

LEGAL NEWSLETTER



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Notable Research in June, 2023

To prevent the risk of "transferring high-carbon production activities abroad", the European Union (EU) decided to equalize the price of carbon between domestic and imports of goods by using the Carbon Border Adjustment Mechanism (CBAM). The CBAM will impose the price of carbon on imports of goods based on the greenhouse gas emissions intensity of the manufacturing process. The CBAM, when officially applied, will affect Vietnamese exporters in some fields of goods to Europe, and if this mechanism is expanded to other sectors, the impact on the Vietnamese economy may increase significantly.

"Carbon Border Adjustment Mechanism (CBAM) Impact Assessment Report" is prepared under the project Impact Assessment of EU's Carbon Border Adjustment Mechanism (CBAM) and recommendations on carbon tax policies for Viet Nam and exclusively for the Southeast Asia Energy Transition Partnership (ETP) and the Department of Climate Change (DCC), Ministry of Natural Resources and Environment, Viet Nam. As one of the parties involved in the Report's contribution, NHQuang&Associates is responsible for analyzing legal aspects related to CBAM, thereby making recommendations on carbon tax design and roadmap based on current national policies and laws.

For more information about the Report, please visit:
<https://www.energytransitionpartnership.org/resource/cbam-summary-of-final-assessment-report/>

OUTSTANDING POINTS ON THE TRANSFER OF OWNERSHIP RIGHT OVER PRIVATELY PLACED CORPORATE BONDS

HAI LONG

On January 3, 2023, the Ministry of Finance issued Circular 30/2023/TT-BTC guiding the registration, depository, exercise of rights, transfer of ownership right, payment, and organization of the market for trading of privately placed corporate bonds in domestic market (**Circular 30**). This Circular takes effect from July 1, 2023 with the following highlights:

Firstly, regulating the registration, and transfer of ownership right over privately placed corporate bonds. Pursuant to Article 6, Circular 30, bond issuers must register the information on privately placed corporate bonds with the Viet Nam Securities Depository and Clearing Corporation (**VSDC**) under the registration form in Appendix I of this Circular, including information about the corporation, the privately placed corporate bonds, and the privately placed corporate bond owners. Circular 30 also guides the cases of transferring ownership right over privately placed corporate bonds in Article 9, including:

(i) VSDC shall transfer the ownership right over privately placed corporate bonds with regard to sale and purchase transactions on the trading system of privately placed corporate bonds at Stock Exchange;
(ii) VSDC shall transfer the ownership right over privately placed corporate bonds registered at VSDC not via the privately placed corporate bond trading system for the following cases:

- Donation, inheritance of privately placed corporate bonds under the Civil Code;
- Division, separation, consolidation, merger of enterprises; reorganization of public non-business units; dissolution of enterprises, dissolution of business households under the Law on Enterprises and other relevant laws;
- Transfer of ownership rights according to a court's judgment or decision, arbitral award, or decision of judgment enforcement agency;



- Transfer of ownership rights for disposal of secured assets being privately placed corporate bonds registered at VSDC and implementation of blockade in accordance with point c, clause 1, Article 23 of Circular 119/2020/TT-BTC on registration, depository, clearing, and settlement of securities;
- Transfer of ownership right over privately placed corporate bonds due to division of spousal common property during marital period under the Law on Marriage and Family;
- Transfer of ownership right over privately placed corporate bonds upon implementation of division, separation, consolidation, merger or dissolution of securities investment funds; establishment or increase in charter capital of private securities investment companies; increase or decrease in charter capital of member funds; funds paid by privately placed corporate bonds in redemption and resale activities of open-end funds;
- Transfer of ownership right over privately placed corporate bonds arising in cases where the bond issuers comply with Article 1 of Decree 08/2023/ND-CP on amendment and suspension of some articles of Decrees prescribing private placement and trading of privately placed corporate bonds in domestic market and offering of corporate bonds in international market (regarding the liability of bond issuers).

Secondly, regulating the organization of privately placed corporate bond trading. According to Circular 30, privately placed corporate bond trading is a normal trading transaction. Especially, Ha Noi Stock Exchange shall apply the method of agreement-based trading in the privately placed corporate bond trading system on the principle that the parties involved in the transaction reach agreement on the transaction contents by themselves. Such method is

established when the buyer or seller enters a trading command into the privately placed corporate bond trading system and the reciprocal party confirms such trading command. The method of agreement-based trading includes:

- Electronic agreement-based trading, which means a transaction in which a trading member enters a tender offer or an offer for sale with a firm commitment into the system or selects appropriate reciprocal commands that have been entered into the system to execute the transaction;
- Normal agreement-based trading, which means a transaction in which the buyer and seller reach an agreement on trading conditions in advance and report the results in the privately placed corporate bond trading system to establish the transaction.

