

The Foreign Business Act Amendment: Q&A

The Ministry of Commerce submitted a draft bill to amend the Foreign Business Act 1999 (FBA) to the cabinet on 9 January 2007. It was approved in principle by the cabinet and will be forwarded to the Council of State for legal clearance. After it is approved by the Council of State, the draft (with changes, if necessary) will be resubmitted to the cabinet again before being sent to the National Legislative Assembly for consideration. Once approved by the NLA and published in the Royal Gazette, the amendment will become effective.

IMPORTANT NOTE: This fact sheet explains features that appear in the draft bill that was submitted by the Ministry of Commerce to the cabinet and approved on 9 January 2007 only. Subsequent changes of the draft bill by the Council of State and the NLA will be addressed later.

What is the Foreign Business Act?

The Foreign Business Act (FBA) is the main law that regulates scope of foreign business activities in Thailand. It does that through a simple 3-step procedure:

1. Defining who “foreigners” are
2. Listing categories of businesses that foreigners cannot do without permission
3. Setting out procedures for foreigners to obtain such permission

In addition to the procedure, the FBA also contains provisions:

- Establishing authorities that are empowered to grant permission
- Setting level of punishment and punishment for violation of the law

Why is it necessary to have the FBA?

Although enacted in 1999, the FBA is not a new law. Its predecessor was called “Alien Business Law” (ABL) or better known in Thailand as “Por Wor 281”. The ABL was promulgated in 1972 in order to limit foreign participation in some business activities either because they were sensitive sectors for Thailand (on security, natural resource, culture, etc. ground) or because the Thai people were not competitive in those sectors.

The ABL was revised twice in 1978 and 1992 to make it gradually more liberal. But in 1999 a major revision was called for and the parliament passed the current law which is now called the Foreign Business Act 1999.

The rationales behind the enactment of the FBA were

- to make foreign business regime more liberalised in line with Thailand’s need for investment and capital inflows;
- to reclassify businesses that should be reserved for Thais so as to make the lists better suited for Thailand competitiveness;
- to implement international agreements to which Thailand is party.

Scope of FBA : Are all foreign businesses in Thailand subject to this law?

No. Only businesses that appear in Lists 1, 2 and 3 which are annexed to the law are subject to the FBA. Most manufacturing activities are not covered by the law. Automobile production activity, for example, is not subject to the FBA which means foreigners can have 100% ownership once they register the company and get tax payment ID.

In addition, businesses that receive certificate from the Board of Investment promotion scheme will be exempted from the FBA.

Who are considered “foreigners” according to the FBA?

The current FBA defines foreigners as

1. A natural person not of Thai nationality
2. A juridical person not registered in Thailand
3. A juridical person registered in Thailand which has 1. or 2. having 50% shares or more
4. A juridical person registered in Thailand which has 1. or 2. or 3. having 50% shares or more
5. A limited partnership with foreign managing partner or manager

Following this definition, as a general rule, foreigners or foreign companies can own shares in any company doing any business in Thailand up to 49.99%. Of course, they can own more than that if they engage in businesses not listed in the FBA.

But foreigners may be allowed less than 49.99% in some sectors that are governed by specific laws. Some of these laws set limit on foreign ownership lower than 49.99% such as banking and insurance. Therefore, foreigners must check what kind of businesses they want to do and what law will they be subject to.

Are foreigners not allowed to do businesses listed under the FBA at all?

No. Foreigners can engage in most of the businesses listed under the FBA. Only the 9 businesses in List 1 are completely prohibited to foreigners.

The FBA contains 3 Lists. Foreigners are permitted to engage in these businesses to a different extent. While they are not allowed to apply for license to engage in business in List 1, they can apply for license to engage in businesses and have majority ownership in List 2 or List 3 businesses.

Although they cannot have majority ownership in List 1 businesses, they can own up to 49.99% of shares (in accordance with the definition of “foreigners” explained above).

