

Implications of Foreign Business Act amendments

On Jan 9, the cabinet appointed by the Council for National Security approved a bill to amend the Foreign Business Act of 1999 (FBA). The most significant issue on the bill was to amend the definition of "alien" to also include companies in which foreigners have the majority vote regardless of their ownership in the companies.

Under the current FBA, a company with foreign shareholding is regarded as "alien" if the majority of its registered capital is held by foreigners. Various businesses are reserved for Thais under the FBA for different reasons, and foreigners wishing to conduct a reserved business have to apply for an alien business licence from the relevant authority. To avoid such a requirement, many foreign investors opt for a joint venture with Thais in which the Thais hold the majority of the registered capital but the foreign minority shareholders have management control over the company and get higher returns. This is accomplished through a structure that gives voting control to the (foreign) minority shareholders. Such arrangement per se is legal and recognised by Thai law.

If such a structure is legal and recognised by Thai law, the question now arises as to why the new bill contemplates on illegalising it. This brings us to the real issue, which is the use of this minority voting control to circumvent the letter and principle of the FBA. It should be noted that the FBA has provisions prohibiting "nominee" arrangements whereby the Thais are not real investors but merely act as "nominees" to hold shares for and on behalf of the "beneficial" (foreign) owners. While the said nominee arrangements are explicitly prohibited under the FBA, minority voting control is not.

The bill is presently under review by the Council of State and thereafter will be forwarded to the National Legislative Assembly for approval.

The whole process of passing a bill and enacting it into law generally takes at least a year. However, it may be different for this bill, as the government wishes to revamp the foreign ownership structure in restricted businesses in Thailand, especially in land and telecommunication industries.

What are the highlights of the bill? A company with foreign shareholders having majority voting rights will be regarded as "alien". Therefore, if the amendment to the FBA is promulgated, all companies with foreign shareholders having voting control will be regarded as "alien" regardless of their shareholding. Such companies have to notify the director-general of the Department of Business Development (DBD) in accordance with the rules and procedures

to be prescribed by the DBD within one year after the effective date of the law. After the notification to the DBD, such companies have to comply with the following conditions depending on their business:

1. Companies engaging in List 3 businesses, e.g., construction, services, retail, wholesale, broker and agent, and hotel: After the notification, these companies will be allowed to continue their business operation until they are dissolved.

2. Companies engaging in List 1 and 2 businesses, e.g., domestic air transport, mining, newspapers, and television: After the notification, these companies will be allowed to continue their business for two years after the promulgation of the law. But according to a meeting between representatives of foreign chambers of commerce and Deputy Prime Minister M.R. Pridiyathorn Devakula on Jan 10, there is a possibility that the grace period may be extended, say by three years.

Companies that fail to notify the DBD within one year and continue their business operations will be subject to imprisonment or fines, or both, as fixed in the FBA. The FBA amendment carries higher fines than the current FBA.

The above conditions are applicable to companies that are not regarded as "alien" under the current definition of the FBA but will be regarded as "alien" after the enactment of the new amendment.

A different procedure will be applied to Thai majority-owned companies with "nominee" arrangements in violation of the FBA or companies with foreign shareholding exceeding the restriction under the FBA. Those companies are required to notify the DBD within 90 days after the enactment of the law and to take corrective measures or dissolve their businesses within one year from the enactment of the law to avoid penalties under the FBA.

It should be noted that the FBA and the new amendment are applicable only to companies engaged in businesses reserved for Thais under the FBA and/or other local laws. Foreigners or companies that are defined as "alien" under the FBA but engaged in businesses that are not reserved under the FBA, such as most manufacturing and all export activities, or companies granted approval by the Board of Investment to conduct reserved businesses, are not subject to the FBA or the proposed amendment to the FBA.

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