



LEGAL UPDATE

November 2022

CIRCULAR NO. 12/2022/TT-NHNN

Our monthly Legal Update is to provide the summary of key regulatory news that potentially impact your investment and business activities in Vietnam.

In this Legal Update, we take a look at the latest regulations in regard to the foreign exchange administration of enterprises' non-government guaranteed foreign loans and repayment in Circular No. 12/2022/TT-NHNN dated 30 September 2022.

On 30 September 2022, the State Bank of Vietnam (“*SBV*”) has issued Circular No. 12/2022/TT-NHNN guiding the foreign exchange administration of enterprises’ non-government guaranteed foreign loans and repayment (“*Circular 12*”). Circular 12 updates and replaces of the earlier Circular No. 03/2016/TT-NHNN dated 26 February 2016 and its amendments namely Circular No. 05/2016/TT-NHNN dated 15 April 2016 and Circular No. 05/2017/TT-NHNN dated 30 June 2016.

1. New cases in which borrowing enterprises are not required to register, register for change of foreign loans

It is stipulated in Clause 3 of Article 11 that in the event a foreign short-term loan is not extended and on the date marking 01 full year from its first withdrawal, there is still the outstanding principal (inclusive of interest added to the principal), the borrowing enterprise shall not register such loan if all remains are repaid within 30 working days on the date marking 01 full year from its first withdrawal (*rather than 10 days pursuant to the previous regulations*).

In the spirit of administrative reform, Circular 12 has supplements more cases where borrowing enterprises may not register change in foreign loans, but only need to notify the change on the website of SBV^[1], including:

- Changing the plan for payment of interest and fees on foreign loans as compared to the plan approved by SBV in the letter of confirmation of registration or registration of the change in foreign loans, without changing the method of calculating interest and fees specified in the foreign loan agreement.
- Changing (increase or decrease) the capital amount to be withdrawn, the amount of principal, interest, and fees to be repaid within 100 currency units of the foreign loan currency compared with the amount stated in the letter of confirmation of registration or registration of the change in of foreign loans.
- Changing the actual amount of capital to be withdrawn or the amount of principal to be repaid in a specific period which is less than the amounts stated in the capital withdrawal or debt repayment plan in the letter of confirmation of registration or registration of the change in of foreign loans.
- Changing the lender address confirmed in the letter of confirmation of registration or registration of the change without changing the lender's country.

Circular 12 also makes it clearer in regulations of the dossiers on registration, registration for change of foreign loans. In regard to the compulsory documents issued by account service providers, Circular 12 stipulates the alternative documents that

^[1] Article 17 of Circular 12.

borrowing enterprises may submit in some specific cases when the account service providers have shuttered business or suspended their operations^[2].

Especially, Article 7 sets out the principles to simplify the dossier preparation and submission. Accordingly, in case a borrowing enterprise simultaneously carries out the procedures for registration, registration for change of several foreign loans at the same time, or during the time when SBV or its branches are considering the borrower's applications, the borrower is not required to resubmit the documents with the same content to the authorities.

2. Notable updates in connection with foreign borrowing and repayment accounts of borrowing enterprises

(a) Borrowers are foreign-invested enterprises ("FDI enterprises")

In compliance with Clause 2 of Article 26, FDI enterprises must use the direct investment capital account ("**DICA**") for all transactions relating to foreign loans. However, in the following cases, FDI enterprises are allowed to use the foreign borrowing and repayment accounts other than DICA:

- For medium and long-term foreign loans in which the loan currency is not the currency of DICA, the borrower may open another foreign borrowing and repayment account at the bank where the borrower opens its DICA. The borrower may use 01 account for 01 or more foreign loans.
- For short-term foreign loans, the borrower may use other foreign borrowing and repayment accounts to conduct payment and collection transactions related to foreign loans. Each loan can only be secured through a bank providing account services. The borrower may use one account for one or multiple short-term foreign loans.
- For short-term loans with the outstanding principal on the date marking 01 full year from the date of capital withdrawal, which the borrower will repay within 30 working days of marking 01 full year from the date of first withdrawal, the borrower shall repay the debt through the foreign borrowing and repayment account being used for these loans.
- In case an FDI enterprise is jointly liable for the repayment of the foreign loan of the initial borrower after the division, split, consolidation or merger, the FDI enterprise will be not required to use DICA to repay the debt for which it is jointly responsible for.

^[2] Clause 8 of Article 16; Clause 6 of Article 19 of Circular 12.

(b) Borrowers are not foreign-invested enterprises

The borrowing enterprises other than FDI enterprises must open a foreign borrowing and repayment account at an account service provider to conduct all transactions relating to foreign loans (including fund withdrawal, principal, and interest repayment). Each foreign loan shall only be processed through 01 account service provider. Borrowers can utilize 01 account for 01 or various foreign loans^[3].

It is notable that the repayment of the debt (principal and interest) and charges relating to the foreign loan granted by deferral of payment for imported goods is not necessarily made via the foreign borrowing and repayment account^[4].

3. Report obligation of borrowing enterprises

Firstly, instead of encouraging, SBV now requires all borrowing enterprises sign up for account to access its websites at www.sbv.gov.vn or www.qlnh-sbv.cic.org.vn via which SBV manages data and information about enterprises' non-government guaranteed foreign loans and repayment^[5].

In regard to the report obligation, on the monthly basis, no later than the 5th day of the month following the reporting period, the borrower shall submit the report on the loan status online. In case of technical problem of the SBV's website, the borrower shall send the written report according to the form in Appendix 05 to Circular 12 within the aforementioned time limit^[6].

