



# **LEGAL NEWSLETTER**

## **DECEMBER 2023**

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## Notable contents of Circular No. 12/2022/TT-NHNN on guidelines for foreign exchange administration in respect of enterprise's foreign borrowing and foreign debt repayment of enterprises

On September 30, 2022, the State Bank of Vietnam issued Circular 12/2022/TT-NHNN on guidelines for foreign exchange administration in respect of enterprise's foreign borrowing and foreign debt repayment of enterprises ("**Circular 12**"). Accordingly, Circular 12 was issued to complete the legal framework on foreign loans and debt repayment of enterprises. The following are notable points specified in Circular 12:

### 1. Rules on using the website for declaration of information for registration or registration for changes of loans, and preparing review reports on the arrangement of conventional loans

Circular 12 provided the use of the website for the declaration of information for registration or registration for changes of loans, and reports on the arrangement of conventional loans. Specifically, Article 11 of Circular 12 provided that loans subject to registration with the State Bank include:

- Medium-term and long-term foreign loans;

- Short-term loans whose principal repayment period is renewed which have more than 01 (one) year of maturity term.

- Short-term loans that are not covered by any loan renewal contract but remain the outstanding principal owed (including outstanding interest included in principal) on the anniversary of the date of the first withdrawal of loan proceeds in a full 01 (one) calendar year, except that borrowers have already paid their principal debt within a permitted duration of 30 (ten) days after the anniversary of the date of first withdrawal of loan proceeds in a full 01 (one) year.



## Notable contents of Circular No. 12/2022/TT-NHNN on guidelines for foreign exchange administration in respect of enterprise's foreign borrowing and foreign debt repayment of enterprises

### 2. Stipulate the time limit for borrowers to submit foreign loan registration documents

Clause 2, Article 15 of Circular 12 provided that Borrowers are required to send 01 application dossier for the registration of foreign loan to the competent authority accorded authority over loan registration confirmation as prescribed in Article 20 of this Circular within the following time limit:

30 working days from the date of signing the medium or long-term foreign loan agreement;

30 working days from the date of signing the agreement to renew the foreign loan agreement from short-term to medium or long-term for the loans specified in clause 2 Article 11 of this Circular in which the signing date of extension is within 01 year from the date of first withdrawal of loan proceeds;

30 working days from the date on which the borrower is granted the Certificate of Business Registration, the License for establishment and operation under specialized laws, the date of signing the public-private partnership (PPP) investment contract, the date on which the parties sign the foreign loan agreement to convert the investment preparation amount into loans (whichever is later), applicable to foreign loans arising from the transfer of the investment preparation amount of the projects that have been granted an investment registration certificate into foreign loans.

60 working days after the anniversary of the date of the first withdrawal of loan proceeds in a full 01 (one) year:

- Short-term loans whose principal repayment period where the total term of the loan is more than 01 (one) year of maturity term years before the date of first withdrawal of loan proceeds;
- Short-term loans which are not covered by any loan renewal contract but remain the outstanding principal owed (including outstanding interest included in principal) on the anniversary of the date of first withdrawal of loan proceeds in a full 01 (one) calendar year, except to the extent that borrowers have already paid their principal debt within a permitted duration of 30 (ten) days after the anniversary of the date of first withdrawal of loan proceeds in a full 01 (one) year.

### 3. Regulations on cases in which foreign loans must be applied for change

Circular 12 provided that the borrower must register the change of foreign loan with the State Bank if it changes any contents related to the loan mentioned in the written confirmation of registration, the written confirmation of registration of change of foreign loans of the State Bank, except for these cases:

## Notable contents of Circular No. 12/2022/TT-NHNN on guidelines for foreign exchange administration in respect of enterprise's foreign borrowing and foreign debt repayment of enterprises

Change of time for withdrawal of loan proceeds, repayment of principal within 10 working days as against the once previously approved by the State Bank;

Change of the borrower's address without change of the city or province where the borrower's head office is located; the borrower shall send a notice of address change to the competent authority accorded authority over registration, registration for change of foreign loan;

Change of the creditor, related information about creditors in respect of a syndicated loan that designates the representative for creditors, except when a creditor is also the representative for creditors in respect of a syndicated loan, and any change of creditors that may entail changes to the roles of the representative for creditors;

Change of the commercial transaction name of the account service provider, the bank providing secured transactions;

Change the plan for payment of interests and fees on the foreign loan as against the one previously confirmed by the State Bank in the written confirmation of registration or registration for change of foreign loan, but do not change the method to calculate the interests and fees specified in the foreign loan agreement. The borrower is responsible for making a schedule to calculate the interests and fees to be paid so that the account service provider has a valid ground for checking and monitoring when making the money transfer;

Change (increase or decrease) the amount of loan proceeds to be withdrawn, repayment of principal, interests and fees within 100 currency units of the foreign loan currency as against the amount stated in the written confirmation of registration, written confirmation of registration for change of foreign loan;

Change of the actual amount of loan proceeds to be withdrawn or principal repayment of a specific period less than the amount stated in the loan proceed withdrawal or debt repayment plan in the written confirmation of registration or written confirmation of registration for change of the foreign loan.