Thirdly, regulating the payment for privately placed corporate bonds. Pursuant to Circular 30, a depository member or a direct account holder must open a deposit account in their name at a payment bank to pay for privately placed corporate bonds in transactions of bond dealing, domestic and foreign brokerage. In the case that a client opens a depository account at a depository member not being a trading member, commands shall be placed via trading members and the payment shall be made via depository members.

After obtaining the trading results provided by Ha Noi Stock Exchange, VSDC shall check the validity of the trading, blockade the amount of sold bonds and notify the valid trading results to depository members, and direct account holders to confirm the trading results. Based on the confirmation by the depository members and direct account holders, VSDC shall determine the payment obligation of privately placed corporate bonds and relevant amounts and send the payment obligation information to the relevant parties and payment banks.

In addition, Circular 30 also stipulates several special cases arising in the process of transaction payment, such as Comparison and confirmation of privately placed corporate bond trading; Handling of errors after trading of privately placed corporate bonds; Handling of insolvency to pay for privately placed corporate bonds.

COMMENTS AND RECOMMENDATIONS

Circular 30 regulates some important issues related to registration, depository, exercise of rights, transfer of ownership rights, payment, and organization of the market for trading privately placed corporate bonds in the domestic market. Enterprises need to update and study the provisions of Circular 30, for example, the obligation to register the issuance of privately placed corporate bonds at the competent authority (VSDC), cases of transferring ownership right over privately placed corporate bonds, organization of privately placed corporate bond trading to implement policies and activities related to corporate bonds in Viet Nam appropriately.

SOME NEW REGULATIONS ON APPRAISAL FEES IN THE FIELD OF CONSTRUCTION

PHUONG ANH

On May 12, 2023, the Ministry of Finance promulgated Circular 27/2023/TT-BTC prescribing the fees for appraisal of technical designs and construction cost estimates, collection, payment, management, and use thereof (**Circular 27**) and Circular 28/2023/TT-BTC prescribing the fees for appraisal of construction investment projects, collection, payment, management and use thereof (**Circular 28**). Circular 27 and Circular 28 both take effect from July 1, 2023 with some outstanding contents related to construction appraisal fees as follows:

The **fees for appraisal of technical designs and construction cost estimates** are stipulated in the following new regulations of Circular 27:

Firstly, regulation on the formula for calculating the fees payable for appraisal of construction designs following fundamental designs and appraisal of construction cost estimates, specifically: Payable appraisal fee = Construction cost x Fee rate. In which, the Construction cost (as prescribed by regulations on management of construction costs) is exclusive of VAT in the construction cost estimate to be appraised; and the Fee rate is specified in the Fee Schedule issued together with Circular 27. The minimum appraisal fee is VND 500,000/construction cost to be appraised/appraising agency, while the maximum is VND 150,000,000/construction cost to be appraised/appraising agency.

Secondly, regulation on appraisal fees for construction investment projects with a modified appraisal of construction designs following fundamental designs and for construction cost estimates. Specifically, Circular 27 stipulates that the fee will be determined in the following 02 cases:

- If a design or cost estimate is modified using contents of the original design or cost estimate which has been already appraised: the fee rate shall equal 50% of that specified in the Fee Schedule issued together with Circular 27.
- If a design or cost estimate is modified without using the contents of the original design or cost



estimate which has been already appraised: the fee rate shall equal 100% of that specified in the Fee Schedule issued together with Circular 27.

Thirdly, regulation on the Schedule of fees for appraisal of construction designs following fundamental designs and construction cost estimates. In particular, the Schedule of fees includes (i) Fees for appraisal of construction designs following fundamental designs; and (ii) Fees for appraisal of construction cost estimates. They are all similar to the Schedule of fees stipulated in Appendix 1, Circular 210/2016/TT-BTC.

