

## Decree on Provision and Management of Government Guarantees

On 16 February 2011, the Vietnamese Government issued Decree No. 15/2011/ND-CP on provision and management of Government guarantees (Decree 15).

The Ministry of Finance (MOF) will provide Government guarantees in accordance with a decision of the Prime Minister (PM) on each loan or bonds issue tranche and within the approved quota on foreign loans and Government guarantees.

### Governing scope

Decree 15 regulates provision and management of Government guarantees and responsibilities of bodies in providing and managing Government guarantees both for domestic and foreign loans, and for issuance of domestic and international bonds.

### Government guarantees

#### FORM OF GUARANTEE

The written undertaking to provide a Government guarantee is made in the form of a letter of guarantee, a contract of guarantee or a decision on guarantee (collectively, "letter of guarantee").

The Government only provides guarantees and does not provide re-guarantees.

#### CONTENTS OF LETTERS OF GUARANTEE

The following particulars are compulsory contents of a letter of guarantee:

- Guarantor
- Principal
- References to relevant commercial contracts and the loan agreement
- Amount requested to be guaranteed and the loan currency
- Undertaking made by the MOF to the beneficiary regarding obligations of the principal and of the MOF
- Rights and obligations of the beneficiary
- Period of validity and revocability of the letter of guarantee
- Governing law and the body, location and language to be used in dispute resolution
- Location and date of signing and issuing the letter of guarantee

Other contents not contrary to Vietnamese law may be agreed by the parties.

A letter of guarantee may only be revoked when all the guaranteed repayment obligations have been fully performed or when the beneficiary sends a letter to the MOF confirming that the period of validity of the relevant letter of guarantee has expired.

During the implementation of a guarantee, the principal must promptly provide written notice to the MOF about any change regarding conditions of the loan contract.

If an amendment to a loan contract does not increase the total value of the guaranteed loan, then the PM will delegate authority to the MOF to issue a decision and a revised letter of guarantee.

If an amendment to the loan contract increases the total value of the guaranteed loan, then the MOF will request the PM's decision prior to issuance of a revised letter of guarantee.

### Responsibilities of principals

Among other things, the principal will be obliged

- to discharge its obligations as the borrower or bond issuer as the case may be
- to register mortgaged assets
- to undertake during the Government guarantee:
  - » to not only assign a part or all of the shareholding or capital contribution portions of Vietnamese organisations and individuals to foreign investors until complete repayment of the debt obligation to the lender (the beneficiary) in respect of the outstanding debt corresponding to the ratio of the proposed shareholding to be assigned
  - » to ensure organisations and individuals owning shareholding or capital contribution portions of 5% or more of paid up charter capital must jointly provide a written undertaking to hold a minimum of 65% paid up charter capital during the entire duration of the guarantee. The principal must register a list of such shareholders and/or capital contributors with the Stock Exchange or Securities Trading Centre in accordance with guidelines of the MOF
- Before loan repayment is made in lieu by the guarantor, the principal must sign a mandatory loan agreement containing the following clauses:
  - » On interest rate: Specifying the interest rate and the interest rate stipulated in the loan agreement or bond issue agreement. Interest

will be calculated from the date of repayment by the MOF in lieu of the principal up until the date the MOF recovers such amount paid

- » On the term of the mandatory loan agreement: the term of a mandatory loan agreement will be as decided by the MOF depending on the ability of each project to repay, but the maximum term is 5 years
- If a principal breaches the undertakings in a mandatory loan agreement on 3 successive occasions, the principal must open a special account and the entire revenue of the principal must be remitted via this account in order to secure priority repayment of the Government guaranteed loan. The minimum balance in a special account will be equal to 100% of the amount due to be repaid during the next repayment period and must be retained for a period of 12 consecutive months

### Responsibilities of State regulators in implementing Decree 15

The MOF is the main State regulator implementing Decree 15 in co-ordination with the Ministry of Justice (MOJ) and the Ministry of Foreign Affairs (MOFA).

#### RESPONSIBILITIES OF THE MOF

Among other things, the MOF provides Government guarantees in accordance with a decision of the PM on each loan or bond issue tranche within the approved quota on foreign loans and Government guarantees; appraises the financial plan and the application file for the guarantee; and approves assignment or transfer of a Government guaranteed loan or bond issue.

