD's recommendation is the concept of materiality. Material information is information the omission or misstatement of could affect economic decisions taken by the users of information. Materiality may also be defined as a characteristic of information or an event that makes it sufficiently important to have an impact on the company's share price.

The application of the materiality concept allows companies to avoid overly detailed disclosure that is ultimately irrelevant to shareholders. For example, damage to VND130 million worth of paper in a large, publicly traded company is, clearly, of little importance to the investor. It may, on the other hand, be material to a small family-owned print shop. Materiality is, consequently, a relative concept that depends on the context. It is often difficult to define with great precision in practice. Companies and auditors may sometimes apply certain numerical thresholds (for example, 5% of earnings) to simplify its application. However, these thresholds can only serve as a starting point for a more rigorous application of the concept of materiality.

The concept of materiality is also recognised by Vietnamese regulations which, in addition to mandatory, itemised information, prescribe all other matters relevant for the understanding of the legal, financial and profit situation of the securities issuer as contents of the document intended for informing the investment public. Thus, the assessment of circumstances, for example, "significant litigations" or "other circumstances that may significantly affect the price of securities" is left to companies themselves. The availability of that assessment should be provided to the public.

19 OECD Principles of Corporate Governance, Principle IV on Disclosure and Transparency. See also: http://www.oecd.org/dataoecd/32/18/31557724.pdf.

Best Practices:

The OECD Principles call for disclosure of all material information in the following areas:

- Financial and operating results of the company
- Company objectives
- Shareholdings and ownership structure
- Directors and key executives, as well as their remuneration
- Material foreseeable risk factors
- Material issues regarding employees and other stakeholders
- Governance structure and policies.

This list is comprehensive, if general. The Technical Committee of the International Organization of Securities Commissions (IOSCO) has developed more detailed, high-level principles for on-going disclosure and material development reporting for listed entities. These principles are:[20]

- Materiality of information for an investor's investment decision
- Disclosure on a timely basis, immediate or periodic
- Simultaneous and identical disclosure in all jurisdictions where the entity is listed
- Dissemination of information by using efficient, effective and timely means
- Disclosure criteria fairness, without misleading or deceptive content and containing no material omissions
- Equal treatment of disclosure, no selective disclosure to investors and others before public disclosure
- Compliance with disclosure obligations.

Vietnamese legislation covers these essentials in considerable detail. The following sub-sections discuss Vietnamese requirements and disclosure practices with respect to the above-mentioned OECD disclosure items.

20 Principles for On-going Disclosure and Material Development Reporting by Listed Entities, OICU-IOSCO, October, 2002. See also: www.iosco.org.

1. Financial and Operating Results

a) Presenting Financial Information

Information about financial results, performance, the situation and operations of the company is of utmost importance for shareholders, potential investors, creditors and other stakeholders. The following list constitutes the most typical forms of, and additions to, financial reporting:[21]

- **The balance sheet** provides a snapshot of the company's assets, capital and liabilities on a particular date. To skilled analysts, it provides important information on, *inter alia*, the degree of risk an investment in the company carries or the company's ability to pay creditors.
- **The income statement** provides information on the company's performance during a specified period of time. Income statements may be organized in a number of different ways. According to internationally recognized practice, income statements must show 1) revenues or sales, 2) the results of operating activities, 3) financing costs, 4) income from associates and joint ventures, 5) taxes, 6) profit or loss from ordinary activities and 7) net profit or loss. The income statement demonstrates business sustainability.
- **The cash flow statement** illustrates a company's sources and uses of cash. It lists all changes affecting cash in operations, investments and financing. For example, net operating income increases cash, the purchase of a plant is an investment that decreases cash and the issuance of shares or bonds is a financing activity that increases cash.
- **The explanatory notes to the financial statements** help explain the company's financial statements by providing important details and insights into how the company prepared its accounts. It also briefly describes features of the company's activities, its main performance indicators and factors that affected the company's financial results, as well as decisions on financial statements and distribution of net profit reviews. This refers to any relevant information that would enable users to receive a complete and objective picture of the company's financial condition, financial results for the reporting period and any changes in its financial position. The notes to the financial statements must specifically state the contents of related party transactions in

21 LOA, Article 29 and Circular 09, Section II, Article 1 and Section IV, Article 1 and Decision 12, Articles 28 & 29.

accordance with Vietnamese Accounting Standard (VAS) Number 26 and the circular providing guidelines on VAS Number 26. The notes must also contain segment reporting as stipulated in VAS Number 28 and its attached guiding circular.

Furthermore, this part contains, when needed, *the statement of changes in owners' equity* that shows all changes in the charter, additional paid-in and reserve capital, as well as retained earnings. In addition, it provides information on changes in statutory and additional funds and briefs on net assets.

Best Practices:

International practice also calls for the Management's Discussion and Analysis (MD&A), which provides management's view of the performance and future prospects of the company. The MD&A, which is typically disclosed in the company's annual report, should:

1) Complement as well as supplement financial statements
2) Have a forward-looking orientation
3) Focus on long-term value creation
4) Integrate long- and short-term perspectives
5) Present information that is significant to the decision-making needs of users
6) Embody the qualities of reliability, comparability, consistency, relevance and understandability.

The MD&A presents a more analytical and qualitative view than the rest of the financial statements.

Finally, *the External Auditor's report with conclusions* enable an independent External Auditor to express an opinion on whether or not the company's financial statements are prepared, in all material respects, in accordance with an identified financial reporting framework and whether they are reliable. This provides shareholders, managers, employees and market participants with an independent opinion about the company's financial position and, if performed properly, should attest to the accuracy of the statements. The annual financial statements of all public and listed companies must be audited by an independent and eligible audit firm (listed

companies must be audited by an accredited auditing company who is on the list of audit companies accredited by the State Securities Commission for audit under the conditions specified by the Ministry of Finance).[22] Annual audited financial statements must be submitted for approval by the GMS.[23]

➔*For more information on the role of the External Auditor, see Chapter 14, Section B.*

b) Preparing Financial Information

Vietnamese legislation regulating financial reporting recognizes the following basic concepts and principles:

- **Accrual based accounting,** according to which revenues and expenses are booked over time and not at the point of payment or receipt of funds. This requires that sales and expenses relating or pertaining to a particular period be recorded in the period of occurrence irrespective of when the amount was received or paid.[24]
- **Going concern assumption,** i.e. that financial statements are prepared on the assumption that the company is operating and will continue to operate for the foreseeable future and that it has neither the intention nor the necessity of liquidation or of materially curtailing the scale of its operations. The going concern assumption is a fundamental principle in the preparation of financial statements. For this reason, it is recognized that management has a responsibility to assess the entity's ability to continue as a going concern. However, management's assessment may not always involve detailed analysis, particularly when there is a history of profitable operations and ready access to financial resources.
- **Consistency**, which states that the presentation and classification of items in the financial statements shall be retained from one period to the next unless a change is justified either by a change in circumstances or a requirement of a new accounting standard.[25]
- **Separation of assets and liabilities,** meaning that the assets (fixed

22 Circular 09, Section II and Section IV, Clause 1, Paragraph 1.1. and LOS, Article 6, Clause 15.

23 LOE, Article 128, Clause 2.

24 VAS, Article 1.

25 LOA, Article 7, Clause 2.

and current) and liabilities (debt payables and equity of owners) of the company shall be separated from those of its owners and other organizations.[26]

In addition, company accounting policies should ensure:

- **Completeness of information disclosure,** meaning that information contained in the company's financial statements should disclose all material business facts and results (actually and potentially) influencing economic decision-making by the users of these financial statements from the standpoints of materiality of such information and the cost of its preparation (an omission can cause information to be false or misleading and thus unreliable and imperfect from the standpoint of its relevance).[27]
- **Timeliness,** i.e. the company needs to publish reports quickly, as up-to-date information is of much more value to users than older information that may have been superseded by events. Annual reports shall be publicized within a 120-day time-limit from the date on which an annual accounting period ends.[28] In a fiscal year, listed companies shall have to disclose at least four quarterly reports, two semi-annual reports and an annual (audited) report.[29]
- **Conservatism,** requiring a company to make prudent and deliberate accounting choices and estimate when future events would have negative impacts on its financial condition.
- **Substance over form,** meaning that for the faithful presentation of information in the financial statements it is necessary that transactions and events are accounted for and presented in accordance with their substance and economic reality (which should prevail) and not merely their legal form.
- **An analytical outlook**. The sum of analytical accounts should be equal to the synthetic account.[30]
- **Balance between benefits and costs,** which, given the complexity and breadth of certain reporting requirements, allows smaller companies to tailor their financial information to be cost-effective. This concept, however, should not be used to deny information to users. The presumption must be that information required by law and

26 LOA, Article 9, Clause 3.
27 LOA, Article 32, Clause 2.
28 LOA, Article 33, Clause 4.
29 Circular 09, Section IV, Clause 1.
30 LOA, Article 6.

accounting standards should be provided to users unless there is a clear indication that the cost outweighs the benefit.

- **Matching.** Expenses are matched to related revenues in determining earnings for the period.[31]

Legislation, accounting and other standards will determine the specific content and format of financial statements. Taken together and compared over time, the financial statements should provide a well-rounded picture of the company's operations and financial position.

Best Practices:

If companies plan to access international capital markets or, simply to improve upon the quality of financial reporting, they will need to prepare financial statements according to an internationally accepted body of accounting standards. The most recognized standards are the International Financial Reporting Standards (IFRS) and U.S. Generally Accepted Accounting Principles (U.S. GAAP).[32]

In addition to standard financial reporting according to the VAS, a company may consider reporting in accordance with IFRS for the following reasons:

- IFRS have clear economic logic and provide better information to the company's management than the current Vietnamese accounting standards do, allowing for a better comparison with a peer group of international companies
- There is global convergence of national standards towards IFRS
- Vietnamese companies will likely need to report using IFRS in the future due to the convergence of Vietnamese standards with IFRS[33]
- All listed companies in Europe with consolidated accounts were required to present their consolidated financial statements using IFRS as of 2005[34] (In Vietnam, consolidated accounts need to be written in accordance with the law and approved international standards)[35]

31 LOA, Article 7.

32 U.S. GAAP is available on the Financial Accounting Standard Board's website under: http://www.fasb.org. A summary of IFRS is available on the International Accounting Standard Board's website under: http://www.iasb.org.

33 Article about IFRS at http://www.tapchiketoan.com/ke-toan-quoc-te/chuan-muc-ke-toan-quoc-te/chuan-muc-bao-cao-tai-chinh-quoc-te.html.

34 Regulation (EC) 1606/2002 of the European Parliament of the Council of 19 July 2002 on the Application of International Accounting Standards. See also: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/1_243/1_24320020911en00010004.pdf.

35 LOA, Articles 8 & 29 and Decree 14, Article 17.

- Unification of standards will allow users of financial statements to "read" financial statements under common rules
- Implementing IFRS could help Vietnamese companies decrease expenses in attracting investment.

Applying IFRS typically has the following impact on the balance sheet of a standard Vietnamese company:

- The need to prepare consolidated financial statements (IAS 27.7/11)
- Inventories can no longer be generally carried at cost, but at the lower cost or net realizable value (IAS 2.6)
- A significant change in the value of fixed assets
- Use of a fair market valuation rather than the historical cost approach for many assets and liabilities
- The appearance of new financial instruments, derivatives in particular
- Recognition of assets and liabilities, the control over which does not stem directly from participation in equity.

Additional items are included in the income statement, such as fair value adjustment for financial instruments and recognition or recovery of asset impairment, amongst others. Disclosures also become more informative and user-oriented.

Depending on where the company intends to list, statements will likely need to be prepared according to one of these two standards.

c) Disclosing Financial Information

Financial information will typically be presented in different forms and at different times throughout the financial year. Financial and operating results will appear in the prospectus, annual report, annual, semi-annual and quarterly financial statements.

