

中华人民共和国住房和城乡建设部（以下简称“**住建部**”）等六部门对《关于规范房地产市场外资准入和管理的意见》（以下简称“**171 号文**”）有关外商投资房地产企业和个人购房的规定进行调整。中华人民共和国商务部（以下简称“**商务部**”）下发了《商务部关于支持自由贸易试验区创新发展的意见》（以下简称“**《自贸区创新发展意见》**”）降低自由贸易试验区（以下简称“**自贸区**”）内部分行业外资准入门槛。国家工商行政管理总局（以下简称“**工商总局**”）等部门要求自 2015 年 10 月 1 日起实施“三证合一、一照一码”与“先照后证”两项登记新制度。

## 一、 住建部等六部委调整 171 号文，降低外资准入房地产市场门槛

经国务院同意，2015 年 8 月 19 日，住建部、商务部、国家发展和改革委员会（以下简称“**发改委**”）、人民银行、工商总局、国家外汇管理局（以下简称“**外管局**”）公布《住房城乡建设部等部门关于调整房地产市场外资准入和管理有关政策的通知》（以下简称“**122 号通知**”），对 171 号文中有关外商投资房地产企业和个人购房的规定进行调整，这将降低外资准入房地产市场门槛。

### （一） 背景

2006 年 7 月 11 日，建设部（现变更为住建部）、商务部、发改委、人民银行、工商总局、外管局公

布 171 号文，就规范外商投资房地产市场准入、加强外商投资企业房地产开发经营管理、严格境外机构和个人购房管理等方面作出严格规定。随后，商务部、外管局、建设部等部门也制定了配套的规范性文件。根据这些规定，境外机构和个人在境内投资购买非自用房地产，应当遵循商业存在的原则，申请设立外商投资房地产企业；外商投资从事房地产开发、经营，应遵循项目公司原则；外商投资房地产企业的设立、变更等事项必须完成商务部备案手续；对未完成商务部备案手续的外商投资房地产企业，外汇管理部门、外汇指定银行不予办理资本项目结售汇手续等。这些规定对于外商投资房地产造成了巨大的影响。

2015 年 3 月 13 日，发改委和商务部公布了 2015 年修订的《外商投资产业指导目录》（以下简称“**2015 年版《目录》**”）给放宽外资准入房地产市场带来曙光，其中一项引人注意的修订是将房地产业从限制外商投资产业目录整体删除。

2015 年 8 月 19 日，住建部、商务部、发改委、人民银行、工商总局、外管局公布 122 号通知，对 171 号文进行修订。

### （二） 法律点评

期盼已久的 122 号通知仅有简短的四条，其对 171 号文的修订如下：

## 1. 调整外商投资房地产企业注册资本与投资总额

171 号文实施前，外商投资房地产企业适用的《国家工商行政管理局关于中外合资经营企业注册资本与投资总额比例的暂行规定》（以下简称“《注册资本与投资总额比例的暂行规定》”），171 号文提高了投资总额超过 1,000 万美元的外商投资房地产企业的注册资本的比例，如下表所示：

投资总额（美元）		注册资本（美元）	
		《注册资本与投资总额比例的暂行规定》	171 号文
1000 万以上至 3000 万（含 3000 万）		≥ 投资总额的 2/5	≥ 投资总额的 1/2
	其中 1250 万以下	≥ 500 万	
3000 万以上		≥ 投资总额的 1/3	≥ 投资总额的 1/2
	其中 3600 万以下	≥ 1200 万	

122 号通知取消了上述要求，规定外商投资房地产企业的注册资本和投资总额比例适用《注册资本与投资总额比例的暂行规定》。对于投资总额超过 1,000 万美元的外商投资房地产企业而言，这将显著减少投资者需缴纳的注册资本金。

## 2. 取消境内外贷款、外汇借款结汇必须全部缴付注册资本金的要求

171 号文要求，外商投资房地产企业注册资本金未全部缴付的，未取得《国有土地使用证》的，或开发项目资本金未达到项目投资总额 35% 的，不得办理境内、境外贷款，外汇管理部门不予批准该企业的外汇借款结汇。

