

# Legal Update

August 2023



## NEW LENDING RULES AFFECTING INVESTORS' FUNDING PLANS

At the end of June 2023 the State Bank of Vietnam (“**SBV**”) released Circular 06/2023/TT-NHNN dated 28 June 2023 (“**Circular 06**”) amending Circular 39/2016/TT-NHNN dated 30 December 2016 (“**Circular 39**”) on lending activities of credit institutions and branches of foreign banks in Vietnam and Circular 08/2023/TT-NHNN dated 30 June 2023 (“**Circular 08**”) on conditions for non-government guaranteed cross-border foreign loans, which replaces Circular 12/2014/TT-NHNN dated 31 March 2014 (“**Circular 12**”) on the same.

Circular 08 came into effect on 15 August 2023 and Circular 06 which comes into effect on 1 September 2023, will directly and materially impact investors' funding plans for projects and business initiatives in Vietnam. We set out the salient points of Circular 08 and Circular 06 as follows:

### 1. Funding for capital contribution or acquisition of shares in target companies (i.e., for a M&A transaction)

- While debt financing (i.e., onshore and offshore loans from banks and shareholders) has been the preferred funding mechanism widely utilized by investors to acquire or subscribe for shares/equity in target companies in Vietnam, Circular 06 and Circular 08 will radically alter and narrow the availability of these funding options:
  - (a) Onshore bank loans are no longer permitted:
 

Circular 06 stipulates that credit institutions are no longer permitted to provide loans to customers for the purpose of:

    - (i) contributing capital, purchasing capital contribution in a limited liability company or partnership company; or
    - (ii) subscribing to new shares or purchasing shares in a joint stock company that is unlisted or unregistered with UPCOM.

The limitations under Circular 06 serve as a clear indication that the SBV aims to reinforce equity capital into the core business instead of facilitating debt financing for financial investment, under which the real estate business is believed to be the most affected sector.

- (b) It remains unclear whether foreign loans are permitted for this purpose:

Previously, Circular 12 did not specify whether it was permitted for a borrower of a foreign loan to utilize the loan for capital contribution or as consideration for the acquisition of shares in a target company. From a practical perspective, however, approvals would ordinarily be granted on a case-by-case basis. Specifically, Circular 12 provides that medium to long-term foreign loans are permitted for the implementation of the “business plan” or “investment project” of the borrower or its direct subsidiary, and we have in previous transactions, observed the use of such funds for the contribution or acquisition of shares in target companies in practice.

Similarly, Circular 08 does not explicitly state the permissibility of using a foreign loan for capital investment as investors had been looking forward to such clarification being provided. It does, however, broaden the use of foreign loans, namely to be utilized for other projects that are within the legitimate operational activities of the borrower. The broad terminology of “other projects” leaves some discretion for the SBV to assess the loan-usage plan (e.g., for capital contribution or payment for acquisition of shares by the borrower) on a case-by-case basis. Investors are advised to adopt a prudent approach in seeking further clarification with the SBV given that onshore lending for this purpose is expressly prohibited. In other words, the SBV might take a more restrictive view with cross-border loans intended for this purpose in line with onshore loan approach.

## 2. Funding for refinancing cross-border debt

- Companies are still able to borrow money from either overseas or onshore credit institutions to repay their outstanding cross-border debts, subject to the same conditions as before, though further elaboration is provided under the new regulations. Particularly,
  - (a) Borrowing from overseas lenders:

Where previously prohibited, Circular 08 now permits borrowers to use short-term loans to refinance their outstanding cross-border loans incurred during their operations. That said, however, it is prudent to seek clarification from the SBV on the permitted scope and implementing procedures as Circular 08 does not specify such details.

Additionally, under current regulations, companies must ensure that the lending expenses, including interests and costs of the new cross-border loan, do not exceed those of the current foreign loan that is to be restructured. Circular 08 now provides more flexibility for budgeting of the new loan wherein the total permissible expenses may include the outstanding principal, interest, outstanding expenses, and new expenses incurred for obtaining the new loan. Upon drawdown date of the new loan, companies must utilize the disbursed loan to pay off their current debt within five (5) business days.
  - (b) Borrowing from onshore credit institutions:

Circular 06 provides a more liberalized approach by allowing companies to borrow in order to repay cross-border debt that has not yet matured or that has not been previously restructured without the requirement that such current debt must have been for business purposes as previously required, subject to the condition that the new onshore loan must not extend the term of the current debt. This requirement is indicative of the SBV’s discouragement of the practice of using alternative funding sources for the purpose of extending the term of an existing outstanding loan.

## 3. New limitations imposed on loan utilization purposes

- Under the new lending rules, investors now face more restrictions on the possible loan utilization purposes.
  - (a) Cross-border loans
    - (i) A borrower is no longer permitted to obtain offshore loans for its subsidiary’s use in operations or project implementation;
    - (ii) A short-term loan may only be used by a borrower to repay its outstanding foreign debt or short-term payables incurred during its business operations and determined in accordance with accounting standards under relevant regulations.
    - (iii) Medium and long-term loans are limited to three purposes only: (A) to implement the borrower’s licensed projects, (B) to implement the borrower’s business plan and other projects, and (C) to refinance the borrower’s outstanding foreign debt.
  - (b) Onshore loans from credit institutions
- Circular 06 now prohibits loans that are to be used for the following purposes:
  - (i) used to make a deposit at a credit institution;
  - (ii) for contributing capital under a capital contribution contract or a business cooperation contract for the implementation of an investment project that is not yet qualified for business;
  - (iii) for financial reimbursement. Exceptions are however made for the loans that meet the following conditions:

- (A) the borrower has used their own capital to fund and pay for its project implementation and these expenses had been incurred less than 12 months prior to the date the loan is granted; and
- (B) the advanced payment made for the borrower's business activities includes the borrower's own funds and the loan granted by a credit institution under a loan use plan that has been submitted to and evaluated by such credit institution for a medium and long term loan for such business activities.

#### 4. Loan currency

- Both Circular 8 and Circular 6 provide more flexibility for lenders and borrowers to structure the loan currency.
  - (a) An onshore loan from a credit institution may be repaid in the same currency of the loan, or in a different currency as agreed between the borrower and lender.
  - (b) For the first time, cross-border loans may be denominated in VND. Its disbursement and repayment, however, must still be in a foreign currency. Further guidance to execute this new rule will be promulgated, but this development in the rules will afford the parties more flexibility to structure their loan repayment plan.

#### 5. Transition

- Investors had until 15 August 2023 to sign cross-border loan agreements and will have until 1 September 2023 for credit facility agreement with credit institutions so that their relevant loans would fall under the purview of Circular 12 and Circular 39. After these dates, any new loan agreement or amendment to existing loan agreement would be subject to the new rules under Circular 08 and Circular 06.

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