

## Regulations on Licensing, Organization and Operation of Commercial Banks

### Background

The State Bank of Vietnam (“**SBV**”) issued Circular 40/2011/TT-NHNN on December 15, 2011 (“**Circular 40**”). The Circular regulates the process of licensing, as well as the organization and operation of commercial banks, branches of foreign banks, and representative offices of foreign credit institutions and other foreign banking operations.

Circular 40 came into force on 1 February 2012. It replaces parts of Circular 03/2007/TT-NHNN (5 June 2007) on organization and operation of foreign bank branches, joint venture banks, banks with 100% foreign owned capital, and representative offices in Vietnam of foreign credit institutions; Circular 06/2010/TT-NHNN (26 February 2010) on organization and operation of commercial banks; and Circular 09/2010/TT-NHNN (26 March 2010) on licensing and operation of shareholding commercial banks.

### Types of Banks

Circular 40 identifies three types of commercial banks.

A shareholding commercial bank is established as a shareholding company. A shareholding commercial bank has capital contributing establishment shareholders who own at least one share at the time of establishment, as well as founding shareholders, who are those capital contributing establishment shareholders who sign the original charter at the first initial general meeting of shareholders, and make other decisions about the establishment of the shareholding commercial bank.

A bank with 100% foreign owned capital is established as either a single member limited liability company, owned by a single foreign bank, or a

multiple member limited liability company, in which there must be one foreign bank which owns at least 50% of the charter capital.

A joint venture bank, in which charter capital is contributed by at least one Vietnamese bank and at least one foreign bank, is established on the basis of a joint venture contract. A joint venture bank must be structured as a multiple member limited liability company, but is limited to no more than five members, in which any single member may not own more than 50% of the charter capital.

Banks with 100% foreign owned capital and joint venture banks, which must be established as limited liability companies, will have either an owner which owns the entire charter capital, if it is a single member LLC, or if it is a multiple member LLC, then it will have *founding members, capital contributing members, and a first initial meeting of capital contributing members*.

Other types of entities governed by Circular 40 are: foreign bank branches, which do not have a legal entity status in Vietnam, and are dependent units of a foreign bank, and representative offices of foreign credit institutions or of foreign organizations with banking operations. A foreign organization is considered to have a banking operation if it regularly provides services such as receipt of deposits, extension of credit, and payment services via accounts.

### Licensing Process and Conditions for Licensing

Circular 40 sets out the fundamental steps of the licensing process for commercial banks, foreign bank branches, and representative offices of foreign credit institutions.

## COMMERCIAL BANKS AND FOREIGN BANK BRANCHES

The investors normally set up a Preparatory Committee to manage the license application process. The Preparatory Committee assembles a license application file and submits it to the SBV. Within ninety days of certifying receipt of a complete application file, the SBV must either provide its approval in principle for the establishment of the commercial bank or the foreign bank branch, or explain the grounds for its rejection of the application.

After receiving the approval in principle, the Preparatory Committee shall provide additional documents, set out in Circular 40. Within thirty days of certifying receipt of the supplementary documentation, the SBV shall issue the license, or explain the grounds for its rejection of the application.

The specific requirements for the additional documentation depend on whether the bank is a shareholding commercial bank, a joint venture bank, a bank with 100% foreign owned capital, or a foreign bank branch. Basic documents required for all commercial bank applications include: an explanatory statement articulating the necessity of establishing the bank, and demonstrating the ability of the bank to stabilize and develop the banking market, including an analysis of the market and the bank's ability to compete; risk management policies; information technology infrastructure; lists of personnel and their qualifications; a draft charter; internal rules on organization and operations; and a proposed business plan for the three years following licensing.

In general, the documentation requirements emphasize disclosure of the financial capacity of the investors, as well as assessments and analysis of the ability of the proposed bank to compete effectively in the market. The goal of the documentation requirements is to demonstrate that the proposed bank fulfills the conditions for licensing.

For a shareholding commercial bank, Circular 40 first refers to the licensing conditions set out in Article 20.1 of the Law on Credit Institutions. These initial requirements state that if the investors in a credit institution are entities, they must be correctly licensed, and if they are individuals, they must have full capacity for civil acts. The investors must have sufficient financial capacity to participate in capital contributions.

