**LEGAL ISSUES RELATED TO ESCROW DEPOSIT TO GUARANTEE THE IMPLEMENTATION OF COMMERCIAL HOUSING PROJECTS**

According to the provision of Article 330 of the Civil Code 2015, An escrow deposit is “an act whereby an obligor deposits a sum of money, precious metals, gems or valuable papers into an escrow account at a credit institution to secure the performance of an obligation”. An escrow deposit is considered as one of the effective measures to ensure that the obligors will properly perform their obligations. In case where the obligors fail to fulfill their obligations, the obligee shall be entitled to receive payment and compensation for damage (if any) caused by the obligor from the bank where the escrow deposit is affected, after deducting the bank service charges. Escrow deposit has also been regulated in various legal fields, including the investment sector. An escrow deposit in the field of investment is considered as a measure to ensure the implementation of investment projects.

According to the provision of Article 43 of the Investment law 2015, the investor shall pay a escrow deposit or have a bank guarantee for the performance of an investment project if such project uses land allocated or leased out by the State or is permitted by the State to repurpose land. However, not all projects which are allocated land, leased or permitted by the State to change the land use purpose are required to make an escrow deposit. Cases that do not need to be performed include:

* The investor is the successful bidder for the right to use a land area that is allocated by the State for land levy or leased out by the State for a lump-sum rent;

* The investor wins bidding for execution of an investment project using land;

* The State allocates or leases out land to the investor on the basis of receipt of an investment project for which a deposit has already been paid or for which the capital has been fully contributed or raised following the schedule specified in the written approval for investment policy or the investment registration certificate;

* The State allocates or leases out land to the investor for execution of an investment project on the basis of the receipt of the land use right and assets on land from another land user.

**Noted:** Any investment project executed or approved or allowed to be executed in accordance with regulations of law before July 01st, 2015 and subject to project execution security as prescribed in Law is not required to have a deposit or a bank guarantee. If the investor adjusts the objectives or schedule for execution of the investment project or repurposes land after January 1st, 2021, the investor must pay a deposit or obtain a bank guarantee in accordance with Law.

1. **Form of escrow deposit**

The obligation to guarantee the project implementation of the investor shall be performed on the basis of a written agreement between the Department of Planning and Investment and the investor. An agreement on assurance of the performance of an investment project includes the following principal contents:

* Name of the investment project, location, scale, investment capital, implementation progress, the operation duration of the investment project as prescribed in the Decision on investment policy approval, Decision on both investment policy approval and investor approval or Investment registration certificate;

* Security measures for the implementation of investment projects (escrow or guarantee of escrow obligations)

* Amount secured for the implementation of the investment project;

* Time and duration to ensure the implementation of the investment project;

* Conditions for refund, adjustment and termination of obligation to guarantee the implementation of the investment project;

* Handling measures in case the money used to secure the project implementation has not been refunded but has been remitted into the state budget;

* Other rights, obligations and responsibilities of the parties;

* Other contents which are agreed upon by the parties but not be contrary to the provisions of law.

1. **Time of making escrow deposit**

**The Escrow deposit will be made after** being granted the Decision on both investment policy approval and investor approval or Decision on investor approval or Decision on approval for bidding result; and **Escrow deposit** **will be made before**:

* In case the investor does not advance the payment for compensation, assistance or relocation, the escrow deposit will be made before implementing the compensation, assistance and relocation plan approved by a competent authority; or

* In case the investor does not advance compensation, assistance or relocation payments or the investor is selected to execute the project through a land use right auction and is leased out land by the State and pays land rents on an annual basis: The escrow deposit will be made before issuing the decision on land allocation or land lease or land repurposing

**Note:** If the investor advances the compensation, assistance or relocation payments to a competent authority to implement the approved compensation, assistance and relocation plan, the following actions shall be taken:

* If the advanced amount is equal to or greater than the guarantee rate as prescribed by law, the investor is not required to immediately pay the deposit amount or submit the credit institution’s guarantee certificate at the above time;

* If the advanced amount is less than the guarantee rate as prescribed by law, the investor must pay a deposit amount or submit the credit institution’s guarantee certificate which equals to the difference between the advanced amount and the guarantee rate at the above time;

* The investor with the deposit amount paid or credit institution's guarantee certificate submitted in the cases mentioned above must pay a deposit to the Department of Planning and Investment when the project is behind schedule according to the decision on investment policy approval, Decision on both investment policy approval and investor approval or Investment registration certificate.

