

Legal Update

Summary of the Proposed Amendments to the Foreign Business Act

The Thai Cabinet on 9 January 2007 approved in principle amendments to the Foreign Business Act B.E. 2542 (A.D. 1999) (**FBA**), agreeing to limit foreign investors to hold less than 50 percent of the shares or the voting rights. This draft amendment would also increase the penalty for violators. Authorities mentioned that the aim of the amendments is to set a clearer definition of foreign corporate entities and to create transparency among foreign companies in doing business in Thailand. This draft amendment shall be forwarded to the Council of State and thereafter to the National Legislative Assembly for further consideration.

Note that this amendment will not affect the existing foreign companies engaged in businesses that are not listed in FBA Schedules (such as manufacturing business), the foreign companies that have obtained foreign business license and/or foreign business certificate in operation of certain restricted businesses in Schedules 2 or 3 of FBA (such as the companies which received investment promotion from the Board of Investment (**BOI**), or received permission under the law of Industrial Estate Authority of Thailand (**IEAT**) or other applicable laws, or the foreign companies claiming "national treatment" rights under the Treaty of Amity and Economic Relations between the United States of America and Thailand).

Details of Amendment:

New Definition of "Foreigner":

Under the current FBA, "foreigner" was defined by the proportion of number of shares held by a person or entity not of Thai nationality. According to the proposed amendment, the definition of foreign companies will now be extended to include the foreign majority shareholding in terms of voting rights as well. As such, any business in which a foreigner holds 50 percent of voting rights or more, despite minority shareholding, will then be deemed as foreigner under the new definition.

Time Frames for Action:

According to this amendment, the companies engaged in businesses under Schedules 1, 2 or 3 of FBA with foreigners having control through majority voting rights despite minority shareholding, shall report their foreign status and obtain the foreign business certificate from the Ministry of Commerce (**MOC**) within one year from the enactment of this amending act.

In such case, those companies operating under Schedule 1 or Schedule 2 of FBA shall be allowed to continue their business operations for two years from the enactment of this amending act. Within such two year period, they shall either reduce the foreign voting rights to be less than 50 percent or cease their restricted business, provided that its Thai shareholders are genuine investors. In case of the companies operating under Schedule 3, once they report and obtain foreign business certificate from MOC within one year, they will be allowed to continue operating their businesses with no need to change their voting structures and without time limitation, provided that its Thai shareholders are genuine investors.

With respect to the companies operating under Schedules 1, 2 or 3, which have been using Thai individual or corporate nominees holding shares on behalf of foreigners in order to circumvent the law and breach of the majority shareholding limit, the violators must report their true status to MOC within 90 days from the enactment of this amending act and within one year from such enactment, those companies must comply with the provisions under the amending act by way of any of the following alternatives:

- (i) Restructuring or correcting their shareholding structure with genuine Thai majority partner,
- (ii) Obtaining foreign business license under FBA, which is at the sole discretion of MOC whether to grant such license or not,
- (iii) Obtaining investment promotion from BOI or permission from IEAT, if applicable, or any permission under other applicable laws, or
- (iv) Discontinuing the operation of restricted businesses, as the case may be.

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Once the above have been complied with, relevant parties will be free from any penalties for the previous violation under FBA, provided that this amnesty shall not apply to those cases that are currently under the process of police inquiry investigation or court procedures.

Increasing Penalty for Violation:

The present FBA imposes a fine for violation in a range of Baht 100,000 to Baht one million but under this amendment, the range of fines would be increased to be Baht 500,000 to Baht five million. Imprisonment of not more than three years remains unchanged.

Amendment to List of Businesses:

Under this amendment, list of businesses in Schedule 3 of the current FBA (businesses in which Thai nationals are not yet ready to compete with foreigners) has also been revised while list of businesses in Schedule 1 and Schedule 2 remain unchanged. Schedule 1 refers to businesses in which foreigners are forbidden to operate due to special reasons. Schedule 2 refers to businesses relating to national safety or security or affecting cultural arts, traditional customs, folk handicrafts and natural resources or the environment.

