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SUBJECT: SOME LEGAL ISUESS FOR FOREIGN OWNED ENTERPRISE (“FOE”) IN CONDUCTING REAL ESTATE BUSINESS IN VIETNAM

DATE: AUGUST 15, 2021

NO. 2

I. LEGAL GROUNDS

- (a) *Law on Investment dated June 17, 2020 (“LOI 2020”);*
- (b) *Law on Investment dated November 25, 2014 (“LOI 2014”);*
- (c) *Law on Enterprise dated June 17, 2020 (“LOE 2020”);*
- (d) *Law on Enterprise dated November 25, 2014 (“LOE 2014”);*
- (e) *Law on Real Estate Trading dated November 25, 2014 (“LOR 2014”);*
- (f) *The Law on Housing No. 65/2014/QH13 on November 25, 2014 (“LOH 2014”); and*
- (g) *The Decree No. 30/2021/ND-CP dated on March 26, 2021 on emending some articles of the Government Decree on guiding for the Law on Housing No. 99/2015/ND-CP on October 20, 2015.*

II. MAIN CONTENTS

No.	Issues	Legal Provisions	HTCLF’s Comments
(1)	Main types of FOE and certain legal procedures	<p>It can be one of the following models:</p> <ul style="list-style-type: none">(a) 01 member Limited-liability company;(b) 02 or more members Limited-liability company; or(c) Joint-stock company <p>The foreign investors will conduct certain legal procedures, including the following steps:</p> <ul style="list-style-type: none">(i) Investment Registration Certificate (“IRC”);	<p>In case of conditional business lines to the foreign investors or business lines which are not under the WTO’s Commitments, please timeline will be longer and subject to the approval of related authorities as well.</p>

		<p>(ii) Enterprise Registration Certificate (“ERC”); and</p> <p>(iii) Making seal, public notification, opening the bank accounts, etc.</p> <p><i>The timeline would be from 20 to 30 days for conducting the above procedures.</i></p>	
(2)	Mainly real estate business activities allowed to the FOE	<p>(a) Renting house or construction for sublease;</p> <p>(b) Investing in building houses for lease; or building other construction (not house) for sale, for rent, or for lease purchase <i>(for the land leased by the State);</i></p> <p>(c) Investing in building houses for sale, lease – purchase <i>(for the land allocated by the State);</i></p> <p>(d) Receiving transfer of all or a part of real estate project of the investor to build houses, construction factories for sale, lease, lease purchase; and</p> <p>(e) Investing in constructing houses and other construction to transfer following the purpose of land use <i>(for land leased in industrial zones, industrial complexes, export processing zones, hi-tech parks or economic zones).</i></p>	Other real estate businesses should be conducted under a proper structure and procedure.
(3)	The legal requirement on minimum legal capital for real estate enterprise	<p>Any organizations or individuals wish to conduct real estate business shall <u>set up enterprise(s)</u> and have legal capital <u>not smaller than VND 20 billion</u>, <i>excluding small-scale or irregular transactions of real estate sale, transfer, lease-out, and lease purchase.</i>¹</p> <p><i>Today, however, real estate businesses are not required to have the minimum legal capital when established.</i>²</p>	The new provisions of the LOI 2020 have expanded the possibility for both domestic and foreign investors to conduct real estate business without having a minimum legal capital as before. This new regulation also contributes effectively to the sustainable development of the real estate market in Vietnam.

¹ Article 10, LOR 2014

² Article 75, Clause 2, Item 1, LOI 2020

(4)	The deposit or bank guarantee for the enterprise to be approved as the investor of the commercial housing construction project	<p>The FOE in commercial housing projects must:</p> <p>(a) Be enterprises or cooperatives established and operated under Vietnamese regulations of law;</p> <p>(b) Be licensed for real estate trading; and</p> <p>(c) <u>Be having a capital deposit or a bank guarantee</u> to execute each project in accordance with the LOI 2020.³</p>	These are mandatory conditions for an enterprise to be approved as the investor of a commercial housing construction project. Today, there is no longer a minimum legal capital requirement for setting up the FOE on real estate business. The new regulation on putting deposit or bank guarantee as a financial measure to effectively ensure for investors in the field of real estate business. The use of this financial leverage also effectively contributes to the real estate business activities which are more dynamic, feasible and prosperous in Vietnam.
(5)	Investor selection methods	<p>Under the LOI 2014, the investors in projects for commercial housing construction shall be selected through the following methods:</p> <p>(a) Holding land auction prescribed in law on land;</p> <p>(b) Inviting bids for land-using projects;</p> <p>(c) <u>Appointing investors</u> who meet all requirements as prescribed or having lawful land use rights as prescribed.</p> <p>However, the Item (c) above is revised by the LOI 2020 as the following:</p> <p><u>“Approving an investor in accordance with the Law on Investment.</u> If multiple investors are approved, the investor shall be</p>	<p>The LOI 2020 has removed the regulation on “appointing an investor in case the investor has a lawful land use right and meets other conditions as prescribed in Article 21 of the LOH 2014 as analyzed in Section 4 above.</p> <p>In some cases, such approval is only limited to "fundamental principles", including the investor’s intentions and directions to do commercial housing investment projects. This approval is not a final decision on the investor selection for the investment project implementation. The competent state management agency can still approve the</p>

³ Article 75, LOI 2020

		<p>determined in accordance with the Law on Construction.</p> <p>The Government shall elaborate this Point.”⁴</p>	<p>policy for many investors to study together on (i) the project's objectives, location, scale, phrases and duration; (ii) investor or investor selection methods; (iii) special mechanisms and policies (if any) for the investment project implementation as well.</p>
(6)	Types of land use to conduct projects for commercial housing construction	<p>Article 23, LOH 2014 prescribes as follows:</p> <p>(a) Building commercial housing on <i>lawful residential land plots</i>.</p> <p>(b) Building commercial housing for lease, lease purchase, or sale on land plots allocated by the State.</p> <p>(c) Building commercial housing for lease on land plots leased out by the State.</p> <p>(d) Building commercial housing on land plots which are transferred as prescribed in law on land.</p> <p>However, the Article 75 of LOI 2020 has revised the item (a) mentioned above as the following below:</p> <p>“Having the <i>lawful right to use residential land and the other types of land</i> which is allowed by a competent authority to be repurposed as residential land.”</p>	<p>Expand the types of land use to implement investment projects on commercial housing construction, including not only residential land but also other types of land such as land for non-agricultural production and business, including land in industrial parks, industrial cluster, and export processing zones; commercial and service land, etc.</p> <p>During the bidding, auction, and approving the project investor in accordance with the LOI 2020, the competent state agency allows for changing the land use purpose from agricultural land to non-agricultural land as well. It is dependent on the master plan of 1/500 scale approved by the competent state agency in particular cases.</p>

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Note: The above summary of the legal ground and procedure aims to give the fundamental sources and to support effectively for foreign investors including both individuals and organizations wishing to conduct real estate business activities in Vietnam. This update is

⁴ Article 75, LOI 2020

neither HTCLF's legal opinion nor contain any commitments binding the HTCLF's civil liability to any valuable clients.

For further details and in-depth advices on this legal issue, please do not hesitate to contact us through:

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