Implications of Sections 16 and 17 of Republic Act No. 11534*

I. SALIENT FEATURES

Republic Act (RA) No. 11534, otherwise known as the "Corporate Recovery and Tax Incentives for Enterprises (CREATE) Act," which was enacted into law on March 26, 2021, and took effect on April 11, 2021, introduced a new Title XIII in the National Internal Revenue Code (NIRC) of 1997, as amended, which provides for a general provision on tax incentives regime in the country (Section 16). Consequently, the law amended and repealed certain provisions of various investment laws in the country (Section 17) that are inconsistent with the provisions of the new Title XIII of the NIRC of 1997, as amended.

Specifically, Section 16 of the CREATE Act provides the following, among others:

a. Tax incentives that may be granted to registered projects or activities and the conditions and period of availment thereof (Sections 294, 295, and 296);

b. Expanded functions and powers of the reconstituted Fiscal Incentives Review Board (FIRB), which include policy making and oversight functions on the grant and administration of tax incentives of investment promotion agencies (IPAs) and other government agencies (OGAs) administering tax incentives, approval or disapproval of grant of incentives to registered business enterprises (RBEs) upon the recommendation of the concerned IPA, monitoring and audit of compliance to performance standards of tax incentives beneficiaries, cancellation, suspensions, or withdrawal of the enjoyment of tax incentives for any violation/s of the conditions imposed in the said grant, among others (Section 297);

c. Formulation of the Strategic Investment Priority Plan (SIPP), which shall contain the priority projects or activities eligible for incentives, scope, and location of industry tiers, recommendations for types of fiscal and non-fiscal support needed to create high-skilled jobs to grow a local pool of enterprises, particularly micro, small and medium enterprises, that can supply to domestic and global value chains, to increase the sophistication of products and services that are produced and/or sourced domestically, to expand domestic supply and reduce dependence on imports, and to attract significant foreign capital or investment (Section 300);

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d. Power of the President to approve a set of incentives not exceeding 40 years, to attract highly desirable projects or very specific industrial activities that will create more employment, higher level of skills training, and greater value-added to the economy (Section 301); and

e. Tax incentives management and transparency (Sections 305 to 308).

II. IMPLICATIONS OF THE CREATE ACT

A. On the single menu of tax incentives, conditions, and period of availment thereof

The single menu of incentives across the 14 IPAs addresses the confusion and forum/incentive shopping of potential investors to apply with the IPA, which has a superior set of incentives. Under the CREATE Act, the FIRB or the IPAs, under a delegated authority from the FIRB, may grant the following types of tax incentives to registered projects or activities:

a. Income tax holiday (ITH);

b. Special corporate income tax (SCIT);

c. Enhanced deductions (ED);

d. Duty exemption on importation of capital equipment, raw materials, spare parts, or accessories; and

e. Value-added tax (VAT) exemption on importation and VAT zero-rating on local purchases.

The period of availment of these tax incentives is based on location and industry tiers. (See Tables 1 and 2.) The location tiers are categorized into three, as follows:

a. National Capital Region (NCR);

b. Metropolitan areas or areas contiguous and adjacent to the NCR; and

c. All other areas.

Industry tiers are also categorized into Tier I[1]; Tier II[2]; and Tier III[3]. The industry tier of activity is prioritized according to the national industrial strategy specified in the SIPP, which will define the coverage of the tiers and provide the conditions for qualifying the activities.

