

# Legal news

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## INVESTMENT LAW

### What does Circular 05 mean for foreign investors in Vietnam?

*Luu Tien Ngoc*

The SBV issued Circular 05/2014/TT-NHNN on March 12 guiding the opening and use of foreign indirect investment accounts for foreign indirect investment in Vietnam. Circular 05 will take effect on April 28 this year and will replace Circular 03/2004/TT-NHNN guiding the foreign exchange management in terms of capital contributions and share purchases by foreign investors in Vietnamese companies.

In brief, the new State Bank of Vietnam (SBV) circular demands that all capital-related transactions in relation to foreign indirect investment (FII) activities regardless of the time active in the country must be made through a FII Account with a bank licensed to operate in transactions governing FII activities in Vietnam.

With respect to an existing foreign investor in Vietnam, its account for capital contribution, and share purchase in VND which was opened under the previously enforced Circular 03, must be re-named as an FII Account in VND which will be opened by the foreign investor according to Circular 05 over a transitional period of 90 days from April 28, 2014. Failure to fulfil this will bar the investor from FII activities in Vietnam.

The foreign investor will also be forced to convert all financial balances into VND and then transfer them all to the FII Account. If the investor again fails to complete this within 90 days of the implementation of the new decree then they shall no longer be able to continue FII activities in Vietnam, be forced to close existing accounts and transfer all balances in the now closed accounts out of Vietnam. In such case, if the balances are in VND, they will be entitled to convert them into or buy relevant foreign currencies for the transfer out of Vietnam.

The transfer of any balance in a FII Account, to any other term-deposit or saving accounts that the foreign investor may have with any bank will also likely be prohibited.

Ultimately a foreign investor will only be entitled to have just a FII Account for all of its FII activities in Vietnam. If the foreign investor wants to change bank, it must close its old FII Account and open a new account with a licensed bank. A point of note is that under Circular 05, a foreign investor may have and maintain not only a FII Account serving for all of its FII activities, but also a foreign direct investment account (FDI Account), if it at the same time engages also in foreign direct investment (FDI) activities in Vietnam. While the use of the FII Account must comply with Circular 05, the use of the FDI Account will fall under legal guidance related to FDI activities in Vietnam. As far as we know, a draft circular regulating foreign exchange matters in respect to FDI activities in Vietnam, including the open and use of FDI Accounts, is still being drafted.

**Relevant points in need of clarification**

Foreign investors are obviously questioning what are the differences between FII and FDI activities and what criteria determines whether investment is considered as either FII or FDI, and when a foreign investor is considered as a FII investor (subject to Circular 05, and must use FII Account for its FII activities) or FDI investor. The other obvious question is what are the possible legal risks and consequences if for any reason, a foreign investor fails to comply with the requirements on the opening and use of the relevant accounts.

**FII and FDI?**

According to the Investment Law, indirect investment means a form of investment by way of purchasing of shares or share certificates whereby the investor does not participate in management of its investment activity. Direct investment means a form of investment whereby the investor invests its invested capital and does participate in management of its investment activity. It seems that the participation in management of its investment activity is the key criteria for differentiating indirect from direct investment, and FII from FDI.

According to Circular 05, the key point to identify FII activities is its participation in corporate administration and management. If a foreign investor invests in purchasing shares in a targeted company, and does not participate in the corporate governance of the targeted company, its investment will likely be considered as FII.

Setting aside the differentiation between FII from FDI set out in Circular 05 from that provided by the Investment Law, it is still unclear at this moment, what does participate in management of its investment activity or corporate administration and management actually mean? Hopefully, this will be soon clarified in relevant laws and regulations on foreign investment in Vietnam.

**FII Account or FDI Account?**

In the absence of a formal interpretation differentiating FII from FDI, it obviously won't be easy in most cases of purchasing shares in a targeted company, to identify whether the investment is FII or FDI. Consequently, it will clearly lead to confusion for foreign investors in the use of either a FII or FDI account, in their investment activities. Other questions arise such as does participation at a board level in a company after initial FII mean the foreign investor is participating in the management or corporate administration and management? Some others may wonder whether participate in management of its investment activity or corporate administration and management may require having certain management positions (such as CEO, CFO, etc.) in the company. If the answer to any circumstance is yes, then their investment will likely be considered as FDI, and then FDI Accounts must be used instead.

