



ESSENTIAL NOTES FOR LOAN REGISTRATION OF FOREIGN NON-GOVERNMENT GUARANTEED LOAN IN VIETNAM

The below Legal Summary prepared by BLG contains a brief discussion with tailored practical information for investment and business activities in Vietnam.

The article concentrates on essential notes for loan registration of foreign non - government guaranteed loan in Vietnam.

A foreign non-government guaranteed loan (*the "Foreign Loan"*) means that the company (*the "Company"*) makes a conventional loan by means of foreign borrowing through its the borrowing contracts, deferred payment contracts for import of goods, lending entrustment contracts, contracts for finance leasing or debt instrument issuance on the international market^[1].

Pursuant to Article 11 of Circular No. 12/2022/TT-NHNN (*"Circular 12/2022"*), there are 03 types of the Foreign Loan requiring registration (*"Loan Registration"*) at State Bank of Vietnam (*the "SBV"*):

- Foreign medium and long-term loans (*"MLT Loan"*);
- Short-term loans that undergo renewal resulting in a total loan term exceeding one year;
- Short-term loans without extension agreement, wherein the outstanding principal (inclusive of add-on interest) remains unpaid for one year since its initial disbursement but cannot be fully repaid within the next 30 working days.

1. Before Loan Registration

1.1 Foreign Loan Agreement

First of all, the Company shall execute a written agreement on loan or extension of the Foreign Loan. This agreement has to clearly prescribe the loan purpose, loan amount, loan duration, repayment plan and interest management, principal or late payment interest, etc. In which:

(a) Foreign Loan purpose^[2]:

The Company is only allowed to use the Foreign Loan for:

- (i) Implementation of the business plans or investment projects of:
 - the Company itself;
 - the enterprise(s) to which the Company makes direct capital contribution (*"Subsidiaries"*) (*MLT Loan only*).
- (ii) Restructuring the foreign debts incurred by the Company without increasing the loan expenses.

^[1] Clause 1 Article 3 of Circular 12/2022/TT-NHNN

^[2] Point b clause 1 Article 5 and point b clause 2 Article 11 of Circular 12/2014/TT-NHNN.

It is stipulated that the Company is not allowed to borrow short-term loans to serve medium and long term purposes. In practice, we have experienced cases when the Company converts a short-term loan into a MLT Loan, the SBV examines the actual use of the short-term loan then refuses the Loan Registration due to loan misuse.

(b) Foreign Loan Amount^[3]:

In regard to the business plans or investment project pursuant to the investment registration certificate (the “*IRC*”), the balance of all loan used for such purposes (*including domestic loans*) must not exceed the difference between the total investment capital and the contributed capital recorded in the IRC. In other words, it does not exceed the mobilized capital amount registered in the IRC.

As it is not required in the Loan Registration, the Company may inadvertently overlook that limit when making a short-term loan. However, there are cases in which the Company fails to repay due short-term debt and has to convert it into a MLT Loan. Regrettably, due to its negligence, the SBV rejects the Loan Registration because the balance of loan exceeds the registered mobilized capital amount in the IRC.

To avoid such scenario, the Company should reduce the loan balance or adjust the mobilized capital equivalent to the expected loan amount in IRC. This will help the SBV to have ground to approve the Loan Registration of the Company.

In regard to the business plan or investment projects without the IRC, the balance of all loan used for it (*including domestic loans*) must not exceed the amount approved by the competent authority in accordance with the applicable laws.

In regard to the business plan or investment projects of the Subsidiaries, the ratio of the loan used for them to the total loan taken by the Company must not exceed the proportion of contribution to the aforesaid enterprise(s) by the Company.

1.2 Cash Flow Management^[4]

For FDI enterprise, the Company shall use its direct investment account (“*DICA*”) to process receipts and expenditures related to with the MLT loan. However, in case the loan currency is not the currency of DICA, the Company can use another foreign loan account provided that it is opened at the bank where its DICA opened.

^[3] Article 5 of Circular No. 12/2014/TT-NHNN.

^[4] Article 26 of Circular 12/2022/TT-NHNN.

For non-FDI enterprise, the Company has to open a foreign loan account in order to perform money transfer transactions relating to Foreign Loan (including fund withdrawal, principal and interest payment).

Each money transfer by the Company (*loan proceed, withdrawal or debt repayment*) relating to Foreign Loan must be performed through the Company's specific above mentioned bank account, unless otherwise stipulated in Article 34 of Circular 12/2022^[5].

^[5] **Article 34 of Circular 12/2022/TT-NHNN. Cases in which withdrawal of loan proceeds or debt repayment is not carried out through foreign loan accounts**

1. Cases in which withdrawal of loan proceeds is not carried out through foreign loan accounts include:

a) Withdrawing loan proceeds in the form that the borrower directly pays the non-resident beneficiary providing goods or services under goods or services sale and purchase contracts with residents being the creditor;

b) Withdrawing foreign loan proceeds in the form of finance lease;

c) Withdrawing loan proceeds through the account that the borrower opens abroad in case the borrower is allowed to open accounts abroad for arrangement of foreign loans;

d) Withdrawing loan proceeds from medium-term, long-term foreign loans through settling or clearing against direct payment obligations to the creditor, including: payment obligation under the goods import contract, obligation to repay foreign loan debt, the obligation to repay the indebtedness amount under the provisions of this Circular directly to the creditor;

dd) Withdrawing loan proceeds in case the amount of money for investment preparation is converted into a foreign loan as agreed between the parties in accordance with the law on foreign exchange management for foreign direct investment activities into Vietnam.