The duration of incentives for export activities and domestic market activities based on the location and industry tier are as follows:

Table 1

Duration of Incentives for Export Activities under the CREATE Act[4]

Location Tier	Industry Tier		
	Tier I	Tier II	Tier III
National Capital Region (NCR)	4 ITH + 10 ED/SCIT	5 ITH + 10 ED/SCIT	6 ITH+10 ED/SCIT
Metropolitan areas or areas contiguous and adjacent to the NCR	5 ITH + 10 ED/SCIT	6 ITH + 10 ED/SCIT	7 ITH + 10 ED/SCIT
All other areas	6 ITH + 10 ED/SCIT	7 ITH + 10 ED/SCIT	7 ITH + 10 ED/SCIT

[1] Tier I shall include activities that (i) have high potential for job creation; (ii) take place in sectors with market failures resulting in under provision of basic goods and services; (iii) generate value creation through innovation, upgrading or moving up the value chain; (iv) provide essential support for sectors that are critical to industrial development; or (v) are emerging owing to potential comparative advantage.

[2] Tier II shall include activities that produce supplies, parts and components, and intermediate services that are not locally produced but are critical to industrial development and import-substituting activities, including crude oil refining.

[3] Tier III activities shall include (i) research and development resulting in demonstrably significant value-added, higher productivity, improved efficiency, breakthroughs in science and health, and high-paying jobs; (ii) generation of new knowledge and intellectual property registered and/or licensed in the Philippines; (iii) commercialization of patents, industrial designs, copyrights and utility models owned or co-owned by a registered business enterprise; (iv) highly technical manufacturing; or (v) are critical to the structural transformation of the economy and require substantial catch-up efforts.

[4] Rule 3, Section 6(A) of the Implementing Rules and Regulation of Title XIII of CREATE Act.

Table 2

Duration of Incentives for Domestic Activities under the CREATE Act[5]

Location Tier	Industry Tier		
	Tier I	Tier II	Tier III
NCR	4 ITH + 5 ED	5 ITH + 5 ED	6 ITH + 5 ED
Metropolitan areas or areas contiguous and adjacent to the NCR	5 ITH + 5 ED	6 ITH + 5 ED	7 ITH + 5 ED
All other areas	6 ITH + 5 ED	7 ITH + 5 ED	7 ITH + 5 ED

The CREATE Act also provides for two additional years of ITH to projects or activities of registered enterprises located in areas recovering from armed conflict or a major disaster, as determined by the Office of the President.

To further encourage investments in less developed areas, the CREATE Act provides for three additional years of ITH to projects or activities registered prior to the effectivity of the CREATE Act, or to those already enjoying the incentives under the CREATE Act but which in the duration of their incentives, will completely relocate from the NCR. However, such additional incentives shall commence only after the completion of the relocation of operations.

Qualified expansion projects[6] may also be granted three years ITH, followed by SCIT or ED, as applicable. The expansion project or activity may also be entitled to duty exemption, VAT exemption on importation, and VAT zero-rating on local purchases.[7]

[5] Rule 3, Section 6(B) of the Implementing Rules and Regulation of Title XIII of CREATE Act.

[6] Refers to a project of an existing enterprise that would involve the installation of additional facilities or equipment, or infusion of additional investment that will result in increase in capacity of the same or similar activity within the same existing plant or facilities of the enterprise, and additional benefits to the economy. It shall include modernization and rehabilitation resulting in the upgrade of the registered product or service. The resulting increase in capacity or upgrade of the registered product or service shall be determined in the SIPP. [Section 3(U), Rule 1, Part I of the IRR, as amended, of Title XIII of NIRC of 1997, as amended by RA 11534]

[7] Amended Section 3, Rule 3 of the CREATE IRR.

The maximum period of customs duty exemption, and VAT zero-rating and exemption, unless otherwise extended by the SIPP,[8] are as follows:

Fiscal incentives	Domestic market enterprises	Export-oriented enterprises
Customs duty exemption on importation of capital equipment, raw materials, spare parts, or accessories	12 years from the date of registration	17 years from the date of registration
VAT zero-rating and exemption	Not applicable.	12 years from the date of registration

Based on the foregoing, a longer period of incentives is given to activities in more sophisticated sectors and will locate in less developed areas. It aims to attract investments to those areas which are less developed and towards activities that require a high level of technology, human capital, competencies or know-how, and infrastructures to be produced or offered. Further, it creates a more equitable tax incentive system that will allow for inclusive growth and the generation of jobs and opportunities in all the country's regions.