Pending a straight forward answer to such a basic question, confusion may arise as a foreign investor may have hold a board or management position in a company (then its investment may be considered as FDI), but it may not at a later date (then its investment may be turned into FII, in which case a FII Account may be required

instead). In such cases, how does the government propose the foreign investor change or switch accounts to be in compliance with the laws.

In respect of FDI Account, Circular 05 simply says that "foreign investors should open and use FDI Accounts, for their FDI activities in Vietnam, in compliance with the relevant foreign exchange regulations on FDI activities in Vietnam", if they maintain FDI activities in Vietnam. In our view, this may imply an obligation by foreign investors to open and use a FDI Account. If it is the case, our view is that this may provide better support for not only investors (who may better control their own capital through FDI Accounts opened by themselves), but also the banks and authorities. However, this may likely conflict with what is generally provided by ordinances related to foreign exchange, whereby FDI Accounts are opened and used (for the benefits of foreign investors) by the targeted companies, where the investment by foreign investors are considered as FDI. Hopefully, this will be soon clarified in the new circular.

### **Possible legal risks and consequences**

It seems under Circular 05 that if foreign investors fail to comply with the requirements on open and use of their FII Accounts for their FII activities in Vietnam, during and after the 90 day period, they may face foreign exchange-related problems with their investment and capital-related transactions in and from Vietnam./.

## **Other Sectors**

### **Finance**

- On 3 March 2014, the Government stipulated Decree No. 16/2014/ND-CP on the management of Vietnam's international settlement balance.
- Circular No. 11/2014/TT-NHNN dated 28 March 2014 of the State Bank of Vietnam providing for the carrying of gold by individuals on exit or entry.
- On 20 March 2014, the State Bank of Vietnam issued Circular No. 10/2014/TT-NHNN on the amendment and supplement to a number of accounts in the System of credit institutions' accounting accounts accompanying Decision No.479/2004/QD-NHNN dated 29 April 2004 of the Governor of State Bank.
- Circular No. 09/2014/TT-NHNN dated 18 March 2014 of the State Bank of Vietnam on the amendment and supplement to a number of articles of Circular No. 02/2013/TT-NHNN dated 21 January 2013 of the Governor of the State Bank providing for the classification of assets, extraction levels and methods for setting up risk provisions, and use of provisions against credit risks in the activities of credit institutions and foreign banks' branches.
- On 11 March 2014, the Ministry of Finance stipulated Circular No. 32/2014/TT-BTC on the amendment and supplement to a number of articles of Circular No.85/2011/TT-BTC dated 17 June 2011 of the Ministry of Finance providing guidelines for the process of organizing the co-ordination in collection of State Budget' revenues among the State Treasury, General Department of Taxation, General Department of Customs, and commercial banks.
- Circular No. 31/2014/TT-BTC dated 7 March 2014 of the Ministry of Finance providing guidelines for the sanctioning of administrative violations in the field of management of prices as stipulated in Decree No. 109/2013/ND-CP dated 24 September 2013 on the sanctioning of administrative violations in the fields of management of prices, charges, fees and invoices.

### **Banking**

- On 17 March 2014, the State Bank of Vietnam issued Decision No. 499/QD-NHNN on the maximum interest rates applicable to short-term loans in Vietnamese Dong provided by credit institutions and foreign banks' branches to borrowers in order to meet the demands for funds serving economic sectors and branches as prescribed in Circular No. 08/2014/TT-NHNN dated 17 March 2014.
- Decision No. 498/QD-NHNN dated 17 March 2014 of the State Bank of Vietnam on the maximum interest rates applicable to deposits in Vietnam Dong of organizations and individuals at credit institutions and foreign banks' branches in accordance with Circular No. 07/2014/TT-NHNN dated 17 March 2014.