It is determined by Circular 09 on disclosure of information on the securities market that all public and listed companies are obliged to disclose the annual audited financial statements no later than 10 days from expiry of the period for completion of annual financial statements. The date of completion of annual financial statements shall be no later than 90 days from the last day of the annual accounting period in accordance with the Law on Accounting. The annual financial statements must be in Vietnamese (accompanied by English translation if applicable), must also be disclosed in the publication and on the electronic information site of the company, and must be archived for at least 10 years at the head office of the company to enable investors to refer to

such items. Finally, all the contents and information about the annual financial statements must be disclosed on the information disclosure media of the SSC and stock exchange (in the case of a listed company) and concurrently the full text of the auditors' report (as a part of the audited financial statements) must be published in one edition of a nationwide newspaper.[36]

Listed companies must disclose additional financial information as follows:

- Quarterly financial statements within 25 days from the end of a quarter. This deadline could be extended to 50 days for a parent company which is required to prepare consolidated financial statements.
- Explanations for unusual fluctuations (i.e. if net profit after tax fluctuates more than 10% during a current period compared with a previous (year) period) must be provided in the quarterly financial statements.
- Quarterly financial statements must be disclosed on the information disclosure media of the SSC and stock exchange, be disclosed in the publication and on the electronic information site of the company and must be archived for at least 10 years at the head office of the company.
- Semi-annual financial statements (which are examined by an approved auditing firm in accordance with Vietnamese auditing standard number 910) must be disclosed within 45 days from the end of the second quarter of each year (or 60 days for a parent company).
- Semi-annual financial statements must be disclosed on the information disclosure media of the SSC and stock exchange, be disclosed in the publication and on the electronic information site of the company and must be archived for at least 10 years at the head office of the company.

Best Practices:

Companies should disclose all material information and do so in a timely basis and in such a manner as to make the information as clear and understandable to users as possible. Companies should adhere to the spirit of the law, not just the letter and should not limit themselves to the minimum standards of statutory disclosure.

36 Circular 09, Section II, Article 1.

d) Financial Information in Groups of Companies

Complete disclosure of intra-group relations, transactions and their financial terms, and consolidated accounts is a crucial pre-requisite to make the group's functions transparent.

Best Practices:

When preparing consolidated accounts, companies should follow uniform accounting policies for the parent and its subsidiaries or, if this is not practicable, the company must disclose that fact and the proportion of items in the consolidated financial statements to which different policies have been applied. In the parent's separate financial statements, subsidiaries may be shown at cost, at re-evalued amounts, or using the equity method. According to IFRS, a company's consolidated accounts should include, *inter alia:*[37]

- The name, ownership and voting percentages for each significant subsidiary
- The reason for not consolidating a subsidiary
- The nature of the relationship if the parent does not own more than 50% of the voting power of a consolidated subsidiary
- The nature of the relationship if the parent owns more than 50% of the voting power of a subsidiary excluded from consolidation
- The effect of acquisitions and disposals of subsidiaries during the period
- In the parent's separate financial statements, a description of the method used to account for subsidiaries.

Vietnamese regulations also impose an obligation to prepare consolidated financial statements and to make separate reports on the companies that are the subject of consolidation. This data also presents an integral part of the required contents of the prospectus and are subject to disclosure obligations in the process of the mandatory informing of the public by the company. In that regard, the regulation on reporting stipulates special obligations in preparing the excerpt of the financial statement for legal entities that prepare consolidated financial statements, which relate to the basic data on the companies that are the subject of consolidation and to their individual financial statements.[38]

37 Excerpt from International Accounting Standard No. 27. See also: http://www.iasb.co.uk.

38 LOA, Article 30, Clause 2.

2. Company Objectives

It is important for markets, shareholders and other stakeholders to be aware of the company's objectives. The communication of company objectives can be either in response to legal requirements or it can be voluntary.

Best Practices:

Comparative legislation requires that company objectives (such as the issuance of securities, acquisition plans, replacement and sales of assets, or research and development) be disclosed in the prospectus. In addition, quarterly (semi-annual) reports must contain forward-looking information including sources of revenue, plans for new production procedures, expansion or reduction of production, new product development, substitution of old products, modernization or repair of fixed assets and modification of the types of company activities. In addition, the annual report must outline the company's position in the industry, priority areas of activity and development trends.

Voluntary disclosure may cover issues such as the company's policies concerning corporate governance, business ethics, environmental issues and other public policy commitments. This information can help to properly evaluate the prospective performance of the company, its relationship with various stakeholders and communities in which it operates and the steps that the company has taken to implement its objectives. As with other types of disclosure, the quality of information provided to the public is greatly enhanced by adhering to a widely accepted standard.[39]

Best Practices:

Companies may choose to voluntarily disclose their objectives in the charter, company-level corporate governance code, and/or ethics code and annual report. Regardless of the form, companies should ensure that this information is readily accessible to the public, for example, on their websites.

39 For a general discussion of non-financial disclosure, see the OECD's Guidelines for Multinational Enterprises. See the OECD website at www.oecd.org or consult the Guidelines directly under: www.oecd.org/dataoecd/62/58/2438852.pdf.

3. Major Share Ownership and Voting Rights

a) Major Share Ownership

It is important that shareholders are informed about company ownership structures to understand their rights, role and authority in governing the company and influence its policy. Depending on the size of ownership, shareholders have various degrees of influence over decision-making in a company. Legislation provides greater rights to shareholders with larger holdings.

➔ *For more information on the rights of shareholders according to their ownership percentage, see Chapter 7.*

Clearly, it is vital to know who is in a position to make (or influence) decisions within a company. For this reason, full information on the amount of the issued capital, its increases and decreases, the rights attached to shares of different types and classes, and the number of shareholders is crucial.

Shareholders with large stakes have the opportunity to exercise control over decision-making in a company. These opportunities are summarized in Table 1.[40]

Table 1: The Influence on Decision-Making Relative to the Ownership

Ownership	Influence on Decision-Making
35% + 1 vote	The shareholder can block major decisions that require a 65% majority, e.g. to amend the charter or reorganize the company.
65%% + 1 vote	The shareholder can unilaterally decide all issues.

In practice, lower thresholds may suffice to exercise control over a company. In particular, in companies with dispersed ownership it is not necessary for a shareholder to hold the percentages of votes outlined in Table 1 above since the quorum for decisions of the GMS is counted based on votes

40 LOE, Article 52, Clause 2.b and Decision 15, Article 16, Clause 1.a, Article 20, Clause 2.

cast.[41] Since it is rare for all shareholders to vote at the GMS, a lesser percentage of shares usually provide the same degree of influence. In any event, the larger the ownership stake, the greater the ease with which shareholders can control the company.

Under Vietnamese regulations, listed companies must disclose periodically every principle shareholder (i.e. who own more than 5% of the total voting right shares[42]), including the following subjects:[43]

- Full name, date of birth (as for individual shareholders)
- Contact address
- Occupation (as for individual shareholders), areas of business (as for institutional shareholders)
- Number and percentage of its ownership in the company
- Changes of ownership of principle shareholders
- Information that may cause big changes in terms of shareholders of the company
- The principle shareholders' increase, decrease or pledge of company stocks

In addition, listed companies shall be responsible to report quarterly and annually and disclose the changes of shareholders ownership to the SSC and stock exchange in accordance with the regulations of the SSC.[44]

Best Practices:

Companies seeking to disclose their ownership structure may wish to follow examples under U.S. and EU regulations. U.S. regulations define a beneficial owner as any person who, directly or indirectly, through any contract arrangement, understanding, relationship, or otherwise has or shares:

- Voting power, which includes the power to vote, or to direct the voting of such a security; and/or
- Investment power that includes the power to dispose, or direct the disposition of such security.

41 LOE, Article 102, Clause 1 and Decision 15, Article 52, Clause 2.a.

42 Circular 09, Section II, Article 4, Clause 1.

43 CG Regulations, Article 29, Clause 1.

44 CG Regulations, Article 29, Clause 2 and LOS, Article 29 and Appendix 3 & 4 of Circular 09.

U.S. securities law states that any person who is directly or indirectly the beneficial owner of more than 5% of any equity security of a class, shall notify the issuer and each exchange where the security is traded of such acquisition within 10 days, as well as of any increase or decrease by 1% of more.[45] If the beneficial owner acts in concert with other institutions or persons, their names and the relationship with the beneficial owner must be disclosed.

The EU Transparency Directive of 2004 provides a framework for disclosure.[46] In summary:

1) Article 9 stipulates that investors must disclose the acquisition or disposal of major shareholdings in listed companies, based on thresholds starting at 5% and continuing at intervals of 5% until 30% of voting rights, or charter capital or both
2) Article 11(2) shortens the reporting obligation of the acquirer to the company and the competent regulatory authority from seven calendar days to five business days on the one hand and, on the other, of the company to the public from nine calendar days to three business days
3) Article 2 extends the definition of "security holder" to include custodians and those holding securities for clearing and settlement purposes
4) Finally, Article 11(5) extends notification requirements to various classes of shares, such as warrants and convertible bonds if the holdings reach or fall below the thresholds defined in Article 9.

Six member states have already introduced this directive by law or regulation. In addition, the EU Takeover Bids Directive's Article 10 regulates transparency issues, including the disclosure of beneficial ownership structures. Listed companies in the EU are thus required to disclose information in their annual report on, *inter alia:*

1) The structure of their capital
2) Any restrictions on the free transferability of securities
3) Significant direct and indirect shareholdings (including pyramid schemes and cross-shareholdings)
4) The holders of any securities with special control rights
5) The system of control of any employee share scheme where the control rights are not exercised directly by employees

↘

45 U.S. Securities and Exchange Act 1934, Sec. 13d-1, 2; 17 CFR 240, 13d-2.

46 See also: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:390:0038:0038:EN:PDF

6) Restrictions on voting rights
7) Shareholder agreements that are known to the company
8) The rules governing the appointment and replacement of Board of Directors members
9) Significant agreements made by the company that take effect upon a change of control
10) Compensation agreements between the company and its directors in the case of a successful takeover bid.

Vietnamese companies wishing to comply with good corporate governance practices should disclose their ownership structure, including beneficial owners, in a transparent manner.

b) Indirect Control

Shareholders owning less than the majority of shares can exercise indirect control over the company through pyramid structures and/or cross shareholdings. Relationships with related parties may also alter the control structure of the company.

Best Practices:

Information on indirect ownership, related parties, and related party transactions should be fully disclosed, specifically in the annual, quarterly and material events reports and other notifications to regulators or creditors.

➔*For more information on the procedure to disclose the company's related parties, see Section C.5 of this Chapter and for more information on the disclosure requirements for related party transactions, see Chapter 12, Section C.5.*

c) Shareholder Agreements and Voting Caps

Shareholder agreements and voting caps can also impact on control.[47]

Shareholder (voting) agreements typically oblige parties to vote as a block and may give first-refusal rights for the purchase of shares to another shareholder. Shareholder agreements can cover many issues including which candidates to nominate for the Board of Directors or the selection of the Chairman. Shareholder agreements are clearly of material interest to shareholders. While difficult to detect, companies should make reasonable efforts to obtain information about the existence of shareholder agreements and to disclose such information to all shareholders. In principle, parties to shareholder agreements should voluntarily disclose this information themselves.

Voting caps limit the number of votes that a shareholder may cast regardless of the number of shares he/she actually possesses. As such, caps go against the principle of one share, one vote and control that is proportional to ownership. Voting caps are often used to either entrench the position of existing controlling shareholders or management, and are rarely supported by good faith investors.

The Law on Enterprises has implicitly prohibited voting caps by introducing the mandatory one share, one vote principle. In accordance with the law, it contains the provision under which it is prohibited for a joint stock company to limit voting rights by maximizing the number of votes of one shareholder.[48]

4. Information on Directors and Executives

a) Personal Data

Investors and shareholders should have access to relevant information relating to capability and qualification of the Board of Directors members and key executives to evaluate their experience and qualifications.[49] Educational background, current occupation and professional experience of directors and senior executives should be disclosed and readily accessible to interested parties. It is also important that shareholders and investors have information

47 LOE, Article 4, Clause 8.

48 LOE, Article 79, Clause 1(a).

49 LOE, Article 110.

about any (existing or potential) conflicts of interest that may affect the independence and decision-making capacity of the Board of Directors and Executive Board. Unfortunately, Vietnamese law does not have any regulation that allows shareholders or investors to have rights to access a full set of the above-mentioned information about Board of Directors members. The right to access information is most important, that may protect shareholders in the market with the information asymmetry.