In addition, Circular 40 sets out requirements related to the founding shareholders. There must be at least two founding shareholders which are organizations. For five years following the date the license is issued, the founding shareholders must jointly own at least 50% of the charter capital, and founding shareholders which are entities must jointly own at least 50% of the total shareholding of all the founding shareholders.

Founding shareholders who are individuals must be Vietnamese, and founding shareholders that are entities must be established under Vietnamese law. They may not use loan capital borrowed from other organizations or individuals in order to contribute capital.

Founding shareholders that are entities must have a minimum VND 500 billion equity in the five consecutive years prior to the year in which the application file is submitted, and their business must have been profitable during that time. Finally, if the entity is itself a commercial bank, it must have minimum total assets of at least VND 100,000 billion.

For establishment of a joint venture bank or a bank with 100% foreign owned capital, the application must first meet the conditions set out in Article 20.1 and 20.2 of the Law on Credit Institutions. In particular, the foreign credit institution must provide a written commitment to ensure that the bank's charter capital will be maintained at no less than the level of the correct legal capital. In addition, the banking authority in the country where the foreign credit institution is headquartered must sign an agreement with the SBV on inspection and supervision of banking operations, and on exchange of information about banking security.

Circular 40 sets out further licensing conditions applicable to a founding shareholder or to an owner which is a foreign credit institution.

It must have international operational experience, and must be classified by international credit rating institutions as stable or better, and able to operate normally even in an economic downturn.

It must have been profitable for the five consecutive years prior to the year in which the application file is submitted, and must maintain this profitability through the date on which the license is issued. It must have minimum total assets equal to at least USD 10 billion at the end of the year immediately preceding the year in which the application file for licensing is submitted.

Finally, for establishment of a foreign bank branch, the application file must first satisfy the conditions set out in Article 20.3 of the Law on Credit Institutions, which require the parent to provide a written commitment accepting liability for the obligations of its branch in Vietnam. Circular 40 requires the application file also meet all conditions applicable to joint venture banks or banks with 100% foreign owned capital. In addition, the parent must have total assets equal to at least USD 20 billion in the year immediately preceding the year in which the license application is submitted. These asset levels must be maintained through the date on which the SBV issues the license.

### REPRESENTATIVE OFFICES

The foreign credit institution or foreign organization with a banking operation submits an application file for issuance of an RO license to the SBV. Within sixty days of certifying receipt of a complete application file, the SBV must either issue a license, or explain the grounds for its rejection of the application.

Circular 40 refers to Article 20.4 of the Law on Credit Institutions, which sets out the conditions for grant of an RO license to a foreign credit institution or a foreign organization with a banking operation. It must be licensed to conduct banking operations in the foreign country where it is registered. In addition, Circular 40 requires that the Chief Representative may not concurrently be the general director of a foreign bank branch in Vietnam.

### Management

The management structure of a shareholding commercial bank shall comprise: the general meeting of shareholders, the management board, the board of controllers, and the general director.

The management structure of a joint venture bank or a bank with 100% foreign owned capital shall comprise: the management board, the board of controllers, and the general director.

A foreign bank branch shall be managed according to the laws applicable to the bank's parent in the home country, as long as its operations are consistent with the Law on Credit Institutions. The SBV must provide its written consent prior to the branch's implementation of the selected management structure.

The management board must establish a Risk

Management Committee and a Personnel Committee. The Head of each Committee must be a member of the either the management board or the board of controllers. Each Committee must have at least three members, and the Committee Working Rules must describe the responsibilities of the members, and set out regulations on meetings and decision-making.

The Risk Management Committee advises the board on the adequacy and effectiveness of the bank's risk management policies, and makes proposals for changes in policies and operational strategies. The Committee also assesses risk levels and warns management of circumstances which may impact the bank. In such cases, the Committee must suggest preventive measures. The Committee also advises the board on decisions about specific investments.