B. *On the newly reconstituted FIRB and its expanded functions and powers*

The FIRB is an existing inter-agency committee created under Presidential Decree (PD) No. 776, series of 1975.[9] Prior to the enactment of the CREATE Act, the membership of the FIRB was composed of the (a) Secretary of Finance, as Chairperson, (b) Secretary of Trade and Industry, (c) Director-General of the National Economic and Development Authority (NEDA), (d) Commissioner Internal Revenue, and (e) Commissioner of Customs, as members. The membership was further expanded pursuant to Memorandum Order No. 23, s. 1986,[10] which included the Secretary of Budget and Management (DBM) and the Executive Director of the National Tax Research Center (NTRC) as additional members of the FIRB.

Under the CREATE Act, the FIRB is chaired by the Secretary of Finance, co-chaired by the Secretary of Trade and Industry, and has three Cabinet-level members, which include the Executive Secretary of the Office of the President, the Secretary of Budget and Management and the Socioeconomic Planning Secretary. The newly

[8] Amended Sections 4 and 5, Rule 8 of the CREATE IRR.

[9] Entitled, "Modifying All Laws, Acts, Decrees, Orders and Ordinances Granting Subsidies, Exemptions from Taxes, Duties, Fees, Imposts and Other Charges Under Certain Exceptions and Creating a Fiscal Incentives Board", (August 24, 1975).

[10] Entitled, "Expanding the Membership of the Fiscal Incentives Review Board (FIRB)", (July 15, 1986).

reconstituted FIRB structure ensures that besides tax subsidies, tax incentives granted by the government are also being monitored and administered by relevant agencies.

The FIRB has a technical committee that serves as its main support unit. The FIRB Technical Committee is composed of the following: (a) Undersecretary of Finance as the Chairperson; (b) Undersecretary or Assistant Secretary of the Office of the President; (c) Undersecretary of Trade and Industry and Board of Investments Managing Head or Assistant Secretary of Trade and Industry; (d) Undersecretary or Assistant Secretary of Budget and Management; (e) Undersecretary or Assistant Secretary of the National Economic Development Authority; (f) Commissioner or Deputy Commissioner of Internal Revenue; (g) Commissioner or Deputy Commissioner of Customs; (h) Commissioner of the Philippine Competition Commission; and (i) Director-General or Chairperson or Administrator of the IPAs, provided that their participation in deliberations and decision-making processes of the Technical Committee shall be limited only on matters concerning their respective IPAs.

The FIRB Secretariat, on the other hand, shall be headed by an Assistant Secretary of Finance and staffed by the NTRC.

Table 3

Comparative Organizational Structure of the FIRB Before and After the CREATE Act

FIRB Structure	Pre-CREATE	CREATE
Board Proper	1. Secretary of Finance, as chairperson; 2. Secretary of Trade and Industry; 3. Secretary of Budget and Management; 4. Socioeconomic Planning Secretary; 5. Commissioner of Internal Revenue; 6. Commissioner of Customs; and 7. Executive Director of the NTRC	1. Secretary of Finance, as chairperson; 2. Secretary of Trade and Industry, as co-chairperson; 3. Executive Secretary of the Office of the President; 4. Secretary of Budget and Management; and 5. Socioeconomic Planning Secretary
Technical Committee	1. Undersecretary of Finance; 2. Undersecretary of Trade and Industry; 3. Undersecretary of Budget and Management; 4. Socioeconomic Planning Undersecretary; 5. Deputy Commissioner of Internal Revenue;	1. Undersecretary of Finance, as chairperson; 2. Undersecretary of Trade and Industry and Board of Investments Managing Head or Assistant Secretary of Trade and Industry;

