

Legal Update



Latest Draft Amendment to Foreign Business Act

On 10 April 2007, the Cabinet approved the new draft amendment to the Foreign Business Act (**FBA**) ("**latest Draft**"). The latest Draft has been made in combination with the 1st draft as previously approved by the Cabinet on 9 January 2007 and the 2nd draft as proposed to and considered by the National Legislative Assembly (**NLA**) on 14 March 2007.

Certain provisions of the latest Draft are summarized as follows:

1. According to the latest Draft, the definition of foreign companies will still be the same as the 1st Draft by extending to include the foreign majority shareholding in terms of voting rights. 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.

However, The Cabinet has relaxed the restrictions on foreigners' voting rights as well as extended the grace period in voting right adjustment to conform with the new FBA for the companies operating businesses in Schedules 1 and 2 from 2 years (under the 1st Draft) to 3 years instead. For the companies operating businesses in Schedule 3 with foreigners having control through majority voting rights despite minority shareholding, the procedures according to the 1st draft will still apply, i.e. reporting 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 order to continue their businesses with no need to change their voting structures and without time limitation, provided that Thai shareholders of those companies shall be genuine investors.

2. The latest Draft also stiffens penalties to up to five years imprisonment and imposes a fine of up to Baht 5,000,000 for both foreign and Thai nationals violating FBA.
3. Under the latest Draft, there is no amnesty or moratorium period for the companies with nominee structure in reporting and/or restructuring themselves to be in line with FBA within one year which is different from the 1st Draft. As such it would cause adverse effect against many existing companies which have been set up and operated through nominee structures.
4. For the list of restricted businesses under FBA, the latest Draft still follows to the 1st Draft. Nevertheless, in addition to certain businesses which will be deleted from the list of Schedule 3 of FBA as stated in the 1st draft, insurance business will also be deleted from such list under the latest Draft since it shall still be controlled by other specific law.

As such, upon enactment of this FBA amendment, all sizes of retail and wholesale businesses shall be prohibited to be operated under FBA unless the prior permission thereof is obtained.

The latest Draft will be forwarded to NLA for further consideration and approval.

Source: The Nations, Bangkok Post, Post Today, 11 April 2007.

Vickery & Worachai Ltd.

Lawyers

16th Floor, GPF Witthayu Towers A, 93/1 Wireless Road, Bangkok 10330, Thailand
Telephone: (66) 02-256-6311, 02-650-9691, Fax: (66) 02-256-6317/8
Email: vwlaw@loxinfo.co.th, Website: www.v-w.co.th

Legal Update



Notice of Trade Competition Commission

Re: Bases on Consideration as Being Business Operator with Influence over the Market

The Trade Competition Commission, with approval of the Cabinet, has issued this Notice prescribing the bases on consideration as being business operator with influence over the market as follows:

The business operator having the following market shares and total sales shall be a business operator who has influence over the market:

Any business operator who, in any market of any good or service, has market share in the preceding year of 50 percent or more and has total sales in the preceding year of Baht one billion or more; or

The first three business operators who, in any market of any good or service, have total market share in the preceding year altogether of 75 percent or more and have total sales in the preceding year of Baht one billion or more. However, any such business operator in this item (2) who has market share in the preceding year lower than 10 percent or has total sales in the preceding year less than Baht one billion shall not be deemed the market dominant enterprise.

The effective date of enforcement under this Notice is 18 February 2007.

Source: Government Gazette, Special Issue, Volume 124, 7 February 2007.



Amendment to Direct Sale and Direct Marketing Act

This amendment to the Direct Sale and Direct Marketing Act B.E. 2545 (A.D.2002) is promulgated because Section 5 of the said Act provides that the competent officer shall be empowered to carry out the duties, but it does not provide that it is an offence, and there is no penalty if a person obstructs or fails to afford convenience to the competent officer who is carrying out such duties. Hence, it is deemed appropriate to prescribe by this amendment that it shall be an offence and there shall be a penalty for such a case, so that the carrying out of duties of the competent officer will be more efficient.

The provision of Section 45 of the said Act shall be repealed and replaced by this amended Act as follows:

“Section 45. Whoever obstructs or fails to afford convenience to the competent officer who is carrying out his/her duties under Section 5, or fails to comply with an order of the Committee or a sub-committee under Section 16, shall be punished by imprisonment for a term not exceeding one month, or fine not exceeding Baht 10,000, or both.”

Source: Government Gazette, Legislation Issue, Volume 124, 5 February 2007.

Vickery & Worachai Ltd.

