



## MEMORANDUM

**To** Clients & Associates  
**FROM** Dang The Duc  
**DATE** 20 September 2007  
**RE** **Major Corporate Vehicles under the 2005 Enterprise Law in Vietnam**

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### LEGISLATION

Formation and operations of enterprises in Vietnam are currently governed by the following main pieces of legislation, among others:

1. Law on Investment No. 59/2005/QH11 passed by the National Assembly of Vietnam on 29 November 2005, effective from 01 July 2006 (“**LOI**”);
2. Law on Enterprises No. 60/2005/QH11 passed by the National Assembly of Vietnam on 29 November 2005, effective from 01 July 2006 (“**LOE**”);
3. Decree No. 88/ND-CP dated 29 August 2006 of the Government guiding the LOE on business registration (“**Decree 88**”);
4. Decree No. 108/2006/ND-CP dated 22 September 2006 of the Government providing guidelines for implementation of a number of articles of the LOI (“**Decree 108**”); and
5. Decree No. 139/2007/ND-CP dated 05 September 2007 of the Government guiding the implementation of a number of articles of the LOE (“**Decree 139**”).

### FORMS OF INVESTMENT

Pursuant to the LOI, all forms of investment in Vietnam are grouped under two broad categories, “direct investment” and “indirect investment”.

**Direct investment** is a form of investment whereby the investor invests its capital and participates in the management of the investment activity. It includes the establishment of wholly foreign- or domestic-owned companies, joint venture companies (JVC) between foreign and domestic investors (in one of the business vehicles / types of enterprise as mentioned below); entering into a Business Cooperation Contract (BCC) or a Building - Operation - Transfer (BOT), Building - Transfer - Operation (BTO) or Building - Transfer (BT) contracts with a competent State body for infrastructure projects; purchasing shares or contributing capital to become shareholders and participate in the management of investment activities; and investment in mergers and acquisitions.

**Indirect investment** is a form of investment by way of the purchase of shares, share certificates, bonds or other valuable papers through a securities investment fund or by way of intermediary financial institutions, and whereby the investor does not participate directly in the management of the investment activity.

While the LOI governs direct investment, the 2006 Securities Law and the LOE govern indirect investment. The key difference between “direct investment” and “indirect investment” is whether or not the investor directly participates in the management of the investment activity. The distinction is not however always clear.

#### **TYPES OF ENTERPRISES**

The LOE governs regulations regarding corporate formation and operations. Under the Vietnamese law, an “enterprise” is defined as an economic organization having its own name, assets and a stable transaction office, with business registration for the purpose of conducting business operations. There are four (4) main types of enterprises in Vietnam:

- **Limited Liability Companies (LLC):** An enterprise with fifty (50) or less members in which a member may be an organization or an individual. An LLC may consist of a single member LLC (**SM-LLC**)<sup>1</sup> or multiple members LLC (**MM-LLC**)<sup>2</sup> all contributing capital.
- **Joint Stock Companies (JSC):** Also known as a shareholding company. It is an enterprise in which the charter capital is divided into equal portions called shares, with a minimum number of three (3) shareholders and no maximum. Only JSCs may issue shares, offer securities and get listed on the stock exchange if satisfying listing requirements under the securities law.

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<sup>1</sup> A SM-LLC is similar to a 100% foreign owned company established under the old Foreign Investment Law.

<sup>2</sup> A MM-LLC is similar to a joint venture or a 100% foreign owned company owned by two or more investors under the old Foreign Investment Law.

- **Incorporated Partnerships:** An enterprise with at least two (2) members being co-owners of the company jointly conducting business under one common name (also known as unlimited liability partners). Partnerships may also have partners with limited liability.
- **Private Enterprises** (i.e. sole proprietorships): An enterprise owned by one (1) individual who shall be liable for all activities of the enterprise to the extent of all his or her own assets (unlimited liability). Each individual can establish one private enterprise only.