FIRB Structure	Pre-CREATE	CREATE
	6. Deputy Commissioner of Customs; and 7. Deputy Director of the NTRC	3. Undersecretary or Assistant Secretary of the Office of Executive Secretary; 4. Socioeconomic Planning Undersecretary or Assistant Secretary; 5. Commissioner or Deputy Commissioner of Internal Revenue; 6. Commissioner or Deputy Commissioner of Customs; 7. Commissioner of the Philippine Competition Commission; and 8. Director-General or Chairperson or Administrator of the IPAs, provided that the participation of the IPA representative shall be limited to matters concerning the IPA
Secretariat	NTRC	NTRC, headed by an Assistant Secretary of Finance

Pursuant to PD 776, s. 1975, the FIRB was primarily tasked with the responsibility of determining what tax exemptions should be withdrawn, revoked, or suspended under certain fiscal parameters. With the issuance of Executive Order (EO) No. 93, s. 1986,[11] the powers of the FIRB were expanded to include the power to grant tax subsidy. Thereafter, the power to determine tax exemption to be withdrawn was later deferred to Congress upon its convention. Hence, prior to the CREATE Act, the only power left to the FIRB was the power to grant tax subsidy.

Upon the enactment of the CREATE Act, the FIRB is mandated to oversee the administration and grant of tax incentives by IPAs and OGAs administering tax incentives [Section 297 (A)] to ensure that the recipient of tax incentives complies with their commitments, thereby promoting accountability and transparency in the administration of tax incentives.

Another power of the FIRB under the CREATE Act is the authority to approve applications for tax incentives [Section 297 (B)]. For applications involving activities or projects with a total investment capital of one billion pesos and below, the same shall be delegated to the concerned IPAs. The FIRB, on the other hand, shall act on applications for tax incentives involving projects with investment capital of more than one billion pesos[12] upon the recommendation of the concerned IPA. To

[11] Entitled, "Withdrawing All Tax and Duty Incentives, Subject to Certain Exceptions, Expanding the Powers of the Fiscal Incentives Review Board and for Other Purposes", issued December 17, 1986.

[12] The one billion pesos threshold may be increased by the FIRB as it may deem proper.

enhance efficiency in performing FIRB functions, the approval of tax incentives with investment capital of more than one billion pesos (P1,000,000,000.00) but not more than three billion pesos (P3,000,000,000.00) shall be acted upon by the FIRB Technical Committee, subject to the confirmation of the Board pursuant to FIRB Resolution No. 10-21.[13]

Further, the CREATE Act also provides that only projects or activities listed in the SIPP are eligible to apply for tax incentives. Furthermore, the applications for tax incentives shall be duly accompanied by a cost-benefit analysis or CBA. This provision of the CREATE Act aims to target projects or activities that may be entitled to incentives and determine the impact of the tax incentives granted by the government on the economy.

The power to approve tax incentives necessarily includes the power to cancel, suspend or withdraw the enjoyment of fiscal incentives. Under Section 297 (E) of the NIRC of 1997, as amended by the CREATE Act, this power may be exercised by the FIRB on its own initiative or upon recommendation of the IPA for material violations of any of the conditions imposed in the grant of fiscal incentives including the non-compliance of the agreed performance commitments.

The power to grant tax subsidy to government-owned and/or -controlled corporations, government instrumentalities, government commissaries, and state universities and colleges vested to the FIRB pursuant to EO 93 was retained and reiterated under the CREATE Act [Section 297 (C)]. In relation thereto, the CREATE Act also granted the FIRB the power to cancel, suspend or withdraw the enjoyment of such and, when necessary, endorse the same for assessment and collection upon finding of a violation of any of the conditions imposed for the grant of tax subsidy [Section 297 (F)].

The above features of the CREATE Act only show that the grant of tax incentives or tax subsidy is not absolute, i.e., these privileges are anchored on fulfillment of commitments made and compliance with the conditions set forth with the grant. This will ensure that despite revenues being foregone by the government, these still translate to benefits that redound to the economy.

