Newsletter

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VILAF

VIETNAM INTERNATIONAL LAW FIRM

Newsletter Autumn 2016:

Roadmap for Liberalization of Cross-border Capital Transactions

In This Issue:

1. *State Bank issued multiple new foreign exchange regulations on cross-border capital transactions and trade transactions;*
2. *Prime Minister approved the principles for developing a roadmap for liberalization of cross-border capital transactions; and*
3. *Ministry of Finance clarifies sectors eligible for CIT incentives and those eligible for import tax incentives.*

Foreign exchange control for offshore direct investment

State Bank of Vietnam Circular 12/2016/TT-NHNN ("Circular 12") guiding foreign exchange control for offshore investment

Circular 12, which took effect on 13 August 2016, provides detailed guidance relating to offshore investments of onshore investors. Circular 12 does not govern offshore investments in petroleum and indirect offshore investment activities. While the legislative distinction between "direct investment" and "indirect investment" can be confusing, the practical rule of distinction for the purposes of foreign exchange compliance is that an offshore direct investment is an offshore investment licensed under an "offshore investment registration certificate" ("OIRC").

Special capital account used for offshore investment

For each offshore project, an onshore investor must open a special account ("OCA") in foreign currency or in Vietnamese Dong (where investment funds are remitted in Vietnamese Dong) for the remittance of investment capital out of Vietnam. The OCA, which must be registered with the State Bank of Vietnam ("SBV"), can be opened with a credit institution or branch of a foreign bank in Vietnam.

Where multiple onshore investors jointly invest in an offshore project, each investor is required to maintain its own OCA.

Before obtaining the OIRC from the relevant authority, the investor is allowed to open an account to remit money out of Vietnam for pre-investment costs and expenses (if any). Such account shall be used as the OCA after the investor is granted an OIRC.

Use of OCA

All remittance of investment capital out of Vietnam as well as loans provided by the onshore investor to the offshore invested company must be made through the OCA.

Dividends, profits, other legitimate revenue and repatriation of funds in case of liquidation, termination of the offshore investment project, reduction of the investment capital or investment project transfer must also be made through the OCA.

Registration with SBV

After (i) being granted with an OIRC, (ii) having the relevant investment approval of the host country where the offshore investment project is implemented; and (iii) opening the OCA, the onshore investor must register its offshore investment with the SBV.

If the investor reinvested the profits from an offshore investment project to increase the investment capital of such project, it is required to amend the OIRC and report such changes to the SBV within 30 days from the date of the amended OIRC.

If the investor reinvested the profits from an offshore investment project to implement another offshore investment project, it must apply for a new OIRC, open a new OCA and register the new project with the SBV.

Offshore Indirect Investment

State Bank of Vietnam Circular 10/2016/TT-NHNN ("Circular 10") on offshore indirect investment

Circular 10, which took effect on 13 August 2016, provides detailed guidance on investment instruments, conditions and procedures for Vietnamese investors who conduct offshore indirect investment.

Offshore indirect investment activities

Offshore indirect investment activities are made through the purchase and sale of securities, valuable papers, or investment via offshore investment funds and offshore intermediary financial institutions.

Eligible Vietnamese investors

Under Decree 135, the following organizations are permitted to make offshore indirect investment by way of trading their own accounts: (i) securities companies and fund management companies, (ii) securities investment funds through fund management companies, (iii) insurance companies, (iv) commercial banks, (iv) general finance companies, and (v) State Capital Investment Corporation.

Other economic organizations can only make offshore indirect investment by way of entrustment to Vietnamese fund management companies or commercial banks.

Vietnamese individuals can only make offshore indirect investments through employee stock award programs.

Indirect investment instruments

Under Circular 10, Vietnamese institutional investors can invest in the following offshore instruments: (i) listed securities; (ii) certificate of securities investment funds; and (iii) bonds, bills and promissory notes issued by the government and other organizations having credit rating evaluated by Standard & Poor's, Moody's Investors Service and Fitch Ratings.