The Personnel Committee maintains the balance between the scale of the bank's executive infrastructure and the long term development of the bank. The Committee helps the board to manage personnel issues related to the election, appointment, and dismissal of members of the board of management, board of controllers, and the bank's executives. The Committee also develops internal rules regarding salary, remuneration, recruitment, training, and incentives for executives and other personnel.

### Increasing and Assigning Charter Capital

Circular 40 provides that charter capital of a commercial bank may be increased from certain sources. These include: the reserve fund for supplementing charter capital, retained profits, public share issues, private share placements, conversion of convertible bonds into ordinary shares, and additional capital issued by the owner (if a single member LLC) or by capital contributing members (if a multiple member LLC).

A foreign bank branch may increase its charter capital only from retained profits or by additional capital issued by the parent bank.

Circular 40 provides for a lock-up period on transfer of charter capital in a joint venture bank. For the five years following the date the license is issued, founding members are only permitted to assign their portion of capital contribution to other founding members, and for the three years following the date of capital contribution, capital contributing members are only permitted to assign their portion of capital contribution to other capital contributing members.

After the lock-up period, assignment of charter capital must nevertheless comply with the limits on capital contribution ratios applicable to joint venture banks and to banks with 100% foreign owned capital.

## Conclusion

Vietnam is currently in the process of restructuring its banking market. Several banks are not operating efficiently and cannot compete effectively. Current pressures are toward addressing bad debts and restructuring struggling banks.

While Circular 40 is highly technical legislation that governs the licensing process, it will also be an important part of the steps Vietnam is currently taking to strengthen its banking sector. In particular, from the perspective of the SBV, the disclosure requirements during the licensing process, the assessment of the role the proposed new bank will play in the economy, and the clarity of the conditions for licensing will be essential to assessing the investment.

## Contact Us

For inquiries related to this Legal Update, please contact the following persons or your usual contacts with our firm.

### **John Marsden**

Partner

T: + 852 2843 2584

E: [john.marsden@mayerbrownjism.com](mailto:john.marsden@mayerbrownjism.com)

### **Kevin Hawkins**

Partner

T: + 84 8 3822 8860 x116

E: [kevin.hawkins@mayerbrownjism.com](mailto:kevin.hawkins@mayerbrownjism.com)

### **Hoang Anh Nguyen**

Partner

T: + 84 8 3825 9775 x101

E: [hoanganh.nguyen@mayerbrownjism.com](mailto:hoanganh.nguyen@mayerbrownjism.com)

### **Mai Phuong Nguyen**

Partner

T: + 84 8 3825 9775 x108

E: [phuong.nguyen@mayerbrownjism.com](mailto:phuong.nguyen@mayerbrownjism.com)

### **Orsolya Szotyory-Grove**

Associate

T: + 84 83 822 8860 x117

E: [orsolya.szotyory-grove@mayerbrownjism.com](mailto:orsolya.szotyory-grove@mayerbrownjism.com)

---

Mayer Brown JSM is part of Mayer Brown, a global legal services organisation advising clients across the Americas, Asia and Europe. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

OFFICE LOCATIONS    AMERICAS: Charlotte, Chicago, Houston, Los Angeles, New York, Palo Alto, Washington DC  
ASIA: Bangkok, Beijing, Guangzhou, Hanoi, Ho Chi Minh City, Hong Kong, Shanghai, Singapore  
EUROPE: Brussels, Düsseldorf, Frankfurt, London, Paris  
TAUIL& CHEQUER ADVOGADOS in association with Mayer Brown LLP: São Paulo, Rio de Janeiro  
ALLIANCE LAW FIRM: Spain (Ramón & Cajal)

Please visit [www.mayerbrownjism.com](http://www.mayerbrownjism.com) for comprehensive contact information for all Mayer Brown offices.

This publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is intended to provide a general guide to the subject matter and is not intended to provide legal advice or a substitute for specific advice concerning individual situations. Readers should seek legal advice before taking any action with respect to the matters discussed herein. Please also read the Mayer Brown JSM legal publications Disclaimer.

Mayer Brown is a global legal services provider comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe - Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown JSM, a Hong Kong partnership and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

© 2012. The Mayer Brown Practices. All rights reserved.