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Real Estate-Backed ICOs: General Information, New Requirements, and Comparison to REITs

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1. Introduction

Recently, the advent of disruptive technology has influenced major aspects of human lives, society and the economy. Various noteworthy technologies, e.g., blockchain, cryptocurrency, etc., have been developed to facilitate people's lives. Thailand, among other countries, is endeavoring to accommodate, utilize and monitor these technologies. Additionally, in 2018, Thailand issued the Emergency Decree on Digital Asset Businesses of 2018 ("**Emergency Decree**"), which governs businesses in relation to cryptocurrency and digital tokens. This briefing will focus only on digital tokenization, particularly "Real Estate-backed ICOs", and its relevant laws.

Regarding the offering for sale of digital tokens, or as officially known as the initial coins offering ("**ICO**"), is regulated by the Securities and Exchange Commission ("**SEC**") and under the Notification of SEC No. GorJor. 6/2564 (2021) Re: Initial Coin Offerings to the Public. Earlier this year, as a significant step forward, the SEC enacted two regulations (i) the Notification of SEC No. GorJor. 6/2564 (2021) Re: Initial Coin Offerings to the Public (No. 5) dated 11 February 2021 ("**SEC Notification No. GorJor. 6/2564 (No. 5)**") and (ii) the Notification of SEC No. GorLor. 4/2564 (2021) Re: Prescription of Categories of Transactions in Capital Market Allowed to Use Trusts (No. 5) dated 11 February 2021 ("**SEC Notification No. GorLor. 4/2564 (No. 5)**") in order to support the offering for sale of digital tokens with the underlying real estate or real estate income streams ("**Real Estate-backed ICO**"), promote the bringing of technologies into use in capital market and introduce a new alternative fund-raising method to business operators. Both regulations have been into force since 1 March 2021 onwards.

2. Key concepts

What is a Real Estate-backed ICO?

A Real Estate-backed ICO is one of the fund-raising methods underlying in blockchain technology. In terms of the general concept of a Real Estate-backed ICO, a company that wishes to raise funds will issue real estate-backed digital tokens (the "**Token Issuer**") and offer to sell the same to those who wish to invest in real estate (the "**Token Holder**") and become a beneficiary thereof in exchange for capital in the form of fiat currency or cryptocurrency via an ICO portal approved by the SEC. Such real estate-backed digital tokens will specify the right of a Token Holder, which can be the right to receive profits from income earned from managing real estate or the right to receive services from such real estate.

Additional key requirements for Real Estate-backed ICOs

As mentioned above, the SEC issued (i) the SEC Notification No. GorJor. 6/2564 (No. 5) and (ii) the SEC

Notification No. GorLor. 4/2564 (No. 5) in order to recognize Real Estate-backed ICOs.

The SEC Notification No. GorLor. 6/2564 (No. 5) added Chapter 5, which specifies additional requirements for Real Estate-backed ICOs, to the existing regulation. The key requirements that should be taken into account are, for example, as follows:

- The real estate property must be completely constructed, ready to be utilized and not subject to any property rights or disputes¹;
- The real estate property to be tokenized must constitute no less than 80% in number or investment value of the entire project², or the aggregate value of the real estate property to be tokenized must be no less than THB 500,000,000³;
- Due diligence must be conducted on the real estate property, e.g., the condition of the real estate property, the obligations on the real estate property, the completion, accuracy and enforcement of the real estate instrument⁴;
- The information on the real estate-backed digital token must be completely and sufficiently disclosed in the filing and draft prospectus⁵;
- The asset must be fully appraised by asset appraisers approved by the SEC⁶; and
- A trust⁷ formation agreement for the Real Estate-backed ICO stipulating the beneficiaries as the Token Holders⁸ must be executed.

Other than the above-mentioned key new requirements, the Token Issuer must also comply with existing requirements, for instance, those regarding the Token Issuer's information disclosure⁹, the Token Issuer's qualifications¹⁰, the conditions for permission¹¹, the criteria for sales promotion¹² and the allocation¹³ of real estate-backed digital tokens¹⁴.

As for the SEC Notification No. GorLor. 4/2564 (No. 5), it requires the Token Issuer to form a Trust for Real Estate-backed ICO of which the underlying asset can be (a) real estate property, (b) a leasehold, or (c) shares held by Special Purpose Vehicles (SPV)¹⁵ in real estate, provided that such shareholding constitutes no less than 75% of all paid-up capital and voting rights of such SPV¹⁶ and such shareholding is for the benefit of the Token Holder.

Difference between Real Estate-backed ICOs and Real Estate Investment Trusts ("REIT")

Even though Real Estate-backed ICOs seem similar to REITs, there are specific differences in, for instance, the governing laws, the offering for sale, and the underlying assets.

¹ Except the Token Issuer, with the Token Issuer's written opinion, considers that such property rights or disputes would not significantly affect the utilization of the real estate, and the conditions for the acquisition of such real estate are generally still beneficial to the Token Holder.