- On 17 March 2014, the State Bank of Vietnam stipulated Decision No. 497/QD-NHNN on the maximum interest rates applicable to deposits in United-States Dollar of organizations and individuals at credit institutions and foreign banks' branches in accordance with Circular No. 06/2014/TT-NHNN dated 17 March 2014.
- Decision No. 496/QD-NHNN dated 17 March 2014 of the State Bank of Vietnam on refinancing interest rates, rediscount interest rates and interest rates applicable to overnight loans in the inter-bank electronic payments and loans for making up capital deficit in the clearing payments of State Bank of Vietnam regarding banks.
- On 31 March 2014, the State Bank of Vietnam issued Circular No. 12/2014/TT-NHNN providing for conditions for foreign loans of enterprises without Government guarantees.
- Circular No. 08/2014/TT-NHNN dated 17 March 2014 of the State Bank of Vietnam providing for the interest rates applicable to short-term loans in Vietnamese Dong provided by credit institutions to the customers in order to satisfy demands for funds serving a number of economic sectors and branches.
- On 17 March 2014, the State Bank of Vietnam stipulated Circular No.07/2014/TT-NHNN providing for the interest rates applicable to deposits in Vietnam Dong of organizations and individuals at credit institutions.
- Circular No. 06/2014/TT-NHNN dated 17 March 2014 of the State Bank of Vietnam providing for the maximum interest rates applicable to deposits in United-States Dollar of organizations and individuals at credit institutions.

## Taxation

- On 27 March 2014, the General Department of Taxation issued Decision No.329/QD-TCT on promulgating the Process of tax registration management.
- Circular No. 30/2014/TT-BTC dated 7 March 2014 of the Ministry of Finance amending and supplementing export tax rate and commodity code for calcium carbonate powder in the Export Tariff.

## Trade

- On 18 March 2014, the Government stipulated Resolution No. 19/NQ-CP on the main tasks and solutions to improve the business environment and to enhance the national competitiveness.
- Decision No. 1002/QD-TCHQ dated 28 March 2014 of the General Department of Customs promulgating the Regulation on collection, updating, management and application of information about violations of laws by persons who perform the exportation, importation, exit, entry or transit.

- On 28 March 2014, the General Department of Customs issued Decision No.988/QD-TCHQ promulgating the Process of E-customs procedures regarding commercial exported or imported goods.
- Decision No. 20/2014/QD-TTg dated 11 March 2014 of the Prime Minister on the establishment of Border-gate Economic Zone in Cao Bang Province.
- On 11 March 2014, the People's Committee of Hanoi stipulated Decision No.1396/QD-UBND approving Program on Development of E-commerce in the area of Hanoi in 2014.
- Decision No. 10/2014/QD-UBND dated 5 March 2014 of the People's Committee of Ho Chi Minh City promulgating the rates of fee for registration of secured transactions and provision of information about security transactions at the Registration Agency for Secured Transactions in the area of Ho Chi Minh City.
- On 3 March 2014, the Ministry of Industry and Trade issued Decision No.1694/QD-BCT announcing the List of expired legal documents, which have been solely or jointly issued by the Ministry of Industry and Trade.
- Circular No. 12/2014/TT-BCT dated 31 March 2014 of the Ministry of Industry and Trade providing for the calculation of average retail prices of electricity.
- On 24 March 2014, the Ministry of Industry and Trade stipulated Circular No.11/2014/TT-BCT providing for the control of administrative procedures under the State management of the Ministry of Industry and Trade.
- Circular No. 10/2014/TT-BCT dated 12 March 2014 of the Ministry of Industry and Trade providing for the implementation of the policies and mechanisms on trade promotion, market development, and industrial development in service of the development of national products.

## Labour

- On 28 March 2014, the Vietnam Social Insurance issued Decision No. 285/QD-BHXH providing for the Regulations on Process of editing, displaying and removing information on the website of the Vietnam Social Insurance.
- Circular No. 33/2014/TT-BTC dated 14 March 2014 of the Ministry of Finance providing guidelines for the implementation of seniority allowances and occupational preference allowances for employee working in the field of national reserve.
- On 6 March 2014, the Ministry of Labour, War Invalids and Social Affairs stipulated Circular No. 07/2014/TT-BLDTBXH promulgating 27 processes of occupational safety inspection for machinery, equipment and supplies subject to strict occupational safety requirements under the responsibility of the Ministry of Labour, War Invalids and Social Affairs.