*The following are the distinctions between a LLC and a JSC as two corporate vehicles available under the laws of Vietnam for investors to adopt.*

#### **DISTINCTIONS BETWEEN LLC AND JSC**

##### Terms

LLC	Limited Liability Company
SM-LLC	Single Member LLC
MM-LLC	Multiple Member LLC
JSC	Joint Stock Company / Shareholding Company
MC	Members' Council (for LLCs)
GSM	General Meeting of Shareholders
BOD	Board of Directors / Board of Management (for JSCs)
BOC	Board of Controllers / Inspection Board

<b>Issues</b>	<b>LLC</b>	<b>JSC</b>
Required number of members/shareholders (promoters)	LLCs have 2 types, SM-LLC and MM-LLC <ul style="list-style-type: none"> <li>• 1 member for SM-LLC</li> <li>• 2 or more members, but not exceeding 50 members, for MM-LLC</li> </ul>	At least 3 shareholders are required, and there is no restriction on the maximum number of shareholders
Liabilities for the members / shareholders	Limited liability	Limited liability
Issuing shares	LLCs may not issue shares	JSCs may issue shares, i.e. more flexible for fund raising
Listing on securities market	Not allowed	A JSC can be listed on the official stock exchange (e.g. HOSE <sup>3</sup> ) or trading center (e.g. HASTC <sup>4</sup> ), provided the listing conditions are

<sup>3</sup> Ho Chi Minh City Stock Exchange

<sup>4</sup> Hanoi Stock Trading Center



Issues	LLC	JSC
Management Structure	<p>(In order, in terms of powers)</p> <ul style="list-style-type: none"> <li>• MC (or Company Chairman)</li> <li>• MC Chairman</li> <li>• Director/General Director, and/or</li> <li>• BOC (in case of having 11 or more members)</li> </ul> <p>MC is the highest authority of the LLC, including all members of the LLC. Members can be individuals or corporate entities. If member is corporate entity, it must appoint an authorized representative to participate in the MC.</p>	<p>satisfied as per the Securities Law.</p> <p>(In order, in terms of powers)</p> <ul style="list-style-type: none"> <li>• GSM</li> <li>• BOD</li> <li>• Director / General Director, and</li> <li>• BOC (in case of having 11 or more shareholders, or with a corporate shareholders holding more than 50% shares)</li> </ul> <p>GSM is the highest authority of the JSC, including all shareholders holding voting shares. If shareholder is corporate entity, it must appoint one or more authorized representative(s) to participate in the SM.</p> <p>BOD is the management body of the JSC, with full authority to make decisions in the name of the JSC, except for issues which fall within the authority of the GSM. The BOD consists of between 3 and 11 members, appointed and dismissed by the GSM.</p>
Pre-emptive rights for transfer of capital contribution/ shares	<p>For MM-LLCs, the members when transferring his share of capital contribution shall be subject to the pre-emptive rights of other members (“right of first refusal”)</p>	<p>Transfer of shares not subject to pre-emptive rights by the laws, unless the shareholders agreement between the shareholders provide otherwise.</p> <p>Only restriction is that, within three (3) years from the date of establishment of a JSC, a founding shareholder if willing to sell his/her shares to the others who are not founding shareholders, the approval of the GSM must be obtained. But he/she may freely transfer his/her shares to another founding shareholder.</p>

**Recommendations**

1. A clear advantage of a JSC is that a foreign partner / investor may always sell shares to raise capital, or it would be more flexible for fund raising. It is also appropriate for the exit strategy for the foreign investor if it wants to sell shares to the others.
2. The LLC structure is likely to be the best structure for a wholly foreign owned enterprise. The sole investor has complete control of the company and is not subject to rules governing business relationships with partners, quorums, and majority voting. The LLC structure may also be preferable for foreign investors entering into joint ventures with Vietnamese parties. In a LLC, the foreign investor may choose his partners, rather than in a JSC where the public has the rights to purchase shares.

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