² The amount or value of the project means the amount or value of the assets as assessed by at least two reliable assessors who have been approved by the SEC (Clause 5 (Clause 32/2 (4)) of the SEC Notification No. GorLor. 6/2564 (No. 5).

³ Clause 5 (Clause 32/2 (2)) of the SEC Notification No. GorLor. 6/2564 (No. 5)

⁴ Clause 5 (Clause 32/2 (3)) and 32/3 of the SEC Notification No. GorLor. 6/2564 (No. 5)

⁵ Clause 5 (Clause 32/2 (3)) and 32/3 of the SEC Notification No. GorLor. 6/2564 (No. 5)

⁶ Clause 5 (Clause 32/2 (4)) and 32/3 of the SEC Notification No. GorLor. 6/2564 (No. 5)

⁷ "Trust" means a legal relationship arising from a trust agreement (Section 3 of the Trust for Transactions in the Capital Market Act of 2007).

⁸ Clause 5 (Clause 32/2 (7)) of the SEC Notification No. GorLor. 6/2564 (No. 5)

⁹ Clause 8 (Clause 46 (2) (b)) of the SEC Notification No. 4/2564 (No. 5)

¹⁰ Clause 5 (Clause 32/2 (10)) of the SEC Notification No. GorLor. 6/2564 (No. 5)

¹¹ Clause 5 (Chapter 5, Part 2) of the SEC Notification No. GorLor. 6/2564 (No. 5)

¹² Clause 5 (Chapter 5, Part 3) of the SEC Notification No. GorLor. 6/2564 (No. 5)

¹³ Clause 5 (Chapter 5, Part 4) of the SEC Notification No. GorLor. 6/2564 (No. 5)

¹⁴ For example, the Token Issuer, as a settlor under the above-mentioned Trust agreement, cannot hold more than 50% of the tokens offered for sale (Clause 5 (Clause 32/10 (1) (a)) of the SEC Notification No. GorLor. 6/2564 (No. 5)

¹⁵ "Special Purpose Vehicles (SPV)" means a limited company or a public company limited incorporated for the purpose of holding ownership or possessory rights in real estate pursuant to the conditions of the offering for sale of digital token (Clause 2 of the SEC Notification. GorLor. 4/2564 (No. 5)).

¹⁶ Clause 2 of the SEC Notification. GorLor. 4/2564 (No. 5)

The table below demonstrates the substantial differences between Real Estate-backed ICOs, general REITs (“Public REIT”) and REITs offered for sale to private placement investors (“Private REIT”).

| Description | Real Estate-backed ICO | Public REIT | Private REIT |
|------------------------|---|---|--|
| 1. Main governing laws | The Emergency Decree and its sub-regulation | The Securities and Exchange Act of 1992 and its sub-regulation | |
| 2. Permission | SEC’s permission required | | Deemed that permission is obtained when the criteria are fulfilled ¹⁷ . |
| 3. Unit holders | <ul style="list-style-type: none"> - Institutional investors or ultra-high net worth investors; - Venture capital or private equity; or - Public investors (not exceeding THB 300,000 per person) (The maximum value of the offering for sale for public investors must not exceed 4 times the proportion of the shareholders of the Token Issuer or 70% of the total value offered for sale, whichever is higher)¹⁸. | General investors | The offering for sale must be limited to ¹⁹ <ul style="list-style-type: none"> - Institutional investors²⁰; and - REIT managers and associated persons of REIT managers unless it is a transfer by inheritance²¹. |
| 4. Underlying assets | <ul style="list-style-type: none"> (a) Real estate property; (b) Leasehold; or (c) Shares held by SPV in real estate, provided that such shareholding is no less than 75% | <ul style="list-style-type: none"> (a) Real estate property; (b) Leasehold; or (c) Shares or debenture of a company established for the purpose of operating in the same manner as a REIT or units of other trusts having the purpose to invest in the main asset of such REIT²². | |

¹⁷ Clause 58 of the Notification of SEC No. TorJor. 49/2555 (2012) Re: Issuance and Offering for Sale of Units of REIT

¹⁸ Clause 17 of the SEC Notification No. GorJor. 15/2561 Re: Initial Coin Offerings to the Public

¹⁹ Clause 57 of the Notification of SEC No. TorJor. 49/2555 (2012) Re: Issuance and Offering for Sale of Units of REIT

²⁰ There are 25 types of Institutional Investors (e.g., commercial banks, securities companies, mutual funds) as prescribed in Clause 4 of the Notification of SEC No. GorJor. 4/2560 (2017) Re: Prescription of Definition of Institutional Investors, High Net Worth Investors, and Ultra High Net Worth Investors.

²¹ There are 3 types of associated persons (e.g., spouse and children under legal age) as prescribed in Clause 2 of the Notification of SEC No. TorJor. 49/2555 (2012) Re: Issuance and Offering for Sale of Units of REIT.