- Circular No. 06/2014/TT-BLDTBXH dated 6 March 2014 of the Ministry of Labour, War Invalids and Social Affairs providing for the activities of Technical occupational safety inspection for machinery, equipment and supplies subject to strict occupational safety requirements under the responsibility of the Ministry of Labour, War Invalids and Social Affairs.
- On 6 March 2014, the Ministry of Labour, War Invalids and Social Affairs issued Circular No. 05/2014/TT-BLDTBXH promulgating the list of machines, equipment, and supplies subject to strict occupational safety requirements.

## Health

- Decision No. 1326/QD-UBND dated 19 March 2014 of the People's Committee of Ho Chi Minh City announcing the newly-issued, amended, supplemented or annulled administrative procedures under the settlement authority of the Department of Health of Ho Chi Minh City.
- On 11 March 2014, the Prime Minister stipulated Decision No. 362/QD-TTg approving the Scheme on Investment in building and upgrading a system of nationwide traditional medicine hospitals for the period from 2014 to 2025.
- Circular No. 12/2014/TT-BYT dated 21 March 2014 of the Ministry of Health providing guidelines for the management and use of vaccines in immunization.

## Education

- On 24 March 2014, the Government issued Decree No. 20/2014/ND-CP on the educational popularization and eradication of illiteracy.
- Decision No. 1021/QD-BGDDT dated 24 March 2014 of the Ministry of Education and Training announcing the amended and supplemented administrative procedures within the scope of management function of the Ministry of Education and Training.
- On 24 March 2014, the Ministry of Education and Training stipulated Decision No. 1020/QD-BGDDT announcing the List of expired legal documents in the field of education, which were issued from 2008 to 2012.
- Decision No. 976/QD-BGDDT dated 20 March 2014 of the Ministry of Education and Training approving the Program and documents on corruption prevention and combat in training at the professional intermediate level.
- On 25 March 2014, the Ministry of Education and Training issued Circular No.09/2014/TT-BGDDT on the amendment and supplement to a number of articles of the Regulation on high-school final examinations accompanying Circular No. 10/2012/TT-BGDDT dated 6 March 2012 as amended and supplemented by Circular No. 04/2013/TT-BGDDT dated 21 February 2013 and



Circular No. 06/2013/TT-BGDDT dated 1 March 2013 of the Minister of Education and Training.

- Circular No. 08/2014/TT-BGDDT dated 20 March 2014 of the Ministry of Education and Training promulgating the Regulation on organization and operation of regional universities and their members being higher education institutions.
- On 11 March 2014, the Ministry of Education and Training stipulated Circular No. 06/2014/TT-BGDDT on the amendment and supplement to a number of articles of the Regulation on the admission of universities, colleges and junior colleges in the form of regular training accompanying Circular No. 09/2012/TT-BGDDT dated 5 March 2012 of the Minister of Education and Training as amended and supplemented by Circular No. 24/2012/TT-BGDDT dated 29 June 2012, Circular No. 03/2013/TT-BGDDT dated 20 February 2013, Circular No.21/2013/TT-BGDDT dated 18 June 2013, Circular No. 24/2013/TT-BGDDT dated 4 July 2013 and Circular No. 28/2013/TT-GDDT dated 16 July 2013 of the Minister of Education and Training.

## **Transport**

- Decision No. 601/QD-BTC dated 26 March 2014 of the Ministry of Finance correcting Circular No. 19/2014/TT-BTC dated 11 February 2014 of the Ministry of Finance providing the procedures for temporary import for re-export, destruction and assignment of cars and motorcycles of persons entitled to tax privileges and immunities in Vietnam.
- On 26 March 2014, the Ministry of Transport issued Decision No. 858/QD-BGTVT promulgating the Guidelines for the application of the system of current technical standards in order to enhance the quality management of design and construction of hot asphalt road routes for large-scale automobile roads.
- Decision No. 318/QD-TTg dated 4 March 2014 of the Government approving the Strategy on development of transport services by 2020, with an orientation to 2030.
- On 10 March 2014, the Ministry of Transport stipulated Circular No.03/2014/TT-BGTVT providing for the test flights, system calibrations, navigation equipment, flight monitoring and methods for flight evaluation by equipment in the field of civil aviation.

