

# Ten Frequently Misunderstood Features of the Foreign Business Operations Act

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Most foreign investors in Thailand are familiar with the Foreign Business Operations Act, B.E. 2542 (FBA), since it is often the first obstacle a prospective foreign investor in Thailand encounters. And many American business persons believe they are “exempted” from most provisions of the FBA under the 1966 Amity Treaty of Economic Relations between Thailand and the U.S. (Amity Treaty), a subject covered in a prior edition of *T-AB*. But some businesses that many would consider “American” do not qualify under the Amity Treaty, and Amity Treaty status does not provide a blanket exemption from every provision of the FBA. Before getting going into this detail, however, we first provide some background and context on the FBA.

## FBA BACKGROUND & CONTEXT

The FBA was enacted in 1999 and prohibits “aliens” – a carefully defined term – from owning a wide range of businesses absent certain exceptions or issuance of an “alien business license”, which is often difficult to obtain in practice.

The FBA does not impose restrictions on foreign involvement in every business activity, but it is very broad, applying to about 50 types of businesses (depending upon how a “type” of business is defined). Generally speaking, for example, manufacturing of most goods is not restricted under the FBA, but for reasons that are explained below, care must be employed when applying this general “rule” to investments in Thailand. In high level summary, the 50 or so businesses covered by the FBA are grouped into the following three Annexes:

- Annex 1 prohibits alien ownership of nine categories of businesses for

“special reasons”, and includes such businesses as newspaper publication, ownership of television stations, forestry, farming and trading in land. The FBA does not permit licenses to be issued to foreigners for ownership of businesses listed in annex 1 under any circumstances.

- Annex 2 is divided into three chapters, and covers, among other activities, domestic transportation. In theory, an alien can obtain a license to own a business operating in Annex 2 with approval of the Thai Cabinet.
- Annex 3 is described as “businesses in which Thai nationals are not yet ready to compete with aliens.” Annex 3 is probably the most controversial annex and lists 21 categories of restricted business activities, including, among others, retailing and wholesaling, accounting service business, engineering service business, and “other service business, unless specifically exempted by Ministry of Commerce regulations”. Annex 3 is supposed to be reviewed at least once annually for purposes of determining if businesses listed on that annex can be opened up for foreign investment on the grounds that Thais are now ready to compete with aliens in that business. But since its enactment in 1999, the Ministry of Commerce (MOC) has only dropped certain securities-related services from Annex 3, and those were already subject to other restrictions.

## THE TEN FREQUENTLY MISUNDERSTOOD FEATURES OF THE FBA

1. Once a company qualifies for Amity Treaty Status, can it engage in any business that that is not specifically restricted under the FBA? No. Amity

Treaty companies were never permitted to own land simply by virtue of their Amity Treaty status. And other restrictions are now potentially applicable. Up until 1999, a company qualifying under the Amity Treaty would receive a simple letter stating that the company could do whatever the Amity Treaty permits Amity Treaty companies to do so long as it maintains its “American” status, but it is more complicated now. Starting in 1999, Amity Treaty companies were provided with a certificate that very specifically lists the activities that the company is allowed to do as an Amity Treaty company. When an Amity Treaty company adds activities, it often needs to apply for an additional certificate to cover the additional activities, and it may have difficulties getting such a certificate if foreign ownership restrictions under other Thai laws apply to that business activity.

2. Do other restrictions apply to Amity Treaty companies? Are there other restrictions on foreign ownership in addition to the FBA? Yes to both. Even if a company has Amity Treaty status, it may still need to obtain various operating licenses to engage in certain activities (such as operating a “tourism business”), and the laws governing those licensing requirements may contain prohibitions on foreign ownership or control. Such other laws may restrict a foreign owned or controlled company from operating in areas that are not even mentioned in the Amity Treaty. And those foreign ownership restrictions will be applied to an Amity Treaty company even though the Amity Treaty provides for “national treatment” of Amity Treaty companies, meaning that the Amity Treaty provides that Amity Treaty compa-

nies must be treated the same as Thai owned companies unless the Amity Treaty specifically provides otherwise.