The provisions of Circular 12 aim to manage foreign exchange concerning the repayment of foreign debts by enterprises effectively, attract and concentrate resources for the country's economic growth and development, and tightly control foreign capital flows and foreign debt repayment activities of enterprises to ensure compliance with the legal provisions. These regulations primarily focus on adjusting, supplementing, and amending administrative procedures in this field; reporting regime regulations; the responsibilities of related parties to create more favorable conditions for enterprises; enhancing transparency while still ensuring the effectiveness of management; and the efficiency of credit institutions authorized to provide account services, as well as the responsibilities of the enterprises themselves in borrowing and repaying foreign debts, ensuring regulatory compliance, and efficient use of borrowed funds.

## Circular No. 67/2023/TT-BTC provides guidelines for the Law on Insurance Business and Decree No. 46/2023/ND-CP dated July 1, 2023, of the Government on the elaboration of the Law on Insurance Business

On November 2, 2023, the Ministry of Finance issued Circular No. 67/2023/TT-BTC guiding certain provisions of the Insurance Business Law ("**Circular 67**"). Some of the highlighted new provisions in Circular 67 include:

### 1. Regulations on audio recording during the sale of insurance products

According to the regulations in Point d, Clause 2, Article 53 of Circular 67, when providing investment-linked insurance products, individual insurance agents or employees within the agency-operating organization directly conducting insurance agency activities must record certain content related to the insurance product advisory at the time the insurance buyer signs the Insurance Request Form.

The recorded content must at least ensure the following information:

- (i) Name and certificate number of insurance agent;
- (ii) Name, address, and phone number of the insurance buyer;
- (iii) Advisory content from the agent or employee within the agency-operating organization regarding insurance benefits, investment benefits, and investment risks that the insurance buyer may encounter when participating in an investment-linked insurance product. Information about fees charged by the insurance company to the insurance buyer and conditions for receiving benefits under the insurance contract;
- (iv) Notification of insurance fees and the payment period for the insurance buyer to choose, confirming suitability with the financial capacity of the insurance buyer;
- (v) Notification to the insurance buyer about the consideration period for insurance participation, rights, and obligations of the insurance buyer, specifying the obligation to transparency declaration, key information about the agreed-upon benefits in the insurance contract, and the conditions for receiving those benefits;
- (vi) Confirmation from the insurance buyer of voluntary participation in the insurance and alignment with the financial needs and insurance needs of the insurance buyer

In cases where there is other relevant information and this information relates to privacy or personal secrets, the recording will proceed with the consent of the insurance buyer regarding the recording of that information.

Insurance companies must ensure compliance with these regulations no later than one year from the effective date of this Circular.

## Circular No. 67/2023/TT-BTC provides guidelines for the Law on Insurance Business and Decree No. 46/2023/ND-CP dated July 1, 2023, of the Government on the elaboration of the Law on Insurance Business

### 2. Insurance companies can provide insurance products through online platform

Circular 67 provides detailed regulations on the provision of insurance products through online platforms in Chapter II (from Article 4 to Article 8 of this Circular). The insurance products that are permitted to complete the entire service provision process on online platforms include:

- (i) Microinsurance, health insurance, term life insurance with a period over one year, and other insurance products with a term of less than one year without appraisal or direct risk assessment is required under the process of the enterprise, branch, or coordinating organization providing microinsurance before entering into the contract;
- (ii) Health insurance, term life insurance for one year or less, motor vehicle insurance, and travel insurance.

### 3. Conditions for life insurance policyholder, health insurance contract

Article 9 of Circular 67 stipulates that life insurance buyers and health insurance contracts must meet the following conditions:

- (i) For organizations: The organization must be legally established and operating in accordance with the laws of Vietnam, meeting the conditions to purchase insurance according to the insurance rules, terms, and conditions.
- (ii) For individuals: Individuals in Vietnam must be 18 and above, have full civil capacity at the time of entering into the insurance contract, and meet the conditions to purchase insurance according to the insurance rules, terms, and conditions.