Shareholders should also be able to assess whether or not Board of Directors, the Supervisory Board and the Executive Board members dedicate sufficient time to their duties and properly carry out their responsibilities. Accordingly, companies should disclose all other Board positions held by Board of Directors members or executive directors in other companies (domestic and foreign) and the meeting attendance records.

Best Practices:

Legal disclosure requirements clearly fall short of best practices. According to the best practices, a company should also disclose the following information in its annual report:

- Other key officials of the company, including their curriculum vitae
- Information about all transactions between these other key officials and the company
- Age, profession, employment and citizenship of each Board of Directors member, as well as all other positions, the date of initial appointment and the current term of appointment
- Information on all claims filed in courts (or arbitration tribunals) against Board of Directors members and executive directors and/or the General Director.

b) Remuneration

Incentive remuneration schemes are common in many countries and come in many varieties. Few companies have such arrangements that are identical to one another.

Executive remuneration plans are usually put in place in an effort to motivate executives, and better align their interests with the interests of

shareholders. They normally include performance based bonuses. Incentive remuneration schemes may not be the most effective way of alleviating inherent conflicts of interests and, in any event, should always be subject to careful legal and financial examination and the approval of both the Board of Directors and the GMS.[50] Remuneration plans for non-executive directors will differ considerably.

In Vietnam, the remuneration granted to each individual member of the Board of Directors and Executive Board over the relevant financial year should be disclosed as a separate item in the annual financial statements of the company and shall be reported to the General Meeting of Shareholders at its annual meeting.[51] It is determined by the CG Regulations that the data on remuneration paid to Board of Directors members of listed companies shall represent mandatory contents of the prospectus and annual business reports.[52]

Best Practices:

Shareholders should be provided with a clear and comprehensive overview of the company's remuneration policy. Disclosure of information on the remuneration policy allows shareholders and investors to assess the main parameters and rationale for the different components of the remuneration package and the linkage between remuneration and performance. Such disclosure aims to strengthen the company's accountability to shareholders. The remuneration policy should be part of an independent remuneration report and/or be included in the annual financial statements and annual report or the notes to the annual financial statements of the company. The remuneration policy should also be posted on the company's website.[53]

Companies should not only be transparent with respect to the levels of remuneration but also to the methods for determining remuneration. The criteria for determining the amount of remuneration for Board of Directors members, the General Director and/or Executive Board members — as well as the total amount of remuneration paid or to be paid depending on the results of the reporting year — must be disclosed in the annual report. The methods for determining remuneration are usually an integral part of the remuneration policy.

50 LOE, Article 108, Clause 2.h and Article 117.

51 LOE, Article 117, Clause 3.

52 Decision 12, Article 17, Clause 4.

53 More about disclosure of the remuneration policy see: European Commission Recommendation fostering an appropriate regime for the remuneration of directors of listed companies (2004/913/EC), Section II.

A large majority of EU member states have introduced high disclosure standards with regard to the remuneration of individual Board of Directors members and key executives, putting shareholders in a better position to assess the extent to which an individual's remuneration is justified in view of his/her responsibility and/or performance. It also allows shareholders to hold executives and Board of Directors members fully accountable for the performance of their duties.

- With respect to executive remuneration plans, shareholders and investors should have sufficient information to properly assess their costs and benefits to the company and the relations between the performance of the company, on the one hand, and the level of executive remuneration, on the other.
- At some point, the independence of non-executive directors may be compromised if they earn a significant amount of their total income from their Board activities. Some countries have monetary thresholds that serve as convenient "rules of thumb" or warning signals. While numerical thresholds may be a reasonable starting point, judgments on independence will, of course, require a much more sophisticated analysis. The disclosure of a non-executive director's remuneration remains critical in order to judge the extent to which his independence may be compromised.

➔ *For more information on non-executive and executive remuneration practices, see Chapter 4, Section H and Chapter 5, Section G, respectively.*

5. Material Foreseeable Risk Factors

Risk (along with return) is one of the most important considerations for any investor. Risks may include particular industry risks as well as political, commodities, derivatives, environmental, market, interest and currency fluctuation risks. In short, risk is an omnipresent feature of business activity.

Risk is, by its very nature, forward looking and extremely difficult to quantify. Nevertheless, specific industry, financial and legal risks as well as other material risks all need to be disclosed in prospectuses.[54] However, Vietnamese companies are not required to describe material risks in their annual reports.[55]

54 Decision 13 (as specified in appendices of this Decision: form of prospectuses).

55 Circular 09, Appendix II.

6. Employees and Other Stakeholders

Strictly speaking, most of the information on employees and other stakeholders may not be "material" according to the accounting or financial definitions of the term. On the other hand, information about the company's employees, creditors and suppliers, as well as the company's relationship with local communities can be "material" to other constituencies. Employees are also users of information, and disclosure helps them to make better employment decisions, protect themselves in the workplace and participate in other aspects of company life. Stakeholder disclosure is becoming increasingly common as an issue of interest and attention worldwide.

Best Practices:

While some forms of stakeholder disclosure are required by law, it is good practice to provide stakeholders with other relevant information. For example, stakeholder disclosure might include health protection for employees, safety conditions in the workplace and environmental or community impact statements.

7. Corporate Governance Structures and Policies

When assessing a company's governance structure, market participants may want to obtain information on the company's governing bodies, including the division of authority between shareholders, directors and executives, as well as on the company's corporate governance policy, its commitment to corporate governance principles and compliance mechanisms.

The charter is the document that sets the rules and procedures of the company's governance system. It is a fundamental document of the company that is to be made publicly available. Company-level corporate governance codes also serve to highlight general corporate governance concepts and structures. Internal regulations provide more detailed guidance on processes.

Article 28 of the CG Regulations requires that a listed company must disclose information on its corporate governance practices in the AGM, annual

reports, including the following contents:

a) Members and structure of the Board of Directors and Supervisory Board
b) Actions performed by the Board of Directors and Supervisory Board
c) Actions performed by non-executive independent members of the Board of Directors
d) Actions performed by the committees of the Board of Directors
e) Plans to enhance the efficiency of corporate governance
f) Remuneration and expenses for the members of the Board of Directors, Executive Board and the Supervisory Board
g) Information on transactions of company shares by members of the Board of Directors, Executive Board and Supervisory Board, major shareholders as well as other transactions by Board of Directors members and related persons
h) Number of Board of Directors, Executive Board and Supervisory Board members who have attended training courses on corporate governance
i) Matters which are not in compliance with the CG Regulations, causes and approaches to overcome.

Best Practices:

It is necessary to disclose information about corporate conflicts resulting from improper implementation by the company of those corporate governance recommendations that the company declared binding upon itself in one form or another. Also, companies must adhere to the "comply or explain" principle in the application of accepted corporate governance rules and recommendations, and that respect, explain in their reports the reasons for possible deviations from their implementation in practice.

a) Commitment to Corporate Governance

Markets are keenly interested in understanding the level of a company's commitment to good governance practices. They wish to determine whether a company sees governance as a public relations, "box-ticking," or "window-dressing" exercise, or whether the company is in fact willing "to do right" by shareholders and to institute and implement real change as necessary and appropriate. While good disclosure, in and of itself, is not sufficient to consistently and uniformly ensure good corporate governance, it is clearly one way of demonstrating the commitment a company is willing and able to make to its shareholders and to its other stakeholders.

b) Corporate Governance Structures

Companies must describe their governance structures, including the authority of each governing body and internal control mechanisms, in their prospectus and reports. Also, companies should regulate and make publicly available through their internal documents the procedures for convening and conducting the GMS and make decisions made at the GMS publicly available through material events reports.

Best Practices:

Companies should disclose information about changes in the identity of (or contractual arrangements with) the company's External Auditor and other externally engaged persons that provide the company with material impact services on the company's business operations (e.g. lawyer's offices engaged for representation in major litigations).

c) Corporate Governance Policies

Companies should disclose their corporate governance policies and provide interested users with easy and inexpensive access to this information.

Best Practices:

CG best practices recommends companies develop disclosure policies that should be approved by the Board of Directors and be binding upon the company. Some of the provisions suggested for inclusion in company policies include:

- List of information the company intends to disclose
- Rules for communicating with the mass media, as well as the sources and regularity of communications
- Media contacts, including press conferences, publications, brochures and booklets
- The requirement for executive bodies to conduct meetings for shareholders and analysts
- Procedures for answering questions from all shareholders
- List of information, documents and materials to be provided to all shareholders for the GMS
- List of confidential information
- Procedures for the identification and treatment of insider information.

In addition, companies should consider disclosing other internal policies or internal regulations such as a code of ethics, environmental policies, and the internal regulations for the Board of Directors and its committees amongst others.

➔*For more information on company policies and internal regulations, see Chapter 3.*

8. Disclosure During the Placement of Securities – Prospectus

The public offer of securities may only be performed with prior registration of the prospectus with the SSC.[56] A prospectus provides material information on the company so that investors can make informed decisions on the merits of

56 The prospectus forms are provided in Decision 13.

potential investments. Prospectuses set forth the nature and object of shares, debentures, or other securities, and the investment and risk characteristics of the issue. Investors must be furnished with a prospectus before purchasing securities.

➔ *For more detailed information on the prospectus, see Chapter 11, Section C.*

C. Voluntary Disclosure

It is good practice for companies to voluntarily disclose material information beyond formal legal requirements. This holds particularly true for companies operating in emerging markets that are often marred by weak legal and regulatory environment and poor enforcement mechanisms. To the extent possible, companies are encouraged to use existing forms of disclosure and adhere to the same quality standards that are demanded for these forms of reporting. They are also encouraged to use existing channels of communication, such as the internet and the print media.

1. Corporate Websites

Corporate websites are easily accessible to the public at low cost and can be an exceptionally powerful means of communication. At present, the internet is beginning to be accepted as an official disclosure channel.

Best Practices:

The following information should be placed on the company's website:

- The company's charter and amendments thereto
- Information on the company's development strategy
- Business reports with financial reports
- Prospectuses
- External Auditor's reports
- Information on material events
- Information regarding the GMS
- Important Board of Directors decisions.

The internet is an effective tool for rapid and cost-effective communications and is increasingly used by Vietnamese companies for voluntary disclosure.

Comparative Practices:

Listed companies place their annual and financial reports and governance information (such as information on Board of Directors members and key executives) on their websites. The better websites have special sections devoted to corporate governance and include contact addresses and telephone numbers for inquiries.

Some companies are already following best practices and disclose additional information on their websites, including:

- Financial statements for the last three years
- Financial ratios for the last three years
- Internal corporate documents
- Structure, authorities, and composition of the governing bodies
- List of affiliated persons for the last year
- Annual and quarterly reports for the last three years
- Materials and decisions of the GMS for the last three years
- Information on corporate securities
- Corporate news ticker.

2. Mass Media

The print media is an additional channel for disclosure. Although publication may entail additional costs, it is a recognized legal channel for disclosure and (unlike the internet, which is passive) ensures the active dissemination of information among the public.

Most companies disclose information about new products, major contracts, acquisitions, financial results, production plans and securities issues in the print media.

Best Practices:

Financial statements are the most important document for shareholders and potential investors to understand the financial position of the company. In this respect, companies with a larger number of shareholders (for example, 10,000 or more) should publish their financial statements in at least two newspapers distributed throughout the entire territory of the country. In principle, these newspapers should be accessible to the majority of the company's shareholders.

