

Rödl & Partner

CLIENT ALERT VIETNAM

MANAGING CHANGE

Issue:

August 2019

NEW REGULATIONS ON FOREIGN EXCHANGE
CONTROL

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New regulations on foreign exchange control of foreign direct investment activities in Vietnam

On June 26, 2019, the State Bank of Vietnam has promulgated Circular 06/2019/TT-NHNN providing guidance on foreign exchange control of foreign direct investment activities (“FDI”) in Vietnam (“CIRCULAR 06”). Circular 06 shall take effect as of 6 September 2019 and supersede Circular 19/2014/TT-NHNN of the State Bank of Vietnam dated August 11, 2014 (“CIRCULAR 19”).

Circular 06 provides guidance on foreign exchange control of foreign direct investment in Vietnam to be in line with the Foreign Exchange Ordinance No. 28/2005/PL-UBTVQH11 dated 13 December 2005, with Ordinance No. 06/2013/UBTVQH13 amending and supplementing a number of articles of the Ordinance on foreign exchange control dated December 13, 2013 (“FOREIGN EXCHANGE ORDINANCE”), with Decree No. 70/2014/ND-CP dated July 17, 2014 providing detailed guidance on Foreign Exchange Ordinance (“DECREE 70”) and with the Law on Investment of 2014.

In comparison with CIRCULAR 19, CIRCULAR 06 has brought about a number of noticeable changes as follows:

A MORE SPECIFIC DEFINITION OF FOREIGN INVESTED ENTERPRISES

CIRCULAR 06 provides a more specific definition of foreign investors and foreign invested enterprises, and it narrows down the kinds of entities required to open a Direct Investment Capital Account (“DICA”) in Vietnam.

CIRCULAR 19 stipulates that “foreign investors” does comprise non-residents being organizations and individuals conducting FDI activities in Vietnam in the form of direct investment as stipulated in the current Investment Law. As the Law on Investment does neither provide a definition of “non-residents” nor of “direct investment”, we might get confused upon actually determining a foreign investor. As per CIRCULAR 19, a foreigner residing in Vietnam shall not be considered as a foreign investor, while in fact he/she is still treated as a foreign investor as per the Investment Law. CIRCULAR 06 fixes these issues by stipulating that “foreign investors” does include individuals of foreign nationality and

organizations established under the foreign laws conducting FDI activities in Vietnam.

Regarding the definition of foreign invested enterprises, CIRCULAR 19 states that a foreign invested enterprise (“FIE”) is an enterprise in which a foreign investor participates by contributing capital for the establishment and the management of the enterprise to conduct investment activities in Vietnam. CIRCULAR 06 gives a more specific definition of an FIE and narrows down the scope of this term as follows:

An FIE is defined as:

- a. an enterprise which is established under the form of investment to establish an economic organization with a foreign investor being a member or shareholder, and which must carry out procedures for the issuance of the Investment Registration Certificate (“IRC”) in accordance with the Law on Investment;
- b. an enterprise which is not covered by the definition as specified under (a), but having 51 per cent or more of its charter capital held by a foreign investor(s), including: (b.1) an enterprise with the capital contribution or purchase of shares or portion of capital contribution being held by a foreign investor(s) (operating with conditional business lines or without conditions applicable to foreign investors) leading to 51 per cent or more of its charter capital being held by a foreign investor(s); (b.2) an enterprise which is established after a separation, consolidation or merger resulting in 51 % or more of its charter capital being held by a foreign investor(s); (b.3) newly established enterprises in accordance with the specialized laws.

CIRCULAR 06 clearly excludes a number of foreign-owned enterprises which are not subject to the investment registration procedures as stipulated by the Investment Law with regard to the scope of FIE (i.e.: a local company with less than 51 per cent of its capital contribution being acquired by a foreign investor). Except for FIE as defined by CIRCULAR 06 above, other foreign-owned enterprises shall not be required to open a DICA for their investment activities in Vietnam.

CAPITAL INJECTION INTO VIETNAM FOR PRE-INVESTMENT

CIRCULAR 06 allows for foreign investors to inject capital into Vietnam to cover expenses during the pre-investment stage directly from overseas, instead of requiring the foreign investors to inject money via an indirect capital account in Vietnam as stipulated in CIRCULAR 19.