## **Circular No. 67/2023/TT-BTC provides guidelines for the Law on Insurance Business and Decree No. 46/2023/ND-CP dated July 1, 2023, of the Government on the elaboration of the Law on Insurance Business**

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### **4. Enhancing the responsibilities of businesses in monitoring and controlling the quality of insurance sales activities through banks**

This content is detailed in Article 53 of Circular 67. Specifically, credit institutions, and foreign bank branches engaging in insurance agency activities are not allowed to advise, introduce, solicit, or arrange the conclusion of investment-linked insurance contracts for customers within 60 days before and 60 days after the disbursement of the entire loan.

Furthermore, Paragraph 4 of Article 53 stipulates that foreign non-life insurance companies and branches of foreign non-life insurance companies must regularly monitor and inspect to ensure the quality of activities related to the introduction and consultation of insurance products by employees of the agency organization. They must promptly coordinate with the agency organization to inspect, review, and handle complaints from the buyer related to the advice of agency employees and handle violations (if any). They are not allowed to sign additional individual agency contracts with employees of the insurance agency organization to exploit the same insurance contract.

Regarding the provision of investment-linked insurance products, life insurance companies must independently review the content of the insurance product advice provided by the agent before deciding to issue a contract. This is to assess whether the insurance buyer voluntarily participates in the product and if the recommended insurance products are suitable for the financial needs of the insurance buyer. Additionally, the company must store and secure documents and recorded data according to the regulations in this Circular for a minimum of 5 years from the effective date of the insurance contract.

Circular 67 includes many provisions that align with trends, such as regulations on the application of technology in the insurance business. These provisions enhance transparency in business operations and management, thereby contributing to the healthy development of the insurance market in Vietnam.



## Case Law No. 25/2018/AL on the exemption from the penalty on deposit for objective reasons

*In civil transactions, depositing is considered a common method to guarantee the performance of obligations. However, when using this method, the party making the deposit should be aware that they may not be subject to forfeiture for objective reasons. Case Law No. 25/2018/AL, passed by the Supreme People's Court on October 17, 2018 ("Case Law No. 25"), is an exemplary case illustrating such situations.*

### 1. Case law summary

On May 12, 2009, Mr. Phan Thanh L deposited 2.000.000.000 dong with Ms. Truong Hong Ngoc H to purchase the house at 1222C (new address 25/2) on 43rd Street, Ward T, District H, Ho Chi Minh City, which Ms. H won at auction according to the decision on asset transfer No. 786/QĐ-THA dated March 2, 2009, by the Ho Chi Minh City Civil Enforcement Agency. Clause 5 of the deposit agreement stipulates that within 30 days from the date of signing the contract, Ms. H must complete the procedures to obtain the ownership certificate for the mentioned house. Afterward, they will sign a notarized sales contract. In case of a violation of the specified deadline, Ms. H will incur a penalty equivalent to the deposit amount of 2.000.000.000 dong.

After receiving the deposit, Ms. H attempted to complete the procedures to obtain the ownership certificate for the house within the agreed 30-day period. However, due to unforeseen obstacles, she was unable to fulfill this obligation.

On July 1, 2009, Ms. H sent a letter requesting Mr. L to extend the deadline by 60 days. On July 7, 2009, Mr. L refused to grant an extension and demanded Ms. H return the deposit along with the agreed penalty. After 5 months of contract violation and Ms. H's failure to fulfill the commitment, Mr. L filed a lawsuit demanding Ms. H to return the deposit of 2.000.000.000 dong and a penalty of 2.000.000.000 dong.

In the First-instance Civil Judgment No. 344/2009/ĐS-ST dated November 11, 2009, the People's Court of Phu Nhuan District, Ho Chi Minh City decided: Accepting Mr. Phan Thanh L's lawsuit; Ms. Truong Hong Ngoc H must pay Mr. Phan Thanh L. 4.000.000.000 dong immediately upon the legal effectiveness of the judgment.

On November 18, 2009, Ms. Truong Hong Ngoc H filed an appeal disagreeing with the first-instance judgment. On November 19, 2009, Mr. Lai Quang T filed an appeal disagreeing with the first-instance judgment. In the Appellate Civil Judgment No. 522/2010/ĐS-PT dated May 6, 2010, the People's Court of Ho Chi Minh City upheld the first-instance civil judgment No. 344/ĐS-ST dated November 11, 2009, of the People's Court of Phu Nhuan District, Ho Chi Minh City.

