

CLIENT UPDATE JULY 2015



Today, 1 July 2015, is a landmark date for foreign investors intending to or currently doing business in Vietnam, as the country sees a series of new legislation come into effect. These laws are of key significance, as they include the widely anticipated Law on Investment (“**LOI**”), Law on Enterprises (“**LOE**”), Law on Housing (“**LOH**”) and Law on Real Estate Business (“**LORB**”). These new laws promise a more open market and transparent legal

environment for Vietnam, and are expected to strengthen corporate governance and afford greater opportunities for foreign investors to enter into the country’s market (particularly real estate) sector in Vietnam. In addition, foreign investors are eagerly waiting for Decree 60/2015/ND-CP to come into effect on 1 September 2015, which will increase foreign ownership in public companies.

This update provides you with an overview of the salient changes introduced by these new regulations.

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FOREIGN OWNERSHIP IN PUBLIC COMPANIES TO REACH 100%



From 1 September 2015, foreign ownership caps in public companies will be removed for a considerable number of sectors – i.e., foreign investors will be able to acquire and hold up to 100% of the shares in public companies under the Government’s Decree No. 60/2015/ND-CP.

Specific restrictions will remain for certain sectors (e.g., banking, telecommunications and energy) under Vietnam’s ratified treaties and legislation. The default 49% cap will also continue to apply to conditional sectors for which the laws are silent on foreign ownership caps. A circular guiding Decree No. 60/2015/ND-CP will be passed at a later date to further particularise the sectors for which caps will apply.

Despite the maintenance of certain restrictions, Decree No. 60/2015/ND-CP is a welcome piece of legislation, aimed at boosting FDI in the country. We anticipate that the country’s traditionally strong sectors, such as manufacturing, will remain open to foreign investment.

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NEW LAW ON ENTERPRISES

Below are key changes introduced by the new LOE:

Business Line Expansions

Under the old LOE, a company could only conduct its business in accordance with the business lines recorded in its Enterprise Registration Certificate (“ERC”). Any expansions to its business lines required the carrying of lengthy procedures to amend the ERC.

Under the new LOE, the recognition of business lines on the ERC has been removed. Business line registration will only be required at establishment, while additional business lines only require a notification to the licensing authorities prior to carrying them out. The company’s business lines will be listed on the National Enterprise Registration Portal, with any changes to the registered business lines updated on this portal.

The change allows companies to expand their business more freely and quickly, and removes the lengthy licensing procedures previously required.

Seal of Enterprise



The new LOE affords greater flexibility in the number of seals that a company may have, as well as the contents of such seals.

Under its charter, companies may now decide on the number of seals, its form, its contents, and its management and use. Prior to using the seal, the company will be responsible for notifying on its seal sample to the business registration authority for publication on the National Enterprise Registration Portal.

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While the new LOE's guiding decree has not yet been issued, according to the draft decree, decisions regarding the company's seals will fall under jurisdiction of the company's Members' Council or General Meeting of Shareholders.

Legal Representative of the Company

Under the new LOE, limited liability companies and joint stock companies may have more than one legal representative. In such cases, the charter of the company must specify the number and managerial position of each legal representative, and the company must register the same with the relevant business registration authority. The company must also ensure that at least one legal representative resides in Vietnam.

However, the new LOE creates difficulties on banks when providing loans and receiving collateral. Particularly:

(i) **Assessment of borrower's information prior to lending**

Under Vietnamese law, banks may only provide a loan when borrower's production plan or business plan is in accordance with its registered business lines. Previously, to assess this, the bank will only require an ERC. However, under the new LOE, in order to conduct its assessment, banks will also need to assess the borrower's charter or purchase information from the National Business Registration Portal.

(ii) **Determination of authority to execute contracts**

In practice, many credit contracts and guarantees are declared invalid due to unauthorised execution. While under the new LOE, multiple legal representatives are permitted under the company's charter, there is currently a lack of guidance on the situation where the legal representative executing a credit contract or guarantee exceeds his/her authority. The legal consequence is unclear, and we expect it will remain so until further guiding regulations are issued on this matter.

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NEW LAW ON INVESTMENT

Below are key changes introduced by the new LOI:

Foreign Investor

The new LOI now provides a definition of a foreign investor, whereas this was unclear under the previously law.

Under the new LOI, foreign investors include individuals of foreign nationality or organisations established under foreign laws that invest in Vietnam. A foreign-owned company (“**FOC**”) will be considered a foreign investor if

51% or more of its equity is owned by foreign investors, and/or it is a company in which at least 51% of its charter capital is owned by foreign investors.



