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Update on an attempt to ease the foreign business restrictions in Thailand

Yothin Intaraprasong / Poonyisa Sornchangwat /
Chatthong Sunthorn-opas / Niparat Pothong

1. Background

Foreign business operations in Thailand are primarily subject to the restrictions under the Foreign Business Act of 1999 (“**FBA**”). Under the FBA, a foreign business operator is prohibited from operating businesses, or conducting certain activities, unless a foreign business license (“**FBL**”) is obtained. However, there have been some exemptions to such FBL requirement granted for certain businesses through the issuance of the subordinated regulations.

Recently, the Department of Business Development, Ministry of Commerce (“**DBD**”) has proposed to grant additional exemption to the FBL requirement for businesses, particularly those under List Three (11), (13), and (21), as attached to the FBA, by contemplating issuing (i) the Draft Royal Decree Amending Type of Lists Annexed to the Foreign Business Act B.E. 2542 (1999) (No. ...) B.E.... (“**Draft Royal Decree**”); and (ii) the Draft Ministerial Regulation Prescribing Businesses Which Are Not Required to Apply for Permission for a Foreign Business License B.E... (“**Draft Ministerial Regulation**”).

In this relation, this article aims to provide a list of the proposed businesses to be exempted from the FBL requirement (“**Proposed Exempted Businesses**”) under the Draft Royal Decree and the Draft Ministerial Regulation with summary of relevant details.

2. Proposed Exempted Businesses

2.1 Under the Draft Royal Decree

The activity under List Three (13) has been granted with certain exemption according to the Royal Decree Amending Type of Lists Annexed to the Foreign Business Act B.E. 2542 (1999) of 2013, which provides that ‘Domestic trading of traditional agricultural products or produce that are not yet prohibited by law, except for the agricultural futures trading in the Agricultural Futures Exchange of Thailand without delivery or taking delivery of agricultural commodities within the country’. ¹

The Draft Royal Decree aims to revise such exemption for List Three (13) in order to facilitate those foreign business operators who wish to operate a business with respect to futures trading of traditional agricultural products in the Futures Exchange Center in delivering or taking delivery of such agricultural products upon the lapse of the term of the agreement without having to obtain an FBL. The proposed amendment to such exemption for businesses falling under List Three (13) will be as follows:

“**List Three (13):** Domestic trading of traditional agricultural products that are not yet prohibited by law, except for the futures trading of the agricultural products in the Derivatives Exchange by delivering or taking delivery of agricultural products in the warehouse as determined by the

¹ Royal Decree Amending Type of Lists Annexed to the Foreign Business Act B.E. 2542 (1999) of 2013

Derivatives Exchange.”

2.2 Under the Draft Ministerial Regulation

The Draft Ministerial Regulation aims to provide an exemption to the businesses under List Three (11) and (21) attached to the FBA as listed below.

(1) Under List Three (11) Brokerage and Agency Businesses

The Proposed Exempted Businesses under this List Three (11) Brokerage and Agency Business will include:

1. A derivative agent which the goods or reference variable is not subject to the derivative law; and
2. A derivative agent with respect to which the payment is calculated from the exchange currency rate or interest rate, and the trading of derivatives is performed outside the derivatives exchange.

(2) Under List Three (21) Other Service Businesses

No.	Proposed Exempted Businesses	Remark
1.	Telecommunications service business for Type 1 Telecommunications License, i.e., a license for telecommunications business operators who do not own a telecommunications network under the telecommunications business law	<ul style="list-style-type: none"> - The characteristics of the Telecommunications service business for Telecommunications License: Type 1 are that: <ul style="list-style-type: none"> (i) telecommunications business operators must not own a telecommunications network; and (ii) such businesses are deemed to be appropriate to freely provide such services (no impact on competition). - Examples of the relevant activities of such business are: <ul style="list-style-type: none"> (a) very small aperture terminal (VSAT) services; (b) internet services; (c) audiotext services; (d) store-and-retrieve value-added services; (e) international calling card services; (f) internet protocol virtual private network-IP VPNs; and (g) non-facilities based MVNOs.²
2.	Treasury center business under the exchange control law	<ul style="list-style-type: none"> - A treasury center is a company registered under Thai law that is permitted by the Bank of Thailand to manage foreign currency activities for its affiliates both in Thailand and overseas.³ - The scope of the business to be conducted by treasury centers is:

² The Notification of the National Telecommunications Commission Re: Prescription of Characteristics and Types of Telecommunications Business Which Must Obtain the Telecommunications License dated 10 May 2019

