



Legal Alert 法律快讯

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今天，体验未来的法律视界

A Close Look at Nominee Shareholders under the Foreign Business Act 聚焦《外商企业经营法》下的代持股东问题

Following on recent news regarding DSI cracking firms that arrange for a Thai nominee for foreign companies in Phuket, we would like to stress the prohibition of a Thai Nominee under the Foreign Business Act B.E. 2542 (A.D. 1999) (“FBA”) in which criminal liabilities are imposed on both foreigners and Thai participants conducting this arrangement.

最近新闻报道，DSI 在普吉府查获为外国公司安排泰籍代持主体的多家律所；依据《外商企业经营法》B.E. 2542 (公元 1999) (“《外商法》”) 的规定，实施代持安排的外国人和泰国参与方均负有刑事责任，本文将对该法下对泰国代持的禁止性规定进行重点强调和介绍。

What is the definition of a foreigner under the FBA? 何为《外商法》中的“外国人”？

Foreigners operating certain businesses in Thailand would be subject to a prohibition or require approvals from the relevant government agencies before commencing operation, depending on the types of businesses to be operated. 外国人被禁止在泰国经营特定业务，或需要在开始经营前获得有关当局的批准，这将具体取决于该外国人经营活动的类别。

The definition of a foreigner under Section 4 of the FBA lays out as follows: (1) individuals who are not Thai citizens, (2) juristic persons not registered in Thailand, (3) juristic persons registered in Thailand with specific ownership structures that include those where at least 50% of the capital shares are held by non-Thai individuals or non-Thai entities, and (4) juristic persons registered in Thailand having persons under (1), (2), and (3) hold at least 50% of the capital shares.

《外商法》第4条对外国人的定义如下：（1）非泰籍公民的个人，（2）未在泰国注册的法人，（3）在泰国注册的法人，其中至少50%的股份由非泰籍个人或非泰国实体所持有的法人，以及（4）在泰国注册且由上述（1）、（2）或（3）项主体持有至少50%股份的法人。

To put simply, foreign ownership in any company at 50% or more of the total of its outstanding shares is considered as foreigner under the FBA.

简言之，由外资持有50%或以上的已发行股份的任何公司被视为《外资法》下的外国人。

What is the key consideration of being a Thai Nominee?

作为泰国代持人的主要风险是什么？

The key government agencies responsible for overseeing and investigating such Thai Nominee issue are the Foreign Business Division of the Ministry of Commerce ("MOC"), and the Department of Special Investigation ("DSI").

负责监督和调查此类泰国代持问题的主要政府机构是商务部 ("MOC") 的外商业务司和特别调查司 ("DSI") 。

In the case that a company with Thai nationality is suspected of concealing its true status as a foreigner or having Thai Nominee, there are certain characteristics that authorities will pay special attention to, among others, having two classes of shares i.e., ordinary shares and preference shares, the right of foreign shareholders prevails over Thai shareholders, sources of funds from foreigners.

如果一家由泰国人持主要股份的公司涉嫌隐瞒其作为外国人的真实身份或拥有泰国代持人，其在特定方面将受到当局的特别关注，包括但不限于是否拥有两类股份，即普通股和优先股，外国股东的权利是否高于泰国股东，入股资金是否来源于外国人，等等。

To note that the exposures do not only come from regulators; competitors or disgruntled employees may also be whistleblowers to regulators, thus using nominee method to conduct restricted businesses consists of both theoretical and practical risks.

需要注意的是，风险不仅来自监管机构，竞争对手或心怀不满的员工也可能向监管机构举报，因此，使用代持方法开展受限业务存在着理论和实操上的双重风险。

This does not mean that having foreign and Thai investors will suddenly trigger suspicions of authorities. We often advise clients on structuring and foreign investment in Thailand and be mindful of this issue.

诚然，同时拥有外国和泰国投资者并不意味着会引起当局突然的怀疑和注目。我们通常建议客户在进行架构设计和外商在泰投资落地的环节中，就对这个问题予以考虑。

What are the procedures of investigation and inspection processes?

初步调查和调查是怎样进行的？

In the case that the MOC is suspicious of your foreigner status, especially Thai Nominee issue, they typically initiate an investigation and, subsequently filling the complaint to the DSI for further examination. The DSI is also empowered to initiate investigations without external complaints.