Table 1: Lists annexed to the FBA

	How many businesses in the List?	How much can foreigners own?	Who can approve for license to permit foreign majority shareholding?
List 1: Businesses that are reserved for special reasons	9	49.99%	Foreigners cannot have majority ownership.
List 2: Businesses that are reserved due to national safety,	16	60% or 75% max	Minister of Commerce with cabinet approval

security, culture, natural resources and environment			
List 3: Businesses in which Thais are not competitive	21	100%	Director-General of Department of Business Development with approval from Committee on Foreign Business

Why does the FBA have to be amended?

- **Address legal loopholes**

Like many laws, the FBA is not without loopholes. There have been 2 major ways to circumvent the FBA – using voting rights and having nominees. Through these arrangements, foreigners can engage in businesses which are regulated in the FBA without applying for a license.

- **Voting rights** – In this case, foreigners hold preferred shares that give them voting rights over Thais so even if they own only 49.99% share, they may have effective control of the company. Generally, holding preferred shares is allowed under commercial laws in Thailand. But it should not be used in a way that would enable foreigners to engage in businesses which are restricted under the FBA i.e., it has become a means for foreigners to circumvent the FBA;
- **Shareholding by nominees** – In this case, foreigners arrange to engage Thais to act as their “nominees” shareholders who would act in accordance with the foreign shareholders’ instructions. Nominee shareholder is not a genuine investor and nominee shareholding in restricted businesses is already an offense under the FBA (Section 36)

- **Revise the Lists**

In addition to addressing these loopholes, there is a need to revise the attached Lists of businesses to make them more in line with the current level of Thailand’s economic development and legal setting.

- **Increase transparency and good governance**

By closing loophole and imposing heavier punishment terms, the government believes that it will promote transparency in the system and strengthen good governance in doing business in Thailand.

Who was involved in the proposed amendments? Were there any representatives from the private sector – both Thai and Foreign?

On 26 October 2006, the Minister of Commerce appointed a 10-member Committee tasked with studying and proposing any amendments to the FBA that it considered necessary and appropriate for the present economic environment in Thailand.

The Committee was chaired by Mr. Pramon Suthiwongse of the Thai Chamber of Commerce and was comprised of representatives from the Thai private sectors key associations (Thai Chamber of Commerce, Federation of Thai Industries, Thai Bankers’ Association), a representative of the Foreign Chambers, the Board of Investment, several academics with the Department of Business Development as its secretariat.

The Committee held 8 intensive meetings and completed its deliberation within the 60 days period given to it. Mr. Pramon made recommendations on behalf of the Committee to the Ministry on 26 December 2006 which then formed the basis upon which the Ministry prepared draft language of the amendments.

On 28 December 2006, the first draft was tabled for consideration at the Economic Ministers' Meeting. Several comments were made which the Ministry of Commerce then incorporated into the second draft which was submitted to the full cabinet meeting on 9 January 2007 and received approval, in principle. The draft is now under consideration by the Council of State.

What are the amendments?

The amendments focused on 3 key elements: definition of "foreigner"; modification of punishment; and revision of the Lists of businesses covered by the FBA.

Table 2: Summary of the amendments

	Current law	Amendment
1. Definition of foreigners	Define 5 types of foreigner (details above)	Add "voting right" as criterion on determining whether a juridical person registered in Thailand is a foreign company or not ➤ So now if a juridical person has foreigners having voting rights of 50% or more, it will be considered as a foreign company, even if it has less than 50% foreign equity participation.
2. Punishment	<u>Imprisonment</u> : 3 years <u>Fine</u> : 100,000 – 1 million baht for violation (10,000 – 50,000 baht daily for non-compliance with court ruling)	<u>Imprisonment</u> : no change <u>Fine</u> : 500,000 – 5 million baht (50,000 – 250,000 baht daily for non-compliance)
3. Lists	3 Lists	<u>Lists 1 and 2</u> : no change <u>List 3</u> : (1) exclude the following: tour operating business; futures trading of commodities and related business; securities, derivatives and related business; banking, finance, credit foncier and related business (2) remove minimum capital level for retail and wholesale that need permission – meaning all retail and wholesale business will have to get permission from now on

What will happen to a company that was previously Thai (foreigners holding 49.99% shares) but will become foreign company due to foreigners having voting rights at 50% or more? Will it be considered as violating the new law or will it be given time to comply?