NOTES

14

Chapter

CONTROL AND AUDIT PROCEDURES

14 | Control and Audit Procedures

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The Chairman's Checklist

- ☑ What is the relationship between the Supervisory Board, Board of Directors, Audit Committee and External Auditor? Have their roles and responsibilities been properly defined to avoid overlaps and conflict?

The Supervisory Board:

- ☑ Is the Supervisory Board fulfilling its function and duties?
- ☑ Has the Supervisory Board ever found, and reported on, possible misstatements or other violations to the GMS?
- ☑ Who are the members of the Supervisory Board? Are any employees members? Are the members fully independent from management?
- ☑ Does the Supervisory Board meet regularly and respond to all shareholder requests and inquiries?
- ☑ Does the Internal Auditor report to management, the Board of Directors or the Supervisory Board? To whom should the Internal Auditor report? Are there barriers that could discourage the Internal Auditor from reporting its findings?

The External Audit:

- ☑ Does the company have an independent External Auditor? Does the External Auditor provide other, non-audit services to the company that could compromise his/her independence? Are audit partners rotated?
- ☑ How is the External Auditor selected? Does an open tender process take place? If so, who organizes this tender process?
- ☑ To whom does the External Auditor report?
- ☑ Does the External Auditor participate in the Annual GMS and answer all questions posed by shareholders?

The Board of Directors' Audit Committee:

- ☑ Should the company's Board of Directors have an Audit Committee? What are the costs and benefits? What needs to be done to ensure that there are no significant conflicts between the Supervisory Board and the Audit Committee in relation to the use of the internal audit function?
- ☑ If the company has an Audit Committee, is it staffed with individuals who are independent, able and willing to do the job properly and effectively?
- ☑ Does the Head of the Audit Committee have the requisite professional and human relations skills? Are members of the Audit Committee publicly recognized financial experts?
- ☑ Does the Audit Committee meet often enough to perform its duties effectively? Does it place the necessary and appropriate issues on the agenda?
- ☑ Does the Audit Committee add value to Board of Directors' discussions covering audit, risk, internal control and financial reporting?
- ☑ Does the Audit Committee receive the necessary information to perform its duties effectively? Does it have resources to hire outside accounting or legal advice?
- ☑ Does the Audit Committee perform self-evaluations on a regular basis?

The Internal Control System:

- ☑ Does the company have an internal control system in place? Does the company have a formal document that regulates the internal control system and procedures? Is this document periodically reviewed?
- ☑ Does the company have a risk management system in place? Does this system cover risk at the subsidiary level as well? How are business, operational and financial risks identified?

An internal and external audit system is an important tool in the management and oversight of a company, which also contributes to transparent and sound financial reporting. There are a number of internal structures and external agents involved in the management and oversight of company finances and operations. These bodies are diverse in their nature, functions and reporting lines. Some are mandatory, while others are optional.

Vietnamese regulations make specific provisions for the establishment of the Supervisory Board. The Supervisory Board shall supervise the Board of Directors and the General Director (or director) with a focus on controlling financial and business activities of the company as well as monitoring compliance with laws and regulations. The Supervisory Board should be independent of the Board of Directors and Executive Board. Supervisory Board members must act diligently in the best interests of company shareholders. The Supervisory Board reports directly to the GMS and in theory, it should have the ultimate inspection role to ensure proper controls are established by the company. The independent External Auditor examines a company's financial and accounting records, as well as supporting documents, in all material respects. Shareholders depend upon the External Auditor to express an independent opinion on whether the financial statements of a company are reliable.

In case of having an ineffective performance of the Supervisory Board, the Board of Directors should consider the establishment of an Audit Committee. The Board of Directors' Audit Committee safeguards the company by questioning executive bodies regarding the way in which financial reporting responsibilities are handled, as well as by ensuring that corrective actions are taken. The Audit Committee oversees the company's relations with the External Auditor. It may consider the appointment of an External Auditor, review the internal audit plan, review the effectiveness of internal control systems, consider major findings of internal audit investigations and management responses to these and promote co-ordination between the Internal and External Auditors. The Audit Committee is part of the Board of Directors, and as such, develops recommendations for the Board's consideration. The Audit Committee consequently has no independent decision-making authority.

The Internal Auditor is responsible for the on-going daily appraisal of the financial health of a company's operations. The internal control system is jointly designed by the Board of Directors, the management and employees to provide reasonable assurance regarding the achievement of the company's

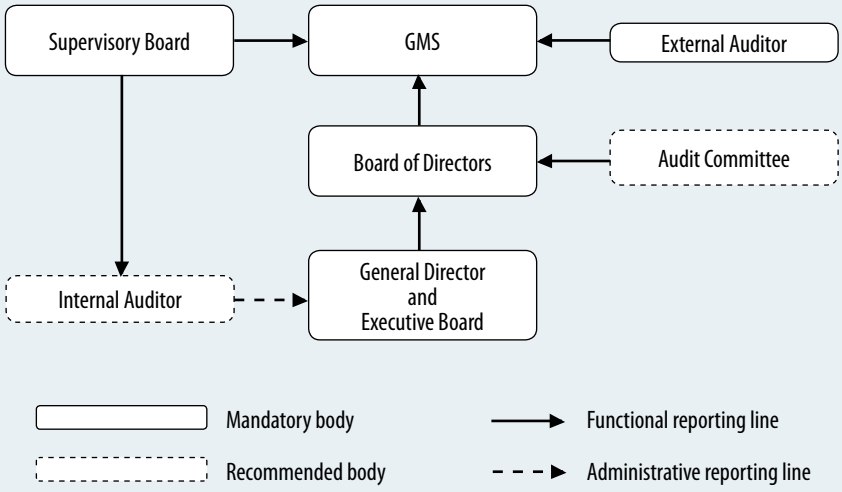
objectives with regards to the effectiveness and efficiency of operations, reliability of financial reporting and compliance with applicable laws and regulations. The main objective of the Internal Auditor is to advise management if the company has sound internal control systems to protect the organization against loss. The Internal Auditor evaluates internal control systems, assess risks and components of risk management, communicate and make suggestions for improvement. An internal audit not only covers the finance function, but also the company's operations and systems.

Best Practices:

The Board of Director's Audit Committee function has only recently been introduced in Vietnam, where there is more experience with the Supervisory Boards. Questions may arise over the extent to which the responsibilities of these two bodies overlap, and which is best able to oversee the preparation of the financial information and assess internal control systems. At present, it appears that given differences in their mandates, they could fulfil complementary functions. However, it has been argued that the Supervisory Board function may indeed overlap with the External Auditor and the Audit Committee. Most countries have chosen to strengthen the later two and abolish Supervisory Board. However, in countries where the legal system requires the existence of the Supervisory Board, many companies have no choice but to either strengthen either the function of this body or the audit committee to fit with their circumstances.

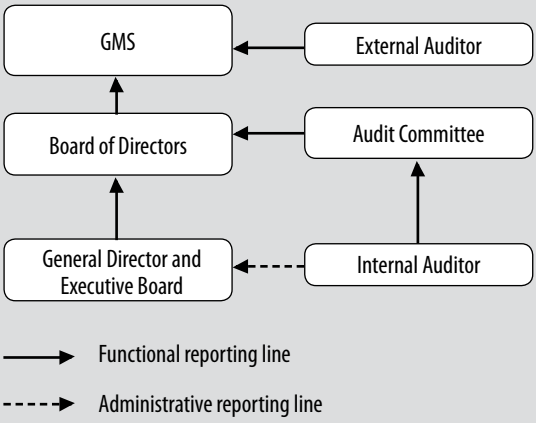
This chapter discusses the role, authority and duties of these various bodies in detail and how they specifically contribute to company transparency and information disclosure. For an overview of these bodies and their reporting lines, see Figure 1 for Vietnam's current model and see Figure 2 for the best practice model used in many other countries.

Figure 1: Vietnam Mandatory and Voluntary Governing Bodies for Control and Audit



Best Practices:

Figure 2: Best Practice Model of Governing Bodies for Control and Audit



A. The Supervisory Board

The Supervisory Board controls the operations and financial activities of the company. Its primary function is to supervise the work of the Board of Directors, the director or General Director, as well as the company's compliance with laws and regulations during business operations.[1]

A public company must have a Supervisory Board.[2]

1. The Composition and Requirements for Members

A Supervisory Board shall have from three to five members with a term of no more than five years and the member of the Supervisory Board can be re-elected with unlimited terms.[3]

Members of a Supervisory Board:[4]

- Should be at least 21 years of age, with full capacity for civil acts, and not falling within the scope of subjects not permitted to establish and manage enterprises in accordance with Law on Enterprises
- May not be a family member of the company's Board of Directors, the director or General Director or other managers
- Shall not hold managerial positions in the company.

More than half of the Supervisory Board must reside permanently in Vietnam and at least one member must have experience/background as an accountant or auditor.[5] For a listed company, it is clearly regulated that at least one member of the Supervisory Board must be an accounting and finance expert. That member must not be company staff from the accounting and

1 LOE, Article 123, Clauses 1 & 2.

2 LOE, Article 95 mentioned that "A shareholding company which has more than 11 individual shareholders or a single shareholder who holds over 50% of the total shares of the company must set up a Supervisory Board."

3 LOE, Article 121, Clause 1.

4 LOE, Article 122.

5 LOE, Article 121, Clause 2.

finance department and must not be a member or staff of the independent auditing firm which audits the financial statements of the company.[6]

Members of the Supervisory Board must not hold managerial positions in the company. Members of the Supervisory Board shall not be required to be a shareholder or an employee of the company.[7] In other words, they should be independent members of the company.

Best Practices:

Generally, members of the Supervisory Board should be chosen based on their financial background and expertise. Only persons with impeccable reputation can be elected to this Board. The charter and internal regulations can provide additional requirements for Supervisory Board members such as proficiency in accounting and financial reporting.

It is recommended that:

- Supervisory Board members should not be elected to that position more than five terms in a row with the same company, because it can have a negative influence on their independence.
- The same person should not be a member of the Supervisory Board in more than five companies at the same time (membership of connected companies is exempted).
- A member of the Board of Directors of a listed company should not be a Supervisory Board member in more than three other listed companies, except if they are connected.
- If a member of the Board of Directors of a company is at the same time a member of the Supervisory Board of another company, then a member of the Board of Directors of the second company should not be a member of the Supervisory Board of the first company (reciprocal membership).

6 Model Charter, Article 36, Clause 1.

7 LOE, Article 122, Clause 2.

2. Authorities

The Supervisory Board has the authority to:[8]

- Supervise the Board of Directors and the directors with respect to the management and administration of the company
- Inspect the reasonableness, legality, truthfulness and prudence in management and administration of business activities, in the organization of statistics and accounting work and preparation of financial statements
- Evaluate reports on business, half-yearly and annual financial statements and Board of Directors management evaluation reports
- Review books of accounts and other documents of the company, the management and administration of company operations
- Carry out inspections of issues required to be inspected by a shareholder or a group of shareholders
- Recommend to the Board of Directors or the GMS any changes and improvements of the organizational structure, management and administration of the business operations of the company
- Give immediate written notice to the Board of Directors and request the person in breach of a company manager's obligations to cease the breach and take measures to remedy any consequences
- Use an independent consultant to perform the assigned duties.

The Supervisory Board has the right to demand an extraordinary GMS[9] and a meeting of the Board of Directors.[10] Members of the Supervisory Board can participate in all meeting of the Board of Directors.[11]

The Supervisory Board has the right to receive the following information:

- Invitations or collecting opinion sheets of Board of Directors members
- Reports made by the General Director (or director) submitted to the Board of Directors and other relevant documents issued by the company
- Access to all files, documents of the company

8 LOE, Article 123.
9 LOE, Article 97, Clause 3d.
10 LOE, Article 112, Clause 4a.
11 LOE, Article 112, Clause 7.

- Information and documents on the management and supervision of the company's operations provided by the Board of Directors and executive management at the request of the Supervisory Board.