The **fees for appraisal of construction investment projects**, Circular 28 specifies some new regulations as follows:

Firstly, regulating the formula for calculating the fees payable for appraisal of construction investment projects, specifically: Payable appraisal fee = Total investment x Fee rate. In which, the Total investment is calculated based on the value to be appraised; and the Fee rate is specified in the Fee Schedule issued together with Circular 28. The minimum Fee payable for appraisal of construction investment projects is VND 500,000/total investment/appraising agency, while the maximum is VND 500,000/total investment/appraising agency. Besides, the appraisal fee of the following investment projects shall be equal to 50% of that specified in the Fee Schedule promulgated together with Circular 28:

- Construction investment projects in which construction authorities or appraising agencies affiliated to investment deciding persons request the investors to select qualified organizations or individuals to investigate certain contents necessary for appraisal tasks;
- Construction investment projects of large scale or with works that significantly affect community safety and interests and are funded by other funding sources as prescribed in clause 15 Article 1 of the Law on amendments to the Construction Law.

Secondly, regulating the appraisal fee for modified construction investment projects. In particular, the fee will be determined in the following 02 cases:

- If a project is modified using contents of the fundamental design and total investment which have been already appraised: the fee rate shall be equal to 50% of that specified in the Fee Schedule issued together with Circular 28;
- If a project is modified without using contents of the fundamental design and total investment which have been already appraised: the fee rate shall be equal to 100% of that specified in the Fee Schedule issued together with Circular 28.

Thirdly, regulating the Schedule of fees for appraisal of construction investment projects. In particular, the Schedule of fees includes the fees for appraisal of feasibility study reports or economic-technical reports, which are similar to the fees for appraisal of construction investment projects stipulated in section 1, Schedule of fees in Circular 209/2016/TT-BTC.

It should also be noted that for construction investment projects of which all appraisal contents have been completed by competent authorities but appraisal results have not yet been given before the effective date of Circular 27 and Circular 28 (July 1, 2023), the appraisal fees shall be collected at the fee rates prescribed in Circular 209/2016/TT-BTC (for cases mentioned in Circular 28) and Circular 210/2016/TT-BTC (for cases mentioned in Circular 27).

COMMENTS AND RECOMMENDATIONS

The promulgation of Circular 27 and Circular 28 aims at strengthening the legal framework on state management of construction. Circular 27 is promulgated as an alternative to Circular 210/2016/TT-BTC, and Circular 28 is promulgated as an alternative to Circular 209/2016/TT-BTC since the administrative procedures on collecting fees for appraisal of construction investment projects prescribed in these 2 Circulars have been altered by new regulations. Organizations and individuals paying appraisal fees for construction projects should take into consideration the provisions of Circular 27 and Circular 28 to ensure compliance with the regulations of the laws.

NEW REGULATIONS ON MANAGEMENT AND USE OF OFFICIAL DEVELOPMENT ASSISTANCE (ODA) AND CONCESSIONAL LOANS FROM FOREIGN DONORS

MY NGAN

On May 4, 2023, the Government issued Decree 20/2023/ND-CP amending and supplementing some articles of Decree 114/2021/ND-CP (**Decree 114**) on management and use of ODA and concessional loans from foreign donors (**Decree 20**). Decree 20, taking effect from March 01, 2022, specifies many notable new points in defining the order, procedure, and the subjects authorized to decide investment policy of programs, projects using ODA and concessional loans as follows:

Firstly, Decree 20 amends and supplements the regulations on authority to decide investment policy of programs, projects using ODA, and concessional loans. Accordingly, in order to narrow the scope of the Prime Minister's authority and decentralize decision-making authority to Ministries, managing agencies, and local state agencies, clauses 1, 2, Article 1 of Decree 20 amends the regulations on the authority of the Prime Minister and supplements the authority of Ministers, Heads of managing agencies and provincial-level People's Councils, specifically:

- The Prime Minister has the authority to decide the investment policy of the following programs and projects:

- Category-A investment programs or projects using ODA, concessional loans, except for national target programs, projects of national importance and public investment programs using ODA, concessional loans as prescribed in clauses 1 and 2, Article 17 of the Law on Public Investment;
- Investment programs, projects using non-refundable ODA in the following cases: Category-A programs, projects; programs, projects enclosed with policy frameworks; programs, projects in the fields of national defense, security, and religion; industry-based approach programs; procurement of goods subject to the Prime Minister's approval.

- Ministers and Heads of managing agencies have the authority to decide the investment policy of Category-B and Category-C investment projects using ODA and concessional loans from foreign



donors, approve technical assistance projects using ODA, concessional loans to prepare investment projects issued by agencies, organizations under their management, except for projects under the authority of the Prime Minister.

