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Direct Sale and Direct Marketing Act: Draft Amendments Could Pose Challenges to Operators

In recent years, the Thai government has attempted to strike a balance between attracting investment and protecting consumer interests. On the one hand, it has tried to liberalize foreign investment, eradicate bureaucratic red tape, and introduce investment promotion and investor-friendly policies through tax and non-tax incentives. On the other hand, it has enacted a number of laws and regulations to enhance consumer protection.

Despite this balancing act, certain laws and regulations still impose stringent requirements on business operators. This includes the Direct Sale and Direct Marketing Act B.E. 2545 (2002) (Act), which requires business operators to register with the Office of the Consumer Protection Board (OCPB) prior to commencing a direct sale or direct marketing business in Thailand. Business operators, and particularly foreign business operators, have faced frequent impediments during registration, caused by stringent processes, policy reviews, and documentation requirements, which are imposed by officials who are tasked with enforcing and applying the Act.

The officials typically request applicants to revise certain documents, such as their product catalogs, marketing plans, and benefit and compensation schemes, on the basis that they do not meet the officials' guidelines. These guidelines, however, are not publicly available. Therefore, not only are business operators faced with strict requirements, but the requirements are also obscure, resulting in a registration process that is time consuming and unpredictable.

A number of draft amendments to the Act have been proposed which will introduce significant changes to its substantive and procedural provisions. This article discusses the amendments, and the impact on business operators and consumers.

Key Amendments and Requirements for Applications

The amendments introduce a definition for a "company," which was not previously defined. This is intended to limit qualified applicants to juristic persons that have registered capital (i.e., only limited companies under the Civil and Commercial Code and public limited companies under the law relating to Public Limited Companies).

Companies that qualify for registration are subsequently required to fulfill statutory requirements, including the need to have paid-up capital amounting to not less than THB 10 million, and not revoking the direct sale or direct marketing registration within a period of five years prior to the application submission date.

Directors or persons who have the power to manage the company must not be: (1) declared bankrupt; (2) adjudged incompetent or quasi-incompetent; (3) imprisoned by a final judgement, excluding imprisonment for negligence or misdemeanors; (4) a director or an authorized person in another company which has already been granted direct sale or direct marketing registration; and (5) a director or an authorized person in any company whose registration has been revoked.

A direct sale and direct marketing committee is prohibited from holding more than 10 percent of the shares in a company conducting a direct sale or direct marketing business within a period of one year prior to and during their time in office, in order to avoid conflicts of interest.

To apply for registration, applicants are required to provide a guarantee to the registrar in accordance with the amount prescribed by Ministerial Regulation, but this amount must not be less than THB 500,000. The guarantee may be in the form of cash, a bank guarantee, government bonds, bonds issued by state enterprises, or other properties which are stipulated in a notification of the direct sale and direct marketing committee. This guarantee may be used to pay damages incurred by consumers as a result of breaches of buy-sell agreements committed by the operators.

The amendments also impose reporting duties on both direct sale and direct marketing operators. If operators relocate their office, they are required to notify the registrar within 15 days from the relocation date. In addition, operators must submit reports on their business operations to the registrar, in accordance with the forms, guidelines, and periods prescribed in a notification issued by the direct sale and direct marketing committee. Any transfer or cessation of operations must be approved by the registrar, in conjunction with publishing a notification in a local newspaper and informing consumers by registered mail or through another medium of communication.

Increased Protection for Consumers

The amendments impose a number of additional responsibilities and liabilities, including the requirement that direct sale operators must be jointly liable to consumers who purchase goods or services from independent distributors, even though ownership of such goods or services is transferred from the operators to the independent distributors.

The responsibility to prepare buy-sell documents for goods or services also falls on operators, and such documents must be provided to consumers, together with the purchased goods or services. For direct sales, the independent distributors must hand over the documents to consumers in place of the direct sale operators. In the event that operators or independent distributors breach these statutory duties, the buy-sell agreements will not be binding on consumers.

Penalties for Registration Violations

The registrar has the authority to impose corrective measures on violators for non-serious violations before revoking a registration, while serious violations will lead to a registration being revoked. The amendments also impose criminal penalties on those who fail to comply with the registrar's orders, or who violate provisions on consumer advertisements and communication.

The amendments provide a transition period for operators that have already registered for direct sale and direct marketing. These operators must comply with the requirements within the prescribed time frame permitted for such matters, as stipulated under the amendments—otherwise, their registrations will be automatically revoked.

While the amendments aim to protect consumers from unaccountable business operators, the additional requirements could adversely impact existing business operators that are unable to meet even more stringent requirements. If the registrations of these operators are revoked, the government may consider the consumers who were negatively affected by the revocation, and remedial measures may be enacted to counteract any ensuing issues. The draft amendments have now been submitted to the National Assembly for further consideration, and business operators in this sector will be closely monitoring the progress of their enactment. ⚖️