By end of the financial year, the Board of Directors shall prepare and send to the Supervisory Board the following reports and material for appraisal at least 30 days prior to the opening of the AGM unless otherwise stipulated by the company's charter:[12]

- A report on the business operations of the company
- Financial statements
- An evaluation report on the management and administration of the company.

The Model Charter, which all listed companies are obliged to adopt, further provides that the Supervisory Board shall manage the relationship with the auditors and progress of the audit, which practically encompass all those duties mostly undertaken by an Audit Committee, as follows:[13]

- To propose the selection of an independent auditing firm, fees for auditing and all issues relating to the withdrawal by, and removal of, the independent auditors
- To discuss the nature and scope of the independent audit before auditing work commences
- To consult the independent professional or legal consultants to ensure that external experts with appropriate professional qualifications and experience participate in the work of the company when considered necessary
- To inspect the annual, six-monthly and quarterly statements before submitting them to the Board of Directors
- To discuss the difficulties and outstanding issues discovered in the mid-term or final-term audit results as well as issues which the independent auditor wishes to discuss
- To review the management letter of the independent auditor and feedback from the company's management
- To review the results of the internal inspections and feedback from the company's management.

12 LOE, Article 128, Clause 1, Clause 3.

13 Model Charter, Article 37, Clause 1.

Best Practices:

In other countries, additional authorities and duties of the Supervisory Board include the authority to:

- Investigate cases of using insider information
- Check the timeliness of payments to contractors and mandatory budget payments
- Check the timeliness of the accrual and payment of dividends, as well as the timely meeting of the company's other financial obligations
- Check the appropriateness of using the company's reserves and other funds
- Check the timeliness of payment for the company's issued shares
- Oversee the timeliness of the valuation of the company's net assets
- Request and receive information concerning related parties and related party transactions
- Review the financial condition of the company, specifically its solvency, the liquidity of its assets, and creditworthiness

3. The Nomination of Members

The procedure for nominating candidates to the Supervisory Board of the company is identical to the procedure for nominating candidates to the Board of Directors. The charter can require that additional information about candidates be included in the proposal for their nomination.

➔ *For more information on the nomination process, see Chapter 7, Section B.12.*

4. The Election and Dismissal of Members

The election and dismissal of members of the Supervisory Board are within the authority of the GMS.[14]

All members of the Supervisory Board must be elected with cumulative voting.[15] The term of the Supervisory Board shall be no more than five years and the members of the Supervisory Board can be re-elected with unlimited terms.[16] At the end of the term and if the Supervisory Board of the new term has not been elected, the former Supervisory Board shall continue exercising rights and obligations until the new Supervisory Board is elected.[17]

➔ *For more information on cumulative voting see Chapter 4, Section B 4.*

Only the GMS can dismiss Supervisory Board members before the end of their term. Supervisory Board members can be dismissed or discharged in the following cases:[18]

- No longer having sufficient qualifications as required
- Not exercising their rights and obligations for six consecutive months without approval from the Supervisory Board
- Having offered a letter of resignation
- Other cases stipulated by the company's charter.

Besides, members of the Supervisory Board can be dismissed at any time according to a resolution of the GMS.[19]

If the Supervisory Board seriously violates its obligations, which probably causes losses to the company, the Board of Directors shall convene the GMS to consider and dismiss the on-going Supervisory Board and elect another one.[20]

14 LOE, Article 96, Clause 2c.
15 LOE, Article 104, Clause 3c.
16 LOE, Article 121, Clause 1.
17 LOE, Article 121, Clause 3.
18 LOE, Article 127, Clause 1.
19 LOE, Article 127, Clause 2.
20 LOE, Article 127, Clause 3.

5. Contracts with Members

Although not regulated in any legal documents, Supervisory Board members will have contracts with the company in the form of normal labor contracts.

Best Practices:

The charter or internal regulations should specify who signs the contract on behalf of the company. In principle, the Chairman of the GMS or the Board of Directors should do this. If, on the other hand, the General Director or another executive signs the contract, this would likely affect the independence of the Supervisory Board, either in appearance or in fact. Of course, the authority to sign the contract does not imply the authority to negotiate or alter contract terms. Key elements and terms of the contract, such as remuneration, are subject to the GMS' approval.

6. The Remuneration of Members

Unless stipulated in the charter of the company, remuneration and other Supervisory Board member benefits shall be implemented in accordance with the following provisions:[21]

- Members of the Supervisory Board shall receive remuneration for the work done and other benefits according to the resolution of the GMS. The GMS shall determine the total remuneration and annual operating budget of the Supervisory Board based on the estimated number of working days, amount and nature of work and the average daily remuneration of members.
- The remuneration shall include expenses for meals, accommodation, travel and for use of independent consultancy services at reasonable rates so that the total amount of such remuneration and expenses shall not exceed the total annual budget of the Supervisory Board approved by the GMS, except otherwise decided by the GMS.

21 LOE, Article 125, Clauses 1 & 2.

7. Operating Procedures

A Supervisory Board's operating procedures can be specified in the charter, or preferably in the company's internal regulations for the Supervisory Board, approved by the GMS. A listed company shall formulate a mechanism to ensure the capability of Supervisory Board members to independently conduct their activities and perform their tasks according to the law and the company's charter.[22]

The Supervisory Board may issue rules on Supervisory Board meetings and the manner in which the Supervisory Board operates, after consulting the Board of Directors. Under the Model Charter, the Supervisory Board must meet at least twice each year and the minimum number of members attending a meeting must be two.[23] However, under the CG Regulations a Supervisory Board meeting must be participated in by at least two-thirds of Supervisory Board members.[24] The minutes of a meeting of the Supervisory Board must be detailed and clear. The secretary and members of the Supervisory Board participating in a meeting shall sign the minutes of the meeting. Minutes of Supervisory Board meetings shall be kept as important documents of the company in order to determine the responsibility of each member on Supervisory Board resolutions.[25]

The Supervisory Board shall have a Chairman.[26] The Supervisory Board members shall appoint one person among themselves to be the Supervisory Board Chairman. For a listed company, the Supervisory Board Chairman must be a shareholder of the company[27] and be an accounting professional who neither works in the accounting and finance department, nor is the finance director (or chief accountant) of the company.[28] The Supervisory Board Chairman shall have the following rights and responsibilities:[29]

- To convene meetings of the Supervisory Board
- To request the company provide relevant information in order to report to Supervisory Board members

22 CG Regulations, Article 20, Clause 2.
23 Model Charter, Article 37, Clause 3.
24 CG Regulations, Article 21, Clause 2.
25 CG Regulations, Article 21, Clause 2.
26 LOE, Article 122, Clause 2.
27 Model Charter, Article 36, Clause 1.
28 CG Regulations, Article 18, Clause 2.
29 Model Charter, Article 36, Clause 1.

- To prepare and sign Supervisory Board reports after consulting the Board of Directors and submit them to the GMS.

Best Practices:

The charter or internal regulations should provide the chairman with the responsibility to:

- Call, organize and preside over Supervisory Board meetings
- Prepare and sign meeting minutes and other decisions
- Represent the Supervisory Board in meetings with third parties
- Cast a deciding vote at meetings in instances of a tied vote
- Cooperate with the Board of Directors Chairman.

The charter or internal regulations should specify what constitutes a quorum and define the voting procedures. The quorum should not be less than half of the members and decisions should be approved by a simple majority vote.

In performance of its duties, the Supervisory Board may inspect all company documents, check their credibility and the veracity of data in them, request reports and explanations from the Board of Directors, management and employees.[30] In the performance of its duties, a company's Supervisory Board may engage the services of external specialists at an appropriate rate.[31]

In some circumstances, a shareholder or group of shareholders who own more than 10% of the total common shares for a continuous period of at least six months or a smaller ratio as stipulated in the company's charter may request the Supervisory Board carry out extraordinary inspections. The Supervisory Board shall carry out inspections within a period of seven working days from the date of receipt of the request and submit the inspection report to the Board of Directors and the requesting shareholder or group of shareholders within 15 days from the date of the inspection's completion. The Supervisory Board investigation shall neither prevent the normal operations of the Board of Directors nor intervene in the normal business operations of the company.[32]

30 LOE, Article 123.

31 LOE, Article 125, Clause 2.

32 LOE, Article 123, Clause 5 in connection with Article 79, Clause 2, Item d.

8. Reporting

The Supervisory Board must prepare inspection reports which must be made available at the head office and branches of the company no later than seven working days prior to the opening day of the AGM, unless otherwise stipulated in the charter of the company.[33]

For a listed company, the Supervisory Board must present an inspection report to the shareholders at each GMS containing at least the following contents:[34]

- Operations of the Supervisory Board
- Review of meetings and decisions of the Supervisory Board
- Supervision results of the company's operations and financial status
- Supervision results of the Board of Directors and the Executive Board members
- Assessment of operating coordination between the Supervisory Board, Board of Directors and the Executive Board.

Best Practices:

All members of the Supervisory Board should sign the report and:

- Those who have not signed the report explain why they have not done so; or
- Indicate that a member refused to sign and was unwilling to provide an explanation for such refusal.

Supervisory Board members who attend the GMS should provide shareholders with the opportunity to ask questions and discuss inspection results.

33 LOE, Article 128, Clause 4.

34 CG Regulations, Article 8.

B. The Independent External Auditor

An independent audit conducted by an External Auditor is an important element of the company's control framework. The objective of an audit is to enable the External Auditor to express an opinion on whether or not the financial statements of the company are prepared, in all material respects, in accordance with an identified financial reporting framework and whether they are reliable. It gives shareholders, managers, employees and market participants an independent opinion about the company's financial position and, if performed properly, should attest to the accuracy of the statements. An independent audit conducted by a publicly recognized and accredited accounting firm normally enhances the company's credibility, and accordingly, its prospects for attracting investment.

Three key points about the independent audit are:

1. Management remains responsible for preparing and presenting the company's financial statements
2. The External Auditor is responsible for forming and expressing an opinion on the financial statements prepared by management
3. The audit of the financial statements does not relieve management of any of its responsibilities.

1. When an Annual Audit is Required

The annual financial statements of all public and listed companies must be audited by an independent and eligible audit firm (listed companies must be audited by an accredited auditing company who is on the list of audit companies accredited by the State Securities Commission for audit under the conditions specified by the Ministry of Finance).[35]

35 Circular 09, Section II and Section IV, Clause 1, Paragraph 1.1 and LOS, Article 6, Clause 15.`

36 Decree 105/2004/ND-CP, Article 24 and Article 33 of the Draft Law on Independent Auditing.

2. The Rights and Duties of the External Auditor

In relation to the external audit of a company, the External Auditor (or Auditing Company) has rights to:[36]

- Receive fees for services provided to clients
- Request the company to supply fully and promptly accounting documents and other necessary documents and information related performance of the audit under the contract
- Request, inspect and confirm economic and financial information related to the companies being audited from relevant sources of information inside and outside such entities.

In relation to the external audit of a company, the External Auditor has the following obligations:[37]

- Allocate adequate and professional human resources to ensure the quality of the audit service delivery. Pay compensation for damages caused by its audit team members to their clients when providing auditing and other relevant services
- During the course of auditing, if it detects signs of financial and accounting legislation violations, it is obliged to notify such to the audited companies or write appropriate comments in the audit reports
- To provide information about operating licensed auditors and audited clients to the audited companies in accordance with legal provisions
- To be held responsible before law, clients and partly responsible before users of audit results and provided services
- To refuse providing services if it finds out that the audit company is not able to ensure independence and professional auditing conditions or if the client violates the Law on Auditing or other related regulations

The auditor or Auditing Company representative shall be permitted to attend all GMS meetings and shall be entitled to receive other notices and information which shareholders are entitled to receive relating to the GMS and shall be entitled to express his/her opinions about issues relating to the audit.[38]

37 Decree 105/2004/ND-CP, Article 25 & 26 and Draft Law on Independent Auditing, Article 34 & 35.

38 Model Charter, Article 48, Clause 5 and CG Regulations, Article 6, Clause 4.

Best Practices:

The External Auditor will often submit, and companies seeking to implement good corporate governance should demand, what is referred to as a 'management letter' in addition to the audit report. This "management letter" typically covers all material weaknesses in the company's internal control, accounting and operating procedures. The purpose of the letter is to provide constructive suggestions to management concerning improvements for such procedures.