3. What are restricted “services” under the FBA? The restriction on “services” is construed very broadly so as to include merely providing a guaranty to a parent company (or its bank) and even some forms of what many would consider OEM manufacturing, which the authorities contend is a “manufacturing service”. The line between what is subject to the FBA’s restrictions on services and what is not subject to this restriction is very murky.
4. If I am not sure if an activity is covered by the FBA, how do I get more information? You can look at prior opinions issued by the MOC’s Department of Business Development (DBD), but those opinions are generally brief and do not contain much useful information. You can submit a formal opinion letter to the DBD, but all relevant facts must be disclosed and it will typically take a few months to get a formal response.
5. There are many foreign retailers in Thailand; does the FBA apply to all retailing and wholesaling? No, but there is considerable confusion over this part of the FBA. The FBA does prohibit foreign ownership of companies engaged in retailing and wholesaling, but that prohibition does not apply if a company has sufficient “minimum capital”. But there is controversy over what constitutes “minimum capital” under this provision of the FBA – in brief: does the term “minimum capital” mean registered capital (as used in the Thai Civil and Commercial Code (CCC)) or does it mean paid-in capital?
6. Does the DBD ever change its opinion on interpretation of the FBA? Yes. For example, the DBD changed its opinion on what constitutes minimum capital for purposes of determining if a company is subject to the FBA’s prohibitions on foreign ownership of companies engaged in retailing and wholesaling. In 2002, the DBD issued an opinion stating that, for private limited companies incorporated under Thai law, minimum capital means

“registered capital” under the CCC – which provides that only 25% of the registered capital needs to be paid-in – and therefore only 25% of that amount actually needs to be paid in for a company to avoid the FBA’s prohibition on foreign ownership of companies engaged in wholesaling or retailing. But since 2006 the DBD has taken the position that 100% of the required minimum capital must be paid-in to be exempted from the FBA’s prohibition on the foreign ownership of retailing and wholesaling businesses.

7. Are DBD opinions law? No. They are the opinions of the DBD’s legal division or foreign business administration division. A failure to comply with a DBD opinion might lead to a probe by the DBD and a DBD opinion may be given some weight if a matter reaches the Thai courts, but they are not law.
8. I don’t have to worry about the FBA if it does not restrict my company’s business activities, right? Wrong. There are, for example, minimum capitalization requirements that apply to all foreign owned businesses activities irrespective of whether the FBA’s prohibitions on foreign ownership apply to that business. And deciding what is and is not a separate business activity can be very difficult.
9. If my company only occasionally performs activities in Thailand and it does not generate revenues from activities in Thailand, it is not subject to the FBA, right? Not necessarily. The term “business” in the FBA means the carrying out of an undertaking in agriculture, industry, handicrafts, commerce or other undertaking for a commercial purpose. Essentially, anything done for a commercial purpose can be considered a business in Thailand. The generation of revenue in Thailand is just one factor the DBD considers.
10. Does anyone really pay attention to FBA compliance? Yes. The DBD website states it detected 81 companies were doing business without the required FBA license. The penalties for violating the FBA are severe and include up to three years imprisonment

and dissolution of a business found to be violating certain provisions of the FBA. Thailand’s Department of Special Investigations, sometimes called the Thai equivalent of the FBI, is responsible for investigating, among other matters, violations of the FBA. There has been a discernible increase in enforcement activity and prosecutions. Although the officials are now more active in their enforcement of the FBA, there are two other areas that should concern a company that violates or is alleged to have violated the FBA.

First, it is not unusual for someone with an interest in creating problems for a local company to file or threaten to file a criminal complaint alleging that the company has violated the FBA. This recently occurred in a dispute between two major telecommunication companies in Thailand – garnering front page treatment in the local press – and we have seen it used as pressure to resolve (some might say “extort”) settlements of civil disputes that have nothing to do with the FBA.

Second, when a company is sold, counsel for the purchaser will typically conduct a due diligence to determine, among other things, if the company is in compliance with the FBA. If violations are found – often by reviewing the financial statements the company must submit to the Thai authorities – this will likely increase transaction costs and the buyer will likely either insist on reducing any previously “agreed” purchase price for the company (to compensate for the FBA risk), indemnities or both. Compliance with the FBA is therefore essential if you have any plans, no matter how vague, to sell your business in Thailand to someone else at some future time. ■

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