

Technical Update

October 2022

1. Circular guiding on foreign exchange control in respect of the borrowing and repayment of foreign loans of enterprises

On 30 September 2022, the Government of Vietnam issued Circular No. 12/2022/TT-NHNN guiding foreign exchange management on the borrowing and repayment of foreign loans of enterprises ("Circular 12"). Circular 12 replaces Circular No. 03/2016/TT-NHNN ("Circular 03") and will take effect from 15 November 2022 with the following notable changes:

- Supplementing cases where the registration for foreign loan/ change in foreign loan is not required as below:
 - (i). Circular 12 allows the Borrower repays the short-term foreign loan within **30 working days** from the maturity date of such loan without the being subject to the registration with the State Bank of Vietnam ("**SBV**") (previously this period is 10 days). In particular, if the Borrower remains being able to repay the loan within 30 working days after the first anniversary of the first disbursement date, the Borrower is not required to register for the foreign medium/long-term loan with the SBV.
 - (ii). Supplement 3 cases of changes to a registered loan which shall be notified on the website of SBV without being subject to registration with the SBV, including:
 - Change of plan for repayment of interest and fees of foreign loans as registered with the SBV but **the determination method** of interest and fees **remains unchanged**;
 - Change (increase or decrease) to the loan withdrawal amount, principal debt, interest and fees within **100 currency units** of the foreign loans compared to the amount stated in the SBV's registration confirmation issued;
 - Change in the actual withdrawal or repayment of principal debt in a specific period being **less than** the amount registered with the SBV.
- Supplementing regulations on the Lender's account for loan disbursement and recovery, which is a new point of Circular 12 compared to Circular 03, especially for foreign loans denominated in VND. Specifically:
 - (i). For loans in VND, the Lender uses a VND account opened at a licensed bank to carry out the following transactions:
 - Disbursement and recovery of foreign loans in VND in case where the Borrower is a foreign-invested enterprise **borrowing from the retained earnings of the foreign investor** being capital contributing member/ shareholder of the Borrower;
 - Recovery of foreign short-term loans which are subject to the registration with the SBV but not eligible for registration; and
 - Recovery of foreign outstanding loans where the registration confirmation issued by the SBV is terminated by reason of the same being fraudulent.

Circular 12 further allows the foreign Lender to purchase foreign currency from its VND account in Vietnam for remittance to the offshore account.

- (ii). For loans in foreign currency, the Lender may use a foreign currency account of non-residents opened at a licensed bank to disburse and recover foreign loans in compliance with the regulations on foreign exchange control of Vietnam.
- Supplementing regulations on foreign exchange control in relevant to security transactions for foreign loans:
 - (i). Guiding the performance of security interests over assets.
 - (ii). Regulating that the transfer of money for the performance of security interests (including the transfer of money for the performance of guarantee obligations and the transfer of money for the performance of obligations secured by assets) shall be conducted through **01 bank serving security transaction** (unless the guarantor receives the collateral itself as a substitute for the performance of the security interests over assets).
 - (iii). Regulating the obligations of the bank serving security transaction to keep, maintain and request for the required documents relevant to the remittance transaction for the performance of the security obligations.
 - (iv). Indebtedness amount (if any) between the Guarantor and the Guarantee shall **not exceed the amount equivalent to debt obligation** in accordance with the foreign loan agreement performed through the realization of security measures. The application of interest, fee to the indebtedness amount shall be **in line with the provisions of the Civil Code** (in case where the Guarantor is a resident) or shall **not exceed the deferred payment interest rate** in foreign loan agreement with secured assets (in case where the Guarantor is a non-resident).
- Amending the reporting regime on foreign loan implementation as follow: Circular 12 requires a **monthly report** instead of quarterly report in Circular 03. The Borrower can submit the report on status of foreign loan implementation on SBV's **online portal**.
- Circular 12 amends all references to "**day**" to "**working day**" for the consistency between the provisions of the Circular and, to reflect the common practice of foreign loan arrangements using "business day". The most noticeable change is that the parties may now register/ register for change of the foreign loan within 30 working days from the signing date of the loan agreement/ amendment, instead of the 30 days per Circular 03.