122 号通知取消了外商投资房地产企业办理境内贷款、境外贷款、外汇借款结汇必须全部缴付注册资本金的要求。

我们注意到，其实早在 122 号通知实施前，外管局于 2015 年 5 月 4 日公布的《国家外汇管理局关于废止和修改涉及注册资本登记制度改革相关规范性文件的通知》已经取消将缴付全部注册资本金作为外商投资房地产企业外债登记和外债结汇的条件。需要注意的是，外商投资房地产企业在办理外债登记和外债结汇时，仍受取得《国有土地使用证》、或开发项目资本金达到项目投资总额 35% 等规定的约束。

## 3. 取消境外个人在境内工作、学习时间超过一年方可购买自用、自住商品房的要求

171 号文要求，在境内工作、学习时间超过一年的境外个人可以购买符合实际需要的自用、自住商品房。

122 号通知取消了在境内工作、学习时间超过一年的要求。但是对于实施住房限购政策的城市，境外个人购房应当符合当地政策规定。

我们注意到，122 号通知并没有修改 171 号文有关境外机构购房的要求，境外机构在境内设立的分支、代表机构（经批准从事经营房地产业的企业除外）可以购买符合实际需要的自用、自住商品房，不得购买非自用、非自住商品房。

## 4. 外商投资房地产企业直接到银行办理外商投资项下相关外汇登记

根据 122 号通知，外商投资房地产企业可按照相关外汇管理规定直接到银行办理外商直接投资项下相关外汇登记。

在 122 号通知实施前，外管局已于 2015 年 2 月 28 日公布了《国家外汇管理局关于进一步简化和改进直接投资外汇管理政策的通知》，自 2015 年

6月1日起取消了境内直接投资项下外汇登记核准，改由银行直接审核并办理登记。122号通知只是重申外管局上述通知的内容。

需要注意的是，根据《国家外汇管理局关于进一步简化和改进直接投资外汇管理政策的通知》，在办理外汇登记时，外商投资房地产企业仍需提交商务部门的备案证明文件。

### （三）关注要点

境外投资者通过股权转让及其他方式并购境内房地产企业应以自有资金一次性支付全部转让金；境外机构在境内设立的分支、代表机构（经批准从事经营房地产业的企业除外）在境内购买商品住房应符合实际需要、自用、自住的原则；在境内没有设立分支机构、代表机构的境外机构不得购买商品住房等 171 号文规定其他规定是否会随着 2015 年版《目录》以及 122 号通知的实施得以进一步修订或废止值得关注。

## 二、商务部出台《自贸区创新发展意见》降低部分行业外资准入门槛

2015 年 8 月 25 日，为了推动自贸区建设，商务部向天津市、上海市、福建省和广东省商务主管部门下发了《自贸区创新发展意见》，就促进对外贸易转型升级、降低投资准入门槛、完善市场竞争环境等方面提出了指导意见。

### （一）法律点评

在降低外资准入门槛方面，《自贸区创新发展意见》值得关注的要点如下：

首先，放宽自贸区内外商投资企业申请直销经营许可资质的条件。《自贸区创新发展意见》取消《直销管理条例》规定的外国投资者应当有 3 年以上在中国境外从事直销活动经验的要求。

其次，允许外国投资者在自贸区投资设立典当

企业。《自贸区创新发展意见》规定外商投资典当企业的设立条件、监督管理与内资典当企业保持一致，并参照《典当管理办法》进行管理。

再次，《自贸区创新发展意见》允许外国投资者以独资形式在自贸区内设立企业，从事加油站的建设、经营，不受门店数量的限制。

最后，支持广东自贸区在《内地与香港/澳门关于建立更紧密经贸关系的安排》框架下，进一步取消或放宽对港澳服务提供者的资质要求、持股比例、经营范围等准入限制。

### （二）关注要点

天津市、上海市、福建省和广东省商务主管部门将如何通过制定相关细则以实施《自贸区创新发展意见》值得关注。

## 三、2015 年 10 月 1 日起实施“三证合一、一照一码”与“先照后证”两项登记新制度

2015 年 8 月 7 日，为了实行工商营业执照、组织机构代码证和税务登记证“三证合一”登记制度，工商总局公布《工商总局等六部门关于贯彻落实〈国务院办公厅关于加快推进“三证合一”登记制度改革的意见〉的通知》，决定自 2015 年 10 月 1 日起，在全国范围内实施“三证合一、一照一码”的新登记模式。