The findings contained in the management letter are considered to be "non-reportable" to third parties, yet require corrective action by management. Companies wishing to attract external finance should be aware that investors would typically request a copy of the management letter.

3. The Rights and Duties of the Company

The audited company has the right to:[39]

- Select an External Auditor or Auditing Company fully satisfying the conditions for lawful professional practice in Vietnam to sign contracts on the provision of auditing services, except otherwise provided for by law
- Request the External Auditor provide relevant information in its registered business license file, an audit opinion or other information about the Auditing Company's practicing auditors
- Refuse to provide information that is not for the purpose of the audit and request the change of the practicing auditors if they violate the independent principle of auditing
- Discuss or demand written explanations relating to unclear issues stated in the draft audit report
- Complain about practicing auditors if they commit illegal acts during the audit
- Request the External Auditor compensate for damages caused by the audit

The audited company is obligated to:[40]

39 Decree 105/2004/ND-CP, Article 5 and Article 45 of the Draft Law on Independent Auditing.

40 Decree 105/2004/ND-CP, Article 6 and Article 46 of the Draft Law on Independent Auditing.

- Provide accurate, sufficient and timely information/documents according to the External Auditor's requests and be responsible for the accuracy, integrity and objectivity of the information provided
- Coordinate with and facilitate the auditors during the audit
- Not block or hinder the scope of the audit
- Implement all recommendations made by the External Auditor in a complete and timely manner
- Inform, in a sufficient and timely manner, all violations by the practicing auditors to the authorized State agency and the professional auditing body
- Pay audit fees in accordance with terms provided in the audit contract
- In case of an audit contract signed for more than three consecutive years, the company must request the External Auditor change the practicing auditors who sign the audit report
- Refuse the Auditing Company's services if the Auditing Company is deemed not to be qualified to perform the audit services
- Other obligations in accordance with legal provisions.

4. The Appointment of the External Auditor

Under the Law on Enterprises, there is no provision on the authority to appoint and dismiss the External Auditor of a public company. Whereas for listed companies, the Model Charter stipulates that the GMS shall approve the selection of the External Auditor of the company.[41] At the AGM, an independent Auditing Company which legally operates in Vietnam and which is permitted by the SSC to audit listed companies shall be appointed to carry out the audit of the company for the next financial year on the basis of the terms and conditions as agreed by the Board of Directors. (In the first financial year, the Board of Directors shall appoint an Auditing Company to conduct the audit of the company after the business registration certificate is issued).[42] The Supervisory Board shall propose the selection of an independent Auditing Company, fees for auditing and all issues relating to the withdrawal or removal of the independent Auditing Company.[43]

41 Model Charter, Article 14, Clause 2d.

42 Model Charter, Article 48, Clause 1.

43 Model Charter, Article 37, Clause 1a.

The AGM agenda must always include the appointment of an External Auditor. Therefore, an External Auditor must be approved for one year until the next AGM.

Best Practices:

It is increasingly common for external auditors to be recommended by an independent audit committee of the board or an equivalent body and to be appointed either by that committee/body or by shareholders directly. Moreover, the IOSCO Principles of Auditor Independence and the Role of Corporate Governance in Monitoring an Auditor's Independence states that, "standards of auditor independence should establish a framework of principles, supported by a combination of prohibitions, restrictions, other policies and procedures and disclosures, that addresses at least the following threats to independence: self-interest, self-review, advocacy, familiarity and intimidation" (see *OECD Principles of Corporate Governance*, pages 55).

a) Who Can Be an External Auditor

Any legal entity with a license to perform auditing services can be appointed an External Auditor. However, as mentioned above, the External Auditor of public companies must be an independent and eligible Auditing Company which is approved and announced by the MOF. In addition, the External Auditor of a listed company must be approved by the SSC.

In general, an Auditing Company must meet the following conditions for its establishment and operation:[44]

- Have at least three auditors with certified Vietnamese public accountant (CPA) certificates and the director (or General Director) must have a CPA certificate. The director (or General Director) of the Auditing Company must have at least three years of audit working experience after being granted a CPA certificate and is not allowed to manage the operations of other companies
- Within 30 days of it granted a business registration certificate, an Auditing Company shall report its establishment and its list of auditors registered for professional practice to the MOF

43 Model Charter, Article 37, Clause 1a.

44 Decree 105/2004/ND-CP, Article 23 and Decree 30/2009/ND-CP.

- During the course of operating, an Auditing Company must have at least three practicing auditors working full-time for companies. After six consecutive months, if it fails to satisfy this condition, it must stop the provision of auditing services.

Besides the above conditions, to be accepted to conduct audits for public companies, an Auditing Company must meet the following conditions:[45]

- Have charter capital or owners' equity of at least VND2 billion for domestic companies and US$300,000 for foreign-invested companies
- Have at least seven CPA auditors who meet all conditions as mentioned below
- Terms of operations in Vietnam at least three years from the date of establishment to the date of application for auditing, in case the auditing company operates in Vietnam from six months to less than three years, the seven CPAs must have at least three years' working experience after the date of being granted an CPA certificate
- Have at least 30 audited clients each year for the last two years or at the time of application for auditing in case of less than three years in operation
- Timely and adequate submission of dossiers for auditing applications as required
- Not be subject to pending litigation relating to auditing results
- The auditing results do not meet the requirements as assessed by the SSC based on accounting and auditing standards, related laws and regulations
- Other conditions as required by law.

To be accepted to conduct audits for public companies, auditors must meet all the conditions for practicing auditors as required under Article 14, Decree 105/2004/ND-CP on independent audits by the Government and the following conditions:[46]

- Be on the list of registered CPAs verified by the Vietnam Association of Certified Public Accounts (VACPA) and do not work part-time for

45 Decision 89/2007/QD-BTC, Article 5, Clause 2.

46 Decision 89/2007/QD-BTC, Article 8, Clause 2.

the Auditing Company
- Have at least two years' working experience after the date of being granted a CPA certificate
- For a foreign practicing auditor, has at least two years' working experience in Vietnam
- Not be a shareholder, or legal representative of voting shareholders, in the audited companies
- Not be in managerial positions of the audited companies
- Not be a customer who is receiving favorable conditions from audited companies
- Not have a family relationship such as be a parent, spouse, child or blood sibling with those in managerial positions (including the Chief Accountant) of the audited company.

The External Auditor must be independent of the company and its management. In particular, an audit cannot be conducted by the Auditing Company if:[47]

- If it fails to notify the lists of profession-practicing auditors to the MOF
- If it provides services such as recording accounting books, making financial statements, internal audits, valuation of assets, management or financial consultancies or performed such services in the preceding year for its clients
- Members of its leadership have economic or financial relations with the audited units, or are a parent, spouse, child or a blood sibling of members of the leadership or Chief Accountants of the company
- The audited units make requests contrary to professional ethics or professional auditing requirements or in contravention of legal provisions
- The Auditing Company has an economic relationship such as a partnership or be a shareholder with the audited company or vice versa
- An individual or organization holds at least a 5% stake in both the Auditing Company and the audited company
- The Auditing Company is a customer receiving favorable conditions from the audited company, such as loans with preferential conditions

47 Decree 105/2004/ND-CP, Article 27 and Decision 89/2007/QD-BTC, Article 6, Clause 2.

or guarantees without collateral

- The Auditing Company is conducting, or has conducted during the last two years, services such as recording accounting books, making financial statements, internal audits, valuating assets, management and financial consultancies.

The SSC shall be responsible to determine and make public announcements on the list of Auditing Companies and auditors accepted to conduct audits for public companies.[48]

Vietnamese legislation stipulates that organizations and individuals are strictly forbidden from intervening in the selection of auditors and the auditing company, unless otherwise provided for by law.[49]

Best Practices:

In the U.S., the 2002 Sarbanes-Oxley Act prohibits public accounting firms from providing non-audit services to their audit clients including, (1) bookkeeping or other services related to the accounting records or financial statements of the audit client, (2) financial information systems design and implementation, (3) appraisal or valuation services, fairness opinions, or contribution- in-kind reports, (4) actuarial services, (5) internal audit outsourcing services, (6) management functions or human resources, (7) broker or dealer, investment adviser, or investment banking services, (8) legal services and expert services unrelated to the audit and (9) any other service that the Board of Directors determines, by regulation, is impermissible.[50]

An exception to this rule is made should non-audit services that are not listed above be pre-approved by the Board of Directors Audit Committee. The Audit Committee should, however, disclose these services to investors in periodic reports. Another exception is made when the non-audit services constitute less than 5% of the total amount of revenues paid to its auditor, these services were not recognized to be non-audit services at the time of engagement, and the Audit Committee promptly approves these services prior to the completion of the audit.

48 Decision 89/2007/QD-BTC, Article 14.

49 Decree 105/2004/ND-CP, Article 12.

50 The Sarbanes-Oxley Act of 2002, Section 201(a). See also: http://news.findlaw.com/hdocs/docs/gwbush/sarbanesoxley072302.pdf.

b) The Contract with the External Auditor

The company must enter into a contract with the External Auditor once it has been approved by the GMS. The Law on Enterprises does not specify who must sign the contract on behalf of the company. In practice, this is often the General Director. The contract with the Auditing Company stipulates the rights and duties of the External Auditor and the company and may include any additional terms that the parties agree upon.

It is stipulated that the company shall have to sign audit contracts with an auditing firm at least 30 days before the end of the annual accounting period.[51]

51 Decree 105/2004/ND-CP, Article 11.

5. Compensation

The company pays for the Auditing Company's services. The Supervisory Board shall propose the fees for auditing.[52] Clearly, the procedure for the payment of compensation and the amount of compensation must not be made dependent upon the audit results.

The Auditing Company and audited company may agree to apply one of the following methods of calculating the auditing service charge:[53]

- Calculating according to working hours of practicing auditors and a charge rate per hour
- Calculating according to each auditing service with a package charge
- Calculating according to each auditing service at charge rates in the percentage (%) of the contract or project values
- Calculating under multi-period audit contracts with a fixed charge rate for each period.

6. Reporting

For a listed company, the External Auditor shall prepare an audit report and submit it to the Board of Directors within two months from the end of the financial year.[54]

The External Auditor presents conclusions on the reliability of the company's financial statements and compliance with accounting procedures. The opinion paragraph of the auditor's report should state the auditor's opinion as to whether the financial statements give a true and fair view (in all material respects) in accordance with the financial reporting framework used by the company and, where appropriate, whether the financial statements comply with statutory requirements. The External Auditor must prepare a report on the annual audit that includes:

- Opinions on the accuracy of the company's reports and other financial documents
- Information on violations of accounting or financial reporting procedures, disclosure rules and relevant laws and regulations.[55]

52 Model Charter, Article 37, Clause 1a.
53 Decree 105/2004/ND-CP, Article 32, Clause 2.
54 Model Charter, Article 48, Clause 3.
55 Decree 105/2004/ND-CP, Article 25, Clause 5.

Best Practices:

The External Auditor should divulge (potential) errors, misconduct, and violations of legislation or the company's internal rules during audits, and report them immediately to the Board of Directors' Audit Committee or Supervisory Board. The External Auditor should make the company aware, as soon as practical and at an appropriate level of responsibility, of material weaknesses in the design or operation of the accounting and internal control systems, which have come to an auditor's attention. The Board of Directors' Audit Committee or the Supervisory Board should take appropriate steps to remedy these problems.

If the company plans to seek access to international capital markets, the External Auditor should prepare the report in accordance with the International Standards on Auditing (ISA) issued by the International Federation of Accountants (IFAC). The audit report must give opinion on the financial statements prepared in accordance with the International Financial Reporting Standards (IFRS) adopted by the International Accounting Standards Board (IASB).

