The RTLA for Foreign Retailers

This article provides information on the conditions for foreign retailers under the amended RTLA as well as opinions formed from past projects.

A brief background

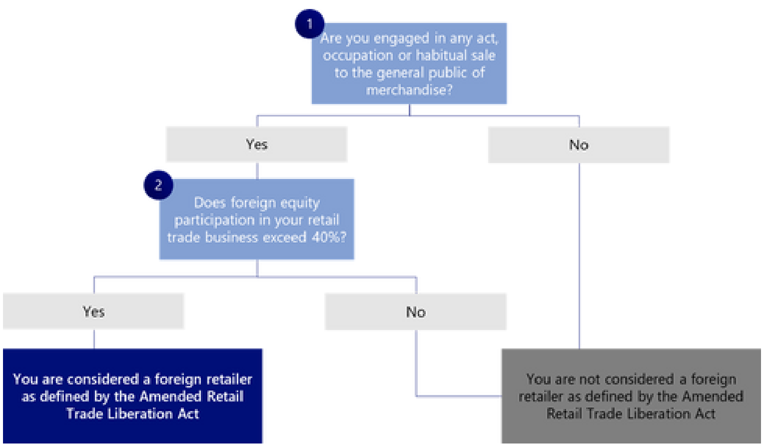
In 2022, former President Rodrigo Duterte signed into law two (2) amendatory laws in response to call for increasing foreign investments and more competition in the country – one of which is the Amended Retail Trade Liberalization Act or Republic Act No. 11595 (hereafter, "amended RTLA").

This law amends Republic Act No. 8762 (hereafter, "RTLA"), which was passed during former President Estrada's office. The amendatory law intends to attract foreign retailers by relaxing requirements for foreign equity participation and standardizing paid-up capital and investment per store requirements, which was otherwise meticulous in the earlier version of the law.

On specific circumstances, however, certain provisions of the RTLA still apply according to the transitory provisions laid in the Implementing Rules and Regulations (IRR).

Which law applies to my business?

To understand which law applies to the foreign retailer, we must first understand the nature of the business and ownership.



1. Is the business engaged in "retail trade"?

As the name of law suggests, the provisions only cover retail trade businesses in the Philippines. According to the RTLA, retail trade shall mean any act, occupation, or habitual sale to the general public of merchandise, commodities, or goods for consumption. The law excludes activities with minimal capital investment or retail trade that is only incidental to other business. Specifically, the following are excluded from the scope:

A. Sales by manufacturer, processor, laborer, or worker to the general public if capital does not exceed PHP 100,000;
B. Sales by a farmer or agriculturist selling product from his farm;
C. Sales in restaurant operations by a hotel owner or inn-keeper irrespective of the capitalization, provided that the restaurant is incidental to the hotel business;
D. Sales which are limited to products manufactured, processed, or assembled by a manufacturer through a single outlet, irrespective of capitalization;
E. Sales to industrial and commercial users or consumers who use the products to render services and/or produce or manufacture another good which is in turn sold by them; and
F. Exclusive sales to the government and/or its agencies and GOCCs.

The application of the amendatory law and its earlier version should not be confused with laws governing other business activities such as Republic Act No. 11659 or the Amended Public Service Act and Republic Act No. 11647 or the Amended Foreign Investment Act. These laws can provide guidance on other foreign enterprises not covered by the RTLA.

2. How much will be the foreign investment?

The Amended Foreign Investment Act prohibit foreign equity in retail trade businesses with paid-up capital of less than PHP 25 million. Thus, for foreign investors to enter the Philippine retail trade market, they must have a minimum paid-up capital of PHP 25 million or more.

Assuming the retail trade business meets the minimum paid-up capital requirement, the percentage of foreign equity participation determines whether the provisions under the RTLA apply to the retail trade business or not.

If foreign equity participation* in a retail trade business is 40% or less, the provisions under the RTLA **do not apply** as stated in the Section 4 of the IRR. Consequently, if foreign equity participation in a retail trade business exceeds 40%, it will be considered a "foreign retailer" and thus subject to the provisions of the RTLA.

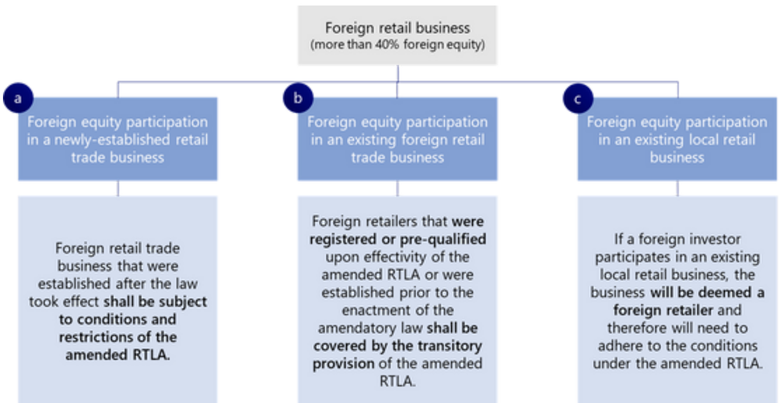
*Foreign equity participation, in this case, shall refer to foreign national, partnership, association, or corporation owning and holding outstanding capital stocks and are entitled to vote.

