Client Alert

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VIETNAM INTERNATIONAL LAW FIRM

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New Circular on guiding foreign exchange control of foreign direct investment ("FDI") activities in Vietnam

The State Bank of Vietnam's ("SBV") issuance of Circular No. 06/2019/TT-NHNN ("Circular 06") on 26 June 2019, to take effect on the 6th of September 2019, ushers significant changes in the current regulatory framework governing foreign exchange in direct investment activities in Vietnam. Despite Vietnam's continued efforts at improving the investment environment and streamlining the regulatory framework on foreign exchange over the past years, the implementation of Circular 19/2014/TT-NHNN dated 11 August 2014 ("Circular 19") – the predecessor of Circular 06 – has presented certain challenges and difficulties to implementing entities and stakeholders alike, and it is precisely to address these challenges that Circular 06 was issued.

This briefing note discusses the significant highlights of the recently issued Circular 06 regulating Direct Investment Capital Account ("DICA") relating to direct investment activities in Vietnam and carves out the changes that Circular 06 will be introducing into foreign exchange controls in Vietnam. In particular, we discuss: (i) the entities responsible for DICA, (ii) the requirements for opening DICA, (iii) the transfer of investment capital; (iv) inbound and outbound transfer of funds using DICA, and (iv) closure of DICA.

MAJOR CHANGES INTRODUCED BY CIRCULAR 06

Definition of a DICA:

A DICA is a current account in either Vietnamese Dong ("VND") or in Foreign Currency ("FCY") that is opened and maintained by entities involved in foreign direct investment activities in Vietnam. A DICA is in the name of the FDI Enterprise or the foreign investor in a business cooperation contract ("BCC") or private partnership contract ("PPP") in Vietnam.

Entities responsible for opening DICA:

The following entities are responsible to open a DICA:

- A foreign invested enterprise ("FDI Enterprise");
- Foreign investor entering into business cooperation contract ("BCC") in Vietnam;
- Foreign investor entering into public private partnership contract ("PPP Investor").

One of the most significant changes brought forth by Circular 06 is a clearer interpretation of 'FDI Enterprise'. An FDI Enterprise under Circular 06 refers to:

- An enterprise established by foreign investor and such foreign investor is required to obtain the investment registration certificate ("IRC");
- Enterprise with a foreign investor owning 51% or more of charter capital in the M&A transaction or newly established by specialized laws;
- Project enterprises established by foreign investor to implement PPP Project in accordance with the investment law.

For instance, in a multiple level holding structure, if a foreign investor owned 51% or more of the charter capital of an enterprise, that enterprise which is 51% foreign owned ("F1") is required to open a DICA. If F1, in turn, owns 51% or more of charter capital of another enterprise ("F2") (i.e., F2 is a subsidiary of F1), then F2 is not required to open a DICA.

Circular 06 likewise introduces a new entity that is subject to open the DICA – a PPP Investor. Specifically, a PPP Investor in a build and transfer contract ("BT Contract") or in a group C project may decide to directly undertake the project without establishing a project company. In such a case, no IRC would be required [Decree No. 63/2018/ND-CP dated 4 May 2018 ("Decree 63")]. In this scenario, the PPP Investor is considered to be directly conducting investment activities and thus, is subject to open a DICA. Accordingly, for cases not falling within the above PPP scenario, then the PPP Investor must nevertheless obtain an IRC and establish a project company.

The requirements to open DICA:

Under the Investment Law, a foreign investor which makes a capital contribution or purchases shares that results in the acquisition of more than 51% of the charter capital of the Vietnamese target company shall conduct the procedure of registration of making capital contribution or purchasing shares by a foreign investor ("M&A Approval") instead of the procedure to obtain the IRC. However, Circular 19 provided that if the Vietnamese target company is granted an IRC, then the Vietnamese target company must open a DICA. As a result of Circular 19, it became a matter of practice for many remittance banks to have requested foreign investors to obtain an IRC before allowing payment via the DICA.

Without an investment certificate (or IRC), the payment for purchasing shares or contributing capital in Vietnamese target company shall be made through what is called an Indirect Investment Capital Account ("IICA") under Circular 05/2014/TT-NHNN, regardless of the shareholdings in the company. Practically speaking, the previous regime under Circular 19 has led to difficulties in managing and monitoring direct and indirect investment flows into Vietnam.

Circular 06 provides that any one of the following legal documents may be used to open DICA:

- IRC
- Establishment and operation certificate;
- M&A Approval;
- The PPP contracts signed with authorized State body;
- Other documents evidencing that the investment by the foreign investors are legally permitted.

Transferring investment capital and investment project:

Circular 06 provides clearer guidance on the kinds of transactions that would need to be coursed through the DICA.

Under Circular 19, it was unclear whether an M&A transaction between two non-residents and two residents shall be subject to conduct via DICA.

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Circular 06 clarifies this conundrum by providing that such M&A transactions (between two non-residents or between two residents) are not required to transfer funds *via* DICA and that these transactions are permitted to be paid in FCY.

If the transaction is between a non-resident and a resident, the transfer of funds must be made through DICA and the payment for the transaction is required to be in VND. This is because the second scenario involves a capital transaction falling within the scope of foreign exchange control regulations. Thus, the second scenario requires that transfers be made through DICA.

Inbound and outbound transfers of funds *via* DICA:

Another significant feature introduced by Circular 06 is the grant of a higher degree of flexibility on foreign investors insofar as inbound and outbound transfers of funds are concerned. Circular 06 also allows the foreign investor to remit the fund for pre-establishment costs of foreign investor before obtaining the investment certificate (or IRC) directly from their foreign countries into Vietnam for the contractors for pre-establishment costs.

As to timelines, Circular 19 set a deadline of thirty (30) working days from the date of conversion of any proceeds of the foreign investors from the foreign direct investment into FCY for remitting such converted FCY amount outside of Vietnam. In comparison, there is no specific deadline for remitting the converted FCY amount outside of Vietnam in Circular 06.

Generally, to get the FCY amount to remit offshore, the investor can purchase such amount from the permitted bank by foreign exchange spot transaction if the payment date is within two (02) days from the date of the spot transaction. Otherwise, the transaction must be a forward transaction under Circular 15/2015/TT-NHNN guiding transactions on FCY markets.

Closing of DICA:

Circular 06 introduces new circumstances in which a DICA must be closed. Accordingly, an FDI Enterprise is responsible to close its DICA in the following cases:

- Where the foreign ownership in an FDI enterprise falls below 51% as a result of either: the foreign investor transferring its shares, or the FDI Enterprise issuing additional shares to increase its charter capital (therefore diluting the foreign ownership); or
- The FDI Enterprise becomes a public company whose shares are listed or registered at the stock exchange.

In these cases, the foreign investor being a non-resident owning shares in such FDI Enterprise shall open an IICA to conduct receivable and payable transactions in accordance with regulation on foreign exchange control for foreign indirect investments.

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