Indirect investment limit of commercial banks and general finance companies

The ratio of indirect investment activities of commercial banks and general finance companies shall not exceed 7% of their equity excluded from the investment. The limit does not apply to trading activities of overseas branches of commercial banks or general finance companies.

Employee stock award program

Vietnamese employees working for foreign organizations may participate in offshore stock award program (ESOP) which shall be implemented under the following types: (i) direct stock issuance; and (ii) stock options with preferential conditions.

Directive for liberalization of capital transaction flows

Prime Minister Decision 1590/QD-TTg on 11 August 2016 approving the plan and principles for developing the road map for liberalization of cross-border capital transactions

The new Prime Minister issued a landmark directive approving the following fundamental principles, among others:

- With respect to offshore investment activities: if market conditions are favorable and the economy growth is stable, to consider the expansion of the types of onshore investors permitted to make indirect offshore investments.

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- With respect to offshore borrowings: to research the possibility of permitting individuals to borrow from offshore banks to serve legitimate purposes such as education and health treatment.

- With respect to offshore lendings: to set forth explicit procedures to obtain the Prime Minister's approval for offshore lending and granting guarantees to non-residents in order to facilitate transparency of policies.

- With respect to convertibility of Vietnamese Dong: to permit the use of Vietnamese Dong for offshore investments in countries that have agreed with Vietnam on investments and payments in domestic currencies.

- With respect to capital outflows in emergency cases: to research and develop measures in dealing with capital outflows in emergency cases, such as providing regulations on the conditions of investors (being organizations) making indirect overseas investments on quotas and term of investments, deposits, taxes based on the term of investment.

Liberalization of cross-border trade payment transactions

State Bank of Vietnam Circular 03/2016/TT-NHNN and Circular 05/2016/TT-NHNN ("SBV Circulars") on foreign exchange control for offshore borrowings

While these SBV Circulars still consider the import of goods under an installment payment arrangement an offshore borrowing, they lift the requirement of registration with the SBV for such import, regardless of the repayment tenure. If the repayment tenure is longer than one year, the importer must comply with account requirements and reporting requirements but does not have to register the offshore borrowing with the SBV. The repayment tenure commences on the 90th day from the date of issue of the bill of lading or the 45th day from the date of customs clearance.

Tax Investment Incentives

Ministry of Finance Circular 83/2016/TT-BTC ("Circular 83") on investment incentives

Circular 83, which took effect on 01 August 2016, addresses corporate income tax (CIT) incentives, import tax incentives and non-agricultural land use tax incentives for investment projects. Tax incentives do not apply to projects for mineral mining, production or business in goods or services subject to special consumption tax except the manufacture of automobiles.

Corporate income tax (CIT) incentives

Under relevant laws, the two common preferential CIT rates of 10% and 17% are available for 15 years and 10 years, respectively, starting from the commencement of operation. Under the CIT Law, as amended, the sectors that are encouraged by the Vietnamese Government and thus are eligible for CIT incentives include education, health care, sport/culture, high technology, environmental protection, scientific research, infrastructural development, processing of agricultural and aquatic products, software production and renewable energy.

Circular 83 specifies that the incentive CIT rates of 10% and 17% shall apply only to a new project meeting either of the following requirements:

(i) falling within a sector listed as eligible for CIT incentives under the CIT Law, as amended, and/or

(ii) located in a region listed as eligible for investment incen tives in Appendix II of Decree 118/2015/ND-CP.

As may be remembered, Decree 118/2015/ND-CP on investment contains Appendix I, which lists the sectors eligible for investment incentives. This list is slightly different from the list of sectors eligible for CIT incentives under the CIT Law, as amended. The above provisions in Circular 83 mean that the list of sectors in Appendix I of Decree 118/2015/ND-CP is not applicable for CIT incentive purposes (although it may be applicable for certain investment incentive purposes).

Some examples of sectors eligible for investment incentives under Appendix I of Decree 118/2015/ND-CP, but are not listed as eligible for CIT incentives under the CIT Law, as amended, are the development of slaughterhouses, supermarkets, commercial centers, logistic centers, libraries and movie theaters, etc.