I am engaged in retail trade and foreign equity is more than 40% -- now what?

As discussed in the foregoing, the RTLA applies if a business is considered engaged in retail trade and has more than 40% foreign equity participation. There is, however, a transitory provision under the amendatory law which applies to existing retail businesses.

To discuss, there are three (3) different scenarios:

1. Foreign equity participation in a **newly-established** joint venture, sole proprietorship, or wholly-owned foreign retail corporation;
2. Foreign equity participation in an **existing** foreign retail business; and
3. Foreign equity participation in an **existing local** retail business.



1.Foreign equity participation in a newly-established foreign retail business

Foreign retail trade businesses that were established after the effectivity of the law (i.e., January 2022) shall be subject to the conditions and restrictions of the amended RTLA as follows:

- They must be registered with the Securities and Exchange Commission (SEC) in the case of corporation or with the Department of Trade and Industry (DTI) in the case of sole proprietorship. Foreign retailers **no longer need** to be formed and organized under the Philippine law to engage in retail trade.
- They must have (and maintain) minimum paid-up capital of PHP 25 million. This requirement is aligned with the Amended Foreign Investment Act. Upon registration, the foreign retailer must submit a Certificate of Inward Remittance of Foreign Exchange or other proof of compliance with the minimum paid-up capital. In addition, the minimum paid-up capital, which may be in cash or in property, must be maintained in the Philippines at all times. The use of the paid-up capital will be monitored by the SEC or the DTI, as appropriate.
- Their country of origin provides reciprocity for Filipino retailers under their laws or through a treaty. Upon registration, the foreign retailer must also submit a certificate stating reciprocity from the proper official or local embassy/consulate of their country of origin.
- If investing in more than one (1) physical store, they must maintain a minimum investment per store of PHP 10 million unless they were specifically exempt from this requirement at the time of effectivity of the amendatory law. The minimum investment per store includes the value of gross assets – both tangible and intangible – and common use investments and facilities. In case of an online store, the warehouse shall be considered as a store.

2.Foreign equity participation in an existing foreign retail business

Foreign retailers that were registered or pre-qualified upon effectivity of the amended RTLA or were established prior to the enactment of the amendatory law shall be covered by the transitory provision of the amended RTLA.

Specifically, foreign retailers that were not required to maintain the minimum investment per store shall continue to be exempt from this requirement of the amendatory law. However, they must still maintain the minimum paid-up capital under the earlier law, which was classified into four (4) categories:

- Category A: Retail business with paid-up capital of less than USD 2.5 million. This category is exclusive to Filipino citizens and Filipino-owned corporation.
- Category B: Foreign retail business with paid-up capital of at least USD 2.5 million but less than USD 7.5 million, and minimum investment per store of at least USD 830 thousand.
- Category C: Foreign retail business with paid-up capital of USD 7.5 million or more, and minimum investment per store of at least USD 830 thousand.
- Category D: Foreign retail business specializing in high-end or luxury retail with paid-up capital of USD 250 thousand per store.

3. Foreign equity participation in an existing local retail business

If a foreign investor participates in an existing local retail business, the business will be deemed a foreign retailer and therefore will need to adhere to the conditions under the amended RTLA.

The conditions discussed in scenario #1 shall apply.

The current scenario

While the primary intention of lowering minimum investment/capital is to promote foreign investment and economic liberalization, the local market is not as attractive yet to foreign retailers according to Paul A. Santos of Retail Asia (Ochave, 2023). Aside from Nitori, which is dubbed by Trade Secretary Pascual as the first major investment under the amended RTLA (Desiderio, 2024), most of the foreign retail investments have been limited to expansion activities (Ochave, 2023).

According to Kearney (2023), Philippines is one of the Southeast Asian countries that is expected to see growth in the luxury space. This was also observed in our previous article on Philippine luxury market. However, the amendatory law is not sending strong signals to large foreign retailers such as those in the luxury space.

Paul A. Santos points to the minimum paid-up capital, which has been lowered to PHP 25 million, as a key factor (Ochave, 2023). According to him, the amendatory law only made the country attractive to foreign SME investors (Ochave, 2023).

From our observation, foreign investor may choose to limit their participation to 40% or less to take advantage of the exemption under the amendatory law. Local retailers may also opt to secure distribution license, rights, or franchise instead of directly inviting foreign investors to the country.

Indeed, the amendments placed the Philippines in a better spot in terms of regulatory constraints. However, from experience, regulatory landscape is only one of the many influencers for foreign investors. For the Philippines to make the most of the opportunities in retail and foreign investments, more efforts must be made to improve business conditions in the Philippines.

Note:
This article includes excerpts from the law and queries from the Board of Investments and personal opinion. To study specific application of the law, further information from the relevant authorities may be necessary.

Sources:

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