## **Natural Resources - Environment**

- Decision No. 16/2014/QD-UBND dated 28 March 2014 of the People's Committee of Hanoi promulgating the Unit prices for the environmental monitoring and analysis in the area of Hanoi.

- On 27 March 2014, the Ministry of Natural Resources and Environment issued Decision No. 487/QD-BTNMT announcing the List of wholly or partly-expired legal documents under the State management of the Ministry of Natural Resources and Environment.
- Decision No. 25/2014/QD-TTg dated 25 March 2014 of the Prime Minister providing for the functions, tasks, powers and organizational structure of the General Department of Environment directly under the Ministry of Natural Resources and Environment.
- On 20 March 2014, the Government stipulated Decision No. 403/QD-TTg on the approval of the National action plan of green growth for the period from 2014 to 2020.
- Decision No. 1495/QD-UBND dated 18 March 2014 of the People's Committee of Hanoi on approving the Planning for system of greenery, parks, gardens and lakes of Hanoi in 2030, with an orientation to 2050.
- On 7 March 2014, the Prime Minister issued Decision No. 340/QD-TTg approving the Draft Protocol between the Government of Vietnam and the Government of the Grand Duchy of Luxembourg on the Project "Initiative and local development to adapt to the climate change".
- Decision No. 18/2014/QD-TTg dated 3 March 2014 of the Prime Minister amending and supplementing Article 3 of Decision No. 62/2004/QD-TTg dated 16 April 2004 on the credits to implement the National strategy for clean water supply and rural environment sanitation.
- On 26 March 2014, the Ministry of Agriculture and Rural Development stipulated Circular No. 09/2014/TT-BNNPTNT providing for a number of contents on strategic environmental assessments and environmental impact assessments managed by the Ministry of Agriculture and Rural Development.
- Circular No. 36/2014/TT-BTC dated 24 March 2014 of the Ministry of Finance providing for the collection rates and the regime on collection, submission, management and use of charges for evaluation of dossiers to issue Certificate of biosafety for genetically-modified crop plants.
- On 24 March 2014, the Ministry of Natural Resources and Environment issued Circular No. 15/2014/TT-BTNMT providing for the formulation and grant of letters of endorsement and letters of approval for projects under the clean development mechanism within the framework of the Kyoto Protocol.

## Construction - Land

- Decision No. 17/2014/QD-UBND dated 31 March 2014 of the People's Committee of Hanoi promulgating the price table of land types in the area of North Tu Liem and South Tu Liem Districts, replacing the price table of land in

the area of Tu Liem District accompanying Decision No.63/2013/QD-UBND of the People's Committee of Hanoi promulgating the prices of land types in Hanoi in 2014.

- On 31 March 2014, the People's Committee of Hanoi stipulated Decision No.1733/QD-UBND approving a residential housing support project for persons deserving well of the revolution in the area of Hanoi.
- Decision No. 1340/QD-UBND dated 20 March 2014 of the People's Committee of Ho Chi Minh City promulgating the Regulations on the management of urban general planning in accordance with the project on adjustment in construction general planning of Ho Chi Minh City up to 2025.
- On 17 March 2014, the People's Committee of Hanoi issued Decision No.1475/QD-UBND dated 17 March 2014 on the establishment of an interdisciplinary working group examining the management of residential housing fund for resettlement, and collection and submission of monies gained from sales and leases of residential housing for resettlement in the area of Hanoi.
- Decision No. 21/2014/QD-TTg dated 13 March 2014 of the Prime Minister providing for the functions, tasks, powers and organizational structure of the General Department of Land Management directly under the Ministry of Natural Resources and Environment.

### Information - Communications

- On 14 March 2014, the Government stipulated Decree No. 18/2014/ND-CP providing for the royalty regime in the field of journalism and publication.
- Decision No. 295/QD-BTTTT dated 21 March 2014 of the Ministry of Information and Communications promulgating the list of wholly or partly-expired legal documents under the State management of the Ministry of Information and Communications.
- On 3 March 2014, the Ministry of Information and Communications issued Decision No. 207/QD-BTTTT announcing the new administrative procedures within the scope of management function of the Ministry of Information and Communications.
- Circular No. 05/2014/TT-BTTTT dated 19 March 2014 of the Ministry of Information and Communications promulgating the List of products and goods potentially unsafe under the management responsibility of the Ministry of Information and Communications.
- On 19 March 2014, the Ministry of Information and Communications stipulated Circular No. 04/2014/TT-BTTTT detailing and providing guidelines for the implementation of a number of articles of Decree No. 88/2012/ND-CP dated 23 October 2012 on the information or press activities of the foreign press, foreign

representative agencies, and foreign organizations in Vietnam.

