



GUIDANCE ON ESTABLISHMENT OF NEW FOREIGN INVESTED ENTERPRISES IN VIETNAM

This guidance focuses on investment activities of foreign investors in relation to the establishment of their foreign invested enterprises (“FIE”) in Vietnam.

① Governing Laws

Key laws and regulations on establishment of the FIE include:

- Law on Investment passed by the National Assembly on 26 November 2014 (“LOI”);
- Law on Enterprises passed by the National Assembly on 26 November 2014 (“LOE”).

Both the LOI and the LOE provide for a general legal framework governing investment activities in Vietnam by all foreign and domestic investors.

② General Licensing Procedures

Normally, there are two steps for establishment of the FIE as generally noted below:

- **Step1 (Registering investment project).** In general, a foreign investor (which first enters into Vietnam) must first register its investment project in Vietnam, by way of applying for the Investment Registration Certificate (“IRC”)¹, in accordance with the LOI.
- **Step2 (Registering for the establishment of the FIE).** Once the IRC is issued, it will serve as the basis for the foreign investor to establish its FIE in Vietnam, by way of further applying for the Enterprise Registration Certificate (“ERC”) in accordance with the LOE. Once the FIE is established, it may be used as an investment vehicle for foreign investor to register other investment projects in Vietnam, by way of applying for other IRCs, without need of establishment of other FIEs in Vietnam.

However, in certain cases where investment projects involve in certain locations or sectors as provided by the LOI, the **Investment Policy Approval (“IPA”)** shall be required to be obtained (*before Step 1 as noted above*). In general, those investment projects and competent authorities which have authority to decide the IPA, are as follows:

- The National Assembly (“NA”) has its authority to decide the IPA in respect of (i) projects with great effects on the environment or with a potentially serious effects on the environment; (ii) other projects which require huge relocation, huge farming land conversion, or special mechanism or policy.
- The Prime Minister (“PM”) has his authority to decide the IPA in respect of (i) projects with big relocation, on construction & commercial operation of airports& air transportation, seaports, exploration & processing of petroleum, betting and casinos, cigarettes manufacturing, industrial

zones, export processing zones, economic zones development, golf courses;(ii) projects which have a scale of investment capital from VND5,000 billion or more; (iii) projects in some special sectors: such as sea transportation, business of telecommunications services with network infrastructure; forestation, publication & press; and establishment of a scientific and technological organization., etc.

- The Provincial-level People's Committees ("PPC") have their authorities to decide the IPA in respect of(i) projects to which the State allocates or leases out land without auction, tendering or transfer; (ii) projects require for land use purpose conversion; and (iii) projects using technology in the restriction list.

③ Step 1 - Applying for the IRC

This guidance focuses only on investment activities and establishment by foreign investors of their FIE in respect of investment projects which are not required for obtaining the IPA, but only the IRC.

(a) Authority to issue the IRC

The licensing authority for issuance of the IRC is are below:

- The provincial-level Management Boards of Industrial Zone, Export Processing Zone, High-tech Zone or Economic Zone ("IZMBs") have their authority to issue the IRCs to investment projects to be carried out in such zones.
- The provincial-level Departments of Planning and Investment ("DPIs") have their authority to grant IRCs to investment projects outside Industrial Zones, Export Processing Zones, High-tech Zones or Economic Zones (collectively "IZs").

In general, the licensing authority (i.e. DPIs or IZMBs) will consider and make their own decision on grant of the IRCs. However, in practice, they may consult with and obtain prior consents or opinions from relevant provincial-level departments or national-level ministries (such as Ministry of Planning and Investment ("MPI"), Ministry of Industry and Trade ("MoIT"), Ministry of Finance ("MoF"), the State Bank of Vietnam ("SBV"), etc.), before having their final decisions. It is noted that while most IRCs are granted by either DPIs or IZMBs as noted above, IRCs or equivalent certificates may be granted by relevant authorities (such as the MoF, SBV) in certain specific sectors (such as insurance, securities, banking).