²² Clauses 12(1), 12/1(1) and 58(4) of the Notification of SEC No. TorJor. 49/2555 (2012) Re: Issuance and Offering for Sale of Units of REIT

| Description | Real Estate-backed ICO | Public REIT | Private REIT |
|--|---|---|---|
| | <p>of all paid-up capital and voting rights of such SPV and such shareholding is for the benefit of the Token Holder.</p> <p>The real estate property must be completely constructed, ready to be utilized and not subject to any property rights or disputes, unless the Token Issuer considers otherwise.</p> | <p>A Public REIT can invest in an unfinished project, provided that (i) the value of the investment for the acquisition and completion of the development of the real estate property must not exceed 10% of the total asset value of such REIT, and (ii) there is sufficient working capital for the development with no effect on the REIT²³. However, it does not apply to Private REITs.</p> <p>Furthermore, for both Public REITs and Private REITs, the acquired real estate must not be subject to any property rights or disputes unless the REIT manager or trustee considers otherwise²⁴.</p> | |
| 5. Value of the investment | <ul style="list-style-type: none"> - The real estate property to be tokenized must constitute no less than 80% in number or investment value of the entire project; or - The aggregate value of the real estate property to be tokenized must be no less than THB 500,000,000. | <ul style="list-style-type: none"> - The aggregate value of the real estate property acquired for purposes of receiving a benefit must be no less than 75% of the total value of the units offered for sale²⁵; and - The aggregate value of the acquired real estate property must be no less than THB 500,000,000²⁶. | <p>The aggregate value of the investment in the main asset must be no less than 75% of the total value of the units offered for sale, including any loan. In addition, such main asset must be acquired within 60 days from the date of REIT establishment or the date of the closing of the offering for sale of units, as the case may be²⁷.</p> |
| 6. Minimum number of holders (i.e., Token Holders, unit holders) | No minimum number of unit holders specified | At least 250 unit holders ²⁸ | At least 2 unit holders ²⁹ |

²³ Clause 12(4) of the Notification of SEC No. TorJor. 49/2555 (2012) Re: Issuance and Offering for Sale of Units of REIT

²⁴ Clause 12 (42) of the Notification of SEC No. TorJor. 49/2555 (2012) Re: Issuance and Offering for Sale of Units of REIT

²⁵ Clause 12 (4) of the Notification of SEC No. TorJor. 49/2555 (2012) Re: Issuance and Offering for Sale of Units of REIT

²⁶ Clause 12 (6) of the Notification of SEC No. TorJor. 49/2555 (2012) Re: Issuance and Offering for Sale of Units of REIT

²⁷ Clause 58(4) (b) of the Notification of SEC No. TorJor. 49/2555 (2012) Re: Issuance and Offering for Sale of Units of REIT

²⁸ Clause 25 (5) (a) of the Notification of SEC No. TorJor. 49/2555 (2012) Re: Issuance and Offering for Sale of Units of REIT

²⁹ Clause 58 (2) of the Notification of SEC No. TorJor. 49/2555 (2012) Re: Issuance and Offering for Sale of Units of REIT

| Description | Real Estate-backed ICO | Public REIT | Private REIT |
|----------------------------------|--|---|--|
| 7. Foreign investment proportion | In the case of an investment in real estate property in Thailand, the foreign investment proportion must be subject to laws and regulations governing such real estate property ³⁰ . | | |
| 8. Listing | It is not mandatory for a Real Estate-backed ICO to be listed on the SET. However, the Token Holders will be able to exchange the digital tokens on the digital asset exchange platform on which such digital tokens are listed. | Required to be listed on the SET ³¹ | Not required to be listed on the SET ³² |
| 9. Benefit of holders | Money or rights in invested real estate, as prescribed by the Token Issuer | Dividend or capital gain by disposing of the REIT interest at the SET | Dividend |

3. **Conclusion**

Real Estate-backed ICOs are in the interests of business operators at present as they provide a new option for fund-raising using disruptive technologies, for instance, blockchain or smart contract. Business operators that wish to use Real Estate-backed ICOs to raise capital must comply with the qualifications and requirements stated in the applicable regulations explained above.

³⁰ Clause 5 (Clause 32/10(2)) of the SEC Notification No. GorJor. 6/2564 (No. 5)

Clauses 30 and 60 of the Notification of SEC No. TorJor. 49/2555 (2012) Re: Issuance and Offering for Sale of Units of REIT

³¹ Clause 10 (1) (d) of the Notification of SEC No. TorJor. 49/2555 (2012) Re: Issuance and Offering for Sale of Units of REIT

³² According to the newly issued Notification of SEC No. TorJor. 2564/43 (2021) Re: Issuance and Offering for Sale of Units of REIT (No. 21), which has been in effect since 16 June 2021, REITs for private investors (private REITs) are non-listed REITs and are not required to be listed on the Stock Exchange of Thailand.

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