

Special Alert

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Key Updates under Circular 25/2023/TT-BKHDT on Investment Templates and Procedures

In the context of increasingly active investment activities both inward and outward, Vietnam must adapt to global trends to remain attractive to potential investors. Recognizing this, the Ministry of Planning and Investment (the "MPI") has, after nearly three years of implementation, reviewed and revised, supplemented Circular No. 03/2021/TT-BKHDT dated 9 April 2021, prescribing templates for documents and reports related to investment activities in Vietnam, outward investment activities and investment promotion activities ("**Circular 03**").

Accordingly, on 31 December 2023, the MPI issued Circular No. 25/2023/TT-BKHDT, effective from 15 February 2024, to amend and supplement templates for documents and reports regulated in Circular 03 ("**Circular 25**"). This Alert primarily focuses on analyzing the key changes to the application forms that directly impact Vietnamese inward and outward investment procedures.

Inward Investment

M&A Approval Procedures

Circular 25 has amended Form A.I.7 – one of key document within the dossier to register capital contribution or acquisition of shares or acquisition of contributed capital of foreign investors (collectively referred to as "**M&A Transactions**"), and to obtain the approval from licensing authority (the "**M&A Approval**"), with two notable amendments as follows:

Firstly, it requires investors to declare the "actual transaction value" of the contract related to M&A Transactions instead of the "proposed transaction value" of the contract related to M&A Transactions as prescribed in Circular 03. The essence of the M&A Approval process is to seek in-principal approval from the state authority for the M&A Transactions before the parties transfer capital to the

bank account of a target company or transfer the purchase price to each other, meaning that no actual transactions have occurred before the issuance of M&A Approval. Consequently, the stipulation to declare the actual value raises the following concerns, considering the time schedule for obtaining the M&A Approval being 15 days or longer:

- *Challenges with Fixed Transaction Value before the M&A Approval process:* M&A negotiations, and numerous factors can lead to adjustments in the final transaction value. As such, disclosing a fixed "actual transaction value" during the M&A Approval process might be difficult for investors; and
- *Exchange Rate Fluctuations:* The time between the submission date of dossier and issuance date of M&A Approval can experience fluctuations in the USD exchange rate. This could create discrepancies between the declared value and the actual transaction value after the issuance of M&A Approval. It's unclear if the Department of Planning and Investment (the "DPI") has established acceptable limits for such discrepancies.

Secondly, regarding the information about the contributed capital of foreign investors after the M&A Transactions, the phrase "*if any*" after the equivalent USD amount has been removed. This implies that the contributed capital of foreign investors in the economic entity must always be declared in both VND and USD. This raises concerns about which exchange rate should be used to convert the capital contribution in VND to USD in case the investor receives a transfer from a Vietnamese investor who contributed the transferred capital contribution in VND only.

Supporting Documents Attached to Application Dossiers

Circular 25 adds the phrase "*Other relevant documents (if any)*" to the "Attached Documents" section of several forms such as form for the registration of the M&A Transactions (Forms A.I.7), form for the amendment of investment project (A.I.11.h), Notice on the cessation of investment project operations (A.I.13), and Notice on the termination of investment project activities (A.I.15). This ambiguity allows state authorities to request additional documents that are not listed in the procedural dossier requirements, which can be time-consuming for investors to prepare and submit.

In practice, we have encountered a case where the DPI of Hanoi City requested investor to submit a certificate of appraisal of fire safety design, and meeting minutes on acceptance of fire prevention and firefighting of the new building where the company planned to locate its location for implementation of the investment project in addition to the documents required by law when registering a change of the location for implementation of the investment project on the IRC. Arguably, these documents are not directly related to the right to use the location for the implementation of the investment project, as required to be proven by the investor under the Investment Law.

Applicant registers the amendment of Investment Project in a Case of Re-Organization of Economic Organization

Under the previous form stipulated in Circular 03, the economic organizations that were restructured are the applicants registering the amendment of the investment project in cases of separation, division, consolidation, merger, or conversion of the type of economic organization (collectively referred to as "**Re-Organization**") and signing the application form submitted to licensing authorities. This regulation raised concerns that if an economic organization that was restructured terminated its existence due to the Re-Organization, there would be no applicant to sign and submit the application dossiers after the Re-Organization. In practice, as a technique, all documents submitted to licensing authorities should be signed before the registration of Re-Organization with the business registration bureau.

Now, as per Circular 25, the form for amending the investment project in the case of Re-Organization (A.I.11.dd) has changed, with the applicant being the economic organization formed as a result of the Re-Organization. Such changes comply with Article 51 of Decree 31/2021/ND-CP dated March 26, 2021, detailing regulations for implementing the Investment Law ("**Decree 31**") and are suitable for practical application.

Outward Investment

Objectives of the Outward Investment Project

Circular 25 adds the instruction "investors shall self-determine based on the business lines registered for investment activities" when the investors declare the main objective of the outward investment project in Form B.I.1. In practice, we have encountered a case where the MPI has required investors to invest overseas only within the business lines registered in Vietnam, even though there was previously no legal document that stipulated this. Circular 25 now appears to impose this restriction for the main objective of the outward investment project by giving the above-mentioned instruction.

Use of Project Investment's Profits for Reinvestment

Previously, the use of project profits for reinvestment was only addressed in a general manner by Article 67 of the Investment Law, lacking specific guidance. This caused difficulties and confusion for investors during the application process. Circular 25 further clarifies the use of profits for reinvestment by distinguishing between two scenarios:

- *For the registration of a new outward investment project:* as per Form B.I.1, Circular 25, profits for reinvestment to a new outward investment project will be sourced from another outward investment project of the investor; and
- *For the amendment of the outward investment project:* as per Form B.I.3, Circular 25, it can be understood that if the existing outward investment project has already generated profits, investors can utilize these profits for reinvestment within such a project.

Capital Transfer Abroad Before Obtaining Outward Investment Registration Certificate ("OIRC")

Form B.I.1, Circular 25 rectifies a prior inconsistency in Circular 03 regarding the authority responsible for verifying capital transfers abroad before OIRC issuance (change from State Bank of Vietnam (SBV) to the authorized credit institution where the investor opened a pre-investment foreign currency account (collectively referred as (the “**Commercial Bank**”)). Such rectification complies with the applicable laws, in which the Commercial Bank is responsible for verifying and conducting the transfer of capital transfers abroad before OIRC issuance.

Conclusion

Circular 25 introduces both positive and challenging changes for foreign investors in Vietnam. While it streamlines some processes, it also adds new complexities. Overall, these changes highlight the need for ongoing dialogue between investors, legal counsel, and the MPI to ensure a smooth and efficient investment environment in Vietnam.

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