



## RESPONDEK & FAN

# LEGAL E-BULLETIN

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Dear Reader,

Legislators in Singapore and also Thailand have been very active recently. There are a number of noteworthy new regulations with a practical impact for foreign investors that we will feature in this edition of our E-Bulletin.

As usual, if you have any comments, remarks or questions, we would love to hear from you.

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Kind regards,  
**RESPONDEK & FAN**  
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### **SINGAPORE: IMPORTANT CHANGES TO THE COMPANIES ACT**

On 8 October 2014, Singapore's Parliament passed the Companies Act Amendment Bill 2014. The Amendment Bill introduces more than 200 amendments and constitutes the largest number of changes to the Companies Act ("CA") in a single amendment bill since the enactment of the CA in 1967. The changes aim to reduce regulatory burden on companies, provide for greater business flexibility and improve the corporate governance landscape in Singapore. The amendments seek to efficiently reflect the realities of business and maintain Singapore's strength as a global business hub.

The amendments will come into force in two stages, i.e. the first phase was introduced on 01. July 2015 and the second phase is expected to come into effect in the first quarter of 2016. The key amendments are summarized below:

#### **Introducing the "small company" concept for audit exemptions**

Before a company was exempted from having its accounts audited if it is an exempt private company with annual revenue of a maximum of SGD 5 mio. The CA Bill enlarges the category of companies exempted from audit requirements to "small companies". To be categorized as a "small

company" in a particular financial year, a private company has to comply with at least two of the following three criteria in each of the previous two financial years:

- a) Total annual revenue not more than SGD10 million
- b) Total assets not more than SGD10 million; and
- c) Number of employees not more than 50.

#### **ACRA's register of members for private companies**

The CA Bill removes the requirement that private companies keep a register of their members. The electronic register maintained by the Accounting and Corporate Regulatory Authority ("ACRA") will be used as the main and authoritative register of members. A transfer of shares in a private company will be effective only upon being updated in the ACRA register.

#### **Residential address of directors, CEOs or company secretaries protected from public disclosure**

Up to now, the address reflected in ACRA searches has been an individual's residential address. Under the CA Bill, individuals now have the opportunity of providing ACRA with an alternate address to be

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reflected as their address in the ACRA register. The Registrar will keep a confidential list of residential addresses of those individuals who decide to disclose their alternate address on the public ACRA register.

#### **ACRA to have power to debar directors and secretaries**

The CA Bill empowers ACRA to debar directors or secretaries of companies who failed to file relevant financial compliance documents. A debarred person will not be allowed to take on any new appointment as a director or company secretary, although he may continue with existing appointments. The Registrar will lift the debarment when the defaults have been rectified.

#### **CEOs to disclose interests in securities of company and conflicts of interests**

The statutory duty of disclosure of conflicts of interest in transactions and shareholdings in the company is so far only a requirement for directors. This disclosure regime will be extended to CEOs of companies (who may not be directors) in acknowledgement of the increasing role that CEOs play. Such disclosure will include interests of the CEO and his/her family members in securities of the company and conflicts of interests in transactions with the company or arising from any offices held or properties possessed by such CEO.

#### **Only one locally resident agent required for foreign companies**

According to the current Companies Act, foreign companies ("branches") are required to appoint a minimum of two locally resident agents. The Bill will reduce this requirement to one, minimizing the regulatory burden and bringing Singapore in line with the requirements of the UK, Hong Kong, Australia and New Zealand. Foreign companies should take note of the concomitant

safeguards such as the requirement that a replacement agent has to be appointed before the sole agent is allowed to resign.

#### **Foreign companies to file similar financial statements as Singapore companies**

The Bill will require foreign companies to file financial statements which include components such as the income statement, statement of changes in equity, statement of cash flows, notes to the accounts, directors' report and auditors' report. The new requirement is comparable to that for Singapore-incorporated companies. These changes aim to give the public a more comprehensive picture of the financial position of foreign companies and enable persons who deal with foreign companies to make better-informed business decisions.

#### **Multiple proxies to allow indirect investors and CPF investors to vote**

At the present, each member is entitled to appoint only two proxies to attend and vote on his/her behalf at general meetings. Due to the amendment, indirect investors, such as those with shareholdings through nominee companies, custodial banks or the Central Provident Fund agent bank, may participate more fully at general meetings by virtue of the appointment by shareholders or multiple proxies. This allows indirect investors the chance to vote at shareholder's meetings, with the same voting rights as direct shareholders. A company will not be allowed to opt out of the multiple proxies regime.

#### **Sending notices and documents electronically**

In order to promote greater efficiency and better administration of companies, Companies will henceforth



be allowed to use electronic modes of transmission to serve notices and send documents to their members. The permitted mode must be set out in the constitutional documents of the company.

#### **Financial assistance permitted for private companies**

Currently, the CA prohibits any company from providing financial assistance for the acquisition of its own shares or the shares of its holding company. The primary rationale for the prohibition is to protect creditors and to preserve the capital of a company. The financial assistance prohibitions will no longer apply to private companies, meaning a private company will be free to provide financial assistance for the purchase of shares in itself and in its private holding company.

