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# MHM VIETNAM

## Newsletter

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## DRAFT DECISION OF THE PRIME MINISTER ON THE PROCEDURE FOR APPROVAL OF OVERSEAS LOANS AND GUARANTEES PROVIDED BY VIETNAMESE ECONOMIC ENTITIES TO OFFSHORE COMPANIES

In late February 2022, the State Bank of Vietnam ("SBV") published a Draft Decision of the Prime Minister ("PM") on the procedures for approval of lending by Vietnamese economic entities overseas ("**overseas loan**") and provision of guarantees by Vietnamese economic entities to offshore companies ("**Draft Decision**"), to collect public opinions. As of the published date of this newsletter, the Government portal is still accepting opinions and there is no official deadline for the submission of opinions.

Under the Ordinance on Foreign Exchange Control, Vietnamese economic entities that are not credit institutions can only provide a loan or guarantee to non-residents if approved by the PM. However, to date, there has been no official guidance detailing the procedure for the PM to approve the provision of loans or guarantees by Vietnamese economic entities to non-residents.

The Draft Decision aims to provide guidance for Vietnamese economic entities and State agencies on the procedures for Vietnamese economic entities to obtain approval for overseas loans or guarantees to offshore companies and the criteria for such approval, with guidance separated between the following two circumstances:

- (i) Loan or guarantee provided as a part of an outbound investment project by a Vietnamese economic entity / investor; and
- (ii) Loan or guarantee provided other than as part of an outbound investment project.

Under the Draft Decision, the fundamental terms of the overseas loan or guarantee (such as the identity of the borrower, and borrowing limit or the extent of liability under the guarantee) must be approved by the PM or the Ministry of Planning and Investment ("MPI"). Furthermore, there are some requirements applicable to Vietnamese economic entities providing overseas loans or guarantees to offshore companies, the borrower or principal and also to the funds to be used for such loans or guarantees.

The table below outlines the key legal requirements for overseas loans and guarantees provided by Vietnamese economic entities and the procedures to obtain approval for such loans and guarantees under the Draft Decision.

	<b>Loan or guarantee provided other than as part of outbound investment project</b>	<b>Loan or guarantee provided as a part of an outbound investment project</b>
<b>Approving authority</b>	PM	<ul style="list-style-type: none"> <li>· PM (if outbound investment project is subject to in-principle approval); or</li> <li>· MPI, as assigned by the PM (if outbound investment projects are not subject to in-principle approval)</li> </ul>
<b>Coordinating agency</b>	SBV	MPI
<b>Source of the loan / guarantee</b>	<ul style="list-style-type: none"> <li>· Equity capital or retained earnings</li> <li>· Foreign currency must be "self-available foreign currency" gained from business activities and not otherwise purchased or borrowed</li> </ul>	Investment capital recorded under the Outbound Investment Registration Certificate of the project
<b>Lender / guarantor</b>	<ul style="list-style-type: none"> <li>· Duly established under the laws of Vietnam, having operated for no less than 5 years</li> <li>· Be profitable and have no overdue domestic or offshore loans or</li> </ul>	<ul style="list-style-type: none"> <li>· Vietnamese investors having outbound investment in accordance with the Law on Investment</li> <li>· Having internal corporate approvals</li> </ul>

	<p>outstanding tax liabilities in the 2 consecutive years before the time of applying for approval</p> <ul style="list-style-type: none"> <li>· Having internal corporate approvals for overseas loan / guarantee plan</li> </ul>	<p>for overseas loan / guarantee plan</p> <ul style="list-style-type: none"> <li>· Having plan for foreign currency balance</li> </ul>
<b>Borrower / principal</b>	<ul style="list-style-type: none"> <li>· Offshore parent company or offshore group companies of the lender / guarantor</li> <li>· Foreign government or offshore organisation guaranteed by a foreign government</li> </ul>	<p>Offshore subsidiary of the lender / guarantor established under the outbound investment project</p>
<b>Procedures</b>	<ul style="list-style-type: none"> <li>· Application dossier (as described below) to be submitted to the SBV</li> <li>· Within 10 working days of receipt of valid and complete dossier: the SBV to send application dossier to relevant State agencies (e.g., Ministry of Finance or Ministry of Foreign Affairs) to request their opinion on the application</li> <li>· Within 15 working days of receipt of the SBV's request: State agencies to send their opinion on the application to the SBV</li> <li>· Within 30 working days of receipt of opinions of all agencies (or expiry of the time for providing opinions): the SBV to submit a report to the PM for the PM's issuance of approval</li> <li>· Within 15 days of receipt of SBV's report: the PM to notify the SBV of the approval (or rejection) of the</li> </ul>	<p><b>Approval by the PM (for outbound investment projects subject to in-principle approval):</b> follows the procedures under the Law on Investments to obtain in-principle approval and Investment Registration Certificate</p> <p><b>Approval by the MPI (for outbound investment projects not subject to in-principle approval)</b></p> <ul style="list-style-type: none"> <li>· Application dossier (as described below) to be submitted to the MPI</li> <li>· Within 10 working days of receipt of valid and complete application dossier: the MPI to send application dossier to the SBV and relevant State agencies (if necessary) to request their opinion on the application</li> <li>· Within 15 working days of receipt of the MPI's request: State agencies to send opinions on the application to the MPI</li> </ul>