2015 年 8 月 27 日，为了推进工商注册制度便利化，工商总局对《企业经营范围登记管理规定》进行修订，新规定自 2015 年 10 月 1 日起施行。

### （一）实施“三证合一、一照一码”新登记模式

在新登记模式下，全国各级工商行政管理部门向新设立企业和农民专业合作社（统称“企业”）、变更企业发放加载法人和其他组织统一社会信用代码（以下简称“统一代码”）的营业执照。企业的组织机构代码证和税务登记证不再发放。

工商总局要求各地要尽快完成现有登记模式向“三证合一、一照一码”登记模式过渡。企业在办理变更登记时，对已领取组织机构代码证的，工商行政管理部门核发加载嵌入原9位组织机构代码的统一代码的营业执照，收缴其原发营业执照、组织机构代码证、税务登记证；没有领取组织机构代码证的，按照“三证合一、一照一码”登记模式核发加载统一代码的营业执照，收缴其相关证照。在过渡期内，未换发的证照可继续使用；过渡期结束后，一律使用加载统一代码的营业执照办理相关业务，未换发的证照不再有效。

我们注意到，各地对于外国企业常驻代表机构、外商投资合伙企业、外国公司分公司能否适用新登记模式的规定不一，例如对于外国企业常驻代表机构，在北京市可以适用新登记模式、在江苏省2015年年底前方可适用、在广东省则暂时不能适用。此外，各地对于过渡期届满日期规定不一，大多数定为2017年12月31日，但北京市定为2020年12月31日。

## （二）实施新修订的《企业经营范围登记管理规定》

本次修订的目的是为了推进工商注册制度便利化，实现国务院要求的“先照后证”。“先照后证”是指对于前置许可经营项目以外的经营项目，企业完成登记取得营业执照后，再取得从事特定经营项

目所需的行政许可。

《企业经营范围登记管理规定》本次修订的主要亮点如下：

1. 放宽企业经营范围登记用语。投资者或者企业可以参照《国民经济行业分类》自主选择经营范围表述用语。对于新兴行业，可以参照政策文件、行业习惯或专业文献选择用语。

2. 按照经营业务是否属于前置许可经营项目区分登记程序。对于前置许可经营项目，应在企业登记前取得从事特定经营项目所需的行政许可。对于前置许可经营项目以外的经营项目，实施“先照后证”，企业登记机关应当在经营范围后标注“（依法须经批准的项目，经相关部门批准后方可开展经营活动）”，企业取得从事特定经营项目所需的行政许可后方可开展该项经营项目。

3. 企业应通过企业信用信息公示系统及时向社会公示其经营项目行政许可的取得及变更的信息。

4. 删除关于查处企业超出登记范围从事经营的规定。

## （三）关注要点

各地关于实施“三证合一、一照一码”新登记模式的立法及进展值得关注。

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The Ministry of Housing and Urban-Rural Development of the PRC (“**MHURD**”) and five other departments revised the regulations governing foreign-invested real estate enterprises (“**FIREEs**”) and real estate purchases by individuals provided in the Opinions for Regulating the Access by and Administration on Foreign Investment in the Real Estate Market (“**Document 171**”). The Ministry of Commerce of the PRC (“**MOC**”) issued the Opinion on Supporting the Innovative Development of Pilot Free Trade Zones (“**FTZ Opinion**”), which lowered the entry thresholds for foreign investment in some industries in the pilot free trade zones (“**FTZ**”). The State Administration for Industry and Commerce (“**SAIC**”) and other departments require new registration rules known as “3 in 1 and 1 code for 1 license” and “business license before permits”.

