Tilleke & Gibbins

NEW GUIDELINES FOR FOREIGN INVESTMENT IN VIETNAM

Nguyen Thanh Tra
thanhtra.n@tillekeandgibbins.com

On September 6, 2010, the Ministry of Finance issued new guidelines that delineate procedures for foreign investment in Vietnamese enterprises via capital contribution and share purchase. This article provides an overview of several critical developments in the regime governing foreign investment in Vietnam.

The new guidelines, which will enter into force on October 21, 2010, can be found in Circular No. 131/2010/TT-BTC ("**Circular 131**"). Circular 131 applies to the Regulations on Capital Contribution and Share Purchase by Foreign Investors in Vietnamese Enterprises, which were issued on June 18, 2009, under Decision No. 88/2009/QD-TTg of the Prime Minister ("**Decision 88**").

Determining whether an investor is a "foreign investor" has long been a controversial subject. Decision 88 and Circular 131 together provide a threshold for foreign capital contribution in a Vietnamese enterprise, above which such an enterprise shall be deemed a "foreign investor". The term "foreign investor" is clarified in Circular 131 as follows:

1. Organizations established and operating under foreign law and branches of such organizations both overseas and in Vietnam;
2. Organizations established and operating in Vietnam with more than 49% of the total capital contribution being from foreign parties;
3. Investment funds and securities investment companies with more than 49% of the total capital contribution being from foreign parties; and
4. Individuals not holding Vietnamese nationality, regardless of their resident location.

Circular 131 provides additional direction for overseas Vietnamese investors. Notably, individual investors with both Vietnamese and foreign nationalities are entitled to the status of domestic investors.

Another significant provision in Circular 131 is a new option for foreign investors to make capital contributions and purchase shares through "trading representatives". Trading representatives comprise:

1. Organizations established and operating under Vietnamese law and permitted to conduct professional activities being investment brokerage, investment consultancy, investment trust, securities brokerage or investment portfolio management; or

2. Individuals being a person of Vietnamese nationality or a foreigner residing in Vietnam, provided such individual satisfies certain criteria, including possessing a practicing certificate relevant to capital contribution and/or share purchase services (securities brokerage practicing certificate, financial analysis practicing certificate, fund management practicing certificate, etc.) and not concurrently working in one of the above organizations.

Note that a foreign organization may only engage an organization to act as its trading representative and may not engage an individual to do so.

Circular 131 sets forth the first clear and detailed guidance on the process of making a capital contribution to and purchasing shares in a Vietnamese non-public enterprise. In addition to complying with other applicable requirements, foreign investors must open an investment capital account at a commercial bank in Vietnam. All share purchases and sales, capital contribution assignments, receipt and use of distributed dividends and profit, remittance of money overseas and other activities relevant to investment in Vietnamese enterprises must be conducted via such account.

If you have any questions about the procedures for capital contribution and share purchase by foreign investors, please contact us at vietnam@tillekeandgibbins.com.

© Tilleke & Gibbins Consultants Limited
HAREC Building, 4th Floor, 4A Lang Ha Street, Ba Dinh District, Hanoi, Vietnam