³ The Notification of the Ministry of Finance Re: Directions of the Minister to Treasury Centers dated 30 June 2004

No.	Proposed Exempted Businesses	Remark
		(a) purchase of obligations or invoices and acting as agents for the payment and receipt of funds; (b) netting of income or obligations; (c) purchase, sale, or exchange of foreign currencies and management of exchange rate risks; and (d) management of liquidity. ⁴
3.	Software development business with specific qualifications	To be qualified for this exemption, there are 2 requirements that must be met: 1. The software development business must be operated by a juristic person registered in Thailand and having the majority of its income generated from the software developed in Thailand. 2. The nature of the software development business must fall into one of the following: (a) development of software relating to analysis and data management (big data analytics and predictive analytics); (b) development of information security and cyber security software; (c) development of software used for controlling or connecting advanced-technology devices; or (d) development of software used to support manufacturing industry (industrial software) using advanced technology or advanced devices.
4.	Service businesses in relation to administrative management, human resource management, and information technology management provided to a Juristic Person with Related Relationship (defined in the right column)	“Juristic Person with Related Relationship” means a company that has a relationship with another company in one of the following manners: (a) more than half of the total shareholders or partners in one juristic person are also more than half of the shareholders or partners of the other juristic person (i.e., considering the number of shareholders);

⁴ The Notification of the Competent Officer Re: Rules and Practices regarding Treasury Centers dated 11 June 2010

No.	Proposed Exempted Businesses	Remark
		<p>(b) at least 25 percent of one juristic person's capital is held by shareholders or partners who also hold at least 25 percent of the other juristic person's capital (i.e., being a sister company);</p> <p>(c) one juristic person is a shareholder or partner holding at least 25 percent of the other juristic person's capital (i.e., being a shareholder of another company); or</p> <p>(d) more than half of the controlling power in a juristic person is held by directors or partners who also hold more than half of the controlling power in another juristic person (i.e., considering the controlling power).</p>
5.	Service business with respect to a guarantee of a domestic loan for a Juristic Person with Related Relationship	The guarantor must be registered under Thai law and the guarantee must be provided for under an obligation/debt which has arisen in Thailand and was created by a Juristic Person with Related Relationship.
6.	Service business with respect to the lease-out of a part of space for installation of an electronic machine used in financial service provision or automatic vending machines to provide services to facilitate the company's employees	<p>The purpose of the lease is relatively limited to a specific activity.</p> <p>If the land of the company is subject to the regulations of the Board of Investment (BOI) or the Industrial Estate Authority of Thailand (IEAT), please make sure to follow their specific regulations.</p>
7.	Service business on petroleum drilling	The scope of petroleum drilling business must be in accordance with the Petroleum Act of 1971, in which the concession right must be obtained from the Ministry of Energy.
8.	Other businesses under the Security and Exchange law: (a) the provision of loans for purchasing securities ⁵ ; and (b) the purchase or sale of securities with a sale or buyback agreement. ⁶	-
9.	Other businesses under the derivatives law:	-

⁵ Section 102 of the Securities and Exchange Act of 1992 and the Notification of the Capital Market Supervisory Board No. TorThor.25/2552 Re: Rules, Conditions and Procedures for Lending of Money for Purchase of Securities dated 20 July 2009

⁶ Section 98(8) of the Securities and Exchange Act of 1992 and the Notification of the Capital Market Supervisory Board No TorThor. 24/2565 Re: Other Operations of Securities Companies in case of Purchase or Sale of Securities with the Sale Agreement or Buyback Agreement and Provision of Advice or Supporting Services to Other Companies dated 29 September 2022

No.	Proposed Exempted Businesses	Remark
	(a) purchasing or selling securities with a sale or buyback agreement; (b) acting as dealers, advisors, or fund managers for derivatives agreements where the goods or reference variable are not subject to the derivatives law; or (c) dealers, advisors, or fund managers for derivatives agreements in which the payment is calculated from the exchange currency rate or interest rate, and the trading of the derivatives is performed outside the derivatives exchange .	

3. Next step

It seems to us that the purposes of the Draft Royal Decree and the Draft Ministerial Regulation are not only to avoid redundancy in regulatory requirements between the DBD, as the main regulator in charge of the FBL, and the other sector-specific regulators, but also to encourage the transfer of technology to Thailand from foreign business operator for some high value business sectors which could result in improvement of the effectiveness and productivity of the workforce within Thailand.

