Vietnam's Regulations on Offshore Indirect Investment and the Impact on Secured Lending

On 31 December 2015, Vietnam's government issued Decree 135/2015/ND-CP regulating offshore investment by Vietnamese natural and legal persons (Decree 135). This is the first time that Vietnam has provided clear procedures and conditions for offshore indirect investment. While individuals are covered by Decree 135, as a practical matter, this kind of investment remains available only to corporate entities established in Vietnam. Decree 135 took effect as of 15 February 2016.

As discussed in this legal update, in addition to providing additional investment opportunities for Vietnamese corporates, Decree 135 may also facilitate lending structures into Vietnam by providing international lenders with higher quality collateral that can be enforced offshore.

Who may invest?

Pursuant to Decree 135, offshore indirect investment means purchasing or selling securities offshore, or investing through securities investment funds or financial intermediaries in foreign countries.

Decree 135 permits Vietnamese individuals and corporate entities that are established in Vietnam (such as liability limited companies and shareholding companies) to participate in offshore indirect investment. This includes foreign invested companies with less than 51 percent foreign capital. Currently, there is no guidance permitting companies with levels of foreign investment above that threshold to participate in offshore indirect investment.

How may investors invest?

CORPORATE ENTITIES

Corporate entities may invest offshore using either "self-trading" or "entrustment".

Self-trading allows a corporate entity to trade offshore securities and valuable papers for its own account or to make investments through offshore securities investment funds or financial intermediaries.

Alternatively, a corporate entity (the "Principal") may entrust capital in foreign currency to another (onshore) corporate entity (the "Entrusted Entity"). The Entrusted Entity conducts offshore indirect investment on behalf of the Principal through an investment trust contract.

VIETNAMESE INDIVIDUALS

Vietnamese individuals are only permitted to participate in a share awards scheme issued by an (offshore) foreign company. This means that Vietnamese individuals cannot engage in self-trading or entrustment. The State Bank of Vietnam (SBV) is expected to issue further guidance allowing Vietnamese individuals to participate in offshore share awards programs.

What types of offshore investments are permitted?

Decree 135 further limits the types of securities and valuable papers in which a corporate entity may trade to those specified by the SBV. The SBV is expected to provide guidance describing the permitted investment instruments.

What are the requirements for conducting self-trading?

Subject to satisfaction of certain conditions, the following types of entities may be permitted to conduct self-trading:

i. securities companies and fund management companies;

ii. securities investment funds may engage in self-trading through which are managed by fund management companies (referred to as securities investment funds); and fund management companies;
iii. insurance companies;
iv. commercial banks;
v. general financial companies; and
vi. the State Security Investment Corporation (SSIC).

Corporate entities may set out their self-trading limit based on the size of their capital, regulatory prudential ratios (if applicable), and their historical level of offshore indirect investment in previous years. Corporate entities then must register their self-trading limit with the SBV and obtain a confirmation of this limit before they can begin self-trading.

The regulations do not require the SSIC to meet any conditions or requirements before it may begin self-trading.

What are the requirements for conducting entrustment?

Subject to satisfaction of certain conditions, fund management companies and commercial banks may be permitted to conduct entrustment.

What types of funds may be used to make offshore indirect investment?

Decree 135 regulates the use of funds for offshore indirect investment.

Commercial banks and general financial companies must independently balance their sources of foreign currency to make offshore indirect investments, in accordance with other regulations on foreign currency limits and prudential ratios applicable to the banking sector.

Excluding commercial banks and general financial companies, entities engaged in self-trading and Principals are subject to particular requirements on funding offshore indirect investments:

- Entities engaged in self-trading may use onshore earnings in foreign currency and foreign currency purchased from credit institutions and branches of foreign banks licensed to provide foreign exchange services in Vietnam to fund offshore indirect investments.
- Principals may only use onshore earnings in foreign currency for offshore indirect investments through Entrusted Entities.

In addition, there are limits on the use of loans to fund offshore indirect investments. Investors may not use (i) loans in Vietnam Dong from credit institutions and branches of foreign banks to purchase foreign currency, or (ii) local and overseas loans in foreign currency to make offshore indirect investments.

How will ownership of offshore assets change offshore lending in Vietnam?

As Decree 135 provides a legal basis for Vietnamese investors to purchase offshore securities, the investors may then pledge the offshore securities as collateral to an offshore lender. This would enable Vietnamese corporate borrowers to acquire liquid, highly rated assets to pledge as collateral pursuant to security documents governed by a jurisdiction other than Vietnam. This structure could reduce many of the practical and legal obstacles concerning enforcement of security in Vietnam that international lenders face when providing loans onshore to Vietnamese entities.

Contact Us

For enquiries related to this Legal Update, please contact the following persons or your usual contact at our firm.

David Harrison
Partner
T: +84 8 3513 0310
E: david.harrison@mayerbrownjsm.com

Orsolya Szotyory-Grove
Senior Associate
T: +84 8 3513 0355
E: orsolya.szotyory-grove@mayerbrownjsm.com

Viet Hung Nguyen
Associate
T: +84 8 3513 0316
E: hung.nguyen@mayerbrownjsm.com