Pursuant to CIRCULAR 19, capital transfers for the investment preparation phase had to be made in accordance with a written agreement between the parties involved, and via such foreign investor's foreign currency payment account opened at an authorized Vietnamese bank. This caused many obstacles for the investor and proved to be a very time-consuming matter, as the investors were required to prepare a lot of documents in order to open an indirect investment bank account in Vietnam. Expenses paid by the foreign investors directly to the suppliers in Vietnam may not be considered as investment capital or deductible expenses though, so that the parties shall experience difficulties upon repayment.

However, CIRCULAR 06 allows for foreign investors to transfer money from overseas or from their foreign currency or Vietnam Dong payment account opened at an authorized bank in Vietnam

PAYMENTS FOR THE SALE AND PURCHASE OF INVESTMENT CAPITAL

CIRCULAR 06 provides clear regulations on the payment for the sale and purchase of investment capital upon the transfer of investment projects, including the bank account to be used, the agreed currency as well as on the payment in the transfer transactions.

In particular, the payment for the purchase of shares/capital contribution amounts between the investors all being non-residents, or between the investors all being residents shall not be made via a DICA. Only payments for the purchase of shares/capital contribution amounts between an investor being a non-resident and an investor being a resident are required to be made via a DICA.

CIRCULAR 06 also stipulates that quotations and payments for the contract price in capital transfers or the transfer of investment projects between non-residents may be agreed in foreign currency. Otherwise, the parties must agree and pay the contract price in Vietnam Dongs.

to pay for the lawful expenses during the investment preparation phase. The foreign investors are no longer required to open a bank account to serve for the pre-investment, but may directly transfer the money from overseas to cover all expenses. Besides, if the investors already had a foreign currency or Vietnam Dong payment account, they will be entitled to use these accounts to inject capital for the pre-investment.

CIRCULAR 06 clearly states that after the issuance of an investment registration certificate ("IRC"), the whole sum or a part of the capital which has been transferred into Vietnam by the foreign investors for pre-investment may:

- a. be converted into capital contribution or
- b. be converted into foreign loan capital or
- c. be paid back in total to the foreign investors in foreign currency or Vietnam Dong.

In case the foreign investor is not granted with an IRC or other required licenses, or in case the investment in Vietnam cannot be realized for some other reason, the foreign investor is entitled to transfer the remaining amounts in foreign currency, or to purchase foreign currency for an overseas remittance of the money that has been transferred into Vietnam, plus the interest (if any) after deduction of any proper expenses for the pre-establishment stage.

TRANSITIONAL REGULATIONS FOR CURRENT INVESTMENTS

Enterprises and foreign investors being non-residents and owning shares or portions of capital contribution in enterprises that opened and used a bank account in accordance with the regulations of CIRCULAR 19, must carry out an account conversion compliant to the regulations of CIRCULAR 06 within 12 months as of September 6, 2019 at the latest.

To be more specific, the conversion of bank accounts must comply with the following instructions:

- a. In case an enterprise has a foreign investor(s) who opened and used an indirect investment capital account ("ICA") to contribute capital, to buy shares or a portion of capital contribution in the enterprise resulting in 51 per cent or more of its charter capital being held by the foreign investor(s), the foreign investor(s) must open a DICA.

b. The enterprise that opened a DICA has to close this account, while at the same time, foreign investor(s) being non-resident and owning shares or a portion of capital contribution in such enterprise must open an IICA in the following cases: (b.1) The enterprise has 51 % or more of its charter capital held by the foreign investor(s), except in case the enterprise has been established under the form of investment to establish an economic organisation, with the foreign investor being a member or shareholder, and it needs to carry out procedures for the issuance of the IRC in accordance with the Law on Investment; (b.2) the enterprise did not have to carry out the procedures for the issuance of an IRC, but did nonetheless apply for and has been granted the IRC by the competent authority; (b.3) the FDI enterprise has stocks listed on the stock exchange or registered for trading on the stock

exchange; (b.4) If an enterprise meeting the specifications in (b.1), (b.2) and (b.3) above is carrying out the borrowing and repayment of foreign loans through a DICA, it may maintain this account for the borrowing and repayment of foreign loans in accordance with the Law on borrowing and repayment of foreign loans of enterprises.

During the time of conversion, enterprises and foreign investors being non-residents and owning shares or a portion of capital contribution in such enterprises may continue to use the existing capital accounts to perform the revenue and disbursement transactions related to the investment activities in Vietnam.

Rödl & Partner Vietnam is happy to accompany and assist clients in their business activities in Vietnam.

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