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# MHM VIETNAM

## Newsletter

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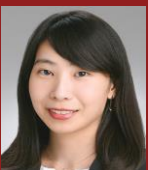
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## VIETNAM LEGAL UPDATE DRAFT CIRCULAR ON FOREIGN EXCHANGE CONTROLS OVER BORROWING AND REPAYING OFFSHORE LOANS

On 5 November 2021, the State Bank of Vietnam ("SBV") issued a draft circular on foreign exchange control over offshore loans and repayment of offshore loans for public comment (the "Draft Circular"). The Draft Circular aims to replace Circular No. 03/2016/TT-NHNN dated 26 February 2016, as amended by Circular No. 05/2016/TT-NHNN and Circular No. 05/2017/TT-NHNN ("Circular 03"). We summarize below some notable changes to Circular 03 proposed under the Draft Circular.

### 1. Extension of repayment period of short-term offshore loans before SBV registration requirement is triggered

Under Circular 03, a short-term offshore loan must be registered with the SBV if it has not been fully repaid within ten (10) days after the first anniversary of its first drawdown.<sup>1</sup> The Draft Circular proposes to extend this ten (10) day period to thirty (30) days.<sup>2</sup> In other words, according to the Draft Circular, if the borrower repays the entire principal of a short-term offshore loan *within* thirty (30) days from the first anniversary of the first drawdown, the borrower is not required to register such short-term loan with the SBV.<sup>3</sup>

Additionally, the Draft Circular also extends the deadline to register a short-term offshore loan which is not repaid as described above with the SBV from thirty (30) to forty five (45) days from the first anniversary of its first drawdown.<sup>4</sup>

<sup>1</sup>Article 9.3 of Circular 03

<sup>2</sup>Article 9.3 of the Draft Circular

<sup>3</sup>Article 9.3 of the Draft Circular

<sup>4</sup>Article 13.3 of Circular 03 and Article 13.3(c) of the Draft Circular

## 2. Revisions of circumstances where amendment of SBV registration of offshore loans is not required

Under Circular 03, all changes to the terms of an offshore loan as registered on the SBV's certification document must be registered with the SBV, except for certain types of changes as specified in Circular 03.<sup>5</sup>

The Draft Circular proposes certain changes to such exceptional cases where registration of an amendment to the terms of an offshore loan as registered on the SBV's certification document is not required:

- (a) *If there is an amendment to the principal drawdown and repayment schedule, and such amendment is less than ten (10) business days and the amendment does not require an agreement between the parties:* In such a case, such amendment is not requested to be registered with the SBV, but the borrower has to notify such amendment in writing to the DICA bank or the bank where a relevant account used to drawdown the funds in Vietnam has been opened.<sup>6</sup>
- (b) *If there is an amendment to the registered schedule for payment of interest and fees, but there is no change to the principles or methods for determining such interest and fees (i.e., the total payable interest and fees remains unchanged):* In such a case, the borrower will only need to notify the SBV of such amendment in writing.<sup>7</sup>
- (c) *If (i) the actual amount of principal drawn down or the actual repayment amount for a particular period (of within one (1) month/quarter/year) is less than the amount set out in the registered drawdown or repayment schedule, and (ii) that change to the amount set out in the registered drawdown or repayment schedule does not require an agreement between the parties:* In such a case, the borrower may proceed with the drawdown or repayment of that lesser amount for that particular period, but the borrower must register with the SBV the changes to the drawdown or repayment schedule (as the case may be) for the remaining amount not drawn down or repaid in that particular period.<sup>8</sup>

## 3. Account for borrowings and repayments under offshore loans

The Draft Circular does not propose any amendments to the current provisions of Circular 03 on the bank account requirements for borrowings and repayments under offshore loans in the case of a borrower who is an enterprise with foreign direct investment capital ("FDI Borrower"), but it does propose additional guidance as follows:

- (a) *With respect to a short-term offshore loan having an outstanding principal amount at the first anniversary of the first drawdown, which is repaid within thirty (30) days after the first anniversary of the first drawdown,* the FDI Borrower may keep using the account it has used for drawdown of that offshore loan to make repayments.<sup>9</sup>
- (b) *With respect to medium and long-term offshore loans (excluding offshore loans in the form of deferred payment terms for the import of goods and short-term offshore loans which are repaid within thirty (30) days after the first anniversary of the drawdown),* the FDI Borrower must use a direct investment capital account ("DICA") for the drawdown and repayment of

<sup>5</sup> Article 15.1 of Circular 03

<sup>6</sup> Article 15.2 of the Draft Circular

<sup>7</sup> Article 15.3(d) of the Draft Circular

<sup>8</sup> Article 15.5 of the Draft Circular

<sup>9</sup> Article 24.2(c) of the Draft Circular

<sup>10</sup> Article 24.2(a) of the Draft Circular

the offshore loan. If the currency of the offshore loan is not the same as that of the DICA, the FDI Borrower may open another foreign currency account which is designated only for the purpose of drawdown and repayment of the offshore loan (and other offshore loans if any) at the same bank at which it opens the DICA.<sup>10</sup>