Lawyers

16th Floor, GPF Witthayu Towers A, 93/1 Wireless Road, Bangkok 10330, Thailand
Telephone: (66) 02-256-6311, 02-650-9691, Fax: (66) 02-256-6317/8
Email: vwlaw@loxinfo.co.th, Website: www.v-w.co.th

Legal Update

Notice of Exchange Control Officer **Re: Based and Practiced Respecting Exchange Control (No.7)**

The Exchange Control Officer has issued this Notice prescribing bases and practices with respect to exchange control. Significant provisions under this Notice are as follows:

1. In buying or exchanging foreign currency in Baht in any of the following cases, the Exchange Control Officer grants an exemption that the authorized juristic person may not set aside reserve money according to the current reserve fund requirement of Bank of Thailand:

(1) Foreign currency which is direct investment money, loan of government agency, and money for buying immovable property.

“Direct investment money” means the money used for the establishment of a business in Thailand or for making a joint investment with a person or a juristic person in Thailand, by having the proportion of shareholding or ownership stake therein at not less than 10 percent of the total capital of such business and by having a part in the management of such business. In any case, the shareholding proportion shall be counted per one case.

(2) Foreign currency which is loan under the loan contract which was executed before 19 December 2006.

(3) Foreign currency sold or exchanged by the following persons:

(a) Thai embassy, Thai consulate, or Thai government agency located abroad.

(b) Foreign embassy, foreign consulate, special agency of the United Nations Organization or of an international organization or institute, in Thailand.

(4) Renewal of exchange rate risk prevention contract by making swap transaction with the same authorized juristic person.

(5) Traveler’s cheques and foreign bank notes.

In the case of (1) to (4), the authorized juristic persons shall request the person selling or exchanging foreign currency to produce the evidences concerned, and upon the authorized juristic person having examined same to his satisfaction that the said evidences are true and correct, and that the foreign currency is truly for the objectives duly prescribed, the authorized juristic person may then buy or exchange the said foreign currency without setting aside a reserve money therefor.

2. In buying or exchanging foreign currency which is investment money in a capital share listed in the Stock Exchange of Thailand (**SET**), investment in non-voting depository receipt (**NVDR**), and investment money in the Centre for Buying and Selling Forward Contracts and Forward Agricultural Produce Market, the authorized juristic person shall comply with the following:

(1) Request the person selling or exchanging foreign currency to produce the evidences concerned, and upon the authorized juristic person having examined same to his satisfaction that the said evidences are true and correct, and that the foreign currency is truly for making such investment, the authorized juristic person may then buy or exchange the said foreign currency without setting aside a reserve money therefor.

Vickery & Worachai Ltd.

Lawyers

16th Floor, GPF Witthayu Towers A, 93/1 Wireless Road, Bangkok 10330, Thailand
Telephone: (66) 02-256-6311, 02-650-9691, Fax: (66) 02-256-6317/8

Email: vwlaw@loxinfo.co.th, Website: www.v-w.co.th

Legal Update

- (2) Procure the person selling or exchanging foreign currency to make a contract with the authorized juristic person so as to have a special non-resident Baht account for securities (SNS) specifically for the purpose of making investment in a capital share listed in SET, investment in NVDR, and investment in the Centre for Buying and Selling Forward Contracts and Forward Agricultural Produce Market, however, subject to the following conditions:
 - (a) The person selling or exchanging foreign currency must have only one SNS account for receiving and disbursement of money from the investment in a capital share listed in SET, the investment in NVDR, or the investment in the Centre for Buying and Selling forward Contracts and Forward Agricultural Produce Market.
 - (b) The Baht amount deposited in the SNS account must have been obtained from the sale of foreign currency for making investment in a capital share listed in SET, investment in NVDR, investment in the Centre for Buying and Selling Forward contracts and Forward Agricultural produce Market, or the Baht amount received from the said investment.
 - (c) In withdrawing Baht amount from the SNS account, it can only be done specifically for the transactions of investment in a capital share listed in SET, investment in NVDR, investment in the Centre for Buying and Selling Forward Contracts and Forward Agricultural Produce Market, or it must be a withdrawal for buying foreign currency for sending abroad.
 - (d) If the owner of SNS account violates or fails to comply with the conditions of deposition and withdrawal under (a) to (c), the owner of such account agrees to allow the authorized juristic person to close the said account with no need to notify him in advance, and the owner of such account also agrees to use the Baht amount remaining in the said account to buy a foreign currency for sending abroad forthwith.
- (3) The authorized juristic person must see to it that the SNS account is in accordance with the conditions agreed upon between them under (2).

Source: Government Gazette, Volume 124, Special Issue, Part 15 Ngor., 7 February 2007.

Vickery & Worachai Ltd.

Lawyers

16th Floor, GPF Witthayu Towers A, 93/1 Wireless Road, Bangkok 10330, Thailand
Telephone: (66) 02-256-6311, 02-650-9691, Fax: (66) 02-256-6317/8
Email: vwlaw@loxinfo.co.th, Website: www.v-w.co.th