New Incorporation Process

Under the new LOI, in order to incorporate an FOC, the foreign investor is required to apply for and obtain two separate certificates: the Investment Registration Certificate (“**IRC**”), which is issued to the foreign investor rather than the FOC, and the ERC, which registers the incorporation of the FOC.

However, for projects subject to approval by the National Assembly, Prime Minister or Provincial People’s Committee, the foreign investor must obtain an “in-principle approval” prior to obtaining the IRC and ERC. This in-principle approval requirement replaces the evaluation process for the purpose of issuing the Investment Certificate under the old LOI.

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Registration and Approval of Significant Acquisitions

Under the new LOI, in the event of an acquisition that results in the foreign investor holding from and over 51% of the company's equity or in the event the company is engaged in conditional sectors applicable to foreign investors, the foreign investor will be required to register and obtain approval by the licensing authorities. This is to be done prior to registration or notifying the change to shareholder/member.

Investment Incentives

Under the new LOI, certain projects are entitled to investment incentives, including:

- (i) projects falling under industries or geographical areas that are entitled to preferential treatment;
- (ii) projects with capital of at least VND 6 trillion (approximately US\$280 million), to be contributed within 3 years from the date of issuance of the IRC or in-principle approval;
- (iii) projects in rural areas employing at least 500 employees; and
- (iv) hi-tech enterprises, and scientific and technological enterprises or organisations.

Deposit for Project Implementation

An investor may now be required to provide a deposit as a guarantee for implementing an investment project if the investor is allocated or leases land from the State. The deposit will range from 1% to 3% of the total investment capital. The government will issue further guiding regulations on this matter.

Dispute Settlement

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Under the former LOI, in general, an FOC may agree to select domestic or international arbitration to resolve disputes, regardless of its foreign shareholding.

However, under the new LOI, this right is considerably restricted and only FOCs with 51% or more of its equity held by foreign investors can agree to select such arbitration. Arbitration can only be selected to resolve disputes relating to their business investment, including the investment of capital in or establishing an economic organisation, or an investment in the form of contracts or implementing an investment project.

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NEW LAW ON RESIDENTIAL HOUSING AND NEW LAW ON REAL ESTATE BUSINESS



The new laws are intended and expected to revive the frozen real estate market in Vietnam, and bring forth several crucial changes in policy, including loosening the conditions for foreign entities to own residential houses and providing a more transparent regulatory framework for real estate transactions in Vietnam.

FOREIGN OWNERSHIP OF RESIDENTIAL HOUSING

Eligible foreign owners of residential housing

Similar to the old LOH, the new law classifies eligible owners of residential housing into three categories: Vietnamese entities, overseas Vietnamese, and qualified foreign entities. Particularly:

- (i) Overseas Vietnamese and foreign individuals: those who are permitted to enter into Vietnam shall be entitled to own residential houses;
- (ii) Foreign entities: in addition to foreign-invested entities as provided under the old law, branches, representative offices of foreign enterprises, foreign investment funds and branches of foreign banks operating in Vietnam can own residential houses.

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Number of houses owned by foreign entities

Foreign entities are entitled to own all types of commercial residential houses, including apartments and houses in residential housing projects, subject to the following limitations:

- (i) The number of apartments to be owned must not exceed 30% of the total number of apartments in one single apartment building; and
- (ii) The number of houses to be owned must not exceed 250 houses in an area having the population equivalent to an administrative level of a ward.

Accordingly, the rights and obligations arising from the ownership of such apartments and houses, particularly for overseas Vietnamese and foreign entities, are as follows:

- (i) Overseas Vietnamese will have the same ownership rights as Vietnamese entities;
- (ii) Foreign individuals will have the same ownership rights as Vietnamese individuals. However, where a foreign individual wishes to lease his/her house, he/she will have to notify the competent authorities of the lease and pay any relevant taxes imposed; and
- (iii) Foreign organisations are only entitled to use their houses as a residence for their employees and are not allowed to lease nor use it for any other purpose.

Duration of ownership

The term of ownership of apartments/houses by foreign individuals is limited to 50 years (with an option of renewal) from the date of issue of the certificate on ownership. If a foreign individual marries a Vietnamese citizen, he/she will be entitled to indefinite ownership term of the house.

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A foreign organisation may own a house for a duration not exceeding the term of its IRC, including the extended period. This duration is calculated from the date the foreign organisation is issued the IRC.

REAL ESTATE BUSINESS

Real estate business means capital investment for profit to carry out the following activities:

- (i) construction, purchase or being transferred real estate for sale, transfer, lease, sub-lease, or hire purchase of such real estate; or
- (ii) provision of real estate services, including real estate brokerage, real estate trading floor, real estate consultancy, and real estate management.

In comparison with the old law, real estate valuation, auction and advertising have been removed from the definition of real estate business and are now governed by specialised laws.