- (c) *With respect to (i) short-term offshore loans and (ii) offshore loans in the form of deferred payment terms for the import of goods*, the FDI Borrower may use a DICA or a different account which is designated only for the purpose of drawdown and repayment of loans under the Draft Circular.<sup>11</sup>
- (d) This requirement of the Draft Circular may affect trading companies importing goods with deferred payment terms. Under Circular 03, a deferred payment for the import of goods is *not* required to be through a DICA or another specific account.<sup>12</sup> Accordingly, trading companies can currently make deferred payments through any normal payment account. However, this exemption is not provided in the Draft Circular. Instead, under the Draft Circular, trading companies may need to use either the DICA or an account for borrowing and repayment of offshore loans to make deferred payments.<sup>13</sup>

#### 4. Additional foreign exchange regulations in relation to enforcement of security interests to repay offshore loans

Circular 03 only sets out foreign exchange regulations applicable to the enforcement of a guarantee given to secure repayment of an offshore loan. Under Circular 03, the guaranteed amount can be paid directly to the lender's account by the guarantors. Circular 03 is currently silent as to offshore paymesnts from the proceeds of enforcing other forms of security such as mortgages and pledges.<sup>14</sup> Accordingly it is not clear whether currently the remittance of enforcement proceeds to repay an offshore loan in such other cases must be effected through a DICA (if the Borrower is an FDI Borrower) or through the Borrower's specialized account for drawdown and repayment of offshore loans. In some large financing transactions, the lenders or security agents have entered into an account management agreement with a licensed bank in Vietnam for this purpose. The management of the DICA or the account for repayment of the offshore loans of the borrower (as the case may be) is governed by such account management agreement. Accordingly, under the account management agreement, the lender or security agent can require the licensed bank to remit the enforcement proceeds through the DICA or such other account without any further documentation or procedures from the borrower.

The Draft Circular covers the remittance of enforcement proceeds and other foreign exchange issues in case of enforcement of other types of security such as mortgages and pledges.<sup>15</sup> The Draft Circular's text suggests that the remittance of such enforcement proceeds to repay an offshore loan can be affected through a bank account of the security enforcement agent.<sup>16</sup>

<sup>11</sup> Article 24.2(b) of the Draft Circular

<sup>12</sup> Article 34.2(dd) of Circular 03

<sup>13</sup> Article 24.2(b) of the Draft Circular

<sup>14</sup> Chapter V of Circular 03

<sup>15</sup> Chapter V of the Draft Circular

<sup>16</sup> Article 35.3 of the Draft Circular

<sup>17</sup> Article 35.3 of the Draft Circular

## 5. Security enforcement agent

A "security enforcement agent" is commonly used in security agreements for offshore syndicated loans (in addition to a security agent) for the purpose of enforcing security due to the Vietnamese laws on agents and authorized representatives. For the first time, the Draft Circular refers to the concept of "security enforcement agent" ("*Tổ chức Đại diện xử lý tài sản bảo đảm*" in Vietnamese).

A security enforcement agent is defined as a legal entity *established and operating under Vietnamese law* who is mutually authorized by the borrower, the provider of the security (if not the borrower) and the lender to carry out the enforcement of security (e.g., receiving the proceeds from the enforcement of the security, and transferring such proceeds to the lender for the repayment of the loan) within the scope of the loan agreement, the security agreement and any other relevant agreements.<sup>17</sup>

It is currently common for a security agent to also be authorized to enforce security, or to be given the power to appoint a security enforcement agent for the purpose of enforcing security where required. For offshore syndicated loans, normally an offshore bank or offshore lender would be appointed as a security agent.

In this regard, if the Draft Circular is issued as currently drafted (which requires the security enforcement agent to be a legal entity *established and operating under Vietnamese law*), an offshore security agent may not be able to take the role of security enforcement agent in future. As a result, parties may need to either appoint an onshore security agent (if they would like the security agent to also enforce security), or separate the role of security enforcement agent to an onshore security enforcement agent.

## 6. Reporting obligations

Under Circular 03, the borrower must submit quarterly reports on the status of the offshore loan to the SBV, and such reports can be submitted online via the official website of the SBV or physically at the applicable SBV office.<sup>18</sup>

The Draft Circular increases the reporting requirement by requiring the borrower to submit reports on a monthly basis, and the only possible method of submission is via online submission at the official website of the SBV. In other words, the SBV will no longer receive such reports by way of physical submission.<sup>19</sup>

If you have any questions or would like further details regarding the matters discussed above, please contact our lawyers listed in the left-hand column of the first page.

<sup>18</sup> Articles 39 and 40 of Circular 03

<sup>19</sup> Article 39 of the Draft Circular

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