Best Practices:

The External Auditor should participate in the AGM and answer shareholder questions with respect to the audit report. Moreover, the Audit Committee or the Supervisory Board should evaluate:

- Whether the audit was made in accordance with the established procedures and whether the External Auditor omitted any matters in carrying out the audit
- The opinion of the External Auditor before it is presented at the GMS.

7. The External Auditor's Liability

Vietnamese laws have not stipulated stringently and clearly the liabilities to which the licensed auditor is relevant. Since the licensed auditor or the Audit

Company is liable for civil, administrative, and criminal infractions, he/she should be adequately insured by a reputable (domestic or international) insurance provider with appropriate coverage. The Audit Company has to be insured from the risks associated with the inaccurate audit opinion given by the licensed auditor, as well as non-application of the ISA, if required and code of ethics for professional accountants.[56]

a) Civil Liability

The grounds and terms of civil liability are usually specified in the contract between the Audit Company and the audited company. The licensed auditor and Audit Company must keep company operations information confidential. If they divulge confidential information, the company may seek compensation for the resulting losses.

b) Administrative Liability

Auditing and accounting regulations state that the licensed auditor bears administrative liability if he/she provides the company with an obviously false opinion. In such cases, the best practice suggested is that the auditor's license may be revoked by the MOF.

c) Criminal Liability

The Penal Code stipulates that when the licensed auditor uses his/her authority for his/her own purposes and violates the rights of a company or related parties, the licensed auditor may be prosecuted.[57]

The damages caused by Auditing Company for which it is responsible to compensate for shall be agreed between the Auditing Company and the audited company or determined by the authorized agency in accordance with laws and regulations. Methods of compensation as agreed between the two companies can include:[58]

- Cancellation the signed auditing contract
- Not being allowed to sign an auditing contract in the following years
- Deduction of the agreed audit fee
- The maximum compensation is 10 times the audit fee for the year.

56 LOA, Article 50 and Decree 105/2004/ND-CP, Article 25, Clause 4.

57 Penal Code, Article 167.

58 Circular 64/2004/TT-BTC, Part B, Section 6.2.

C. The Audit Committee and the Board of Directors

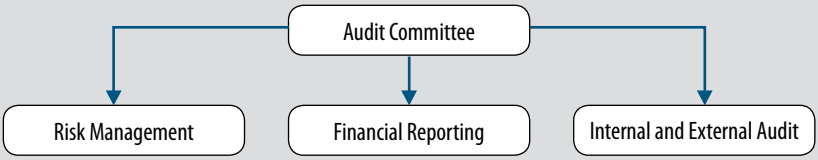
The Board of Directors is not legally required to establish an Audit Committee, though it is increasingly seen as an essential element of the corporate governance structure in many countries. While still optional in Vietnam, the CG Regulations and this Manual recommend that companies consider the needs of establishing an Audit Committee under the Board of Directors.

The following are some best practices on the functions of the Audit Committee (in case the function of the Supervisory Board is abolished or ineffective).

Best Practices:

The Audit Committee typically focuses on financial reporting, risk management, internal and external auditing (see Figure 3).

Figure 3: The Three Main Areas of Focus for the Audit Committee



International best practices suggest that the Audit Committee develop and maintain an internal document, for example a regulation for the Audit Committee that addresses its purpose, duties and responsibilities. The following are suggested by the New York Stock Exchange:[59]

- The purpose of the Audit Committee is to assist the Board of Directors to oversee the integrity of the company's financial statements, the company's compliance with legal and regulatory requirements, the External Auditor's qualifications and independence, and the performance of the company's internal audit function and External

59 New York Stock Exchange Corporate Accountability and Listing Standards Committee, dated 6 June 2002 (see also: www.iasplus.com/resource/nysegovf.pdf).

Auditor on the one hand and to prepare the report that SSC rules require be included in the company's annual proxy statement.

- The duties and responsibilities of the Audit Committee are to, *inter alia*:
  - At least annually, obtain and review the External Auditor report
  - Discuss the annual audited and quarterly financial statements with management and External Auditor
  - Discuss earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies
  - As appropriate, obtain advice and assistance from outside legal, accounting or other advisors
  - Discuss policies with respect to risk assessment and risk management
  - Meet separately, at least quarterly, with management, with the Internal Auditor and External Auditor
  - Review any audit problems or difficulties and management's response with the External Auditor
  - Set clear hiring policies for employees or former employees of the External Auditor
  - Report regularly to the Board of Directors.
- Conduct an annual performance evaluation of the Audit Committee.

1. Functions

Best Practices:

The National Association of Corporate Directors' (NACD) Blue Ribbon Commission on Audit Committees has identified the following indicators of risk that the Audit Committee should monitor and closely examine:[60]

- Complex business arrangements which appear to serve little practical purposes

60 The Report of the NACD Blue Ribbon Commission on Audit Committees. See also: www.nacdonline.org. Reprinted with permission of the NACD, 1133 21-st Street, NW, Suite 700, Washington, DC 20031, www.nacdonline.org.

- Large last-minute transactions that resulted in significant revenues in quarterly or annual reports
- Auditor changes over accounting or auditing disagreements
- Overly optimistic news releases in which the Chief Executive Officer (General Director) seeks to cajole investors into believing in future growth
- Widely dispersed business locations with decentralized management and a poor internal reporting system
- Inconsistencies between management's discussion and analysis, the President's letter and the underlying financial statements
- Insistence by the General Director or Chief Financial Officer that he/she be present at all meetings of the Audit Committee, Internal or External Auditor
- A consistently close or exact match between planned results and reported results, and managers who always achieve 100% of their bonus opportunities
- Hesitancy, evasiveness, and/or lack of specifics from management or auditors regarding questions about the financial statements;
- Frequent differences of views between management and the External Auditor
- A pattern of shipping most of the month's or quarter's sales in the last week or last day
- The internal audit operating under scope restrictions, such as the Internal Auditor not having a direct line of communication to the Audit Committee
- Unusual balance sheet changes, or changes in trends or important financial statement relationships such as, for example, receivables growing faster than revenues, or accounts payable that are continually delayed
- Unusual accounting policies, particularly for revenue recognition and cost deferrals such as recognizing revenues before products have been shipped ("bill and hold"), or deferring cost items that are normally expensed as incurred
- Accounting methods that appear to favor form over substance
- Accounting principles/practices at variance with industry norms
- Numerous and/or recurring unrecorded or "waived" adjustments that rose in connection with the annual audit.

2. Composition

Best Practices:

Members of the Audit Committee must be financial literate. An experienced individual who is a financial expert should chair the Audit Committee. The independence, aptitude and leadership skills of the chairman are crucial for the committee's success.

The Audit Committee should further be composed entirely of independent directors. If this is not practically possible, it is recommend that an independent director chair the Audit Committee and the Committee be composed solely of non-executive directors.

3. Meetings

If a Board of Directors meeting considers matters pertaining to Audit Committee activities, an Audit Committee meeting should take place before the Board of Directors meets. This meeting should occur sufficiently in advance of the Board of Directors meeting to allow the Audit Committee to communicate its conclusions and allow the Board of Directors to thoroughly consider them.

The Audit Committee should also:

- Regularly inform the Board of Directors about violations of procedures and legislation by the company's officers
- Inform the Board of Directors about individuals who are responsible for irregularities, the circumstances under which they took place and how errors could be prevented in the future
- Analyze and give recommendations to the Board of Directors regarding risks associated with transactions and operations of the company.

The Audit Committee should conduct meetings at least on a quarterly basis.

Best Practices:

In some countries the Audit Committee is required to conduct meetings once a month. However, meeting once a month may be regarded as onerous and burdensome, as well as costly. The new U.K. Combined Code suggests that Audit Committee meetings be held to coincide with key dates in the financial reporting and audit cycle, with no fewer than three formal meetings per year.[61] The Audit Committee's Chairman will likely call additional meetings to establish an on-going and informal contact with the Chairman of the Board of Directors and the General Director.

4. Access to Information and Resources

The Board of Directors should be provided with information on the financial and operating results of the company. Therefore, Audit Committee members will need to have unfettered access to documents and corporate information to allow them to fulfil their functions of reporting to the Board of Directors. The Corporate Secretary often plays a crucial role in this respect, facilitating a free flow of information to fulfil the Audit Committee's requests.

Best Practices:

It is recommended that the Audit Committee be authorized and be provided with resources to hire outside audit, financial, legal and other professional advisors without seeking permission from the Board of Directors or executives.

61 The U.K. Combined Code on Corporate Governance, Section 2.7. See also: www.frc.org.uk/combined.cfm.

D. Internal Control Function

Internal control in fact is a process jointly conducted by the Board of Directors, management and the company's employees, to provide a reasonable guarantee that financial reporting is reliable and accurate, operations are efficient and effective, and the company complies with legislation, its own internal rules and guidelines.

In fact, an effective internal control structure can help the company:[62]

- Make better business decisions of a higher quality and more timely information
- Gain (or regain) the trust of investors
- Prevent loss of resources
- Provide security over its assets
- Prevent fraud
- Comply with applicable laws and regulations
- Gain a competitive advantage through streamlined operations.

The internal control system can be defined as control over the conduct of the company's financial and business operations (including the implementation of its financial and business plan) by the company's divisions and bodies.

Recognizing the importance of an effective internal control system to the operations of an organization, the SBV issued Decision 36/2006/QD-NHNN dated 1 August 2006 providing regulations on the internal control of credit institutions. As defined under this decision, an internal control system is a set of regimes, policies, procedures and internal regulations as well as the organizational structure of the credit institutions established in accordance with prevailing laws and regulations and implemented to prevent, discover and resolve all risks and obtain objectives as set out.[63] Following this decision, all credit institutions in Vietnam must establish and maintain the operation of an internal control system which satisfies all necessary requirements and

62 Moving Forward - A Guide to Improving Corporate Governance Through Effective Internal Control: A Response to Sarbanes-Oxley, Deloitte & Touche, January 2003.

63 Decision 36/2006/QD-NHNN, Chapter I, Article 2.

principles. Periodically, credit institutions must conduct self-assessment on their internal control system. The internal control system also needs to be assessed by an independent body such as the internal audit function of a credit institution or by an External Auditor. Depending on the size, scope and nature of the operations, credit institutions shall decide to establish a delegated internal control function under the General Director's management to supervise the compliance with laws and regulations, procedures and internal regulations and to assist the General Director in conducting a self assessment to ensure the effectiveness and efficiency of the internal control system.[64]

To have a better understanding of the internal control system, in the following section, we shall discuss the internal control principles, elements of internal control systems, bodies and persons responsible for the internal control as well as the roles of internal auditing in the internal control system.

1. Internal Control Principles

A company's internal control system should be based on the following principles:

- The internal control system should function at all times and without interruption. A system that functions on a permanent basis allows the company to identify deviations on a timely basis and helps to predict future deviations.
- Each person involved in the internal control process should be held accountable. The performance of each person carrying out control functions should consequently be managed by yet another person in the internal control system.
- The internal control system should segregate duties. Companies should prohibit duplication of control functions and should distribute functions among the employees so that one and the same person do not combine functions relating to the authorization of operations with certain assets, recording of such operations, ensuring and safe-keeping of assets and inventory of these same assets.
- The proper authorization and approval of operations. Companies should establish procedures for approving financial and business operations by authorized persons, within the scope of their authority.

64 Decision 36/2006/QD-NHNN, Chapter II, Section 1.

- Companies should ensure the organizational separation of its subdivision responsible for internal control and ensure that this subdivision is accountable directly to the Board of Directors (commonly through its Supervisory Board). This organizational separation ensures that internal controls are verified by an independent authority, in this case the Board of Directors, which is not involved in the implementation or maintenance of internal controls.
- All units and departments of the company should integrate and cooperate to allow the internal control system to be properly implemented.
- A culture of continuous development and improvement needs to be put in place. A company's internal control system should be structured to allow it to flexibly address new issues and be easily expanded and upgraded.
- A system for the timely reporting of any deviations should be put in place. Ensuring the timeliness of reporting on deviations with the shortest possible deadline allows authorized persons to act swiftly to correct problems.

