



Legal Alert

28 June 2023

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A Close Look at Nominee Shareholders under the Foreign Business Act

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.

What is the definition of a foreigner under the FBA?

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.

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.

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.

What is the key consideration of being a Thai Nominee?

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**”).

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.

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.

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.

What are the procedures of investigation and inspection processes?

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.

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.

What is a penalty for having Thai Nominee under FBA?

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.

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.

Deloitte's suggestion

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.

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.

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