#### RESPONSIBILITIES OF CO-ORDINATING BODIES

The MOJ will be responsible for:

- participating in negotiating and providing its opinion on legal issues in foreign loan

agreements, in international bond issue agreements and in letters of guarantee prior to submitting same to the PM for his decision; and to provide its opinion on other legal issues in foreign loan instruments and instruments regarding repayment of foreign debts by domestic enterprises and economic institutions at the request of borrowers, lenders and the MOF

- presiding over negotiating and providing legal opinions on foreign loan agreements, international bond issue agreements, letters of guarantee, guarantors and principals
- co-ordinating with the MOF in dealing with any legal dispute arising from, and regarding, implementation of letters of guarantee

The MOFA will co-ordinate with the MOF to appoint appropriate Vietnamese representative offices abroad to receive legal files regarding Government guarantees in cases where the legal proceedings stipulated in the foreign loan agreement and letter of guarantee require such office in the foreign country to receive the legal file.

### Programs and projects eligible to be considered for a Government guarantee

- Investment programmes and projects in which investment is decided by the National Assembly or the PM
- Programmes and projects applying high technologies and projects in energy, mineral exploitation and processing, or export production or provision of export services decided by the PM in conformity with national socio-economic development
- Programmes and projects in localities eligible for State investment incentives as decided by the PM

### Conditions for provision of Government guarantee

To obtain a Government guarantee, an applicant must satisfy specified conditions with respect to the

- program/project;
- borrower or bond issuer; and
- loans or bonds to be issued.

### Level of guarantees and guarantee fees

The level of a guarantee must not exceed 80% of the total investment of the program/project including all relevant loan fees.

In the case of a foreign-invested enterprise eligible for a Government guarantee, only the portion of the loan capital of the Vietnamese party in the enterprise will be guaranteed.

The maximum guarantee fee must not exceed 1.5% per year of the guaranteed debt balance. In the case of late payment of guarantee fee, the enterprise will pay interest on the late amount.

Upon repayment, if the enterprise fails to pay or fails to make full payment, the guarantor will pay as committed in the letter of guarantee. The guaranteed enterprise will be responsible to return to the guarantor all such payments made plus all costs incurred as a result of such payment on its behalf.

### Procedures for provision of guarantees

Decree 15 specifies prescribed content in an application file for provision of a Government guarantee. Notably, the application requires:

- Audited financial statements for the last three years. If an enterprise is newly established or has not been operating for a full three years, there must be written undertaking(s) from the owner's representative, the owner or the parent company ensuring ability to repay the loan. The contents of the undertaking(s) from the owner's representative, the owner or the parent company are aimed at ensuring their readiness to repay if the guaranteed enterprise runs into difficulties regarding repayment
- Written undertakings must be in the standard form issued with Decree 15

Within 30 business days from receipt of a complete and valid application file from a borrower or bond issuer, the MOF will appraise the loan or bond issue proposal and the application file. On completion of the appraisal, the MOF will report to the PM for the decision on providing the loan guarantee.

## Mortgaged assets

Assets formed from Government guaranteed loan capital must be used as security for discharge of the obligations of the borrower to the MOF. These assets must not be used as security for the discharge of other civil obligations.

Mortgaged assets are not permitted to be sold or exchanged except with agreement from the MOF. If mortgaged assets are sold, the monetary proceeds or assets formed from the sum collected will become mortgaged assets in lieu of the sold assets.

After the MOF has issued the letter of guarantee, and within 6 months after official acceptance of the assets, the principal must conduct registration of the mortgage securing the Government guarantee pursuant to legislation on registration of secured transactions.

If the principal fails to fully perform the obligation to indemnify the MOF for all amounts already paid by the MOF in lieu of the principal, and if the principal lacks the ability to make such repayment, the mortgaged assets will be realised to ensure repayment to the MOF.

The methods of realisation of mortgaged assets and of release of security must comply with legislation on secured transactions. Money collected from realisation of such assets will be paid into a special Government fund to provide a source for repayment of the guaranteed loan.

## Effectiveness

Decree 15 will take effect as from 5 April 2011, and replaces Decision No. 272/2006/QD-TTg of the PM dated 28 November 2006 issuing Regulations on provision and control of Government guarantees for foreign loans.

In the case of Government guarantees issued prior to promulgation of Decree 15 and which remain effective for implementation, any issues arising pursuant to such letters of guarantee will continue to be implemented pursuant to Decree 15.

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