#### **Share buyback limit maintained at 20 %**

The share buyback limit in the Companies Act was recently increased from 10 % to 20% on 01 October 2013. The share buyback limit provided for in the CA will be maintained at 20 %.

#### **Replacement of Memorandum and Articles of Association with the Constitution**

The Memorandum and Articles of Association will be merged and renamed the “Constitution”. Private companies and companies limited by guarantee can select to adopt the whole or parts of several model constitutions prescribed for different types of businesses. If a company chooses to adopt the model constitutions in its entirety, there is no need to file the model constitution with ACRA. “Older” companies can choose to switch over to the new constitutions, or may choose to continue with its current Memorandum and Articles of Association.

#### **Three new grounds to strike a foreign company off the register**

At present, the Registrar may strike a foreign company off the register when he has reasonable cause to believe that it has ceased to carry on business in Singapore or that it is being used for an unlawful purpose. The Bill introduces three new grounds to strike a foreign company off the register:

- The sole authorized representative has given notice of his resignation to the company and lodged a notice with the Registrar, but the foreign company has failed to respond or appoint another authorized representative within the period of 12 months from the date of the lodgement of the notice
- An authorized representative of a foreign company has received no instructions from the company within 12 months of a request made by the authorized representative as to whether the foreign company intends to continue its registration in Singapore; or
- The foreign company does not appoint a replacement authorized representative within 6 months after the death of the sole authorized

#### **Conversion of classes of shares**

A company the share capital of which is divided into different classes of shares may now authorize in its constitution the conversion of one class of shares into another class of shares.

**NEW BOI INVESTMENT POLICY IN THAILAND**

The Thai Board of Investment (“BOI”) is a government investment office that offers a certain range of investment privileges, including both tax and non-tax benefits to attract new investment to Thailand. After keeping the previous investment policy essentially unchanged during a 15 year period, the BOI recently announced a new 7-year investment promotion strategy to restructure the Thai economy and help support long-term sustainable growth. The new policy is effective from 01. January 2015 until the end of 2021.

**The BOI’s Policies for Investment Promotion**

Under the Investment Promotion Act B.E. 2520, the BOI is authorized to grant the following incentives:

**Tax incentives:** exemption of juristic person income tax and tax on dividends for 3 to 8 years; exemption/reduction of import duties on machinery and reduction of import duties for raw or essential materials.

**Non-Tax incentives:** permit to bring into the kingdom skilled workers and experts to work in investment promoted activities;

granting of permits to foreign nationals to own lawn; shareholding for manufacturing projects without any restrictions for foreign investors.

**Industry Sectors that are eligible for BOI promotion**

As before, promotional privileges are still offered in the same seven industry sectors:

- Agriculture and Agricultural Products
- Mineral, Ceramics and Basic Metals
- Light industries

- Metal products, Machinery and Transport Equipment
- Electronics and Electrical Appliances Industry
- Chemicals, Papers and Plastics
- Service and Public Utilities

**Criteria for Project Approval**

The BOI stipulates the following criteria for project approval:

- In general the value added must not be less than 20 % of revenues and modern production and new machinery must be used
- Projects that have investment capital of THB 10 million or more must obtain a certification
- Adequate and efficient guidelines and measures to protect environmental quality and to reduce environmental impact must be installed.

The Board will give special consideration to the location and pollution treatment of a project with potential environmental impact

- The minimum capital investment requirement of each project is THB 1 million (excluding costs of land and working capital) unless specified otherwise on the list of activities).
- For newly established projects, the debt-to-equity ratio must not exceed 3 to 1.

**Available investment incentives**

Generally speaking, the BOI stipulates two types of available incentives into **(i)** activity based incentives and **(ii)** merit based incentives.

**(i) Activity based incentives**

The BOI differentiates between two types of activity based incentives with regard to the specific activity as follows:

**Group A:**

Businesses using high technology is granted corporate tax exemption for a maximum of 8 years, machinery



and raw-materials import duty incentives, and other non-tax incentives. Group A is sub-categorized into four different categories. In this respect, tax incentives granted vary from corporate income tax exemptions for a minimum of 3 years to a maximum of 8 years. The income tax could be capped to the amount of actual capital investment in the BOI promoted project, depending on the BOI categorized group.

**Group B:**

Consists of businesses with less complex technology. These activities shall receive machinery and raw materials import duty incentives besides other non-tax privileges. Group B is again divided into 2 subgroups.

**(ii) Merit-based incentives**

Businesses being constructive for Thailand and its industry shall receive additional merit-based incentives on top of the ones granted under the prioritized activities.

