

PROCEDURES FOR LOAN CONVERSION INTO CAPITAL CONTRIBUTION (DEBT/EQUITY SWAP)



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There is no specific procedure for capital increase by way of setting off foreign loan repayment obligations. Instead, it shall follow the general procedure for a capital increase of a Company plus fulfill the obligation to register foreign loan changes with the State Bank of Vietnam ("SBV").

However, please be noted that, the approval to contribute capital to the Vietnam company is an essential document required to be submitted to SBV for loan conversion purpose.

STEP 1. Register for an approval of Department of Planning and Investment ("DPI") to contribute capital in Vietnam

On the basis that the borrower can get the loan from any lenders, there are 02 (two) cases of lenders as below:

Case 1. The lender is also an investor of the company, and the conversion of the loan to capital does not cause a change of ownership ratio in the borrower

Regarding Article 26 of Law on Investment 2020 ("LOI 2020"), in case the increase of capital (from any sources) does not make the increase in ownership ratio of the foreigners, the company does not need to get approval to contribute capital.

Overview of the regulations issued by SBV, there is no specific regulation that guides the borrower to carry out the procedure to get the approval of DPI in the processing of swap loans.

In practice, the approval to contribute capital to the Vietnam company is an essential document required to be submitted to SBV for loan conversion purpose.

Case 2. The conversion of loan to capital causes the change of ownership ratio of each investor/member in the borrower

Increasing the foreign capital that increases the ratio of foreigners will be subject to carry out the approval of DPI to contribute capital to Vietnam company.

The borrower and the lender prepare an application as prescribed in Article 26 of LOI 2020 to obtain approval prior to carrying out the procedure to change the loan purpose at SBV.

STEP 2. Register for foreign loan changes with the SBV if the foreign loan is a medium or long-term loan

According to Article 15 of Circular No. 03/2016/TT-NHNN guiding foreign exchange control of foreign loans borrowed by enterprises and of loan repayment ("Circular 03/2016"), if there is any change as compared to the items in the loan registration confirmation issued by the SBV, the borrower must register such change with the SBV, except for:

Case 1. Subject to notification to the SBV due to change of the borrower's address, the lender's information and commercial name of the account service provider (Article 15.3 of Circular 03/2016); or

Case 2. Subject to notification to the bank opening an account for capital drawdown and loan repayment where there is a plan on capital drawdown, on loan repayment or on remittance of expenses which makes an actual change within 10 days compared to the plan on same which the SBV previously certified (Article 15.2 of Circular 03/2016).

Given the fact that conversion of loan to equity (i) does not cause a change in Case 1 but (ii) may cause a change to a principal repayment plan in Case 2, there are two scenarios as follows:

- If the loan repayment plan is changed within 10 days compared to the plan same as certified in the SBV's loan registration confirmation, Company is not obliged to register on change of foreign loan but notify the bank opening an account for capital drawdown and loan repayment;
- Otherwise, Company must register the changes to SBV.

Pursuant to Article 16.2.a of Circular 03/2016, the application for foreign loan change registration shall be submitted to the SBV within 30 days after the date of signing the agreement on the change.

STEP 3. Amendment of the Enterprise Registration Certificate with the Business Registration Office (BRO) - DPI

The conversion of the loan into an equivalent amount of contributed capital in Company shall make changes to the charter capital of Company, the capital contribution portion of the lender (in case as a member/ shareholder of Company) and the capital contribution ratio.

According to Article 68.4, Article 30.2 Law on Enterprises 2020 ("LOE 2020"), Company must register the increase of charter capital, changes in capital contribution portion and capital contribution ratio to the BRO within 10 days from the date of such changes.

Please be noted that,

- According to Article 68.2 of LOE 2020, the additional contributed capital (i.e., converted amount of capital) shall be allocated to each member in proportion to its portion of capital contribution in the charter capital of the borrower. As such, the lender should reach an agreement with other members of Company that other members will refuse to subscribe to the increased capital and this should be noted in the meeting minutes and resolutions of the Members' Council so the lender may subscribe to the entire newly increased capital of Company.
- According to Articles 36.1, 36.3 of LOE 2020, valuation of assets contributed as capital shall be applied to assets that are not Vietnamese Dong, freely convertible foreign currency or gold and shall be conducted by either Members' Council and the person making the capital contribution on the basis of agreement or by a price evaluation organization.

STEP 4. Amendment of the Investment Registration Certificate ("IRC") with the DPI

According to Article 41.2 LOI 2020, the investor shall conduct procedures to amend the IRC if the amendment of the investment project changes the contents of the IRC.

In this case, if the increased capital is decided to be surplus capital for project implementation, both the capital contribution and the total investment of the project in the IRC shall be changed accordingly. Thus, Company is responsible to register for changes in IRC.

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