## 1. MHURD and five other departments revised Document 171 and lowered the entry thresholds for foreign investment in the real estate market

With the approval of the State Council, on 19 August 2015, the MHURD, the MOC, the

National Development and Reform Commission (“**NDRC**”), the People's Bank of China (“**PBOC**”), the SAIC, and the State Administration of Foreign Exchange (“**SAFE**”) published the Notice of the MHURD and Other Departments on Amending the Policies Concerning Access by and Administration of Foreign Investment in the Real Estate Market (“**Notice 122**”), which revised the regulations governing FIREEs and real estate purchases by individuals provided in Document 171 and, thereby, lowered the entry thresholds for foreign investment in the real estate market.

### 1.1 Background

On 11 July 2006, the Ministry of Construction (the predecessor of the MHURD), the MOC, the NDRC, the PBOC, the SAIC, and the SAFE published Document 171, which included tight regulations on the entry of foreign investment in the real estate market, the development and management of real estate by foreign-invested enterprises (“**FIEs**”), and real estate purchases by foreign institutions and individuals. The MOC, the SAFE, and the Ministry of Development subsequently promulgated auxiliary regulatory documents. According to these regulations,



when an overseas institution and/or individuals intend to purchase real property in China, which is not for their own use, such investment and purchase shall comply with the principle of commercial presence and an FIE shall be established for the purpose; foreign investment in the development and management of real estate shall comply with the Principle of the Project Company; the establishments and changes of FIREEs shall go through the filing procedures of the MOC; and the foreign exchange authorities and banks shall not process the settlement and sale of foreign currencies for the capital of FIREEs that have not completed filings with the MOC. These regulations had a tremendous impact on foreign investment in real estate.

On 13 March 2015, the NDRC and the MOC published the 2015 revised version of the Catalogue of Industries for Guiding Foreign Investment (“**2015 Catalogue**”), which relaxed controls on the entry of foreign investment in the real estate market. One of the revisions of note was the deletion of the entire real estate industry from the catalogue of restricted industries.

On 19 August 2015, the MHURD, the MOC, the NDRC, the PBOC, the SAIC, and the SAFE published Notice 122 and, thereby, revised Document 171.

## 1.2 Legal Review

The long anticipated Notice 122 contained only four items and made the following revisions to

Document 171:

(1) Adjusted the ratio of registered capital to total investment of foreign investment real estate enterprises

The Interim Provisions of the State Administration for Industry and Commerce on the Ratio of the Registered Capital to the Total Investment of a Sino-Foreign Equity Joint Venture Enterprise (“**Interim Provisions**”), was applicable to FIREEs before Document 171 came into force. Document 171 raised the required ratio of registered capital of an FIEE with total investment exceeding 10 million US dollars. The table below compares Document 171 to the Interim Provisions:

Total Investment (USD)		Registered Capital (USD)	
		Interim Provisions	Document 171
More than 10 million, but less than or equal to 30 million		≥ 2/5 of total investment	≥ 1/2 of total investment
	If 12.5 million or less	≥ 5 million	
30 million or more		≥ 1/3 of total investment	≥ 1/2 of total investment
	If 36 million or less	≥ 12 million	

Notice 122 abolishes the higher investment requirements and provides that the Interim Provisions apply to the ratio of the registered capital to the total investment of FIREEs. The registered capital will be significantly reduced

for an FIREE with total investment exceeding 10 million US dollars.

(2) Abolished the requirement that the registered capital must be fully paid in before taking any loan or making foreign exchange settlement for any foreign-currency loan

Document 171 provides that an FIREE shall not take out any loan, foreign or domestic, and the foreign exchange authorities shall not approve the foreign exchange settlement for any foreign-currency loan taken by such enterprise, if the registered capital of such enterprise has not been fully paid in, such enterprise has not obtained the State-Owned Land Use Certificate, or the capital for the development project of such enterprise is less than 35% of the total investment of the project.

Notice 122 abolishes the requirement that the registered capital must be fully paid in before an FIREE takes any loan or makes any foreign exchange settlement for any foreign-currency loan.

We noted that the SAFE abolished the requirement for an FIREE to have its registered capital fully paid in before complying with the foreign debt registration and foreign exchange settlement for foreign debts provided in the Notice of the SAFE on Repealing and Revising the Normative Documents concerning the Reform for Registered Capital Registration System. Such notice was published on 4 May 2015, before Notice 122 came into force. It should be noted that an FIREE must still meet

the requirements of obtaining the State-Owned Land Use Certificate and having at least 35% of the total investment of the project as capital for its development project.