Besides the monthly report, the borrower may be required to make irregular reports by SBV.

4. Accounts of lenders at a credit institution or foreign bank branch in Vietnam

Article 30 is a detailed regulation guiding on the open and use a Vietnamese-dong payment account at a credit institution or foreign bank branch in Vietnam of a lender for the following purposes:

- Disbursing and recovering foreign loans in Vietnamese dong in case the borrower is a FDI enterprise borrowing loans from profits gained from direct investment activities in the territory of Vietnam by the lender that is a foreign investor contributing capital at the borrower.

^[3] Clause 3 of Article 26 of Circular 12.

^[4] Clause 3 of Article 4 Circular 12.

^[5] Article 5, 8, 9, 10 of Circular 12.

^[6] Article 41 of Circular 12.

- Recovering short-term loans with the principal repayment period extended and with the total length of the term longer than 01 year, and short-term loans whose term is not extended by any agreement and whose principal (inclusive of interest added to the principal) is outstanding on the date marking 01 full year from the date of the first capital withdrawal but ineligible for registration.
- Recovering outstanding foreign loans but the confirmation letter of registration or registration of changes is terminated due to fraudulent information or forged documents.

In addition, the lender is only allowed to use the above Vietnamese dong payment account for the transactions provided in Clause 2 of Article 30 of Circular 12.

5. Other updates

(a) Definitions

- “*Investment project*” has been defined in Circular 12 as the projects that are granted Investment Certificates, Investment Registration Certificates (IRC) or Decisions on approval of investment policies by a competent authority in accordance with the law on investment and regulations or applicable laws and regulations, leading to the permitted purposes of obtaining the foreign loan narrowed.
- “*Bank providing secured transactions*” is separated from the “Bank providing account services”, referring to credit institutions, foreign bank branches operating within the territory of Vietnam which provide money transfer for performing guarantee obligations or for realizing collateral relating to foreign loans.
- “*Foreign loan use plan*” is clearly defined as a plan for production and business to be financed by the foreign loan which the borrower justifies their legal and reasonable purposes and the need of foreign loan.

(b) *New regulation in case a borrower is fully divided, partly divided, consolidated, or acquired*

Pursuant to Article 6 of Circular 12, when a borrowing enterprise is fully divided, partly divided, consolidated, or acquired, the successor shall take on the rights and obligations in relation to the foreign loan and continue to discharge the responsibilities of the borrower. Circular 12 clarifies solutions when there is only one or there are various entities inheriting the initial rights and obligations related to the foreign loan.

(c) Determination of withdrawal date

Clause 4 of Article 12 provides 05 different ways to determine the withdrawal date of a foreign loan as following:

- The date on which the loan proceed is credited to the borrower's account for loans disbursed in cash.
- The date on which the lender makes payment to the non-resident for provision of goods or services under goods or services sale contracts with the resident being the borrower.
- The date on which the borrower is recorded as fulfilling the payment obligation to the lender in case the parties choose to withdraw proceeds from the medium and long-term foreign loan in the form of clearing as prescribed in Point d, Clause 1, Article 34 of Circular 12.
- The date on which the borrower receives the leased asset for loans in the form of foreign financial lease in accordance with relevant laws.
- The date on which the borrower is granted the Certificate of Business Registration, the License for establishment and operation under special laws, the date of signing the public-private partnership (PPP) investment contract, the date on which the parties sign the foreign loan agreement to convert the investment preparation amount into loans (whichever is later), applicable to foreign loans arising from the transfer of the investment preparation amount of the projects that have been granted an investment registration certificate into foreign loans in accordance with the law on foreign exchange management for foreign direct investment activities in Vietnam.

(d) Extend the time limit to register a foreign loan

Instead of 30 days, the time limit for borrowing enterprises to register foreign loans is 30 working days or 60 working days subject to each case provided in Clause 2 of Article 15 of Circular 12.

(e) Consequence in case of fraudulent information, forged documents in registration, registration for change of foreign loan

Firstly, the competent authority shall issue a written cancellation of the confirmation of registration, registration for change of foreign loan in case the relevant contains fraudulent information, forged documents to the borrowing enterprises, the account service provider and bank providing secured transactions (if any).

It is also expressed clearly in Article 24 that upon the receipt of cancellation notice, the account service provider, the bank providing secured transactions shall not continue to conduct money transfers related to such foreign loan and must notify the competent authority in writing of the relevant money transfer transactions made through these banks until the date of the written notice of cancellation as per request. At the same time, the borrower uses a checking account denominated in Vietnamese dong opened at an account service provider to refund outstanding foreign loan proceeds and indebtedness amount (if any). The exchange rate used to determine the amount in Vietnamese dong to be repaid shall be decided by the parties in accordance with applicable laws.

(f) New regulation on performance of security obligations in the form of collateralized security

Article 36 stipulates that when a collateralized security obligation arises for a foreign loan, the grantor shall perform the security obligation in accordance with the commitments in the loan agreement and the guaranteed agreements which are not contrary to Vietnamese law on secured transactions and other relevant laws.

The transfer of the amount collected after handling collaterals in the territory of Vietnam to the lender or the lender's representative to perform the asset security obligations shall be carried out via the bank providing secured transactions.

In case of handling collaterals in the form that the secured party shall receive such collaterals as a substitute for the performance of obligations, the borrower shall be responsible for notifying the bank providing account services the fact that the debt liabilities have been paid by receiving collaterals as a substitute for performance of the obligations.

Circular 12 will be coming into force on 15 November 2022.

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