In general, CIT incentives are not applicable to an investment project producing goods subject to the special consumption tax. Nevertheless, an investment project manufacturing automobiles with less than 24 seats is eligible for CIT incentives if it satisfies one of the conditions for CIT incentives such as

when the project is located in a region eligible for CIT incentives. A new investment project that satisfies the conditions for different CIT incentives is entitled to select the most favourable CIT incentive.

Import tax incentives and non-agricultural land use tax incentives

Different from the case of CIT incentives, both the lists of sectors in Appendix I and the list of regions in Appendix II of Decree 118/2015/ND-CP are eligible for import tax incentives and non-agricultural land use tax incentives. Even projects falling under the sectors in Section B of Appendix I of Decree 118/2015/ND-CP, such as the development of slaughterhouses, supermarkets, commercial centers, logistic centers, libraries, movie theaters, sport stadiums, production of automobiles, etc, are eligible for the import duties exemption on imported goods used to form fixed assets for the project.

Circular 83 provides more detailed guidance on the import tax incentives for an investment project with a total investment capital of at least VND 6,000 billion. Such project is eligible for import tax exemption on imported goods used to form fixed assets. It is also exempted from import tax on imported goods used as production materials five years from the date of commencement of the production activity. If the project investor does not inject at least VND6,000 billion during the first three years of the project, the import tax exemption will be reviewed and revoked at that the end of the three years.

Government Office temporarily ceasing government guaranteed loans

Government Office issued Official Letter 7089/VPCP-KTTH in August 2016, directing ministries that since 2017 the Government will temporarily cease approving new Government guarantees for new projects, in a trend to gradually reduce Government guarantees in an effort to restrain public debts.

In case of necessity, the Prime Minister would consider granting special approvals on a case by case basis.

The World Bank forecasts that Vietnam's public debt will increase from 62.2% of gross domestic product (GDP) in 2015 to 63.8% in 2016, 64.4% in 2017 and 64.7% in 2018.

The Government-guaranteed loans as of end-2015 stood at VND459 trillion (USD20.3 billion), equal to about 17.6% of the country's public debt.

Important draft regulations to watch out for

In July and August 2016, the government published two important draft regulations to collect public opinions:

1. Draft Decree on the Business of Alcoholic Beverages; and

2. The 8th draft of the Decree on the Trading Business of Foreign Investors and Foreign Invested Enterprises.

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VILAF won new international awards 2016

In May 2016 and August 2016 respectively, VILAF took home the ALB 2016 Vietnam Law Firm of the Year Award and ALB Project Finance Deal of the Year Award at the *Asian Legal Business* (ALB) South East Asia Law Awards 2016 at Fullerton Hotel in Singapore, and the Best M&A Law Firm of the Year Award at the Vietnam M&A Forum in Ho Chi Minh City.

The ALB hosts each year the presentation of professional legal awards before the Southeast Asia legal circle.

Vietnam M&A Forum is the largest M&A and strategic investment annual public event in Vietnam for the business community, domestic and foreign investors in Vietnam, organized by Vietnam Investment Review, AVM Vietnam, and the Ministry of Planning and Investment.

3rd Annual IFLR Southeast Asia Forum

VILAF represented by Partners Vo Ha Duyen and Bui Ngoc Anh, participated in the third annual IFLR Southeast Asia Forum held at Fairmont, Singapore.

Duyen and Ngoc Anh led the discussion in investment trends and updates in Vietnam, in the panel with Le Nguyen Thuy Dung (Indochine Counsel, Kimberly Clark) and David Blanco (Monsanto Company).

The focus of the discussion were on developments in Vietnam's investment laws, effects of the Trans-Pacific Partnership, effects of the Enterprise Law, and the Trade Agreement between Vietnam and South Korea, among others.

4th Asian Regional Conference, World Law Group

On March 4-6, VILAF, the sole Vietnam firm member of the World Law Group (WLG), hosted the 4th Asian Regional Conference in Des Artes Hotel in Ho Chi Minh City.