(3) Abolished the requirement that foreign individuals must work or study domestically for more than one year before purchasing any traded real property for own use or residence

Document 171 provides that foreign individuals who have worked or studied domestically for more than one year may purchase traded real properties that are suitable for their actual needs of their own use or residence.

Notice 122 abolished the one-year requirement. In cities where housing purchase restrictions have been adopted, however, foreign individuals shall comply with local policies when they purchase real properties.

We noted that Notice 122 did not change the requirement set forth in Document 171 for the purchase of real properties by foreign institutions. Domestic branches and representative agencies of foreign institutions (other than enterprises that are permitted to carry on the real estate business) may purchase traded real properties for their own use or residence and may not purchase traded real properties for purposes other than for their own use or residence.

(4) FIREEs may make foreign exchange registrations relating to foreign investment directly at banks

According to Notice 122, FIREEs may make foreign exchange registrations relating to foreign direct investment directly at banks pursuant to the relevant foreign exchange regulations.

In the Notice of the SAFE on Further Simplifying and Improving the Policies of Foreign Exchange Administration Applicable to Direct Investment (which was published on 28 February 2015, before Notice 122 came into force), the SAFE required that, from 1 June 2015 onwards, the foreign exchange registration and approval for direct investment shall not be conducted by foreign exchange authorities and that banks shall be in charge of the relevant approval and registration. Notice 122 only restated the content of this notice.

It should be noted that, according to the Notice of the SAFE on Further Simplifying and Improving the Policies of Foreign Exchange Administration Applicable to Direct Investment, when making foreign exchange registration, FIREEs are still required to submit proof of filing with the commerce authorities.

### 1.3 Next Step

A foreign investor shall remit full payment with its own funds in order to acquire a domestic real estate enterprise through a transfer of shares or other methods. Domestic branches and representative agencies of foreign institutions (other than enterprises that are permitted to carry on the real estate business) purchasing domestic traded real properties shall comply

with the principles of actual need and the owners' use or residence. Foreign institutions that have not set up any domestic branch or representative agency may not purchase traded real properties. Whether these rules, which were also provided in Document 171, will be further revised or abolished after the promulgation of the 2015 Catalogue and Notice 122 is worth our continued attention.

## **2. MOC promulgated the FTZ Opinion and lowered the entry thresholds for foreign investment in some industries**

On 25 August 2015, in order to facilitate the development of the FTZ, the MOC issued the FTZ Opinion to the commerce departments in Tianjin City, Shanghai City, Fujian Province, and Guangdong Province. The MOC thereby provided guidance in respect of promoting the upgrade and transformation of foreign trade, the lowering of investment entry thresholds, and the enhancement of the market competition environment.

### 2.1 Legal Review

The following items of the FTZ Opinion are worth noting:

First, the requirement for FIEs to be permitted to engage in the direct sales business was relaxed. The FTZ Opinion abolished the requirement set forth in the Regulations on Administration of Direct Sales that a foreign investor must have at least three years of experience in direct sales activities outside of



the PRC.

Second, foreign investors are permitted to establish pawn enterprises in the FTZ. The FTZ Opinion provides that the rules concerning the requirements for founding a foreign-invested pawn enterprise and the supervision thereof shall be consistent with the rules applicable to domestic-invested pawn enterprises and their administration shall follow the Administrative Measures for Pawning.

Third, the FTZ Opinion permits foreign investors to engage in the construction and operation of gas stations, free from restrictions on the number of stores, through their wholly-owned enterprises established in the FTZ.

Fourth, the Guangdong FTZ was encouraged to further abolish or relax the entry restrictions in respect of qualification requirements, stockholding, and business scope under the framework of the Arrangement for the Establishment of Closer Economic and Trading Relationship Between Mainland China and Hong Kong/Macau.

## 2.2 Next Step

It is worth observing how the commerce departments of Tianjin City, Shanghai City, Fujian Province, and Guangdong Province will implement the FTZ Opinion through the promulgation of relevant regulations.