- Provincial-level People's Councils shall have the authority to decide the investment policy of Category-B and Category-C investment projects using ODA or concessional loans from foreign donors, approve technical assistance projects using ODA, concessional loans to prepare investment projects under local management, except for projects under the authority of the Prime Minister.

Previously, Decree 114 stipulated that the Prime Minister had the authority to decide investment policy of Category-B and Category-C investment programs, projects using ODA, concessional loans; Category-B programs, projects using non-refundable ODA; technical assistance projects using ODA, concessional loans from foreign donors. At the same time, Decree 114 only allows Heads of managing agencies to decide the investment policy for Category-C investment programs, and projects using non-refundable ODA. Provincial-level People's Councils do not have the authority to decide the investment policy of programs, projects within the scope of Decree 114. In accordance with Decree 20, the Prime Minister no longer retains the authority to decide the investment policy for Category-B and Category-C investment programs, projects using ODA, concession loans; Category-B programs and projects using non-refundable ODA; technical

assistance projects using ODA, concessional loans from foreign donors to prepare investment projects; instead, such authority is assigned to the Ministers, the heads of the managing agency or the provincial-level People's Councils.

In addition, with significant changes in authority, Decree 20 also supplements and amends some regulations related to the implementation of related subjects' authority such as supplementing the order, procedures for deciding investment policies, deciding the extension of the time for appraisal of pre-feasibility study reports, report on proposal of investment policies for programs, projects subject to the competence of Ministers, Heads of managing agencies and provincial-level People's Councils, amending the procedures to adjust the investment policy for programs, projects using ODA and concessional loans, etc.

Secondly, the Decree amends, supplements the composition of the dossier appraising the pre-feasibility study report, *the proposal report for investment policies related to programs, projects using ODA, concessional loans*. Accordingly, Decree 20 requires such additional documents as Letter of suggestion from the Ministry of Planning and Investment, the Ministry of Finance and relevant agencies (for Category-B and Category-C investment projects using ODA, concessional loans). Moreover, Decree 20 specifies the cases that must subject the reports on internal appraisal results of managing agencies on investment policies of programs, projects using ODA and concessional loans, including national target programs, projects of national importance, public investment programs; Category-A investment programs, projects using ODA and concessional loans, other investment programs, projects using ODA and concessional loans under the Prime Minister's authority to decide investment policy.

Thirdly, Decree 20 amends and supplements the regulations on activities to be implemented in advance in the stage of implementation preparation for programs, projects using investment preparation capital. Accordingly, after the project investment policy is approved and before relevant international treaties, agreements on ODA and concessional loans are signed, in order to shorten the time for organizing bidding if necessary, Decree 20 allows competent subjects to organize the establishment, appraisal and approval of the contractor selection plan to create the basis for the investor to implement activities of preparing for contractor selection, including:

- (i)** Prepare, appraise and approve the dossier for expression of interest, a dossier of pre-qualification participation (if any);
- (ii)** Identify a short list for project procurement activities (if any); and
- (iii)** Prepare, appraise, and approve bidding dossiers, and request dossiers.

In addition, Decree 20 supplements the provisions on establishing, appraising, approving the contractor selection plan for pre-implementation activities, including (i) Decision on approving the project investment policy; and (ii) Non-objection opinion of the donors on the establishment, appraisal, and approval of the contractor selection plan for pre-implementation activities. Furthermore, in this case, the contractor expressing their interest or attending the pre-qualification must pay all expenses related to the preparation and submission of the relevant dossier. In the case where the shortlist has been selected but international treaties, agreements on ODA, and concessional loans of the project are not signed, the investor shall notify the contractors named in the shortlist about not continuing the organization of the bidding.

COMMENTS AND RECOMMENDATIONS

Decree 20 amends and supplements a number of important contents on the authority, order and procedures related to the decision on investment policy of programs, projects using ODA and concessional loans. In particular, the change in the authority to decide on investment policy of the programs, projects using ODA, concessional loans is considered a new remarkable feature of Decree 20. Contractors and investors should pay attention to study the changes of Decree 114 in Decree 20, including transitional provisions, such as national target programs, projects of national importance, public investment programs; Category-A investment programs, projects that have the investment proposal, investment policy approved before the effective date of Decree 20 (March 03, 2022) shall continue implementing the order, procedures in accordance with the provisions of Decree 114.

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