Details of the revision of list of businesses in Schedule 3 are as follows:

- (1) Deletion of certain businesses that are under control of other specific authorities, i.e. guided tour business, futures trading under the futures commodity law with no delivery of goods, and service businesses relating to such futures trading, securities, derivatives and other related businesses under the Securities and Exchange Act, banking, finance and credit foncier businesses; and
- (2) Regulation on wholesale and retail businesses of all sizes (under the current FBA, only such businesses with minimum capital of less than Baht 100 million are included).

Lists of businesses in Schedules 1 and 2 and the revised Schedule 3 of FBA are as follows:

Schedule 1: Categories of business which, because of special reasons, foreigners are forbidden to operate:

- 1) Publishing of newspaper business, radio or television broadcasting business
- 2) Rice, field crop or orchard farming
- 3) Animal raising
- 4) Forestry and wood processing from natural forests
- 5) Fishery, exclusively aquatic animals in the Exclusive Economic Zone of Thailand
- 6) Extraction of Thai herbs
- 7) Trade and auction of Thai ancient objects or objects of historical value to the country
- 8) Manufacture or casting of Buddha images and manufacture of alms bowls
- 9) Trade in land

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Schedule 2: Categories of business which, because of national security, culture, arts, traditional customs, folk handicrafts or natural resources and the environment, a foreigner can operate with license issued by the Minister of Commerce with Cabinet approval, and which must have (a) to be announced minimum capitalization, (b) specified percentage of minority Thai ownership (which shall be at least forty percent, but may with Cabinet approval be reduced by the Ministry of Commerce to not less than 25%), and (c) not less than 40% of directors must be Thai citizens.

Chapter 1 Business related to national safety or security

- 1) Manufacture, distribution and maintenance of
 - a) firearms, ammunition, gunpowder, explosives,
 - b) components of firearms, ammunitions and explosives,
 - c) armaments, military ships, aircraft or vehicles,
 - d) accessories or components of war equipment of all kinds
- 2) Domestic land, water or air transport, including domestic airline business

Chapter 2 Business affecting cultural arts, traditional customs and folk handicrafts

- 1) Trade in old objects or art objects, being Thai artwork or handicrafts
- 2) Manufacture of wood carvings
- 3) Silkworm raising, Thai silk production, Thai silk weaving or Thai silk pattern printing
- 4) Production of Thai musical instruments
- 5) Manufacture of products from gold, silver, niello, bronze or lacquer
- 6) Manufacture of crockery or earthenware of Thai cultural arts

Chapter 3 Business affecting natural resources or the environment

- 1) Production of sugar from sugarcane
- 2) Salt farming, including subsurface salt production
- 3) Rock salt production
- 4) Mining, including stone blasting and quarrying
- 5) Wood processing for production of home furniture and utensils.

Schedule 3: Categories of businesses in which Thai nationals are not yet ready to compete with foreigners, which may be operated by foreigners if licensed by the Director General of the Department of Business Development, Ministry of Commerce, with the approval of the Foreign Business Board.

- 1) Rice milling and production of flour from rice and field crops
- 2) Fishery, exclusively aquatic animal cultivation
- 3) Forestry from man-made forests
- 4) Manufacture of plywood, wood veneer, chip board or hard board
- 5) Manufacture of lime
- 6) Accounting service business
- 7) Legal service business
- 8) Architectural service business
- 9) Engineering service business
- 10) Construction, except
 - a) construction of things providing fundamental services to the general public in the field of public utilities or communications requiring special equipment, machinery, technology or expertise, with a foreign minimum capital of THB 500,000,000 or more
 - b) other constructions prescribed in ministerial regulations
- 11) Brokerage or agency business, except
 - a) brokerage or agency in buying and selling securities or services related to futures trading in agricultural commodities, financial instruments or securities
 - b) brokerage or agency in the sale or procurement of goods or services necessary for production or the provision of services amongst affiliated enterprises
 - c) brokerage or agency, in the nature of international business, in the sale, purchase, distribution or acquisition of markets, both domestic and foreign, for the distribution of domestically manufactured or imported goods, with a foreign minimum capital of THB 100,000,000 or more
 - d) brokerage or agency of other kinds as prescribed in ministerial regulations