2. Cases in which debt repayment is not carried out through foreign borrowing and foreign debt repayment accounts include:

a) Paying debts by means of providing goods or services for the borrower;

b) Paying debts in the form that the creditor and the borrower agree to convert the outstanding debt into shares or contributed capital of the borrower;

c) Paying debts in the form that the creditor and the borrower agree to swap the outstanding debt into shares or contributed capital owned by the borrower;

d) Paying debts incurred from medium-term or long-term loans through settling or clearing against direct receivables with the borrower;

dd) Paying debts through the account that the borrower opens abroad (in case the borrower is allowed to open accounts abroad for arrangement of foreign loans).

Furthermore, is essential to explicitly state the purpose of each money transfer when making the money transfer orders between the Company and the lender involved in the Foreign Loan in order for account service providers to have the basis for verification, examination and record preservation and transaction performance. Accordingly, the Company shall be responsible for clarifying and instructing the lender to do this as the basis for determining foreign debt obligations and transferring money to pay debts incurred from loans (principal, interest) on the payment due date.

2. Loan Registration Process

Loan Registration applications must be submitted within the time limit stipulated under Clause 2 Article 15 of Circular 12/2022. After consideration, the SBV shall send approval or rejection of confirmation of Loan Registration (with clear explanation).

The delay of submission after such prescribed period may result in the imposition of fines ranging from VND40 million to VND60 million^[6].

3. Post Loan Registration Approval

3.1 Registration for changes

In the event of any change to contents in connection with the Foreign Loan which was registered and recorded in the approval confirmation of the SBV, except for those specified in clause 2 Article 17 of Circular 12/2022, the Company must register for such changes.

Compared to previous regulations, Circular 12/2022 expands cases where the Company is not required to register changes but only notify them via the SBV Portal only, such as:

- (a) Change in trading name of the bank serving secured transactions;
- (b) Change in plan for repayment of loan interest/fees in comparison with the approved plan without change to methods of calculation of interest and fees prescribed in the loan agreement;

3. Within 05 working days from the date of withdrawal of loan proceeds or debt repayment in the cases specified in Clauses 1 and 2 of this Article, the borrower is responsible for notifying and sending documents proving the withdrawal of loan proceeds, debt repayment in the form of not using the foreign loan account so that the account service provider knows and continues to monitor the borrower's foreign loan.

^[6] Point b clause 3 Article 3 and Point g clause 3 Article 23 of Decree 88/2019.

- (c) Change in loan withdrawal or repayment of principal, interest or fees up to 100 units of the foreign currency compared to the confirmed amount; and
- (d) Change in actual amount of the loan withdrawal or principal repayment in a specific period which is less than the relevant amount registered in the SBV's written confirmation. However, in this case, the Company shall register the change of the loan proceed withdrawal and debt repayment as to the outstanding amount in accordance with the law prior to withdrawing the loan proceeds or repaying the outstanding debt of such period.

The Company should register the changes timely. Failure to do so, the Company may face a fine ranging from VND40 million to VND60 million^[7].

3.2 Mandatory reports

The Company is required to submit reports to the SBV, regardless of short-term loan or MLT Loan:

- (a) Monthly report. The Company is required to lodge an online review report with SBV on the implementation of the Foreign Loan and the repayment status no later than the 5th day of the month immediately after the reporting period on SBV's websites, or a written report by post in case of failure to submit an online report.
- (b) Ad-hoc report. The Company is required to submit specific reports upon requested by the SBV in certain unexpected events or when necessary.

The Company may face a fine ranging from VND10 million to VND20 million in case of the failure of the report submission^[8].

3.3 Tax withholding on interest payments

Pursuant to the applicable laws^[9], the income from loan interest received by the lender is subject to corporate income tax at a rate of 5% within 10 days since the date of an interest payment. In practice, for the convenience of the lender, the Company shall withhold, declare, and pay this tax on behalf of the lender. This arises due to the fact that most lender do not meet the requirements to declare tax in Vietnam as stipulated

^[7] Point b clause 3 Article 3 and Point g clause 3 Article 23 of Decree 88/2019/ND-CP.

^[8] Point b clause 3 Article 3 and Point b clause 1 Article 47 of Decree 88/2019/ND-CP.

^[9] Clause 1 Article 1, Clause 1 Article 7, Article 13 of Circular No. 103/2014; Clause 3 Article 44 of the Law on Tax Administration 2019 and Point n Clause 4 Article 8 of Decree No. 126/2020/ND-CP.

under Circular 103/2014. This matter can be addressed through appropriate clauses in the loan agreement or similar agreement.

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