如果 MOC 怀疑贵司的外资属性，尤其是否存在代持问题时，通常会启动初步调查，并随后将投诉提交至 DSI 进行进一步审查。DSI 也有权在没有外部投诉的情况下启动调查。

The decision to conduct inspections is determined by the Board of the DSI, considering whether the case falls under the definition of a special case as

outlined in the Special Case Investigation Act B.E. 2447 (A.D. 1904) and the company's total assets, as indicated in their financial position statement reaches THB 100 million or more. The investigation procedures undertaken by the DSI involve gathering evidence, issuing inquiries and summons, conducting searches, and, if necessary, making temporary arrests. It is normal practice for the Criminal Court to grant the DSI permission to conduct searches and make temporary arrests of the suspect. These measures are often taken to gather additional evidence, secure the premises, or prevent suspects from tampering with evidence. After gathering sufficient information, the DSI will decide whether to deliver the case to the prosecutor for further legal action. If it comes to the prosecutor, filing of an indictment to the Criminal Court will be next if the prosecutor views that there is sufficient evidence. The sanction can take a few years, but the reputation is already damaged from the commencement by the DSI.

由 DSI 理事会决定是否启动特案调查程序，该理事会将考虑案件是否属于《特案调查法》B.E. 2447（公元 1904）中规定的特案，以及公司财务报表中所显示的公司总资产是否达到或超过 1 亿泰铢。DSI 的调查程序包括收集证据、发出质询和传唤、开展搜查以及在必要时实施临时逮捕。通常情况下，刑事法院给与 DSI 准许以对嫌疑人实施搜查和临时逮捕。采取这些措施通常是为了收集更多证据、保护现场或防止嫌疑人篡改证据。在收集到足够的信息后，DSI 将决定是否将案件移交给检察官以采取进一步的法律行动。如果检察官认为证据充足，将向刑事法院提起公诉。审判可能需要耗费几年的时间，但是涉事公司的商誉从 DSI 甫一展开调查之时起即受到了损害。

What is a penalty for having Thai Nominee under FBA?

《外商法》的处罚

In the event that a court determines that a Thai shareholder is a Thai Nominee who assists, supports, or facilitates foreign individuals or entities, severe penalties are imposed. The Thai shareholder may face imprisonment for a maximum term of three years and a fine ranging from THB 100,000 to THB 1,000,000, or both. Furthermore, the court has the authority to issue orders requiring the cessation of any involvement in aiding or abetting, joint business operations, or shareholding related to the violation. Failure to comply with the court's order may result in daily fines ranging from THB 10,000 to THB 50,000, as Section 36 of the FBA stipulated.

如果法院认定泰国股东是协助、支持或为外国个人或实体提供便利的泰国代持主体，则将处以严厉处罚。泰国股东可能面临最长三年的监禁或 10 万至 100 万泰铢的罚款，或两者并罚。此外，法院有权发布命令，要求泰国股东停止参与任何与违法行为有关的协助或教唆行为、联合经营或持股行为。依据《外商法》第 36 条规定，不遵守法院命令或被处以每日罚金，从 1 万泰铢至 5 万泰铢不等。

If a Thai shareholder is deemed a Thai Nominee, the company itself may be considered as engaging in reserved business activities without proper approval under Section 37 and if the offender is a juristic person, the person(s) managing the business will also be subject to the same penalty as mentioned above.

根据第 37 条规定，如果泰国股东被视为泰国代持人，公司本身可能被视为未经适当批准而从事受限的业务活动，即使违法者是法人，业务管理人员也将受到上述同样的处罚。

Deloitte's suggestion

德勤观察

We have observed that there have been continuing numerous investigations of Thai Nominees by the DSI, foreign investors seeking to establish a new company in Thailand should conduct a feasibility study to ensure that the proposed company structure and business operations comply with the relevant regulations. Similarly, existing companies with foreign shareholders should

review their company structure and make necessary amendments to ensure compliance.

据观察，此次 DSI 对泰国代持问题进行了多番持续的调查；计划在泰国设立新公司的外国投资者应进行可行性研究，确保其拟议的公司架构和业务运营模式符合相关法规要求。同样，为确保合规，有外国股东参股的运营中公司也应当审查其公司架构并进行必要的整改。

The foreigners should engage a reputable legal advisor to provide advice and assist with the relevant implementation. By taking these proactive measures, you can be ensured that the businesses are in compliance with Thai laws and regulations and not under the significant risks of criminal liabilities.

外国人应聘请信誉良好的法律顾问提供咨询服务并协助开展相关的执行工作。通过采取这些积极行动，您将确保贵司符合泰国法律法规的要求，而不会面临刑事责任方面的重大风险。

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