

UPDATES ON FOREIGN EXCHANGE ADMINISTRATION IN RESPECT OF ENTERPRISES' FOREIGN LOAN BORROWING AND REPAYMENT

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On September 30, 2022, the State Bank of Vietnam (SBV) promulgated Circular 12/2022/TT-NHNN on guidelines for foreign exchange administration in respect of enterprises' foreign borrowing and repayment (**Circular 12**), replacing Circular 03/2016/TT-NHNN and its amendments and supplements (Circular 05/2016/TT-NHNN, Circular 05/2017/TT-NHNN). Circular 12 took effect from November 15, 2022 with some notable points as follows:

Firstly, Circular 12 provides further regulations on the implementation of foreign loans after a borrower is divided, separated, consolidated, or merged. Accordingly, Circular 12 stipulates that the organization inheriting the rights and obligations related to foreign loans shall continue to perform the borrower's responsibilities. The determination of the inheriting organization shall comply with the laws on enterprises in cases of division, separation, consolidation, or merger of enterprises. There are 2 scenarios for the situation in which a borrower is divided or separated:

(i) In the case where there is only one inheriting organization, the lender, the newly established organization after division, the separated organization and the separating organization shall conclude an agreement to decide which organization shall inherit the rights and obligations of the borrower divided or separated regarding the foreign loan;

(ii) In the case where several organizations are jointly obligated for foreign loan repayment, these organizations shall:

- enter into a written agreement on authorizing an organization to perform administrative procedures and to conduct reporting regimes related to the foreign loan;
- jointly open an account for foreign borrowing and repayment. In the event that there is no common account for foreign borrowing and repayment,



these organizations shall ensure that they open the account for foreign borrowing and repayment at the same bank providing account services with a view to continuing to repay the foreign loan;

- in the event that one of the organizations being jointly responsible for the repayment obligation of a foreign loan is a foreign direct investment (**FDI**) enterprise, the use of the account for repayment of this loan shall be in accordance with Article 6, Circular 12 instead of other regulations on opening and use of FDI capital accounts. The bank at which the organizations with joint responsibility open an account to repay the foreign loan is not mandatory to be the bank where the FDI capital account is opened.

Secondly, Circular 12 supplements cases of amending foreign loans in which borrowers make changes on the Portal for administration of foreign borrowing and repayment without guarantee by the Government. Accordingly, there is no need to register for changes to foreign loans as of November 15, 2022, including:

(i) Change to the plan of interest and fee payment of foreign loans compared to the plan confirmed by the SBV in the written confirmation of registration or confirmation of registration for foreign loans adjustment without changing the method of interest and fee determination as specified in the relevant foreign loan agreement;

(ii) Change (increase or decrease) to the amount of capital withdrawal, repayment of principal, interest, and fees within 100 currency units of the foreign loan currency compared to the registered amount stated in the written confirmation of registration or confirmation of registration for foreign loan adjustment;

(iii) Change to the actual amount of capital withdrawal and principal repayment of a specific period to be fewer than the amount stated in the

plan for capital withdrawal and repayment in the written confirmation of registration or confirmation of registration for foreign loan adjustment.

Thirdly, Circular 12 supplements guidance on foreign exchange administration in respect of asset security for foreign loans. Accordingly, Article 36, Circular 12 stipulates that if there is any activity for the disposal of secured assets, the proceeds gained from the disposal of the secured assets within Vietnamese territory must be transferred to the lender or lender's representative for executing asset secure obligation via a bank serving secured transactions as prescribed in Article 37, Circular 12. In the case where the securing party receives the collateral itself to replace the obligation performance, the borrower is liable for notifying the bank (account service provider) that the loan obligation has been paid by the corresponding form.

Furthermore, the borrower of foreign loans should note the change related to the period for reporting foreign borrowing and repayment without guarantee by the Government. Accordingly, such reports would be made monthly instead of quarterly as previously stipulated under Circular 03/2016/TT-NHNN.

COMMENTS AND RECOMMENDATIONS

With the promulgation of Circular 12, enterprises, especially borrowers of foreign loans, should pay more attention to regulations on division, separation, consolidation or merger of borrowers in the context that a large number of foreign enterprises tend to restructure due to the impact of the economic downturn. The provisions of Circular 12 relative to disposal of secured assets involving foreign loans should also be addressed for implementation at the commercial banks that provide secured transactions services. Besides, they should also address the obligation to notify and prepare documents for the banks to permit the money transfer to fulfill the security obligation for foreign loans. In addition, the update of Circular 12 in terms of administrative procedures (registration, registration for changes to foreign loans, reports on the implementation of foreign loans, and changes in application forms) is necessary for borrowers to comply with the SBV's requirements.