(b) Application dossier for issuance of the IRC

Foreign investors must submit an application dossier to either DPI or IZMB for an IRC. In general, an application dossier for the IRC normally includes the followings:

- Application letter for implementation of the investment project;
- Valid copy of the identity card, or passport of individual investors; and/or copy of the incorporation certificate or other equivalent document certifying the legal status of organizational investors;
- Proposal for the investment project;
- Valid copy of any one of the following documents: financial statements for the last 2 years of the investor; undertaking of the parent company to provide financial support; undertaking of a financial institution(s) to provide financial support; guarantee for the financial capability of the investor; or a document proving the financial capability of the investor;

- Proposal for a need for land use; or, a copy of the site lease agreement or other document certifying that the investor has the right to use the site for implementation of the investment project; and
- Explanatory statement on technology application with respect to projects using technology in the list of technologies the transfer of which is restricted in accordance with the law on technology transfer.

Under the LOI, before submitting the application dossiers for issuance of IRCs, foreign investors must first declare online all information of their investment projects in Vietnam, on the National Information System on Foreign Investment which is administered by the MPI. In this regard, each foreign investor will be provided with an account for access to the said system, which will enable foreign investor to monitor the status of consideration by competent authorities of its application dossier.

(c) Timeline for issuance of IRC

Within a 15-day time-limit from receipt of a complete and valid application dossier, the licensing authority (i.e. DPI or IZMB) must make its own decision on either issuance of the IRC to foreign investor or rejection of its application by having a written notice to foreign investor specifying clearly the reason for rejection. However, it is noted that in practice, the process may take a longer time.

(d) Investment sectors

Foreign investors are permitted to invest in all sectors (including conditional sectors) in which investment is not prohibited by law. In this regard, the LOI lists all sectors in which investment is conditional and prohibited:

- **Prohibited sectors:** They are listed in Appendices 1, 2 and 3 attached to the LOI, relating to major 6 categories being (i) trade in drugs, (ii) trade in chemicals or minerals of certain types, (iii) trade in specimens of wild fauna or flora listed as Endangered Species, (iv) trade in prostitution, (v) purchase or sale of humans, tissues or parts of the human body, and (vi) activities relating to asexual reproduction.
- **Conditional sectors:** They include 267 sectors, which are listed in Appendix 4 attached to the LOI.

It is noted that in respect of foreign investment in service/ non-production sectors, in addition to conditions provided by the LOI as noted, foreign investors may further be subject to conditions/ restrictions provided by international commitments by Vietnam (including the Vietnam's WTO commitments). Typically, conditions/ restrictions provided by the Vietnam's WTO commitments may include:

- Conditions regarding ratio of ownership of foreign investor in charter capital of an enterprise;
- Conditions regarding investment forms;
- Conditions regarding scope of investment activities;
- Conditions regarding Vietnamese parties participating in implementation of investment activities; and
- Other conditions prescribed in the laws, ordinances, decrees and international treaties on investment.

It is noted that for the first time the LOI and its guiding decree confirm that (i) foreign investors of countries/territories which are not members of WTO will enjoy the same treatments as applicable to

those coming from WTO member countries, unless otherwise stipulated by specific laws and international treaty between Vietnam and such countries, and (ii) foreign investor may have opportunity to have their investment in the service sectors which are not committed by Vietnam in international treaties (including Vietnam's WTO commitments), without need of obtaining prior consents/ opinions from relevant authorities, if an approval has been given to another foreign investor and such service sectors have been uploaded on the National Portal on Foreign Investment administered by the MPI.

(e) Investment incentive

Under the LOI, investment incentives (e.g. tax exemption or reduction, land rental exemption, lower tax rate) may be considered to provide to investment projects which fall in one of the following categories:

- By investment sectors, investment projects which engage in (i) high-tech, and research and development activities; (ii) production of new materials, new energy, clean energy or renewable energy; production of products with an added value of 30% or more, and energy-saving products; (iii) production of electronics, prioritized mechanical products, agricultural machinery, automobiles, automobile parts; shipbuilding; (iv) production of industrial products which support production of garments and textiles or leather products and the products prescribed in (iii); (v) production of products of information technology, software and digital content products; (vi) breeding, growing and processing agricultural, forestry and aquaculture products; a forestation and protection of forests; salt production; fishing and fishing logistics, creation of plant and animal varieties and production of products of biological technology; (vii) collection, processing, reprocessing or reuse of refuse; (viii) investment in development and operation, and management of infrastructure facilities; and development of public transportation in urban areas; (ix) pre-school, general or vocational education; (x) medical consultation and treatment; production of medicines of certain types, raw materials for production of medicines, vaccines, medical biological products; and scientific research in relation to technology of preparation or biological technology for production of new medicines; (xi) people's credit funds, and micro-financial institutions; etc.
- By geographical locations, investment projects which locate in (i) locations (outside IZs) where socio-economic conditions are either difficult or especially difficult; and (ii) IZs.
- By capital scale, investment projects which register their investment capital of VND6,000 billion or more, of which at least VND6,000 billion will disbursed for a period of 3 years from the date of the IRCs.
- By employment size, investment projects which locate in rural areas and employ 500 full-time employees or more.