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Widely attended by member firms from Australia, Hong Kong, India, Japan, Malaysia, Philippines, South Korea, Taiwan, Thailand, and Vietnam, the three-day conference aimed to strenghten ties between the member firms and provide a platform to discuss relevant legal business topics including the Trans-Pacific Partnership (TPP) – What it Means for Asian Signatories and Non-signatories and How it Fits with ASEAN and the Regional Comprehensive Economic Partnership.

RECENTLY CLOSED DEALS

Berjaya Corp Bhd's investment in computerized lottery

VILAF advised Berjaya Corp. Bhd in negotiating and concluding a USD 210 million Business Cooperation Contract with Vietlott Company for a computerized lottery business. This is the first and sole computerized lottery/jackpot project in Vietnam.

On January 20, 2016, Berjaya announced the Hanoi Department of Planning and Investment had issued the Investment Registration Certificate to certify an exclusive 18-year contract awarded to invest in and operate a nationwide computerised lottery in Vietnam.

Partner Nguyen Duy Linh and Senior Associate Duong Thi Thu Ha advised this deal.

ANA Holdings Inc. acquisition of shares of Vietnam Airlines

VILAF advised ANA Holdings Inc., Japan's largest airline group, in its USD109 million acquisition of 8.8% shares of Vietnam Airlines JSC (VNA), Vietnam's leading airline. This is the first time that VNA opened to foreign investment and a strategic investor since its IPO in 2014.

The state ownership in Vietnam Airlines has been lowered to 75% after this deal. It will be further cut down to 65% of charter capital in line with the approved divestment scheme.

Vietnam Airlines currently operates 89 airplanes. Its network covers 29 international and 21 domestic destinations and serves 66 flights per week to Narita and Haneda airport in Tokyo, Chubu Airport in Nagoya, Kansai Airport in Osaka and Fukuoka Airport.

Partner Bui Ngoc Anh and Senior Associate Tran Thuy Anh advised this deal.

JX Nippon acquiring shares of Petrolimex

VILAF advised JX Nippon Oil & Energy Corporation in the USD185 million acquisition of 8% on fully diluted basis of Vietnam National Petroleum Group (Petrolimex), which is the biggest import/export and retail brand name in Vietnam for petroleum distribution. This is the first time that Petrolimex has opened to foreign investment.

Partner Bui Ngoc Anh, Counsel Vu Le Trung and Senior Associates Pham Thuy Anh and Mac Phuong Khanh advised this deal.

BNP Paribas's aircraft financing for AWAS and Vietjet

VILAF advised BNP Paribas, acting for the lenders as facility agent and security trustee, in arranging the financing of Airbus A320 aircrafts for AWAS, a global leader in commercial aircraft leasing, and Vietjet, a leading budget airline in Vietnam.

Partner Vo Ha Duyen, Senior Associates Nguyen Thi Kim Anh and Nguyen Thanh Tung advised these deals.

Cheng Yang Paper Mill Financing

VILAF advised Nine Dragons Paper (Holdings) in a syndicate loan facility of USD168 million to finance its 422,000 tons paper mill expansion project at its Cheng Yang Paper Mill in Binh Duong province, Vietnam. Bank of China was original lead arranger, bookrunner, facility agent and security agent.

Partner Vo Ha Duyen and Senior Associate Nguyen Thanh Tung advised this deal.

Masan's issuance of corporate bonds

VILAF advised Masan Consumer Holdings in the issuance of VND9,000 billion five-year corporate bonds by a private placement. The issue was arranged by Vietcombank. This is the largest size corporate bonds ever issued in the Vietnamese market.

Partner Nguyen Quang Hung and Counsel Vu Le Trung advised this deal.

Standard Chartered Bank secured financing transactions

VILAF advised Standard Chartered Bank in a USD100 million secured financing to Vietinbank.

Partner Vo Ha Duyen and Senior Associate Nguyen Thanh Tung advised this deal.

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