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VIETNAM INTERNATIONAL LAW FIRM

New regulations on onshore loans and offshore loans: the State Bank of Vietnam further tightens the rules but provides some favorable clarifications

Towards the end of June 2023, the State Bank of Vietnam (“**SBV**”) issued two important circulars governing the credit market in Vietnam:

- Circular 08/2023/TT-NHNN (“**Circular 08**”) on offshore borrowing conditions to replace Circular 12/2014/TT-NHNN on the same subject matter; and
- Circular 06/2023/TT-NHNN (“**Circular 06**”) amending and supplementing certain articles of Circular 39/2016/TT-NHNN on lending activities of credit institutions and foreign bank branches in Vietnam (“credit institutions”).

Circular 08 will take effect on 15 August 2023 while Circular 06 will take effect on 1 September 2023.

This article provides an overview of the major changes introduced by Circular 06 and Circular 08 and their implications.

I. HIGHLIGHTS OF IMPORTANT CHANGES

Onshore Loans

- It is no longer permissible to provide onshore loans to fund the deposit of monies or to fund equity investments other than listed stock investments.
- Financing capital contributions under capital contribution contracts, investment cooperation contracts, or business cooperation contracts for an investment project that does not meet the eligibility criteria for “being put into business” under relevant laws is prohibited but it is unclear how to determine if a project is eligible “for putting into business.”
- A legal regime for digital lending is introduced. Each individual may not maintain a total outstanding digital borrowing balance of more than VND100,000,000 with a credit institution.

- More stringent and detailed requirements on internal lending regulations are imposed on credit institutions.
- Costs which are funded by reimbursement loans must have incurred within 12 months prior to the credit institution's decision to lend.

Offshore Loans

- All categories of borrowers may borrow offshore loans (short-term, medium-term and long-term) to refinance their existing offshore debts.
- Circular 08 removes its predecessor's requirement that a refinancing must not increase the borrowing costs. Instead, Circular 08 limits the borrowed principal amount to the aggregate of the outstanding principal, interests and fees of the refinanced offshore debts and fees payable on the proposed offshore refinancing loan determined as of the refinancing time.
- A non-credit-institution borrower may borrow offshore short-term loans to fund the discharge of its short-term payables determined according to corporate accounting rules (other than the outstanding principal of onshore loans) arising in its implementation of investment projects, production or business plans or other projects.
- Circular 08 removes references to the borrowing to fund investment projects of subsidiaries of the borrower. Accordingly, the presented borrowing purpose must be a business plan of the borrower, such as to make capital contributions to its subsidiaries.

Fortunately, in the finally issued Circular, the SBV has removed some controversial provisions proposed in previous drafts. It has eliminated the previously proposed cap on the total foreign debt which finances the borrower's general business activities and the foreign exchange hedging requirement. Moreover, the finally issued Circular only restates the general requirement that the Governor has the authority to announce a cap on offshore borrowing costs when deemed necessary but does not fix a cap yet in the Circular as previously proposed. Overall, these amendments demonstrate the SBV's responsiveness to feedback and the evolving needs of the financial landscape

II. CIRCULAR 06 ON ONSHORE LOANS

Prohibited Borrowing Purposes

Circular 06 introduces additional fund use purposes for which lending is prohibited. The following are the

key fund use purposes that fall under this prohibition:

- (a) funding the deposit of monies;
- (b) funding capital contributions or the purchase of equity interests in limited liability companies or partnerships, as well as the purchase of shares in joint stock companies that are not listed on a stock exchange or registered for trading on UPCoM;
- (c) funding capital contributions under capital contribution contracts, investment cooperation contracts, or business cooperation contracts for an investment project that does not meet the eligibility criteria for "being put into business" under relevant laws;
- (d) funding the reimbursement of expenditures that do not meet the statutory reimbursement conditions (discussed below).

Item (b) restricts the financing of equity investments, excluding investments in listed stock. It is worth noting that the financing of investments in listed stock is permitted but has already been restricted under Circular 22/2019/TT-NHNN and Circular 23/2020/TT-NHNN on prudential standards for credit institutions. For example, loans provided for financing such investments cannot have a tenor longer than one year, and lenders must satisfy additional conditions such as maintaining a bad debt balance ratio below 3%.

Item (c) aims to restrict the financing of cooperation contracts for investment projects that are not yet eligible for "*being put into business*." The restriction seems to primarily target the residential development sector. However, the vague language of this item has raised concerns among investors, as its ambiguities may unreasonably constrain the financing of development projects. For instance, in the residential development sector, the housing laws permit developers to mobilize capital through business cooperation contracts once the project satisfies certain milestone conditions, such as obtaining project approval and land clearance and resettlement according to registered schedules. On the other hand, under the real estate business laws, developers are subject to more statutory milestone conditions before they can "*put the project into business*" (i.e. launching the pre-sale), such as obtaining a construction permit and the construction authority's certification of eligibility for pre-sale.