It is important to note that the scope of exempted businesses mentioned above are still in the preliminary stages of discussion and may undergo further detailed amendments. To clarify, the Draft Ministerial Regulation underwent a public hearing until 15 March 2024. Following the conclusion of the public hearing process, the DBD will propose it to the Council of the State and seek cabinet approval. It is expected that the Draft Royal Decree and the Draft Ministerial Regulation will be promulgated by the end of this year. Once the Draft Royal Decree and the Draft Ministerial Regulation are approved, foreigner business operator will no longer need to apply for the FBL to operate such businesses in Thailand. However, other specific approvals from the sector-specific authorities related to these businesses will still be required. We will keep you updated on any developments.

[Authors]



Yothin Intaraprasong (Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd. Partner)

yothin_intaraprasong@noandt.com

Yothin Intaraprasong is a partner at Nagashima Ohno & Tsunematsu, Bangkok office. He has been involved in providing legal advice on civil and commercial laws, focusing on foreign investments in Thailand. He also represents a number of Japanese, Thai, and international clients in a wide range of ongoing business issues.



Poonyisa Sornchangwat (Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)

poonyisa_sornchangwat@noandt.com

Poonyisa is a Thai qualified lawyer and notarial services attorney based in the Bangkok office. She has provided support to local and multinational corporate clients in several domestic and cross-border projects and transactions. Her practice areas cover corporate, M&A, joint venture, data protection, and legal compliance.



Chattong Sunthorn-opas (Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)

chattong_sunthorn-opas@noandt.com

Chattong is a Thai-qualified attorney based in Bangkok, with a distinguished academic background and extensive legal expertise. He holds a First-Class Honors LL.B. from Chulalongkorn University and an LL.M. with the distinction of highest honors from the Graduate School of Law at Waseda University. Additionally, he earned an LL.M. with a Certificate of Specialization in Business Law from Keio University Law School. He represents both Thai and Japanese clients across a wide range of transactions. His main areas of practice include foreign investment law, M&A corporate transactions, competition law, general commercial laws, and regulatory advice.

Niparat Pothong (Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)

niparat_pothong@noandt.com

Niparat graduated with a Second-Class honors LL.B. from Thammasat University. She has experience assisting both local and multinational companies in a wide range of projects and commercial transactions. Her main practice areas include corporate, labor, and general commercial law.

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NAGASHIMA OHNO & TSUNEMATSU

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan

Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com



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Singapore Office

(Nagashima Ohno & Tsunematsu Singapore LLP)



6 Battery Road Level 41
Singapore 049909
Tel: +65-6654-1760 (general)
Fax: +65-6654-1770 (general)
Email: info-singapore@noandt.com

Bangkok Office

(Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)



34th Floor, Bhira Tower at EmQuartier
689 Sukhumvit Road, Klongton Nuea
Vadhana, Bangkok 10110, Thailand
Tel: +66-2-302-4800 (general)
Fax: +66-2-302-4899 (general)
Email: info-bangkok@noandt.com

HCMC Office

(Nagashima Ohno & Tsunematsu HCMC Branch)



Suite 1801, Saigon Tower
29 Le Duan Street, District 1
Ho Chi Minh City, Vietnam
Tel: +84-28-3521-8800 (general)
Fax: +84-28-3521-8877 (general)
Email: info-hcmc@noandt.com

Hanoi Office

(Nagashima Ohno & Tsunematsu Hanoi Branch)



Suite 10.04, CornerStone Building
16 Phan Chu Trinh, Hoan Kiem District
Ha Noi City, Vietnam
Tel: +84-24-3266-8140 (general)
Fax: +84-24-3266-8141 (general)
Email: info-hanoi@noandt.com

Jakarta Office (*Associate office)

(IM & Partners in association with

Nagashima Ohno & Tsunematsu)



Jakarta Mori Tower 14th Floor, Unit 1401
Jalan Jenderal Sudirman Kav. 40-41
Jakarta 10210, Indonesia
Tel: +62-21-25098080 (general)
Fax: +62-21-25098090 (general)
Email: info-jakarta@noandt.com

Shanghai Office

(Nagashima Ohno & Tsunematsu

Shanghai Representative Office)



21st Floor, One ICC, 999 Middle Huaihai Road
Xuhui District, Shanghai 200031, China
Tel: +86-21-2415-2000 (general)
Fax: +86-21-6403-5059 (general)
Email: info-shanghai@noandt.com

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