	<p>application</p> <ul style="list-style-type: none"> <li>· Within 10 days of receipt of opinion of PM: the SBV to issue approval or notify of rejection</li> </ul>	<ul style="list-style-type: none"> <li>· Within 15 working days of receipt of opinions of all agencies (or expiry of the time for providing opinions): the MPI to issue approval</li> </ul>
<b>Application dossier</b>	<ul style="list-style-type: none"> <li>· Application form</li> <li>· Certified copy of Enterprise Registration Certificate (ERC) and Investment Registration Certificate (IRC)</li> <li>· Certified copy of incorporation documents of the borrower / principal evidencing the relationship between the borrower and lender or the principal and guarantor</li> <li>· Audited financial statements for the latest 2 financial years</li> <li>· Report on onshore and offshore credit balance as of the latest month</li> <li>· Confirmation by tax authorities of the payment of all tax liabilities for the latest 2 financial years</li> <li>· Overseas loan / guarantee plan</li> <li>· Certified copy of the internal corporate approval for the overseas loan / guarantee plan</li> <li>· Bank confirmation of the foreign currency account balance of the lender or guarantor for the latest month</li> <li>· Framework agreement, MOU or</li> </ul>	<p><b>Approval by the PM (for outbound investment projects subject to in-principle approval):</b> follows the procedures under the Law on Investments to obtain in-principle approval and Investment Registration Certificate</p> <p><b>Approval by the MPI (for outbound investment projects not subject to in-principle approval):</b></p> <ul style="list-style-type: none"> <li>· Application form</li> <li>· Certified copy of Enterprise Registration Certificate (ERC) and Investment Registration Certificate (IRC)</li> <li>· Certified copy of incorporation documents of the borrower / principal evidencing the relationship between the borrower and lender or the principal and guarantor</li> <li>· Overseas loan / guarantee plan</li> <li>· Certified copy of the internal corporate approval for the overseas loan / guarantee plan</li> <li>· Documents evidencing plan for foreign currency balance</li> </ul>

	<p>draft loan / guarantee agreement</p> <ul style="list-style-type: none"> <li>· Certified copy of approval from foreign government (for loans guaranteed by a foreign government)</li> </ul>	
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Regarding the timeline to obtain the approval for overseas loan or guarantee, it takes around 3 months under the statutory timeline if the loan or guarantee must be approved by the PM. In practice, it may take longer. Moreover, once the approval from the PM is obtained, the approved loan will also need to be registered with the SBV pursuant to the procedure set out under Circular 37/2013/TT-NHNN dated 31 December 2013 of the SBV (as amended), which takes another 30 days.

In respect of the funds to be used for the loan or to meet any obligations under the guarantee, the Draft Decision stipulates that it must be sourced from the equity capital or retained earnings of the Vietnamese economic entities. The SBV explains in its explanation paper for the Draft Decision that this restriction is to ensure that overseas loans and guarantees will not adversely affect the business of Vietnamese economic entities, or their capacity to pay taxes. Furthermore, in the case of foreign currency denominated loans or guarantees, the foreign currency required for the loan or to meet any obligations under the guarantee must be the available from the company's business activities rather than purchased or borrowed from a bank. This requirement is due to the limited availability of foreign currency in Vietnam and the reliance of Vietnam's economy on foreign investment.

Although the Draft Decision has not yet been officially adopted, it appears that the provision of an overseas loan or guarantee to an offshore entity by Vietnamese economic entities will remain difficult due to the complicated approval procedure and the restrictions regarding the funds that may be used for such loans or guarantees as discussed above. Further revisions to the Draft Decision should be expected, but Vietnam's policy regarding foreign exchange controls is unlikely to be changed in the near future.

If you have any questions or would like further details regarding this issue, please contact our lawyers listed in the left-hand column.

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