**1. Merit on competitiveness enhancement:**

Investments in the following business areas are eligible:

- Research and development
- Donation to Technology and Human Resources Development Funds
- IP acquisition/licensing fees for commercializing technology developed in Thailand
- Advanced technology training
- Product and Packaging design

**2. Merit on decentralization**

Businesses that are located in “Investment Promotion Zones” with low per capita income shall be granted additional corporate tax exemption for three years and additional tax deductions. Other incentives under this category are deductibility of costs for infrastructure installation or construction, transportation, electricity and water.

**3. Merit on industrial area development**

Projects located within industrial estates or promoted industrial estates or promoted industrial zones shall be granted one additional year of corporate income tax exemption.

**Conclusion**

The revised BOI promotion concept creates a new business environment for foreign investors. Even though several previously promoted industries will not be promoted in the future anymore, this does not mean an overall decrease of promotional incentives, but rather a shift of focus and different emphasis on areas like high technology, areas that will enhance Thailand’s competitiveness, new regional focus (special economic development zones etc) energy saving and use of alternative energies that will henceforth be the promoted business activities. One of the main advantages for foreign investors with a BOI promotion is the possibility to hold a majority stake in a Thai company, without violating the restrictions of the Thai Foreign Business Act.

**THAILAND – NEW WORK PERMIT REGULATION**

Under the Thai Alien Occupation Act B.E. 2551, foreign nationals in Thailand are only allowed to work and/or perform services if they hold a valid work permit from the Ministry of Labor. The definition of “work” under Sec. 5 of the Act is rather broad: “work” under the Act *”means engaging in work by exerting energy or using knowledge whether or not in consideration of wages or other benefits.”*

It should be noted that the Act does not define “work”





as doing something in return for financial or any other benefits. And so far – and little attention seems to have been paid to it by foreign visitors – a work permit would have been required to attend business meetings or participate in conferences, seminars or board meetings. On 06. March 2015 the Department of Employment issued a “Notification Re Activities Not Considered Work under the Foreign Workers Act B.E. 2551” whereas the following activities do not require a work permit any more:

- Attending business meetings, conferences or seminars;
- Attending an exhibition or trade show as visitor;
- Attending discussion style businesses meetings;
- Attending special lectures and educational forums as audience;
- Attending lectures for training and technical seminars, as audience;
- Purchasing products at a trade show;
- Attending a board for directors meeting within someone’s own company.

The above activities can be performed with a business visa (non-Immigrant B visa). However if the above activities exceed 15 days, a work permit will still be required.

It should however be noted that presenting a lecture, training or seminar, or exhibiting at a trade show still requires a work permit. The same applies to attending a shareholders’ meeting.

**THAILAND: NEW CLASS ACTION LAW**

**1. Introduction of class action lawsuits under Thai law**

After 14 years of deliberations, class actions are coming to Thailand very soon. Thailand’s National Legislative

Assembly has passed legislation amending the Civil Procedure Code to provide for class action litigation that will become effective on 04. December 2015. The law is heavily influenced by Rule 23 of the United States Federal Rules of Civil Procedure.

As defined in section 222/1 of the newly amended Civil Procedure Code, a “class action” is a type of lawsuit which permits one or more plaintiffs to file a lawsuit on behalf of a large class of plaintiffs. In addition, a “class” is defined as a group of people having the same rights in relation to the same facts and law as well as possessing similar characteristics even though that person may suffer a different kind of damage from another member of the class.

**Type of class actions**

According to the amendments of the Thai Civil Procedure Code, the plaintiff can request the court to allow a class action lawsuit regarding the following cases: (i) Tort, (ii) breach of contract and (iii) various other laws including environment, consumer protection, labor, securities and stock exchange, and trade competition. Sec. 222/12 of the Civil Procedure Code addresses the requirement for class actions in further detail.

**3. Competent courts**

All Thai courts except for the district courts which have jurisdiction to hear a case filed by an individual will have jurisdiction to hear a related class action. For example, for a class action case on trade protection, the competent court will be the Intellectual Property and International Trade Court. Under the provisions of the newly amended civil procedure code, the court has the power to define the class membership, approve, and terminate a class action. In addition, it will also be able to appoint qualified person or experts to testify as witness in court.

**4. Outlook**

For plaintiffs, class actions are clearly beneficial,



because it allows the combination of claims that otherwise might be too small to be litigated individually. Also in terms of costs, plaintiffs have an advantage as the litigation costs are to be divided among the class members. One area that may see class actions for the first time is in all likelihood the area of labor law.

**THAILAND: NEW TRANSFER PRICING LAW TO COME**

On 7 May 2015, the Thai cabinet approved a draft Revenue Code amendment bill aimed to insert transfer pricing provisions into the Revenue Code. The draft bill is now under review by the State Council and then will be sent to the National Legislative Assembly for consideration before being passed into law.

The amendment bill provides the power of Revenue Department officers to adjust revenues and expenses that are not on an arm's length basis and require companies or juristic partnerships to submit the following documents: 1. Relationship in terms of investment, management, or control, either direct or indirect 2. Calculation method of transfer pricing with related party transactions.

As soon as the new law will have been enacted, we will summarize the main features.

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