

Vietnam: New regulations on offshore borrowing and repayment of offshore debts

In brief

On 30 September 2022, the State Bank of Vietnam (SBV) officially issued Circular No. 12/2022/TT-NHNN providing instructions on foreign exchange administration regarding offshore borrowing and offshore debt repayment of enterprises ("**Circular 12**").

Circular 12 came into effect on 15 November 2022, replacing Circular No. 03/2016/TT-NHNN and its amending circulars ("**Circular 03**").

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Key takeaways

Circular 12 has provided various significant changes to the regulations under Circular 03, as follows:

- The regulations on the registration of offshore loans with the SBV have been amended and supplemented to be more specific and enable the borrower to flexibly perform the relevant procedures.
- Most references to the term "guarantee" have been replaced with the term "security" so that the scope of security measures relating to offshore loans have been expanded (including both guarantee and other security measures).
- Circular 12 has introduced the new concept of supporting security bank.
- Circular 12 provides a set of detailed requirements on accounts serving overseas remittance in relation to the offshore loans.
- Other issues in respect of interests rate applicable to indebtedness amounts between the borrower and the securing party have also been specified in Circular 12.

In more detail

1. Loans required to apply for registration with the SBV

- (i) The following offshore loans are subject to registration with the SBV pursuant to Circular 12:
 - Medium and long-term loans
 - Short-term loans **having a principal payment period** extended for which the total term is over one year
 - Short-term loans without any renewal agreement being over one year from the first utilization date, unless the borrower fully completes its debt repayment obligation within **30 working days** from the first anniversary of the first utilization date
- (ii) Circular 12 has also extended the timeline to register the offshore loans and amendments to the registered offshore loans, from **30 days** (as previously stipulated in Circular 03) to **30 working days** from the signing date of the loan agreement or amendment agreement, giving more time for the borrower to prepare to lodge the application dossiers to the SBV for the registration of offshore loans or the registration of any amendments to the registered offshore loans.

(iii) Apart from the circumstances that are not subject to the registration of an amendment to the registered offshore loan under Circular 03, Circular 12 has also introduced some new circumstances in which the borrower's notifications of any change to the SBV via the SBV portal¹ or the account bank (where relevant) are sufficient, as follows:

- Change to the registered repayment schedules of interest and fee but there is **no change** to the principle or method of determining this interest and fee.
- Change (increase or decrease) to the amount of drawdown, principal repayment, interest repayment or fee repayment within **100 currency units** of the foreign loan currency, as compared with the corresponding content as previously certified by the SBV.
- Change to the actual amount of drawdown; principal repayment in a particular period that is **less** than the amount on the registered schedule.

Nonetheless, the borrower is still required to register the drawdown/repayment schedule with the SBV for the remaining amount of that period.

2. Inclusion of security measures other than guarantees

The scope of security measures currently under Circular 03 refers to guarantees ("bảo lãnh" in Vietnamese) only. Circular 12 has amended most references of "guarantee" in Circular 03 to "security" ("bảo đảm" in Vietnamese). As such, the scope of security measures relating to offshore loans has been expanded to include not only guarantees but also other security measures available under the law, which may help avoid unnecessary confusion (both linguistically and legally).

3. Account bank and supporting security bank

(i) The responsibilities of account bank (i.e., bank providing account services) are the following:

- Provide account services for offshore loan transactions (withdrawal of loan proceeds, debt repayment, fee payment, money transfer relating to security of offshore loans, etc.) based on the documents listed in Article 45.1 of Circular 12 (e.g., approval of the SBV, loan agreements, etc.)
- Inspect and check the consistency between the transfer requests and the documents presented by the borrower and the related parties to ensure that remittance transactions relating to offshore loans are consistent with the SBV's approvals, loan agreements and other relevant arrangements and in accordance with the regulations on foreign exchange management
- Provide the borrower's accurate information on the offshore loans (e.g., drawdown or repayment schedules, information on loan agreements, etc.) in the written confirmation of the status of offshore loans that is issued at the request of the borrower or the competent authority.

(ii) Supporting security bank ("ngân hàng phục vụ giao dịch bảo đảm" in Vietnamese)

- For the first time, Circular 12 has introduced a new concept of "supporting security bank" (i.e., bank supporting security transactions) that can be a credit institution or a foreign bank branch that is operating within the territory of Vietnam and provides services of remitting the proceeds resulting from the performance of guarantee obligations or the security enforcement with respect to the offshore loans.
- The transfer of money to perform the security obligations (i.e., the security enforcement proceeds and/or guarantee payment) must be made through one supporting security bank only.
- The responsibilities of supporting security bank are as follows:
 - Provide remittance services for the purpose of performing security obligations
 - Check and archive documents when providing remittance services for the purpose of performing the security obligations
 - Provide accurate information on the remittance for the performance of the security obligations at the request of the competent authority, the borrower or the borrower's account bank.