③ Step 2 - Applying for the ERC

After being granted with the IRC as noted in Step 1 above, foreign investor will submit another application dossier to the Business Registration Office ("**BRO**"), which is a sub-ordinate organization of and administered by the DPI, for the issuance of the ERC.

(a) Authority to issue the ERC

Regardless of whether FIE locates inside or outside an IZ, the ERC for the establishment of FIE will be issued only by the BRO of the city or province where the FIE registers its head office.

(b) Forms of FIE to be established

To carry out investment projects in Vietnam, foreign investors may select an appropriate form of FIE to be established, amongst available forms prescribed in the LOE and further provided below:

- A limited liability company with a single member (“**SM-LLC**”) or a limited liability company with 2 or more members (including not only foreign members but also their Vietnamese counterparts), but not exceeding 50 members (“**MM-LLC**”);
- A joint stock company (“**JSC**”), which requires a minimum of 03 shareholders (including not only foreign members but also their Vietnamese counterparts);
- Partnerships; and
- Private enterprise.

In practice, SM-LLC, MM-LLC and JSC are the forms most preferred by foreign investors when setting up their FIEs in Vietnam. As a result, this guidance focuses only on the application dossiers for issuance of the ERC for establishment of FIEs under the form of SM-LLC, MM-LLC and JSC.

(c) Application dossier for establishment of FIE

Depending on the form of the FIE to be established, the application dossier for establishment of FIE are as below:

- **SM-LLC.** The application dossier for establishment of FIE under the form of SM-LLC normally include: (i) Request for company registration; (ii) Company charter; (iii) Valid copy of personal identification document of the authorized representative if FIE is organized under the management structure including chairman of the FIE, director or general director and inspectors; (iv) List of authorized representatives, and valid copy of personal identification document for each authorized representative if FIE is organized under the management structure including members’ council, director or general director and inspectors; (v) Valid copy of personal identification documents of individual investor; and/or of establishment decision/corporate certificate or equivalent documents of organizational investor, together with Charter or equivalent documents of the organizational investor; (vi) Valid copy of IRC issued under Step 1 above; and (vii) Letter of authorization from the organizational investor to the authorized representative.
- **MM-LLC or JSC.** The application dossier for establishment of FIE under the form of MM-LLC or a JSC normally include: (i) Request for company registration; (ii) Company charter; (iii) List of investors (i.e. members of MM-LLC or shareholders of JSC); (iv) List of authorized representatives of investors if they are organizational investors; (v) Valid copy of personal identification documents of individual investors; and/or of establishment decision/corporate certificates or equivalent documents of organizational investors; (vi) Valid copy of personal identification document of authorized representatives investors if they are organizational investors; and (vii) Valid copy of IRC issued under Step 1 above.

(d) Timeline for issuance of the ERC

Within 3 day time-limit from receipt of a complete application dossier, the BRO will consider and issue either an ERC or a written notice requesting amendment of application dossier in case of the application dossier is not satisfied.

It is noted that application dossiers for both IRC and ERC in this Step 2 and Step 1 above, must be prepared in Vietnamese or in Vietnamese and a widely-used foreign language in accordance with

standard forms published by the MPI. If there is any discrepancy between Vietnamese language and foreign language, the Vietnamese language version will prevail.

The number of set of application dossier will be subject to the nature of the investment project and the specific requirements of the licensing authorities. In general, for applying the IRC, from 04 to 08 sets of application dossier will be required for investment projects which requires to obtain the Approval on Investment Policy before the IRC, while 01 set of application dossier will be required for investment projects which do not require to obtain the Approval on Investment Policy, but only the IRC. With respect to the ERC, only 01 set of application dossier will be required in all cases.