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Foreign Business Act

# Services Between Related Foreign Companies No Longer Require a Foreign Business License

## Introduction

A newly issued Ministerial Regulation, published in the Royal Gazette on 25 June 2019, has lifted the constraint on majority foreign-owned companies providing services to other members of their group without first obtaining a Foreign Business License (**FBL**). Until recently, this meant that a majority foreign-owned company could not lend funds domestically or sub-lease office space to a related company within its group – essentially it could not set up as a “back-office service provider” - without first obtaining an FBL.

The newly issued Ministerial Regulation will allow majority-owned foreign companies to reconsider how services are provided amongst group members.

## Background: The Foreign Business Act

The conduct of business in Thailand by a foreign person or juristic person (**Foreigner**) is regulated by the provisions of the Foreign Business Act B.E. 2542 (1999) (**FBA**).

The FBA contains three schedules listing types of business activity and their level of restriction.

1. Schedule One lists those businesses which Foreigners are prohibited from conducting.
2. Schedule Two lists those businesses which Foreigners are prohibited from conducting without Cabinet approval. Once Cabinet approval for majority ownership has been obtained, Foreigners nevertheless may operate businesses in this Schedule only if Thai nationals hold at least 40% of the shares and 2/5 of the directors are Thai nationals (the Cabinet may at its discretion reduce the minimum Thai shareholding to 25%).
3. Schedule Three lists those businesses which Foreigners are prohibited from conducting without approval of the Director General of the Department of Business Development of the Ministry of Commerce (**MOC**).

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## Foreign Business Act

Schedule Three includes, in Clause 21, “the provision of services other than those specified by the Ministerial Regulations”. Clause 21 operates as a catch-all provision which encompasses most “consulting” and service-oriented businesses. Certain service businesses are excluded from the FBA by way of Ministerial Regulations, which recently include financial institution business, life and non-life insurance according to the laws governing such businesses, representative office and regional office pursuant to the Rules of the Prime Minister’s Office on Establishment of Visa and Work Permit Service Center B.E. 2540 (1997).<sup>1</sup>

A Foreigner seeking approval to conduct a business in Schedule Three must submit an application to the Director General of the MOC’s Department of Business Development (**DBD**). The Director General has 60 days in which to review the application and make a decision on the issuance of an FBL.

In reality, the 60 day review period is not calculated from the date of submission of the application, but from the date on which the decision making body considers it has received sufficient documentation and allowed the applicant make the application submission fee. Further requests for supporting documentation/additional information are typically made by the officials in almost every case.

## **New Ministerial Regulation: List of Three New Services Excluded from the Foreign Business Act**

A new Ministerial Regulation was published in the Royal Gazette on 25 June 2019 prescribing three further types of service businesses which do not require an FBL.

The three service businesses mentioned in the Ministerial Regulation are as follows:

- (1) the service business of domestic (and not foreign) lending between related juristic persons;
- (2) the service business of office space rental with utilities between related juristic persons; and
- (3) the service business of providing consultation between related juristic persons, only in the areas of administration, marketing, human resource and information technology.

Many of these services are those which group companies would routinely provide to each other from time to time or which they may elect one particular entity to provide in the sense of being a “back-office service provider”.

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<sup>1</sup> According to the Ministerial Regulations Prescribing Service Businesses Which Do Not Require a Foreign Business License B.E. 2556 (2013), No. 2 B.E. 2559 (2016) and No. 3 B.E. 2560 (2017).

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## Foreign Business Act

We note that the exemption does not cover other key practices that we often see group companies wish to undertake, such as lending offshore to a related juristic person or the provision of guarantees to other group members.

### **What is a Related Juristic Person?**

According to the Ministerial Regulation, a related juristic person has any one of the following characteristics:

- (1) Shareholders or partners exceeding one half of the total number [of shareholders or partners] in one juristic person are also shareholders or partners exceeding one half of the total number [of shareholders or partners] in another juristic person;
- (2) Shareholder(s) or partner(s) holding shares or being a partner constituting twenty five percent or more of the capital of one juristic person also holds shares or is partner constituting twenty five percent or more of the capital of another juristic person;
- (3) One juristic person holds shares or is a partner constituting twenty five percent or more of the capital of another juristic person;
- (4) Directors or partners with management power exceeding one half of a total number [of directors or partners] in one juristic person are also directors or partners with management power exceeding one half of a total number [of directors or partners] in another juristic person.

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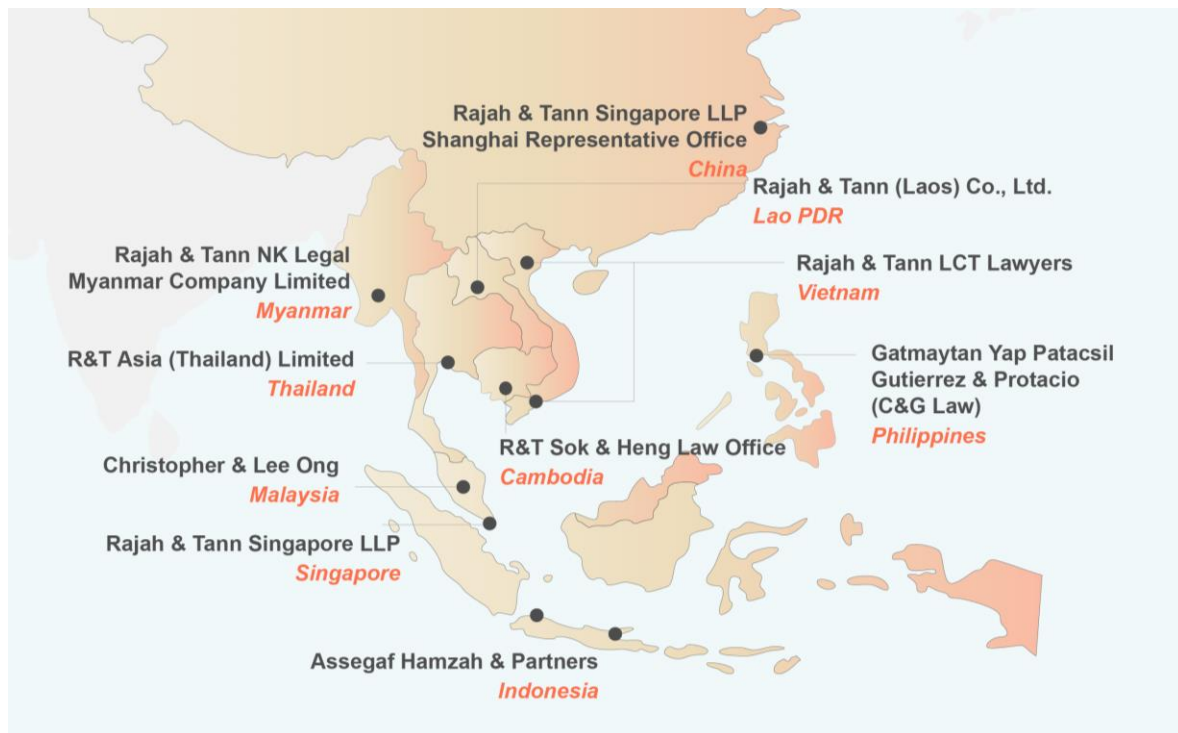
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