

## The Foreign Business Act Amendment: a Brief Explanation

### Introduction

The Ministry of Commerce (MOC) 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, if any, will be addressed later.*

### Explanation outline

1. Reasons for amendments
2. Current law
3. Detail of amendments
4. Scope of application

### 1. Why the amendment?

1.1 MOC has been receiving complaints and requests to investigate cases on violation of the Foreign Business Act (FBA) on 2 issues:

- Abusing **voting rights**<sup>1</sup>
- Using “**nominee**” – a person holding shares on behalf of someone else – to enable foreigners to do businesses which are restricted under the FBA without permission. A nominee is not a genuine investor but is a person that simply allows foreigners to use its name to hold shares in a company and who will act in accordance with the foreigners’ instruction.

1.2 At the moment, there are 12 pending such cases.

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<sup>1</sup> A company can specify in bylaw or its voting agreement conditions on voting rights of preferred shares and ordinary shares. In many cases, such differential voting rights enable foreign shareholders that have preferred shares of less than 50% to have voting power more than 50%. As such, that company appears to have foreigners holding its share less than 50% (ie., remains a Thai company in accordance with definition of Foreigners in the FBA) but in fact, foreign shareholders have control over the company through the higher voting power than Thai shareholders. Although such differential shareholding arrangements are not against commercial laws in Thailand, it should not be used as a means to let foreigners to engage in businesses that are restricted under the FBA without permission (ie., should not be used to circumvent the FBA). The proposed amendment will address this issue by requiring that if a company has its foreign shareholders holding shares less than 50% but have combined voting rights more than 50%, it will now be considered a foreign company and thus must get permission from the Ministry of Commerce.

1.3 Because of these complaints, the MOC believed an amendment of the FBA is necessary to achieve the following **objectives**:-

- **To promote good governance** – The amendment will forbid the use of preferential voting rights for and by foreign shareholders in prohibited businesses and thereby closing an important legal loophole in the FBA
- **To strengthen compliance** – It will impose heavier fine penalty on nominee shareholding in restricted business which is against the law (Section 36)
- **To provide flexibility** – It will allow grace period and “grandfathering” clause for compliance to avoid business disruption
- To clarify what constitutes “foreign business entity”
- To strengthen enforcement and oversight capacity
- To increase transparency and good governance in foreign business regime;

1.4 **Three key amendments**:

- Definition of “foreigners”
- Punishments
- List of businesses under the FBA

## 2. The current law

2.1 “**Foreigners**” are defined 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 partners or managers

2.2 “**Nominee and punishments**” are

- shareholding through nominee to enable foreigners to engage in restricted businesses is against the FBA (Section 36)
- Punishments
  - Imprisonment : 3 years
  - Fine : 100,000 – 1 million baht

2.3 “**List of restricted businesses**” includes

**List 1** – foreigners not permitted to have majority ownership for special reasons

**List 2** – businesses related to national safety, security, culture, natural resources and environment.

Foreigners can have majority ownership (max 75%) if granted permission from Minister of Commerce with cabinet approval.

**List 3** – businesses in which Thais are not competitive.

Foreigners can have 100% ownership if granted licenses from Department of Business Development.

### 3. Details of the proposed amendments

Current law	Proposed amendments
<p><b>Definition of “Foreigners”</b></p> <p>juridical persons with <math>\geq 50\%</math> foreign equity shareholding are considered “Foreigner”</p>	<p><b>voting right</b> will be another determining criterion:</p> <p><i>'Juridical person with foreigners holding majority voting right (<math>\geq 50\%</math>) will now be regarded as a foreign business'</i></p>
<p><b>Punishments</b></p> <p><b>Imprisonment:</b> 3 years</p> <p><b>Fine:</b> 100,000 – 1 million baht</p>	<p><b>Imprisonment:</b> remains 3 years as in current law</p> <p><b>Fine:</b> increases 5 times (to 500,000 – 5 million baht)</p>
<p><b>Lists of restricted businesses</b></p> <p><b>List 1</b> – foreigners not permitted to have majority ownership for special reasons e.g. Newspaper business, radio broadcasting, television station business, rice farming, animal farming etc.</p> <p><b>List 2</b> – businesses related to national safety, security, culture, natural resources and environment e.g. Production/selling/repairing and maintenance of firearms, ammunition, gun powder, explosives, domestic land, waterway or air transportation, trading of antiques or art objects being Thai arts and handicraft, production of carved wood, manufacturing sugar from sugarcane etc.</p> <p><b>List 3</b> – businesses which Thais are not competitive e.g. Rice milling and flour production, fishery, forestry from forestation, accounting service, legal service, other services etc.</p>	<p><b>List 1 and 2</b> remain unchanged</p> <p><b>List 3</b> – Businesses that are under jurisdiction of other authorities will be taken out:</p> <ul style="list-style-type: none"> <li>○ Tour operating business</li> <li>○ Futures trading of commodities and related businesses</li> <li>○ Securities, derivatives and related businesses</li> <li>○ Finance, banking and credit foncier</li> <li>○ Retail/wholesale : all foreign retailing / wholesaling companies will have to get permission</li> </ul>
<p><b>Adjustment period</b></p> <p>Existing businesses with <u>foreigners’ voting right</u> <math>\geq 50\%</math>:</p> <ul style="list-style-type: none"> <li>• <b>List 3</b> – must report to MOC within 1 year to get certification to continue operations (“grandfathered”);</li> </ul>	

Current law	Proposed amendments
	<ul style="list-style-type: none"> <li>• <b>Lists 1 and 2</b> – must report to MOC within 1 year; will be given 2 years to reduce foreigners’ voting right to below 50% which could then continue their business operation. Otherwise,               <ul style="list-style-type: none"> <li>○ <b>List 2</b> businesses that want to continue operation as foreign companies (ie., with foreign voting rights <math>\geq</math> 50%) can apply for licenses after such 2 years.</li> <li>○ <b>List 1</b> businesses cannot apply to have foreign voting rights <math>\geq</math> 50% and will have to cease their business operation after such 2 years.</li> </ul> </li> </ul> <p>Existing businesses where foreigners, through <u>nominees</u>, hold <math>\geq</math> 50% of total shares:</p> <ul style="list-style-type: none"> <li>• <b>List 1, 2 and 3</b> –               <ul style="list-style-type: none"> <li>○ Must report to MOC within 90 days of the entering into force of the amendment</li> <li>○ Will have 1 year to comply with the law</li> <li>○ No grandfathering</li> </ul> </li> </ul>

#### 4. Scope of Application

The amendments will not affect:

- existing foreign companies in manufacturing industries and export business
- businesses not listed under or exempted from the Act
- BOI-promoted businesses

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**Ministry of Commerce**  
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