Another important feature of the CREATE Act is the grant of authority to the FIRB to require IPAs and OGAs administering tax incentives to submit, regularly or when requested, summaries of approved investment and incentives granted, and firm or entity-level tax incentives and benefits data [Section 297 (G)]. In relation thereto, the FIRB is also mandated under the CREATE Act to publish regularly at per-firm and entity-level data pertaining to the amount of tax incentives, tax payments, and other related information, including benefits data [Section 297 (H)]. This feature of the law will create a database of information that will be useful in evaluating the

[13] FIRB Resolution No. 5-21 (dated 14 April 2021) also provides that the grant of incentives for projects or activities with investment capital of more than one billion pesos (P1,000,000,000.00) shall be submitted to the FIRB pursuant to Section 297 (B) of the NIRC of 1997, as amended by RA 11534.

country's tax incentives system and its overall impact on the economy, as well as in coming up with directives or policies aimed at furthering the objectives of the law.

C. *On the formulation of the SIPP*

The CREATE Act likewise mandates the BOI, in coordination with the FIRB, IPAs, and OGAs administering incentives, to formulate the SIPP, which shall identify priority projects or activities entitled to incentives. All sectors and industries included in the SIPP shall undergo an evaluation process to determine the suitability and potential of such industries in promoting long-term growth. Furthermore, the projects or activities must comply with the specific qualification requirements or conditions as set and determined by the FIRB. The formulation of the SIPP, pursuant to the CREATE Act, ensures a more targeted list of activities with significant positive externalities, making the Philippines globally competitive.

Pending the issuance of the SIPP, the 2020 Investment Promotion Plan (IPP) shall serve as the transitional SIPP. This is embodied under FIRB Resolution No. 5-21 (dated April 14, 2021), which provides that Memorandum Order No. 50, Approving the 2020 IPP (signed by the President on November 18, 2020, which took effect on December 6, 2020), and the General Policies and Specific Guidelines to Implement the 2020 IPP shall serve as the transitional SIPP. Hence, the transitional SIPP shall serve as the basis for the grant of incentives to registrable projects and activities by the IPAs and the FIRB.

D. *On the power of the President to grant incentives*

In the interest of national economic development, the CREATE Act grants the President of the Philippines the power to approve and grant incentives for highly desirable projects or specific industrial activities. The President is given the power to modify the mix, period, or manner of availment of tax incentives or craft the appropriate financial support package for a highly desirable project or a specific industrial activity. The grant of ITH, however, shall not exceed eight years, and thereafter, SCIT may be granted, but in no case shall the total period of incentives availment exceed 40 years.

The power of the President to grant tax incentives shall be based on the positive recommendation from the FIRB upon finding that the project has a comprehensive sustainable development plan with clear inclusive business approaches, and high level of sophistication and innovation, and has a minimum investment capital of 50 billion pesos or its equivalent in Unites States dollars, or a minimum direct local employment generation of at least 10 thousand within three years from the issuance of the certificate of registration. However, this power of the President shall be deemed suspended and cannot be exercised during fiscal years when an unimaginable fiscal deficit is declared by the President on the advice of the Development Budget Coordination Committee.

This authority of the President allows flexibility in the grant of incentives to highly desirable activities that will help the country attract big-ticket projects that create high-value jobs, build new industries to diversify economic activities, and attract significant foreign and domestic capital or investment.

E. Tax incentives management and transparency

The CREATE Act also gives importance to management and transparency in the grant of tax incentives. The CREATE Act repealed and adopted certain provisions of RA 10708 or the "Tax Incentives Management and Transparency Act (TIMTA)" to further strengthen the fiscal accountability and transparency in the country's grant and management of tax incentives.