- Circular No. 03/2014/TT-BTTTT dated 11 March 2014 of the Ministry of Information and Communications providing for the standards of skills in using information technology.
- On 10 March 2014, the Ministry of Information and Communications issued Circular No. 02/2014/TT-BTTTT on promulgating the National technical regulations.

### **Administration - Judiciary**

- Decision No. 1728/QD-UBND dated 31 March 2014 of the People's Committee of Hanoi on the amendment and supplement to the tasks and responsibilities of the Office of the People's Committee of Hanoi, Department of Justice and other departments, divisions and branches as stipulated in Decision No. 1909/QD-UBND dated 8 May 2012 of the People's Committee of Hanoi.
- On 19 March 2014, the People's Committee of Hanoi stipulated Decision No.1503/QD-UBND on the amendment and supplement to Decision No.4548/QD-UBND dated 30 September 2011 of the Chairman of the People's Committee of Hanoi promulgating the Regulation on co-ordination in approaching and handling feedbacks and recommendations of individuals and organizations on administrative regulations within the scope of management functions of the People's Committee of Hanoi and the Chairman of the People's Committee of Hanoi.
- Decision No. 19/2014/QD-TTg dated 5 March 2014 of the Prime Minister on the application of quality management system according to the National standard ISO 9001:2008 in activities of the agencies and organizations of the State administrative system.
- On 21 March 2014, the Ministry of Finance issued Circular No. 35/2014/TT-BTC providing for the collection rates and the regime on collection, submission, management and use of charges for judicial expertise in the field of forensic mental health.
- Circular No. 34/2014/TT-BTC dated 21 March 2014 of the Ministry of Finance providing for the collection rates and the regime on collection, submission, management and use of charges for judicial expertise in the field of forensics.

### **Agriculture - Forestry - Fishery**

- On 21 March 2014, the Ministry of Agriculture and Rural Development stipulated Decision No. 517/QD-BNN-KHCN approving the list of Ministerial-level researches ordered in service of the restructure of the Agriculture and Rural Development branch.

- Decision No. 352/QD-BNN-TCCB dated 3 March 2014 of the Ministry of Agriculture and Rural Development on the adjustment in and supplement to tasks and organizational structure of the National Institute of Animal Sciences.
- On 20 March 2014, the Ministry of Agriculture and Rural Development issued Circular No. 08/2014/TT-BNNPTNT providing guidelines for the implementation of a number of articles of Decision No. 68/2013/QD-TTg dated 14 November 2013 of the Prime Minister on support policies to reduce losses in agriculture.

## Enterprises

- Resolution No. 15/NQ-CP dated 6 March 2014 of the Government on a number of solutions for boosting the equitization and withdrawal of the State capital from enterprises.
- On 14 March 2014, the Government stipulated Decree No. 19/2014/ND-CP promulgating the Sample Charter of the State-owned one member limited liability companies.
- Decision No. 1005/QD-TCHQ dated 31 March 2014 of the General Department of Customs promulgating the "Guidelines for developing Customs - Enterprise partnership".
- On 27 March 2014, the Ministry of Finance issued Decision No. 615/QD-BTC promulgating the Plan of legal assistance for enterprises in 2014.

## Miscellaneous

- Decree No. 17/2014/ND-CP dated 11 March 2014 on the organization and operation of the Inspectorate of Foreign Affairs.
- On 24 March 2014, the Prime Minister stipulated Decision No. 24/2014/QD-TTg of the Government on support mechanism for development of biomass power projects in Vietnam.
- Decision No. 366/QD-TTg dated 11 March 2014 of the Government approving the scheme on building and development of the market for derivative securities in Vietnam.
- On 7 March 2014, the People's Committee of Hanoi issued Decision No.13/2014/QD-UBND providing for the functions, tasks, powers and organizational structure of the Hanoi Authority for Planning and Investment.

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