The ambiguous reference to "putting the project into business" has led to concerns that Circular 06 may be interpreted to block the financing of business cooperation contracts that would otherwise be permissible under the housing laws during the gap period between project approval and construction permit.

Furthermore, for other types of investment projects like commercial property development or power plant development, this ambiguous phrase may potentially cause difficulties in obtaining financing for development of such projects given that it is unclear what milestone this phrase refers to with respect to such projects.

Regarding item (d), funding the reimbursement of expenditures refers to financing costs that (i) have been paid using the borrower's own capital or loans provided by non-credit-institution lenders and (ii) have been incurred for the implementation of a business plan, business project, or living needs. The statutory reimbursement conditions required for such financing are as follows:

- The borrower has advanced payments for the costs using its own capital, and these costs have incurred within 12 months prior to the credit institution's decision to lend; and
- The costs are associated with a business plan or project for which the credit institution has evaluated the provision of medium or long-term financing.

Digital Lending

Circular 06 establishes a legal framework for credit institutions to engage in digital lending activities. Notable requirements include:

- (a) Information system: The information system utilized for digital lending must meet information technology security conditions at level 3 or higher, as per the regulations on information technology security conditions.
- (b) E-KYC requirements: The credit institution must adhere to Circular 06's e-KYC requirements, storing and preserving comprehensive customer identification information, customer biometric data, audio, images, video recordings, voice recordings, phone numbers used for transactions, and transaction logs throughout the lending process.
- (c) Borrowing limit: Each individual may not maintain a total outstanding digital borrowing balance of more than VND100,000,000 with a credit institution.
- (d) Finance documents: The loan agreement can be signed and stored electronically, provided that information technology safety requirements are met.

Other important changes

Application of payments to outstanding debts

With respect to the order of application of repayment amounts, Circular 06 further supplements that, where one or more payable instalments are overdue, repayments will apply according to the following priority order:

1. overdue principal amounts;
2. overdue interests;
3. due principal amounts; and
4. due interests.

Lending to fund a security deposit

Circular 06 adds a requirement on lending to fund a security deposit. If the borrowing purpose is to fund a deposit securing certain obligations, the deposit must be held and blocked at the credit institution providing the loan until the security is discharged.

Internal lending regulations

Circular 06 imposes more stringent regulation on the internal lending regulations by requiring more contents to be covered in the internal lending regulations, including specific criteria to determine the lending purposes, to assess the loan utilization plan and financial capacity to repay the loan, and the process for verifying, approving and granting loans. Circular 06 also requires supplements to the internal lending regulations to add regulations applicable to circumstances where loans are provided to fund investment cooperation contracts, circumstances where loans are provided to fund a security deposit, and, where relevant, digital lending circumstances.

III. CIRCULAR 08 ON OFFSHORE LOANS

Borrowing purposes of non-credit-institution borrowers

Short-term borrowing

Apart from offshore debt refinancing purpose, a non-credit-institution borrower may borrow offshore short-term loans to fund a discharge the borrower's short-term payables according to corporate accounting rules (other than the outstanding principal of onshore loans) arising in the borrower's implementation of investment projects, production or business plans or other projects.

Circular 08 removes the restriction on borrowing offshore short-term loans to fund medium/long-term capital use purposes. Accordingly, it is permissible to borrow an offshore short-term loan to fund the discharge of short-term payables arising in the implementation of an investment project or other projects even though projects are long-term investments.

Medium/long-term borrowing

A non-credit-institution borrower may borrow medium/long-term offshore loans to fund the following purposes:

- (a) to implement the borrower's investment projects; and/or
- (b) to carry out the borrower's production or business plans or other projects.

Circular 08 clarifies that an "investment project" in limb (a) is distinguished from an "other project" in limb (b) in that an "investment project" is one which is licensed under an investment certificate, investment registration certificate or investment in-principle approval pursuant to the investment laws, while an "other project" is an investment endeavor which is not required to be licensed under any of the aforesaid certificate or approval.

It's helpful to note that Circular 08 removes references to borrowings to fund investment projects of subsidiaries of the borrower. Accordingly, the presented borrowing purpose must be funding a business plan of the borrower, such as for making capital contributions to its subsidiaries.

Borrowing purpose of credit institution borrowers

A credit institution borrower may borrow offshore short-term or medium/long-term loans to supplement the borrower's sources of capital to provide credit to customers.