(iii) The process between the account bank and security supporting bank

¹ Access at sbv.gov.vn or <http://www qlnh-sbv.cic.org.vn>.

In case the supporting security bank is not an account bank for the purpose of the offshore loans, when transferring money to perform security obligations, the supporting security bank will have the following responsibilities:

- Examine and keep documents, and transfer money based on documents listed in Circular 12
- Notify and send to the account bank the documents proving the debt amount (principal, interest, and/or fee) paid to the creditor through the performance of security obligations within seven working days from the date of the money transfer to perform the security obligations.

4. Overseas remittance process in relation to the offshore loans

- (i) Under Circular 12, withdrawal and repayment of an offshore loan can only be made through "offshore borrowing and offshore debt repayment account(s)" (offshore loan account(s)) opened at one account bank. The borrower may use one offshore loan account for one or multiple offshore loans.
- (ii) A foreign-invested enterprise may choose to use a direct investment capital account (DICA) for the purpose of receipts and expenditures, with respect to the medium or long-term offshore loan(s). A DICA can be utilized by the borrower for the same purpose, regarding the short-term loan(s) in addition to its current offshore loan account(s).

Note: For short-term loans with the outstanding principal at the first year anniversary date from the first loan drawdown date, provided that the borrower will make repayment within 30 working days from the anniversary date, the borrower will have to repay the loan via the same offshore loan account used for the loan drawdown.

- (iii) Circular 12 also sets forth certain purposes for which the withdrawal or repayment of the offshore loans by the borrower is not required to be conducted via the offshore loan account ("**Exempted Purposes**"), particularly as follows:

Activity	Exempted Purposes	Note
Withdrawal of the offshore loan proceeds	<ul style="list-style-type: none"> • Direct payment to the offshore service/goods provider • Loans in a form of a financial lease • Drawdown via an offshore account of the borrower, in case it is allowed to open the account overseas • Offset against payment obligations between the borrower and the lender • Conversion of the advanced monies for the new project/company set up in Vietnam into an offshore loan. 	If the withdrawal and/or repayment is not made via the offshore loan account to serve any of the Exempted Purposes, the borrower will have to inform the account bank of the withdrawal and/or repayment evidenced by supporting documents within five working days from the date of the withdrawal and/or repayment.
Repayment of the offshore loan	<ul style="list-style-type: none"> • Payment in the form of the provision of goods/services to the lender • Conversion of loans into equity • Offset against payment obligations • Payment via the offshore account of the borrower in case it is allowed to open the account overseas. 	

- (iv) The borrower can only withdraw and repay the offshore loan after the loan is registered with the SBV, except in the following cases:

- Withdrawal of loan proceeds and partial repayment of the principal and interest in the first year of the short-term offshore loans.

Note: *If the term of the short-term loan is extended after one year from the first drawdown date, withdrawal and/or repayment of the loan (including principal and interest) is subject to the successful registration of the loan with the SBV, unless the loan repayment is fulfilled within 30 working days of the expiry of one-year of the term from the first utilization date.*

- Conversion of the advanced monies for the investment preparation into an offshore loan.
- (v) If the receipt of the loan proceeds and/or payment of principal and interest is made by the borrower via an account of a non-resident third party other than the lender (in case of a bilateral loan) or the facility agent or paying agent (in case of a syndication loan), this use of the account must be agreed in the loan agreements and registered with the SBV (if the loan is subject to the SBV registration).

5. Other issues relating to the indebtedness amount between the borrower to the securing party

- (i) Interest rate applicable to the indebtedness amount ("khoản nhận nợ" in Vietnamese):
- If the borrower and the onshore securing party have an agreement on the interest and fee on the indebtedness amount, the interest and fee shall observe the prevailing regulations of the Civil Code.² For example, in case the onshore securing party is a non-credit institution, the interest rate applicable to the indebtedness amount payable by the borrower should not exceed the ceiling rate of 20% p.a. under the Civil Code.
 - In case the securing party is an offshore entity, the interest rate and fee applicable to the indebtedness amount must not be higher than the late payment interest rate as set forth in the secured offshore loan agreement.
- (ii) The borrower can make the payment, via its offshore loan account, to the securing party by way of submission of the following documents to the account bank:
- Offshore loan agreement and relevant security/guarantee agreements
 - Agreement on the reimbursement of the indebtedness amount payable by the borrower to the securing party
 - Documents evidencing that the securing party has performed its security obligations in relation to the offshore loan
 - Other documents if required by the account bank.

² Civil Code No 91/2015/QH13 issued by the National Assembly of Vietnam on 24 December 2015 ("Civil Code").

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