On June 23, 2010, Ms. Truong Hong Ngoc H submitted a complaint that she disagreed with the compensation of the deposit. She argued that the reason for not fulfilling the agreement within the specified period was due to objective factors, specifically the delay by the Civil Enforcement Agency in transferring ownership of the house to her. Therefore, she could not transfer the ownership to Mr. L.

# Case Law No. 25/2018/AL on the exemption from the penalty on deposit for objective reasons

## 2. Determination of Civil Court of Supreme People's Court

The court made the following determination:

Regarding the request for the penalty of the deposit by Mr. L, at the time Mr. L deposited 2,000,000,000 dong for Ms. H, Ms. H had received the house but had not completed the transfer procedures because the Ho Chi Minh City Civil Enforcement Agency was managing all relevant documents related to the house. Therefore, the fact that Ms. H was not listed on the Ownership Certificate within 30 days as per the initial agreement should be examined on whether it's due to Ms. H's fault for not contacting the Civil Enforcement Agency to complete the transfer procedures, or due to the fault of the Civil Enforcement Agency for being slow in transferring the ownership to Ms. H.

After the appellate trial, along with the complaint, Ms. H submitted Document No. 4362/THA dated June 5, 2009, from the Ho Chi Minh City Civil Enforcement Agency ("Document 4362") to the Supreme People's Court. The content of the document explained that the reason for the delay in transferring the estate to Ms. H, despite winning the auction, was due to a complaint by Mr. Nguyen Tan Li, demanding Ms. Tram Thi Kim P to pay 38 SJC gold taels she still owed when Mr. LI purchased the house. Therefore, during the retrial, the Court needs to verify and collect the original document and the process of transferring the ownership to the auction-winning buyer from the Civil Enforcement Agency. If there is evidence confirming that the Civil Enforcement Agency was delayed in transferring ownership to Ms. H, the fault leading to Ms. H's inability to fulfill the commitment to Mr. L is objective, and Ms. H should not be penalized for the deposit. If there is evidence determining that Ms. H delayed in completing the procedures to transfer ownership, the fault will entirely be Ms. H, and she should be penalized for the deposit.

The First-instance Court and the Appellate Court have clarified the issues mentioned above but immediately accepted Mr. Phan Thanh L's lawsuit to compel Ms. H to bear the deposit penalty of 2,000,000,000 dong is insufficient.

The Court annulled the Appellate Civil Judgment No. 522/2010/DS-PT dated May 6, 2010, of the People's Court of Ho Chi Minh City, and the First-instance Civil Judgment No. 344/DS-ST dated November 11, 2009, of the People's Court of Phu Nhuan District, Ho Chi Minh City. The case is transferred to the People's Court of Phu Nhuan District, Ho Chi Minh City, for a retrial according to the legal provisions."



## Case Law No. 25/2018/AL on the exemption from the penalty on deposit for objective reasons

### 3. Notable matters in the Case Law

In Case Law No. 25, Ms. H was unable to fulfil her obligation due to force majeure. According to Article 351, Clause 2 of the Civil Code 2015, if a party breaches an obligation due to an event of force majeure, they will not be held liable for civil remedies. Force majeure, as defined in Clause 2 of Article 156, is an objective event that cannot be anticipated and remedied, despite applying all necessary and feasible measures. Therefore, the Court's determination in Case Law No. 25 is justified under the legal provisions. Ms. H could not foresee the situation where the enforcement agency delayed transferring ownership of the house to her, which is the fault of the enforcement agency. Ms. H also could not carry out the transfer of ownership of the mentioned house by herself.

Case Law No. 25 provides a resolution approach for disputes related to deposit agreements with specified deadlines. The party receiving the deposit must fulfill its obligation, and if violated, it incurs a penalty. However, after the agreed-upon period, if the receiving party fails to fulfill its obligation due to objective reasons, it must be determined that the inability to fulfill the commitment is due to objective circumstances, and the receiving party should not be penalized.

In addition to the above issues, several other considerations can be derived from Case Law No. 25:

When parties engage in deposit agreements to ensure the fulfillment of obligations, it is advisable to establish clear provisions from the outset regarding penalty clauses and cases where no penalty is applicable to avoid disputes.

In case of disputes, the parties involved should gather comprehensive documentation and relevant evidence related to their rights and interests for submission to the court. In this judgment, the plaintiff submitted Document No. 4362 to the Supreme People's Court after the conclusion of the appellate trial. If the plaintiff had submitted this document during the trial at the trial court and appellate court, the court would have a basis to handle the case in line with the guidance provided in the judgment, saving time and effort for all parties involved.

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