1. **Rate of Escrow deposit**

Based on the scale, nature and progress of each investment project, the escrow deposit for assurance of project execution is 01% - 03% of the investment capital of the project. Specifically:

* For the investment capital up to VND 300 billion, the guarantee rate is 3%

* For the investment capital over VND 300 billion to VND 1,000 billion, the guarantee rate is 2%;

* For the investment capital of over VND 1,000 billion, the guarantee rate is 1%.

**Noted:**

* The  investment capital of the project does not include land levy or land rent payable to the State and costs of construction of the investment project’s works (if any) which the investor is obliged to transfer to the State for management after completion.  If the costs of construction of works to be transferred to the State have yet to be accurately determined at the time of signing the project execution guarantee agreement, the Department of Planning and Investment shall determine the guarantee amount according to the cost estimate specified in the project proposal prepared by the investor.

* In case the project comprises multiple investment phases, the payment and refund of the deposit amount or payment and adjustment of the guarantee amount or termination of the guarantee obligation shall be carried out in each phase of the implementation of the investment project under the project execution guarantee agreement. The investor may transfer the remaining deposit amount or remaining guarantee amount of the previous period to guarantee project execution for the next period without having to refund the remaining deposit amount or invalidate the guarantee of the previous period, and make any additional payment of the deposit amount or guarantee amount for the next period and the deposit amount or guarantee amount of the previous period (if any).

1. **Account for making the escrow deposit**

The guarantee amount shall be paid to the investment registration the account of the Department of Planning and Investment opened at the commercial bank established under the law of Vietnam **and selected by the investor**; the investor shall pay all costs related to the opening and maintenance of the account for project execution guarantee and conduct of transactions relating to the account.

In case of execution of multiple projects, it is required to sign a project execution guarantee agreement with the same Department of Planning and Investment. The investor may negotiate with the Department of Planning and Investment on the use of the same account for receiving guarantee amounts with respect to the projects executed in the areas under its management.

1. **Refund of escrow deposit:**

The refund and adjustment of a guarantee amount, and termination of the guarantee obligation shall be carried out as follows:

* 50% of the escrow deposit shall be refunded or 50% of the guarantee rate at the time the investor is issued by a competent authority with the decision on land allocation, land lease or land repurposing and issued by a competent authority with other licenses or approvals to commence the construction (if any);

* The remaining escrow deposit and its interest (if any) shall be refunded or the guarantee for deposit payment obligation shall be invalidated at the time when the investor accepts the construction works;

* In case the investment capital of the project is decreased, the investor shall receive a refund of an amount of deposit corresponding to the decreased investment capital according to the adjusted decision on approval for adjustment of the investment policy or the adjusted investment registration certificate;

* In case the investment capital of the project is increased, the investor shall pay an additional amount of deposit or credit institution’s deposit payment guarantee corresponding to the increased investment capital according to the adjusted decision on approval for adjustment of the investment policy or the adjusted investment registration certificate. If 50% of the paid escrow deposit has been refunded prior to the adjustment, the investor shall only investor shall only pay a half of the required additional deposit;

* In case the execution of an investment project cannot to be continued due to a force majeure or due to the implementation of administrative procedures by a competent state agency or due to the project adjustment made at the request of a competent authority in case of change of the planning, the investor may claim the refund of the guarantee amount or terminate the guarantee obligation.

* Domestic investors who have been approved for investment policies and are not subject to the issuance of an Investment Registration Certificate, when the project not subject to adjustment of its investment policy is adjusted as prescribed by law and the adjustments change any content of the agreement on the project execution guarantee, the investor shall send a written notification to the Department of Planning and Investment prior to the adjustment. The Department of Planning and Investment and investor shall adjust the agreement on the project execution guarantee in accordance with the adjusted contents of the investment project.

The above are some legal issues related to the escrow deposit for the implementation of commercial housing projects. Investors can refer to and comply with to properly implement and limit errors leading to unfortunate consequences during the implementation of the project.