2. Circular guiding the bank guarantee

On 30 September 2022, the SBV issued Circular No. 11/2022/TT-NHNN providing for the bank guarantee ("**Circular 11**"), replacing Circular No. 07/2015/TT-NHNN dated 25 June 2015. Circular 11 shall take effect from 01 April 2023 with the following notable changes:

- Supplementing the provisions on electronic guarantee. Specifically, credit institutions, foreign bank branches and customers **are allowed to select** to perform bank guarantees **through electronic means**. Accordingly, credit institutions, foreign bank branches shall decide at its sole discretion the methods, forms and technologies to carry out electronic guarantees and must satisfy the requirements of: (i) solutions and technical technology to ensure the accuracy, confidentiality and safety in the process of collecting, using and checking information and data; (ii) measures to assess, compare, update and verify information and data, to prevent acts of forging, interfering, editing, falsifying information and data; (iii) measures to assess, manage and control risks; assign specific responsibilities of each department and individual involved in electronic guarantees and in risk management and supervision.
- Supplementing the case in which credit institutions, foreign bank branches are not allowed to guarantee for the bond payment obligations of the issuing enterprises. Accordingly, in addition to the purpose of restructuring the debt of the issuing enterprise itself, credit institutions and foreign bank branches are not allowed to guarantee bonds of the issuing enterprise for the purpose of (i) **capital contribution, shares purchase in other enterprises**, and (ii) **increase the size of working capital**.
- Supplementing regulations on guarantee of off-the-plan real estate ("**Guarantee Contract**")
 - (i). Validity period of the Guarantee Contract: valid from **the signing date**, until the **guarantee obligations of all letters of guarantee** for the buyer **expire** and **all obligations of the investor** to the commercial banks under Guarantee Contract are completed.
 - (ii). Validity period of the letter of guarantee: valid from **the issuance date** until **at least 30 days after** the time limit for hand-over and take-over of the house as agreed in the house purchase contract, house rental contract, unless the guarantee obligation is terminated as prescribed in Article 23 of Circular 11;

- (iii). Guarantee sum for off-the-plan real estate projects: **the aggregated amount** which investor **is allowed to receive as advance from the buyer** under Article 57 of the Law on Real Estate Business and other amounts (if any) under the house purchase or house rental contract.
- (iv). Supplementing a number of provisions on the required contents, in addition to the general terms and conditions as prescribed, for Guarantee Contract and Letter of Guarantee.

3. New regulations on the method for determining electricity generation price framework of solar power plants and wind power plants

On 03 October 2022, Ministry of Industry and Trade (“**MOIT**”) issued Circular No. 15/2022/TT-BCT providing for the method for determining electricity generation price framework of solar power plants and wind power plants (“**Circular 15**”). Circular 15 shall take effect from 25 November 2022 with the following notable contents:

- Specifying the regulated entities including organizations and individuals which invest in:
 - (i). solar power plants in part or in whole and have signed power purchase agreement with Vietnam Electricity (“**EVN**”) before 01 January 2021 but do not meet the eligibility for electricity purchase price under Decision No. 13/2020/QĐ-TTg; and
 - (ii). wind power plants in part or in whole and have signed power purchase agreement with EVN before 01 November 2021 but do not meet the eligibility for electricity purchase price under Decision No. 39/2018/QĐ-TTg.
- Specifying the method for determining electricity generation price framework, including: (i) principle for developing electricity generation price framework; (ii) method for determining electricity generation framework; (iii) method for determining average fixed costs; and (iv) method for determining fixed operation and maintenance costs of the standard solar power plants and standard wind power plants.
- For the determining, appraisal and issuance of electricity generation price framework, the following entities are obliged to provide the feasibility study or technical design to EVN **within 15 days from the effective date of Circular 15**:
 - (i). Investors of **ground-mounted solar power plants** and **floating solar power plants** which have entered into power purchase agreements **before 01 January 2021**; and
 - (ii). Investors of **onshore wind power plants** and **offshore wind power plants** which have entered into power purchase agreements **before 01 November 2021**.

On the basis of these reports, EVN shall determine electricity generation price framework and send it to the Electricity Regulatory Authority of Vietnam (“**ERAV**”) for appraisal. Within 10 days from the issuance date of the appraisal result, the ERAV shall complete the dossier and submit it to the MOIT for approval of the electricity generation price framework applicable to the above types of plants and announces on the website of the MOIT and the ERAV.

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