Pursuant to Section 305 of the NIRC of 1997, as amended by RA 11534, the FIRB shall require all RBEs to submit a complete Annual Tax Incentives Report (ATIR) with their respective IPAs. Consequently, IPAs are required to submit tax incentives and benefits data to the FIRB for its own monitoring, evaluation, and reporting of tax incentives. Table 4 shows the list of reports and other submissions required of RBEs and IPAs pursuant to the CREATE Act and its implementing rules and regulations (IRR) and the deadlines of submission, viz.:

Table 4

Reports and Calendar of Submissions to the IPA and/or FIRB

Particulars	Sender	Recipient	FIRB template	Deadline
Monitoring of the imported capital equipment, spare parts, and accessories	RBE	IPA	No	Every 5^{th} of the month
TIMTA annexes	RBE	IPA/FIRB	Yes	30 days after Income Tax Return (ITR) filing (simultaneous submission to FIRB)
Monitoring report on the compliance of RBEs with the terms and conditions imposed for registration and availment of tax incentives	IPA	FIRB	No	90 days after ITR filing for above P1 billion 180 days after ITR filing for P1 billion and below
Consolidated TIMTA	IPA	FIRB	Yes	

Particulars	Sender	Recipient	FIRB template	Deadline
Master list of all RBEs availing of tax incentives	IPA	FIRB	Yes	On or before August 31, 2021, for RBEs as of April 10, 2021
	IPA	FIRB	Yes	Within 30 days after the end of each calendar year (January 30, 2022)
List of projects or activities with tax incentives with investment capital of P1 billion and below	IPA	FIRB	Yes	On or before August 10, 2021 for projects or activities approved from April 11 to July 31, 2021
	IPA	FIRB	Yes	Within 10 days after the end of each month
Consolidated TIMTA [ATIR and Annual Benefits Report (ABR)]	IPA	BIR	Yes	Within 60 days from the statutory deadline for filing of Final Adjustment Return and payment of taxes due thereon
List of all registered business enterprises availing of tax incentives (before and after the passage of CREATE)	IPA	BIR	Yes	To be updated 60 days after the close of each calendar year
Master list of all registered business enterprises (RBEs) under the IT-BPM sector as of August 31, 2021, and as of December 31, 2021	IPA	FIRB	Yes	On or before January 15, 2022
Monthly report of bonded laptops, desktops, and other properties and details of bonds posted related to work-from-home arrangements for RBEs in the IT-BPM Sector in accordance with FIRB Resolution No. 19-21 starting September 2021	IPA	FIRB	Yes	Within 15 days after the end of each month

Particulars	Sender	Recipient	FIRB template	Deadline
Monthly report bonded laptops, desktops, and other properties and details of bonds posted related to work-from-home arrangements for RBEs in the IT-BPM Sector in accordance with FIRB Resolution No. 19-21 starting September 2021	RBE	IPA	Yes	Within 10 days after the end of each month
Master list of all RBEs that have been issued with Gaming License/s as of December 31, 2021	IPA	FIRB	Yes	Within 15 days after the end of each month
Master list of all RBEs that have been issued with Service Provider Accreditation as of December 31, 2021	IPA	FIRB	Yes	Within 15 days after the end of each month

III. CONCLUSION

After almost three decades and numerous proposals in Congress, the rationalization of the fiscal incentives system is finally brought to fruition through the enactment of the CREATE Act. The provisions of the CREATE Act on fiscal incentives harmonization across IPAs, a longer period of incentives to more sophisticated activities, and the institutionalization of the SIPP make the fiscal incentives regime of the country more equitable that will allow for inclusive growth and generation of jobs and opportunities in all the regions of the country and ensure access and ease in the grant of these incentives, especially for applicants in the least developed areas. Furthermore, the expanded powers of the FIRB from an administrator of tax subsidy to a policymaker and regulator of fiscal incentives in the country strengthens the management and monitoring of tax incentives granted so that the government will not unnecessarily forego its much-needed revenues.