2. Elements of the Internal Control System

The internal control system includes the following inter-related elements:[65]

1. **Control environment:** The control environment sets the tone of an organization and influences the control consciousness of its people. It is the foundation for all other components of internal control, providing discipline and structure. Control environment factors include the integrity, ethical values, and competence of the company's employees and officers, management's philosophy and operating style, the way management assigns authority, responsibility and organizes and develops its staff and the attention and direction provided by the Board of Directors.

65 Internal Control — Integrated Framework, COSO. See also: http://www.coso.org/IC-IntegratedFramework-summary.htm.

Best Practices:

An essential element of an effective internal control system is a strong control culture.[66] It is the responsibility of the Board of Directors and senior management to emphasize the importance of internal control through their words and actions. This includes the ethical values that management displays in business dealings, both inside and outside the organization. The words, attitudes and actions of the Board of Directors and senior management affect the integrity, ethics and other aspects of the company's control culture.

2. **Risk assessment:** Every entity faces a variety of risks from external and internal sources. A precondition to risk assessment is setting the company's objectives. Risk assessment is the identification and analysis of relevant risks to achieve company objectives, forming a basis for determining how risks should be managed.
3. **Control activities:** Control activities are the policies and procedures that help guarantee that management directives are carried out. They help ensure that necessary action is taken to address risks and achieve the entity's objectives. Control activities occur throughout the organization, at all levels and functions. They include a range of activities as diverse as approvals, authorizations, verifications, reconciliations, reviews of operating performance, security of assets and segregation of duties.

Best Practices:

Control activities should be as strict on the top as on the bottom of the company's operations, lending credibility to the control environment and the tone at the top.

66 Framework for Internal Control Systems in Banking Organizations, Basel Committee Publications No. 40, September 1998, http://www.bis.org/publ/bcbs40.pdf. Note that this document is for banking organizations. However, some of its provisions are equally applicable to companies in other sectors.

4. **Information and communication:** Pertinent information must be identified and communicated in a form and within a timeframe that enables employees to carry out their responsibilities. Information systems produce reports containing operational, financial and compliance-related information that make it possible to run and control the business. They not only deal with internally generated data, but also information about external events, activities, and conditions necessary to informed business decision-making and external reporting. Effective communication must also occur in a broader sense — flowing up, down and across the organization. All personnel must receive a clear message from senior management that control responsibilities must be taken seriously. Furthermore, they must understand their own role in the internal control system, as well as how individual activities relate to the work of others. Of particular importance is that management do not limit itself to communicating on a control measure in and of itself, but properly emphasize the meaning and purpose of the particular control element. They must also have a means of communicating significant information upstream. There also needs to be effective communication with external parties, such as customers, suppliers, regulators and shareholders.
5. **Monitoring the efficiency of the internal control system:** Internal control systems need to be monitored over time to assess the quality of the system's performance. This is accomplished through on-going monitoring activities, separate evaluations, or a combination of the two. On-going monitoring occurs during the course of operations. It includes regular management and supervisory activities and other actions personnel take in performing their duties. The scope and frequency of separate evaluations depend primarily on an assessment of the risks and effectiveness of on-going monitoring procedures. Internal control deficiencies should be reported upstream, with the most serious matters reported directly to senior management and the Board of Directors. Senior management and the Board of Directors need to clearly formulate sanctions to be imposed as a result of control violations on an *ex ante* basis.

3. Bodies and Persons Responsible for Internal Control

Internal control is, to some degree, the responsibility of everyone in an organization and should be an explicit or implicit part of everyone's job description. Virtually all employees produce information used in the internal control system or take other actions needed to effect control. Also, all personnel should be responsible for communicating upward problems in operations, non-compliance with an internal code of conduct or company-level corporate governance code, should such documents exist, or other policy violations or illegal actions.

Best Practices:

The company's department responsible for corporate training programs should ensure that all employees and executives receive training on the company's control culture and system. Furthermore, although each company has its own specific internal control system and bodies, there are some general rules that a company should follow. Internal control always starts at the top of the company, at the level of the Board of Directors and executive bodies. In particular, the Board of Directors and executive bodies are responsible for establishing the proper internal control environment and maintaining high ethical standards at all levels of the company's operations. Furthermore, the approval of internal control procedures falls within the competence of the company's Board of Directors, commonly through the Audit Committee. The Board of Directors Audit Committee is also assigned to review and evaluate the efficiency of the internal control system as a whole, and prepare proposals on how to improve it. Finally, the implementation of internal control procedures is the responsibility of the executive bodies.

In Vietnam, as regulated under Decision 36/2006/QD-NHNN, the following bodies and persons shall be responsible for the internal control system of credit institutions, the Board of Directors, the director (or General Director), the Supervisory Board and the Head of Internal Audit.[67]

67 Decision 36/2006/QD-NHNN, Chapter II, Section 2.

The Board of Directors:

- Issue and periodically review the business strategies as well as the objectives and policies of the credit institution
- Be responsible for the appropriateness and effectiveness of the internal control system, issue adequate regulations on the organization's structure, delegation of authorization, regulations on business management, supervision, internal control and internal audit
- Ensure that the director (or General Director) establish and maintain an appropriate and effective internal control system, a system for the measurement, assessment and management of risk in all operations of the credit institution, a system for capital assessment, a system for true, fair and timely financial reporting and management information
- At least once a year review and assess the internal control system
- Implement internal control system directives and requirements from the SBV in a timely manner.

General Director (director):

- Be responsible to the Board of Directors for the implementation of business strategies, objectives and policies approved by the Board of Directors
- Establish, maintain and develop an appropriate and effective internal control system which satisfies the requirements in measuring, evaluating and managing risk as well as appropriately evaluating capital to ensure secure and efficient operations in compliance with laws and regulations
- Establish and issue operational procedures for all business transactions of a credit institution, ensure the supervision, control and management of risks for each process
- Maintain and implement a clear and effective organization structure, delegation of authority and management of operations
- Maintain a fair, appropriate, adequate and timely financial and management information system
- Ensure compliance with laws and regulations as well as internal policies, procedures and regulations
- Periodically report to the Board of Directors and the Supervisory Board on the internal control system self-assessment results together with recommendations to improve the internal control system.

Supervisory Board:

- Direct and manage the internal audit function to conduct an independent and objective examination, review and assess the internal control system, the system for the recognition and management of risk, the method for capital evaluation, the system for financial reporting and management information, operational procedures and internal regulations
- Periodically report to the Board of Directors and General Director on the internal control system together with recommendations to improve it.

Head of Internal Audit:

The Head of Internal Audit must ensure the implementation of all functions, duties and authorities relating to the internal control system audit as regulated under the internal audit regulation issued by the SBV Governor and other related internal regulations.

Best Practices:

The General Director is ultimately responsible for and should assume ownership of the system.[68] More than any other individual, he/she sets the 'tone at the top' that affects the integrity and ethics of a positive control environment. In a large company, the General Director fulfils this duty by providing leadership and direction to senior managers and reviewing the way they control the business. Senior managers, in turn, assign responsibility to establish more specific internal control policies and procedures to personnel responsible for the unit's functions. For example, controls for the company's IT system should fall under the responsibility of the Chief Information Officer or manager responsible for IT. Of particular significance are financial officers and their staff, whose control activities cut across, as well as up and down, the operations and other units of a company.

68 Internal Control — Integrated Framework, COSO. See also: www.coso.org/publications/executive_summary_integrated_framework.htm.

The executive bodies, in particular the General Director or the Finance Director should further create structures (services or departments), or assign persons to be responsible for carrying out specific control activities on a daily basis.

The SBV inspection body shall conduct the inspection and supervision to ensure compliance with internal control regulations covering credit institutions.[69]

4. The Internal Auditor

The Internal Auditor plays a significant role in a company's governance structure to ensure good controls are in place. The Internal Auditor carries out regular internal audits. The internal audit is an integral part of a company's internal control system. While internal control is wider in scope, the internal audit can be defined as an independent, objective assurance and consultation activity designed to add value and improve an organization's operations.[70] It helps an organization accomplish its objectives by introducing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control and corporate governance processes.

As defined by the SBV, for credit institutions, the internal audit is the activity of independently and objectively examining, reviewing and evaluating the internal control system, independently evaluating the appropriateness and the compliance with policies and procedures as established within the credit institution, through which the internal audit function makes recommendations to improve the effectiveness and efficiency of systems, processes and regulations to ensure the security, efficiency and in compliance with laws and regulations in the operation of the credit institution.[71]

More specifically, internal auditing reviews and ensures the reliability and integrity of information, compliance with policies and regulations, the safeguarding of assets, economical and efficient use of resources and the attainment of established operational goals and objectives. Internal audits encompass financial activities and operations including systems, production, engineering, marketing and human resources.

69 Decision 36/2006/QD-NHNN, Chapter II, Section 3, Article 13.

70 The Institute of Internal Auditors. See also: www.theiia.org.

71 Decision 37/2006/QD-NHNN, Chapter I, Article 2.1.

Credit institutions and insurance companies in Vietnam are now required to establish and maintain an appropriate and effective internal audit function in their organization structures. The SBV Governor issued Decision 37/2006/QD-NHNN on 1 August 2006 outlining regulations on internal audit of credit institutions. According to this decision, the objective and main functions of internal audit are to give an independent evaluation on the appropriateness of, and the compliance with, policies and procedures as established within the credit institutions. Besides, the internal audit shall examine, review and assess the adequacy, effectiveness and efficiency of the internal control system to improve it. Three main principles of internal audit include independence, objectivity and professionalism.

However, as regulated under Decision 37/2006/QD-NHNN, the internal audit function shall be under the Supervisory Board, not the Board of Directors. Based on the size and nature of the operations of the credit institution and with the request from the Supervisory Board, the Board of Directors shall determine the organization of the internal audit function, remuneration and bonus to the Internal Auditor. Credit institutions can hire competent external experts and organizations to conduct a part of the internal audit.[72]

The Head of Internal Audit is appointed and dismissed under requests from the Chairman of the Supervisory Board. The Deputy Head of Internal Audit and other positions are appointed and dismissed under requests from the Head of Internal Audit.[73]

The internal audit function shall be responsible to keep confidential documents and information in accordance with prevailing laws and regulations, the credit institution's charter and the internal regulations on internal audit of the credit institution. The internal audit function shall be responsible before the Supervisory Board and the Board of Directors on the results of the internal audit, the assessment and recommendations in the internal audit report. The internal audit function shall review and follow up implementation of their recommendations.[74]

72 Decision 37/2006/QD-NHNN, Chapter II, Section 1, Article 7.

73 Decision 37/2006/QD-NHNN, Chapter II, Section 1, Article 9.

74 Decision 37/2006/QD-NHNN, Chapter II, Section 1, Article 14.

Comparative Practices:

The typical internal audit tasks include:

- Appraise compliance of business activities with internal policies and procedures
- Provide advice in setting up internal policies and procedures
- Appraise controls over the safeguarding of assets
- Appraise compliance with laws and regulations
- Appraise internal controls over financial information
- Appraise internal controls over business processes
- Appraise the process for identifying, evaluating, and managing business risks
- Appraise operational efficiency
- Appraise compliance with contractual obligations
- Conduct audits of information technologies
- Investigate fraud
- Audit subsidiary companies.

In order to function properly, the Internal Auditor should enjoy a reasonable degree of independence. This can be attained by making him/her accountable to the Board of Directors (through the Audit Committee) rather than an executive of the company (the General Director or Finance Director).

Best Practices:

In reality, it is difficult for the internal audit function to be entirely independent of management. Indeed, the internal control function is a key management tool. It would lose a great deal of its utility if it did not report to management. Cognizant of the need to maintain independence while working closely with management, the Institute of Internal Auditors suggests that the Internal Auditor report administratively to the General Director and functionally to the Board of Directors' Audit Committee.

NOTES

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