

Legal Update

August 2019

New rules on foreign exchange control applicable to foreign direct investment activities in Vietnam

On 26 June 2019, the State Bank of Vietnam (“**SBV**”) issued Circular 06/2019/TT-NHNN providing guidelines on foreign exchange control for foreign direct investment (“**FDI**”) activities in Vietnam (“**Circular 06**”). Circular 06 will come into effect on 6 September 2019 and replace Circular 19/2014/TT-NHNN dated 11 August 2014 of the SBV on the same subject matter (“**Circular 19**”).

Below are the salient points and changes contained in Circular 06:

Broadening the definition of FDI enterprises subject to direct investment capital account (“DICA”) requirement

Circular 06 provides a clearer and more broadened definition of FDI enterprises subject to DICA requirement for capital transactions, including:

- a. Enterprises being (newly) established ones which have members or shareholders being foreign investors (regardless of their ownership ratios) and who must obtain an Investment Registration Certificate (“**IRC**”) in accordance with the Law on Investment 2014;
- b. Enterprises (other than those in group (a) above) having 51% or more of the charter capital owned by foreign investors, including:
 - i. enterprises acquired by foreign investors;
 - ii. enterprises established as the result of a division, separation, merger or consolidations; and
 - iii. enterprises (newly) established in accordance with specialized laws (i.e. credit institutions, insurance businesses, securities companies, law firms, etc.).

It is worth noting that, the terms “FDI” and “FDI enterprises” no longer exist under the current Law on Investment 2014. Furthermore, enterprises under group (b)(i) and (iii) above are not required to obtain IRCs pursuant to the Law on Investment 2014 and therefore are not required to have a DICA for capital transactions under Circular 19.

Clearer guidelines on opening and use of DICAs

A FDI enterprise is required to open and maintain only one DICA in a foreign currency corresponding to the registered foreign currency for capital contribution and another DICA in Vietnamese Dong (in case the capital contribution is made in Vietnamese Dong) at one licensed bank in Vietnam.

Where a FDI enterprise obtains foreign loans in currencies other than that of its DICA, Circular 06 allows the FDI enterprise to open a “bank account for taking and paying foreign loans” in such foreign currencies of the loans at the licensed bank where the current DICA is maintained.

In case a FDI enterprise wishes to move its DICA to another licensed bank, it must close the current DICA after remitting the balance to the new DICA.

Circumstances under which FDI enterprises are no longer required to maintain DICAs and their foreign members or shareholders being non-residents are required to open indirect investment capital accounts (“IICAs”)

Circular 06 sets out the following circumstances under which FDI enterprises under group (b) above must close their DICAs and their foreign members or shareholders being non-residents must open IICAs under their own names:

- i. upon a transfer of shares or capital contribution or issuance of additional shares in the FDI enterprises which results in a reduction of the foreign ownership in such enterprises to less than 51%; or
- ii. upon the FDI enterprises being public companies having their shares listed or registered for trading on the stock exchange.

Circular 06 however does not set out the timeline for closing the DICAs and opening of the IICAs under the above circumstances. Of note, the opening and use of IICAs are currently governed by Circular No.05/2014/TT-NHNN dated 12 March 2014 of the SBV ("**Circular 05**").

Greater clarity on the currency and payment for capital transfer ("M&A") transactions in FDI enterprises

Two of the ambiguities that have been unclear for years in M&A transactions are whether:

- i. the transfer value can be denominated in foreign currency; and
- ii. the payment for capital transfer can be made offshore.

Circular 06 expressly addresses these ambiguities:

- For transfer transactions amongst non-resident investors: the transfer value shall be permitted to be denominated in foreign currency and the payment shall not be routed via DICAs
- For transfer transactions amongst resident investors: the transfer value must be in Vietnamese Dong and the payment shall not be routed via DICAs
- For transfer transactions between resident and non-resident investors: the transfer value must be in Vietnamese Dong and the payment must be routed via DICAs

Where foreign investors being non-residents conducting M&A transactions in enterprises not categorized as FDI enterprises pursuant to the above definition, the transfer value must be denominated in Vietnamese Dong and the payment must be made via ICCAs as currently governed by Circular 05.

Relaxing the requirement on inward remittance of funds for payment of pre-investment expenditures

Circular 06 relaxes the requirement on inward remittance of funds by foreign investors for payment

of legitimate expenses incurred during the investment preparation stage ("**Pre-investment Expenses**"). Accordingly, prior to obtaining the IRCs (or approvals for capital contribution or acquisition or establishment permits from relevant Vietnamese authorities as the case may be), foreign investors may opt to make the payment of these Pre-investment Expenses either (i) directly from their overseas bank accounts or (ii) via their payment accounts in foreign currencies and/or in Vietnamese Dong opened at a licensed bank in Vietnam in their own names.

This new provision eliminates unnecessary inward remittance of funds by foreign investors during their investment preparation stage, as well as avoiding potential challenges from tax authorities on the deductibility of these expenses for Vietnam tax purposes of the FDI enterprises if the funds are not routed via a bank account in Vietnam as strictly required by Circular 19.



Transitional provision: 12 months to complete the conversion to the appropriate capital accounts

Circular 06 provides a 12-month period for implementation (i.e. by 6 September 2020) for relevant FDI enterprises and foreign investors under the following circumstances must convert their bank accounts for capital transactions to the appropriate types:

- For enterprises having 51% or more of the charter capital owned by foreign investors and the foreign investors have opened and used their IICAs for contribution of capital or purchase of shares or capital contribution in these enterprises, they must open DICAs for their future capital transactions.
- For enterprises currently maintaining DICAs, they must close their current DICAs and their foreign members or shareholders being non-residents must open IICAs, if (i) having less than 51% of the charter capital owned by foreign investors, except for FDI enterprises being newly established and granted with the IRC in accordance with the Law on Investment 2014 as mentioned in (a) above, and (ii) FDI enterprises having their shares listed or registered for trading on the stock exchange.

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