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- 12) Auction, except
 - a) auction in the nature of international bidding which is not a bid for old objects, antiques or art objects being Thai art work, handicrafts or ancient objects or of historical value to the country
 - b) auction of other kinds prescribed in ministerial regulations
- 13) Domestic trade in indigenous production or agricultural products not yet barred by law except the futures trading as specified under the future commodity law with no delivery of goods
- 14) Retail of goods of all kinds
- 15) Wholesale of goods of all kinds
- 16) Advertising business
- 17) Hotel business except for hotel management service
- 18) *(Deleted – Guided tour business)*
- 19) Selling of food and beverages
- 20) Cultivation or reproduction or development of plants business
- 21) Other service businesses except the following:
 - a) service businesses relating to futures trading under the futures commodity law
 - b) securities, derivatives and any related businesses under the securities and exchange laws
 - c) banking business under Banking Act
 - d) finance and credit foncier businesses under the Act on the Undertaking of Finance Business, Securities Business & Credit Foncier Business
 - e) other service businesses as prescribed under Ministerial Regulations.

Ministry of Commerce to clarify the meaning of Business Operator with Market Domination

Intense competition involving both local players and foreign firms has prompted the Department of Internal Trade (DIT) to draw up proposals for the Cabinet concerning a revision of the Trade Competition Act (Act). One of the main aims is to ensure the enforcement of rules against market domination and monopoly.

Section 25 of the Act was adopted to address and reduce the risk of unfair practices by market dominant enterprises. The meaning of Business Operator with Market Domination is broadly defined under the Act as follows: "One or more business operators in any certain goods or service market whose market share and total sales revenue exceed the level prescribed with due consideration to market competition, by the Commission....". In the absence of a definition of market share and prescribed percentage of market share and total sales volume necessary to qualify as a Business Operator with Market Domination, it is difficult at this stage to express any opinion as to scope of application of this provision.

In order to deal with this problem out, the Committee of DIT have launched a proposal to prescribe the rule as follows:

- (i) One or more business operators in the market of any goods or service who have the market shares in previous year above 50 percent and have total sales in previous year above Baht one billion; or
- (ii) The first 3 business operators in the market of any goods or service who have market shares together in previous year above 75 percent and have total sales in previous year above Baht one billion, except who has market share in previous year lower than 10 percent or has total sales lower than Baht one billion.

At this stage, DIT will determine which kinds of businesses will be deemed as market dominators and will follow up such business. If it is proved that such business is likely business operator having power over the market and conducting unfair practice to small business operator, it will be subject to a fine punishment up to Baht 6 million and/or imprisonment of not exceeding 3 years. Nonetheless, any business operator which is likely to dominate the market but operating its business as usual without conducting unfair practice to small operators will not be subject to punishment.

Sources: *Thairath* 25 December 2006

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Bank of Thailand's regulations are quickly revised after SET crashed.

The Bank of Thailand (**BOT**) made a major intervention to curb the soaring of Thai Baht, setting a reserve requirement on short-term capital inflows. The measure, effective on 19 December 2006, required financial institutions to withhold 30 percent of foreign currencies bought or exchanged against Thai Baht, including foreign direct investments which would be subject to the reserve requirement but shall be refunded upon submission of supporting evidence as required by BOT.

Details of the measure and related operational procedures are summarized as follows:

1. After one year, customers whose foreign currencies have been withheld can request for refunds by submitting related evidence to prove that the funds have been in Thailand for at least one year. Once financial institutions have examined and certified the one-year minimum stay period, they shall inform BOT to return such reserved funds, with no interest, to the customers.
2. Should any customers wish to repatriate their funds earlier than one year, they would be refunded only 2/3 of the reserved amount and with no interest.
3. Foreign exchange transactions which have been traded prior to 19 December 2006 are exempt from this reserve requirement.
4. The earnings received from this measure would be earmarked for public benefits.