## 3. Two new registration systems “3 in 1 and 1 code for 1 license” and “business license

### before permits” were launched on 1 October 2015

On 7 August 2015, in order to implement the “3 in 1” registration system (the “3” refers to business license, organization code certificate and tax registration certificate), the SAIC issued the Notice of the SAIC and Other Five Departments on Implementing the Opinions of the General Office of the State Council on Accelerating the “3 in 1” Registration System Reform and decided to launch the new registration model “3 in 1 and 1 code for 1 license” across the country on 1 October 2015.

On 27 August 2015, in order to reduce the burdens imposed by the registration system, the SAIC revised the Administrative Provisions on Business Scope Registration for Enterprises, effective on 1 October 2015.

### 3.1 Launch of the new registration model “3 in 1 and 1 code for 1 license”

Under the new registration model, all levels of administration for industry and commerce (“**AIC**”) in the country will issue business licenses containing the Unified Social Credit Code Of Legal Entity And Other Institutions (“**Unified Code**”) to newly established enterprises, farmers’ cooperatives (collectively “**Enterprises**”), and Enterprises making change registrations. The organization code certificates and the tax registration certificates of Enterprises will no longer be issued.

The SAIC requests that the transition from the

current registration model to the “3 in 1 and 1 code for 1 license” registration model be completed as soon as possible in all parts of the country. For Enterprises making change registrations that have already received organization code certificates, the AIC shall issue business licenses containing the Unified Code, which consists of the previous 9-digit organization code of such Enterprises, and withdraw the previous business licenses, organization code certificates and tax registration certificates. If the said Enterprises have not received organization code certificates, the AIC shall issue business licenses containing the Unified Code and withdraw relevant certificates in accordance with the “3 in 1 and 1 code for 1 license” registration model. The previous certificates may continue to be used during the transition period. When the transition period ends, only business licenses containing the Unified Code shall be issued and used, and all previous certificates will be invalid.

We noticed that rules on whether the new registration model is applicable to representative offices of foreign enterprises, foreign-invested partnership enterprises and branches of foreign enterprises vary by location. For example, with respect to the representative office of foreign enterprises, while the new registration model is applicable in Beijing, it will only be applicable near the end of 2015 in Jiangsu Province and is not currently applicable in Guangdong Province. In addition, rules on the end date of the transition period vary by location. In most locations, the end date is 31

December 2017. However, in Beijing, the end date is 31 December 2020.

### 3.2 Implementation of the newly revised Administrative Provisions on Business Scope Registration for Enterprises

The purposes of such revision are to reduce the burden imposed by the registration system and to put into practice the requirements of the State Council, i.e. “business licenses before permits”. The term “business licenses before permits” means that, except for certain businesses for which permits are required before obtaining business licenses, all Enterprises shall apply for and obtain business licenses before obtaining the required permits for their business scopes.

Set out below are the highlights of the revised Administrative Provisions on Business Scope Registration for Enterprises:

(1) The limits on the wordings used to describe the business scope of the Enterprises are loosened. Investors or Enterprises will have the discretion to choose wordings from the Industrial Category for National Economy to describe their business scope. As for new industries, such wordings may be borrowed from policy documents, industry practice or professional publications.

(2) Registration procedures will vary depending on whether prerequisite permits are required for the intended business. If prerequisite permits are required, Enterprises

shall obtain such permits prior to obtaining business licenses. If the prerequisite permits are not required, the “business licenses before permits” rule will apply. Business registration authorities shall include a note next to the business scope text specifying that “(businesses that are required by the law to obtain permits shall only be carried out after obtaining permits from relevant authorities)”, and the Enterprises will only be allowed to carry out such business after obtaining required permits for the intended business.

(3) Enterprises shall timely publicize to the general public, information about the acquisition and variation of government permits

through the enterprise credit information publication system.

(4) The provisions on investigating and punishing Enterprises that operate their businesses beyond their registered business scopes are deleted.

### 3.3 Next Step

The legislation and procedures for implementing the “3 in 1 and 1 code or 1 license” new registration model in different parts of the country is worthy of attention.

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