Offshore loan capital use plan

General

An "offshore loan capital use plan" must be approved by the relevant corporate authority and (in the case of medium/long-term loans) must be submitted to the SBV as supporting evidence of the borrowing purpose in the registration of the offshore loan other than (a) an offshore loan to fund an investment project and (b) an offshore refinancing loan. For an offshore loan to fund an investment project, the applicable invest-

ment certificate, investment registration certificate or investment in-principle approval pursuant to the investment laws is sufficient evidence of the borrowing purpose, and, for an offshore refinancing loan, the debt refinancing plan (discussed below) is applicable evidence of the borrowing purpose.

Note that offshore loans borrowed in the form of deferred payment for the import of goods are explicitly exempt from the borrowing conditions under Circular 08. Therefore, such offshore loans are not subject to the requirement on offshore loan capital use plans.

Content requirements

Circular 08 provides more comprehensive requirements on the offshore loan capital use plans. In particular, this plan must include, among other things, basic corporate particulars of the borrower; details of the proposed offshore loan; borrowing purposes and size including general capital needs of the production, business or project to be funded by the offshore loans and relevant details on the proposed utilization of the offshore loan proceeds (i.e. intended groups of customers to be provided with credit funded by the offshore loan borrowed by a credit institution borrower, intended credit interest rate and repayment term; or expenses incurred for implementation of a project intended to be settled by the offshore loan proceeds); measures for managing risks arising from the offshore loan; approving authority in respect of the offshore loan capital use plan and grounds for determination of such authority.

Schedule of the short-term payables

In the case of an offshore short-term loan of a non-credit-institution borrower, a schedule listing the short-term payables to be funded by the offshore short-term loan and the breakdown of projected payable amounts according to a prescribed form must be enclosed with the offshore loan capital use plan. The schedule and the offshore loan capital use plan must be amended to record any changes before such changes occur. These documentations must be properly maintained in records for inspection by the relevant state authorities.

Offshore refinancing loans

Refinancing conditions

In addition to the above borrowing purposes, Circular 08 permits all categories of borrowers to borrow offshore loans (short-term, medium-term and long-term) to refinance their existing offshore debts.

Circular 08 removes its predecessor's requirement that a refinancing must not increase the borrowing costs. Instead, Circular 08 limits the borrowed principal amount to the aggregate of the outstanding principal, interests and fees of the refinanced offshore debts and fees payable on the proposed offshore refinancing loan determined as of the refinancing time. If the proposed offshore refinancing loan is a medium/long-term loan, the borrower must repay the refinanced offshore debts within 5 business days after the drawdown of the offshore refinancing loan.

Debt refinancing plan

A “*debt refinancing plan*” must be approved by the relevant corporate authority and, in the registration of any offshore medium/long-term refinancing loan, submitted to the SBV as supporting evidence of the borrowing purpose.

This plan must include, among other things, basic corporate particulars of the borrower; details of the existing offshore debts to be refinanced including lender, principal amount and currency, repayment term, borrowing costs, borrowing purpose, status of drawdown, repayment and outstanding as of the time of preparation of the debt refinancing plan; loan code (for offshore medium/long-term loans), a table listing out the use of the existing short-term offshore loans (if applicable); details of the proposed offshore refinancing loan including lender, principal amount and currency, repayment term, borrowing costs, drawdown and refinancing schedules; approving authority in respect of the debt refinancing plan and grounds for determination of such authority.

Additional borrowing conditions of credit institution borrowers

Short-term foreign debt ratio condition

To be eligible to borrow offshore short-term loans in a relevant year, the credit institution borrower's ratio of total short-term foreign debt to owner capital (on a separate basis) must not exceed 30% (if it is a commercial bank) and 150% (if it is another type of credit institution) on 31 December of the preceding year. This short-term borrowing condition will take effect

later than other parts of Circular, on 1 January 2024.

Prudential compliance condition

Additionally, to be eligible to borrow offshore loans, the credit institution borrower must have complied with all prudential standards applicable to it as of the end of the three month's period preceding the signing of the loan agreement and, in case of a medium/long-term loan, up to the end of the month preceding the application for registration of the offshore loan. Circular 08 permits some exceptions to this requirement, of which a notable exception is when the offshore loan is eligible as tier-2 capital of the credit institution borrower and the borrowing is to help the borrower to satisfy relevant prudential standards.

Other notable requirements

- (a) In case that certain parts of an offshore loan have been drawn but temporarily not yet used, the borrower must deposit such loan proceeds with a credit institution (with appropriated banking license) with a deposit term not longer than one month.
- (b) The SBV Governor has the power to decide to announce certain conditions on borrowing costs and a cap on the borrowing costs from time to time when he finds necessary.

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