The introduction of such policy severely affected the financial market and stock market. Stock Exchange of Thailand (**SET**) recorded the single largest one day drop in its history. The Finance Minister admitted that authorities had underestimated the impact that the policy would have on the market and immediately had a meeting with markets regulators, securities brokers and banks to discuss the fallout of the measure.

The Finance Minister has quickly changed the capital policy, on the evening of 19 December 2006. The changed policy stated that the 30 percent capital reserve requirement would remain intact on funds brought into the country for investing in financial instruments, as well as for borrowing. But, there would be no such requirement on foreign funds brought into the country for foreign direct investment and for investing in the stock market, which change was effective since 19 December 2006.

Subsequently, even though BOT has exempted foreign direct investments and the stock investment, the reserve rule has seriously impacted in the financial markets and caused the Baht, Bond and Stock Markets to fluctuate wildly over the past few weeks.

Summary of the Reserve Requirement on Short-Term Capital Inflows (No. 52/2006)

The following summary is intended to help add clarity regarding the measure and serve as a reference for financial institutions in implementing the reserve requirement.

1. Foreign currencies bought or exchanged against baht for the following transactions are exempt from the 30 percent foreign currency reserve requirement:
 - 1.1. Foreign exchange transactions related to current account activities including transactions related to exchange of goods, services, income, transfers and aid.
 - 1.2. Inflows for equity investment in companies listed in the Stock Exchange of Thailand (**SET**) and Market for Alternative Investment (**MAI**) (excluding mutual funds and warrants), investment in the Thai Futures Exchange (**TFEX**), and investment in the Agricultural Futures Exchange of Thailand (**AFET**). Funds destined for the aforementioned investments should be deposited in the Special Non-resident Baht Account for Securities: SNS.

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- 1.3. Foreign direct investment defined as investments by non-residents in resident entities where the investor owns at least 10 percent of the equity capital and has managerial power.
- 1.4. Investment in real estate such as land and condominiums (excluding real estate mutual funds).
- 1.5. Foreign currency borrowings transacted prior to 19 December 2006.
- 1.6. Currency swap transactions associated with rolling over existing exchange rate hedging contracts with the original financial institution.
- 1.7. Foreign currencies bought or exchanged against baht amounting to less than USD 20,000 or equivalent.
- 1.8. Foreign exchange bought or exchanged against baht from clients or authorized money changers in the form of travellers' cheques and bank notes.
- 1.9. Foreign currencies bought or exchanged against baht from (a) foreign embassies, foreign consulates, specialized agencies of the United Nations, international organizations/ institutions incorporated in Thailand; and (b) Thai embassies, Thai consulates or other Thai government entities located outside Thailand.
- 1.10. Foreign currency borrowings of government entities.
2. Foreign currencies bought or exchanged against baht for the following transactions are subject to the 30 percent foreign currency reserve requirement:
 - 2.1. Investments in debt securities transacted from 19 December 2006 onwards.
 - 2.2. Foreign currency borrowings transacted from 19 December 2006 onwards.
 - 2.3. Foreign currencies bought or exchanged against baht for purposes other than those exempted in 1 above.
3. Balances in Non-resident Baht Accounts are allowed to exceed Baht 300 million without limit until 8 January 2007. After that, the balances shall not exceed Baht 300 million.
4. From 8 January 2007 onwards, balances in the SNS accounts shall not exceed Baht 300 million. The Bank of Thailand will continue to review the appropriateness of this limit.

Sources: Bank of Thailand News the announcement No. 51/2006, No. 52/2006 and Relaxation of Practice on 20 December 2006, Bangkok Post, The Manager, The Nation and Post Today.

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