A long-awaited draft of amendments to the 2005 Ordinance on Foreign Exchange Control (the “Forex Ordinance”) has recently been revealed by the State Bank of Vietnam (the “SBV”). The 14 May 2012 Draft Ordinance on Amendments of a Number of Articles of the Ordinance on Foreign Exchange Control (the “Draft Ordinance”) is expected to be submitted to the National Assembly for approval in its 13th Session (from 21st May to 21st June). Significant amendments of the Draft Ordinance are highlighted below.

a. Borrowing and Repayment of Foreign Loans

The Forex Ordinance allows residents being (i) economic institutions, (ii) credit institutions and (iii) individuals to borrow and repay foreign loans on the principle of self-borrowing and self-repayment in accordance with law. However, the Draft Ordinance narrows down the list of eligible borrowers by erasing the term of “individuals” and changing the term of “economic institutions” to “enterprises”, which effectively carves “co-operatives” out of such list as “co-operatives” shall in no case considered “enterprises” under the Law on Co-operatives.

b. Provision and Recovery of Foreign Loans

Currently, economic institutions are entitled under the Forex Ordinance to provide foreign loans (subject to Government permission) but not to guarantee non-residents. It also remains unclear as to whether export of goods and services on deferred payment is regarded as “provision and recovery of foreign loans” and thus, requires the Government permission. According to the Draft Ordinance, economic institutions are expressly permitted to not only (i) provide offshore loans (except for export of goods and services on deferred payment) but also (ii) guarantee non-residents when the Prime Minister so permits.

c. Limited Use of Foreign Exchange within the Territory of Vietnam

In order to limit the use of foreign exchange within the territory of Vietnam, the Forex Ordinance stipulates that within the territory of Vietnam, all transactions, payments, listings and advertisements of residents and non-residents must not be effected in foreign exchange except for necessary cases permitted by the Prime Minister. The scope of limitation is substantially expanded under the Draft Ordinance by adding the following prohibited acts: (i) quotations, (ii) settings of prices, (iii) statements of prices in contracts and agreements and (iv) other similar forms which are effected in foreign exchange. The authority to grant the permission for any exception where the foreign exchange is used is revised to be vested to the SBV in lieu of the Prime Minister.
d. **Opening of Direct Investment Capital Account by Foreign Invested Enterprises**

It is a requirement of the Forex Ordinance that the remittance of investment capital in foreign currency into Vietnam, the remittance of principal investment capital and profits and the payment of loan interest and other lawful revenue to overseas countries by foreign invested enterprises must be effected via a foreign currency account opened at one authorized credit institution. This requirement has been fundamentally revised under the Draft Ordinance. Specifically, the Draft Ordinance provides that (i) a resident being an enterprise with foreign directly invested capital must open a direct investment capital account at an authorized credit institution, and (ii) contribution of investment capital, and remittance of principal investment capital, profit and other lawful revenue must be conducted via this account.

Apparently, the compulsorily opened account is now titled “a direct investment capital account” and no longer required to be in foreign currency. This is because investment capital contribution is likely to be made in Vietnam Dong by investment licensing authority for the time being. Payment of loan interest is also not obliged to undergo this account. Most importantly, it appears under the Draft Ordinance that the revision is aimed at prohibiting payments for transfers of capital in a foreign invested enterprise between an offshore transferor and an offshore transferee from being made offshore directly between the offshore parties. In other words, such payment must be made within the territory of Vietnam and via the “direct investment capital account” of the target company.

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