However, the specific scope of real estate business of an entity will depend on various factors, including:

- (i) whether the persons engaging in real estate business are domestic entities, overseas Vietnamese, and/or FOCs, especially in respect to leasing houses and building for sub-lease; and
- (ii) whether the land being used for the real estate project is allocated by the State, land leased from the State, land of which land use right is recognised by the State or land being transferred from others.

Another key change to the scope of real estate business is that overseas Vietnamese and FOCs are now entitled to lease houses and buildings for sub-leasing in Vietnam.

LEGAL CAPITAL APPLICABLE TO COMPANIES CONDUCTING REAL ESTATE BUSINESS

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If an investor wishes to engage in real estate business through incorporation of a company, it must have a legal capital of at least VND 20 billion (approximately USD 1 million). This is a considerably more restrictive floor amount, compared to VND 6 billion under the old law.

Organisations, households and individuals who sell, transfer, lease or grant a hire purchase of real estate irregularly and on a small scale will be not subject to the above condition. However, the law currently does not specify the criteria on what is regarded as “irregular” and “small scale”. Guiding legal instruments are anticipated to be announced to further particularise this ambiguity.

In addition, the required ratio of charter capital over investment capital applicable to developers of residential housing, new urban developments and infrastructure project, which cannot be less than 15% or 20% of the total investment capital of the real estate project, shall not be applied under the new law.

CAPITAL CONTRIBUTION IN RESPECT OF HOUSES TO BE FORMED IN THE FUTURE (OFF-PLAN PROPERTY)

Condition for leasing and selling off-plan property:

The following conditions need to be satisfied:

- (i) having land use rights certificates, project documents and approved design drawings for construction execution;
- (ii) having the relevant construction permit;
- (iii) having documents on acceptance of the completion of the construction of the technical infrastructure in accordance with the approved project schedules, as well as minutes on the acceptance of the completion of the construction of the foundation of the building with respect to future houses being an apartment building or mixed-use building with a residential function.

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In addition, prior to the selling or lease-purchasing the future house, the following procedures must be followed:

- (i) the investor must send a notice to the municipal residential housing State management authorities on the satisfaction of conditions for selling or lease-purchasing such residential house; and
- (ii) the investor must obtain a guarantee issued by a qualified commercial bank (as per the State Bank of Vietnam) for its financial obligations, noting that the term of a guarantee contract must be extendable to the time the residential house is handed over to the purchaser.

If the developer fails to hand over the proposed real estate to the purchaser in accordance with its committed schedule, the guarantor bank will, as requested by the purchaser, refund the advance payment made by the purchaser to the developer in accordance with the sale contract and guarantee contract.

However, to date, the law is silent on the minimum amounts of the guarantee that the investor must apply for at the commercial bank. Thus, the government will issue further guiding regulations on this matter.

Condition for payment schedule

The following payment schedule applies:

- (i) subsequent instalments must be in accordance with the approved project schedule;
- (ii) the first instalment must not exceed 30% of the contract value;
- (iii) prior to house handover, the total paid amounts collected by a domestic seller must not exceed 70% of the contract value. However, if the seller is an FOC, the amounts must not exceed 50% of the contract value; and

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- (iv) prior to issuance of the certificate of land use right and ownership of assets attached to land to the purchaser, the payment of instalments must not exceed 95% of the contract value.

HOUSE OWNERSHIP



Time of transfer of the house ownership

For residential houses used as capital contribution, donation, or exchange, transfer occurs at the time the capital contributee, donee, or party in exchange is handed over the residential house.

For residential houses purchased from the developer of a residential project, transfer occurs when the purchaser receives the residential house from the developer **or** when the purchaser fully pays the purchase price.

For residential houses purchased from a company or cooperative engaged in real estate business, transfer occurs when the seller hands over the residential house **or** when the purchaser fully pays the purchase price, unless the parties otherwise agree.

For residential houses purchased and leased and purchased in other cases, transfer occurs when the purchaser fully pays the purchase house price **and** is handed over the residential house, unless the parties otherwise agree.

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House ownership certificate

To avoid delays in the application for the issuance of the ownership certificate to the purchaser, within 50 days from the date of handover of the house or when the purchaser of a leased-purchased residential house fully pays the purchase price, the developer of a residential project must apply for the issuance of the certificate of land use right, house ownership and ownership of assets attached to land. This is unless the purchaser wishes to apply for the certificates independently.

PARTIAL TRANSFER OF REAL ESTATE PROJECTS

The new law now clearly provides that an investor is entitled to wholly or partially transfer its real estate project to another investor.

REAL ESTATE TRADING FLOORS

Under the new law, the requirement to sell and lease real estate through a real estate trading floor is no longer applicable.

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