The government understands that such company was not in violation of the FBA before so it will be given time to comply with the new law. All such company will be required to report to the Department of Business Development in order to obtain Certificate

to continue operation. However, the length of operation will differ between businesses in Lists 1, 2 and List 3.

Table 3 : Adjustment period for companies that have become foreigners due to “voting rights” criterion

Business	Period of time to notify	Length of operation
Lists 1 & 2	1 year	2 years; after that, such company will have to become “Thai” company i.e., must have less than 50% of foreign shareholdings and voting rights
List 3	1 year	Until the company is dissolved

What will happen to a company that have nominee shareholding on behalf of foreigners at 50% or more? Will it be given time to comply?

A company that has nominee shareholding is already in violation of the current FBA. However, to avoid major disruption in the economy, the government will allow time for them to comply with the law. But companies which are under investigation by law enforcement authorities or are during court proceedings pursuant to the provisions of the current FBA, will have their cases continued.

Table 4: Adjustment period for nominee

Business	Period of Time to notify	Length of operation
Lists 1, 2, and 3	90 days	➤ 1 year to comply.

If circumvention of the law was due to both voting rights and nominee, why are there changes on definition only on voting rights? Why wasn’t there any change on nominee?

There’s no need to change definition to address nominee issue because it is already deemed illegal under the current FBA. As such, it was not necessary to elaborate further on what might constitute nominee. With regards to nominees, the proposed amendments are the increase in punishment through fine, the 90-day period allowed for notification and the 1-year adjustment period. What the government will do is to step up its enforcement efforts on investigating any company that might be using nominee shareholding and did not report to the Ministry of Commerce. One year after the law enters into force, such non-reporting company will be punished in accordance with the new law.

Is the amendment in violation of Thailand’s international obligations?

The proposed amendments do not violate any of Thailand’s international obligations, including those under WTO. This is self-evident with regards to the amendment of the punishment terms and the attached Lists.

The amendment to introduce voting rights as criterion for determining the nationality of a company is consistent with Thailand’s obligations under the WTO Agreement and other treaties to which Thailand is party. As far as the WTO is concerned, the definition of ‘foreign service supplier’ is part of domestic regulation, an area in which Members have flexibility. Moreover, the definition as amended is more in keeping with the definition of ‘juridical person’ under Article XXVIII of the GATS.

As it has always been the case, Thailand will continue to observe its international obligations, including those under the WTO Agreement and FTAs to which Thailand is party. Companies already established in Thailand that are deemed under the new definition to be a 'foreigner'¹ will be allowed, in accordance with formalities to be published, to operate in Thailand in sectors in which Thailand has commitments for an indefinite period for sectors under List Three, and for two years for sectors under Lists One and Two.

The Royal Thai Government welcomes any interested governments to make enquiries and representations at the Department of Trade Negotiations on matters relating to Thailand's international commitments.

What plan does the government have to liberalise services and investment under the FBA in the future?

The Government plans to progressively liberalise services and investment currently restricted under the FBA through an annual review of the Lists. Such annual review is mandated by Section 26 of the current FBA. The Ministry of Commerce invites any associations, academic institutes or companies to submit propositions with supporting data to withdraw any businesses from the Lists.

Ministry of Commerce
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¹ For example, a company established in Thailand in which 49% or less of capital shares is held by a national of a WTO Member, but in which such national has control of the voting rights, is deemed to be a 'Thai' company under the current definition of the FBA. Under the new definition, this company will be deemed to be a 'foreigner', ie. a company of the WTO Member concerned.