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CLIENT ALERT VIETNAM

MANAGING CHANGE

Issue:  
April 2019

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- Regulations on foreign exchange management with regard to FDI activities

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### Regulations on foreign exchange management with regard to FDI activities

#### Current regulations under Circular 19/2014/TT-NHNN and the related entanglements

##### CIRCULAR 19/2014/TT-NHNN

Circular 19/2014/TT-NHNN of the State Bank of Vietnam dated 11 August 2014 provides guidance on foreign exchange management for foreign direct investment (FDI) in Vietnam (Circular 19). The Circular entered into effect as of 25<sup>th</sup> September 2014.

Focusing on FDI activities in Vietnam, Circular 19 in particular comprises provisions on investment capital, opening and using of direct investment capital accounts (DICA) in foreign currency and in Vietnam dong; overseas remittance of capital, profit and other lawful income; and the transfer of investment capital for the pre-investment phase.

Besides Circular 19, a second circular - Circular 05/2014/TT-NHNN - covering the opening and using of indirect investment capital accounts (IICA) and foreign indirect investment (FII) activities in Vietnam has been issued 12<sup>th</sup> March 2014.

##### ENTANGLEMENTS OCCURRED UPON THE IMPLEMENTATION OF CIRCULAR 19

Within the four years since its implementation in 2014, Circular 19 has revealed a number of entanglements and insufficiencies, causing numerous challenges for foreign investors (FI) and foreign invested enterprises in Vietnam (FIE), as well as confusion on the part of commercial banks upon handling transactions related to FDI - resulting in a delay in capital transactions and increased expenses for FI and FIE.

##### DEFINITION OF FORM OF INVESTMENT AND FORM OF FIE

The Foreign Exchange Ordinance, its guidance decrees and this Circular 19 provide specific

definitions with regard to “foreign direct investment” (FDI), “foreign indirect investment” (FII), “foreign direct invested capital enterprise” (FDIE), “direct investment capital account” (DICA) and “indirect investment capital account” (IICA). These definitions, however, are not part of the current Law on Investment (which has been enacted later, on 26<sup>th</sup> November 2014). This Law only identifies “investment” in general and “economic organizations having foreign invested capital”.

This inconsistency in defining the form of investment results in major difficulties for FIs, FIEs and commercial banks upon determining the actual form of foreign investment (direct or indirect) as well as the correct capital account (DICA or IICA) to be used with such foreign investment.

##### CAPITAL TRANSACTIONS VIA BANK ACCOUNTS

Due to the difficulties in defining the form of foreign investment as described above, the FI, related enterprises and commercial banks see themselves confronted with the challenge to determine which bank account to be used for the respective capital transactions, e.g. the capital transactions between the non-residents among each other, between non-resident and resident (and vice versa) in Vietnamese enterprises.

##### CAPITAL INJECTION INTO VIETNAM FOR PRE-INVESTMENT

Prior to be granted an Investment Registration Certificate and an Enterprise Registration Certificate, the FI may need to arrange payments in favor of suppliers in Vietnam for land/premise lease, other expenditures for services and equipment, labor, etc. Circular 19 provided for such transactions only to be effected via a bank account opened by the FI with an authorized bank in Vietnam. This provision caused an increase in expenses and a delay in investment into Vietnam for FIs. Further obstacles occurred upon return transfers/reimbursements on behalf of the FIs.

The unclear and improper regulations under Circular 19 have caused numerous difficulties to foreign investors as well as to the foreign invested enterprises upon their investment in Vietnam.

## DRAFT CIRCULAR – AN ORIENTATION TO REDUCE ENTANGLEMENTS AND INCONSISTENCIES

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Recently, the State Bank of Vietnam released its draft circular (Draft Circular), which is supposed to amend and supplement a number of articles of Circular 19, in order to resolve the current entanglements, to provide clearer regulations and to ensure overall consistency with the investment laws.

### FORM OF FOREIGN DIRECT INVESTMENT ENTERPRISES (FDI ENTERPRISES)

Article 3 of the Draft Circular provides a clearer definition of FDI enterprises which is in line with the applicable Law on Investment, comprising:

- (i) Economic organizations having members or shareholders being foreign investors who are subject to Investment Registration Certification;
- (ii) Economic organizations having foreign investors who contribute capital or purchase shares or a capital participation, which are operating in an industry or trade in which investment and business are subject to the regulations for foreign investment;
- (iii) Economic organizations having foreign investors who contribute capital or purchase shares or a capital participation, resulting in such foreign investor holding 51 % or more subscribed capital of the economic organization;
- (iv) Project enterprises established by foreign investors for implementing a PPP project in accordance with the law on investment.

### WHO IS REQUIRED TO OPEN AND USE A DICA

According to the Draft Circular, the following business ventures are required to open and use a DICA for their financial transactions:

- (i) FDI Enterprises as defined under Article 3 of the Draft Circular;
- (ii) Foreign investors participating in BCC contracts;
- (iii) Foreign investors directly implementing a PPP project.

## GENERAL PRINCIPLES FOR FOREIGN EXCHANGE CONTROL APPLIED TO FOREIGN INVESTMENT ACTIVITIES

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- (i) Foreign investors are entitled to transfer cash from overseas into Vietnam for pre-investment activities.
- (ii) For foreign direct investment in Vietnam, the business ventures as specified above have to open a DICA in foreign currency at one authorized bank. All transactions of money receipts or payments in relation to foreign direct investment activities in Vietnam must be effected via such DICAs, with exception of some specific cases of capital transactions:
  - Capital transactions between non-residents shall not be effectuated via DICA;
  - Capital transactions in an economic organization other than those described above.

### PRE-INVESTMENT ACTIVITIES

The Draft Circular provides a specific regulation to prevent a loss of control with regard to transactions of FI during the pre-investment period. Accordingly, FI are entitled to either transfer cash from overseas or from their bank account at an authorized bank in Vietnam into bank accounts of the suppliers or competent authorities for their pre-investment activities, in accordance with written agreements between the relevant parties.

### BANK ACCOUNTS AND CURRENCIES USED IN CAPITAL TRANSACTIONS

The Draft Circular provides clearer regulations on bank accounts and currencies to be used in capital transactions.

- (i) Bank account:
  - Capital transactions between 2 non-residents or between 2 residents are not required to be effected via DICA.
  - Capital transactions between a non-resident and a resident (or vice versa) are required to be effected via DICA.
  - Capital transactions, the acquisition of shares/capital participation in economic enterprises not classified as FDI Enterprises shall be made via IICA.

(ii) Currency:

- capital transactions, the acquisition of shares/capital participation in economic enterprises between 2 non-residents are entitled to be effected in foreign currency.
- capital transactions, the acquisition of shares/capital participation in economic enterprises between non-resident and resident have to be effected in VND in accordance with the regulations on the restriction with regard to the utilization of foreign exchange in the territory.

So far, the current Draft Circular still contains some inconsistent regulations which are currently being evaluated and discussed by the competent experts, while the draft has not yet been ratified. It reflects the mindset of the State Bank of Vietnam on the solution of the related matters. During the validity of Circular 19, it shall be subject to the evaluation of the respective commercial banks to handle the capital transactions, and the FIEs in Vietnam may seek advice from the State Bank of Vietnam with regard to unclear regulations.

Once the Draft Circular has been approved, it may reduce a number of burdens in relation to FDI in Vietnam.

Rödl & Partner Vietnam accompanies and assists clients of all kinds in their business activities in Vietnam.

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## Imprint

Client Alert Vietnam | April 2019

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