

THE SECURITIES AND EXCHANGE ACT: NEW REGULATORY REGIME OF THE THAI CAPITAL MARKET

This report highlights the salient features of the new Securities and Exchange Act which is considered a significant development of the law relating to the Thai capital market. Among the features highlighted are the powers of the Securities and Exchange Supervision Commission, public offering, mutual fund, private fund management and criminal liabilities for offences committed under the Act.

THE new Securities and Exchange Act¹ (the "Act") has passed its third reading in the National Assembly on 27 February 1992 and can be considered as a significant development of the law relating to the Thai capital market. In the past, the law relating to the capital market comprised several statutes, *i.e.*, the Stock Exchange of Thailand Act 1974² (the stock market), the Finance, Securities, and Credit Foncier Businesses Act 1979³ (securities companies), and the Public Companies Act 1978⁴ (public offerings of securities). These statutes have been unified into this one single Act. The new Act is therefore intended to put in place a regulatory environment which will permit the development of the Thai capital market into the next century.

The main contents of the Act can be summarised as follows:

Securities and Exchange Supervision Commission

A commission to be known as the Securities and Exchange Supervision Commission (the "Commission") will be established. The Office of the Securities and Exchange Supervision Commission (the "Office") will be set up as a separate legal entity to facilitate the work of the Commission.

The Commission will consist of the following persons:

1. Minister of Finance (as Chairman).
2. Governor of the Bank of Thailand.

¹ Government Gazette, vol. 109 pt. 22 (16 March 1992).

² Government Gazette, Special Issue, vol. 91 pt. 85 (20 May 1974).

³ Government Gazette, Special Issue, vol. 96 pt. 74 (9 May 1979).

⁴ Government Gazette, Special Issue, vol. 95 pt. 149 (25 December 1978).

3. Permanent-Secretary of the Ministry of Finance.
4. Permanent-Secretary of the Ministry of Commerce.
5. Qualified persons appointed by the Cabinet (not less than 4 persons but not exceeding 6 persons with at least three of such persons being a legal expert, an accounting expert and a financial expert).
6. Secretary-General of the Office.

The Commission will have extensive powers to govern capital markets and securities business. These powers include the control and supervision of securities businesses, stock market, over-the-counter market, public offerings, insider trading and stock manipulation, and tender offers. The Commission will become the only government agency with powers to control the whole capital market. These powers were formerly vested in several agencies, resulting in many inconsistencies in the regulation of the capital market and securities business. These agencies will cease to have power in those areas regulated by the Commission.

The Office will be set up as an independent agency similar to the Bank of Thailand with the Secretary-General as the person in charge of all its administrative affairs. The Secretary-General will be appointed by the Cabinet. It is understood that the Office will be mainly staffed by officers from the Bank of Thailand.

Public Offering

Under the Act, only public companies are able to offer their shares to the public. Private companies are no longer allowed to make any public offering even though they are listed companies on the Stock Exchange.⁵ All private companies listed on the Exchange are required to convert themselves into public companies within two years after the Act becomes law on 16 May 1992.⁶

Additionally, public companies are not able to offer their securities to the public unless prior approval from the Office is **obtained**.⁷ In granting the approval, the Office may consider, amongst other matters, the issuing companies' **debt/equity ratio, subscription and allotment criteria**.⁸ It is important to note that the Commission may permit certain private companies to make public offerings of non-convertible debentures and certain types of notes. The criteria for granting such permission have yet to be specified.

⁵ See the Securities and Exchange Act 1992 (SEA), ss. 32 and 33 and the Civil and Commercial Code, s. 1102.

⁶ SEA, s. 334.

⁷ SEA, ss. 32 and 33.

⁸ SEA, s. 35.

Public offerings of securities are prohibited unless the seller (which includes any existing holders of such securities) or issuer (the "offeror") has filed a registration statement (a "Registration Statement") and a draft prospectus with the **Commission**.⁹ The contents of the Registration Statement will be stipulated by the Commission and will contain specified information about the **offeror** - for example, registered capital, nature of business, financial condition and important business **information**.¹⁰ The statement will become effective 45 days after filing.¹¹ However, the Commission has the power to suspend the effective date of the statement if it is of the opinion that the information contained in the statement is false or misleading or if there are any factual **omissions**.¹²

Information concerning the offering may be distributed to prospective subscribers prior to the effective date provided that it is in compliance with the Office's requirements and contains an explicit statement to the effect that the information is not a **prospectus**.¹³

The Act provides that an **offeror** who violates the provisions of the Act, for example, in relation to the prospectus or Registration Statement requirements, may incur liability to subscribers for losses suffered - the maximum liability being the difference between the market price and the offering **price**.¹⁴ It is important to note that the auditor, financial advisor, underwriters and property valuer of such issue are also subject to the same liability. However, such persons will not be held liable if they are able to prove that the subscriber knew or should have known of the violation or the damage suffered by him is not the result of a violation of the **Act**.¹⁵ The limit of such liability is two years from the effective date of the **statement**.¹⁶

Substantial Acquisitions of Shares and Tender Offers

Under the Act, whenever any person purchases or sells a holding in a company of five per cent (or more) of the shares listed on the Stock Exchange of Thailand or of any public company, such person is required to report such purchase or sale to the Office on the next day. Such person will also be required to submit a similar report if his holding in any of the said shares increases or decreases by **five per cent**.¹⁷

⁹ SEA, s. 65.

¹⁰ SEA, s. 69.

¹¹ SEA, s. 67.

¹² SEA, s. 76.

¹³ SEA, s. 77.

¹⁴ SEA, ss. 82 and 85.

¹⁵ SEA, s. 83.

¹⁶ SEA, s. 82.

¹⁷ SEA, s. 246.

Where a person wishes to make a purchase of shares of any listed or public company, as a result of which he may become a 25 per cent or more shareholder of such company, he may be required by the Commission to make the purchase by way of tender offer.¹⁸ In such a case, he is required to file a purchasing statement (a "Purchasing Statement") with the Office. The Purchasing Statement will become effective after a period to be prescribed by the Commission.¹⁹ The offeror also has to deliver a copy of the Purchasing Statement to the target company.

After receipt of the Purchasing Statement, the target company will be required to make a response to such offer and submit it to the Office. The response must also be sent to all the target company's shareholders.²⁰

The offeror is prohibited from making any purchase of shares before the Purchasing Statement becomes effective and he cannot purchase the shares in any manner other than that specified in the statement.²¹

If the number of shares tendered is higher than the amount required, the offeror has to buy all the said shares if (i) the shares tendered are listed securities and the offeror intends to delist them; (ii) the offeror intends to change the target company's main business; (iii) the offeror intends to hold more than 75 per cent of the target company's shares; and (iv) other cases as defined by the Commission.²²

Whether the tender offer is successful or not, the offeror must refrain from making another tender offer for one year.²³

Securities Business

Securities business will be controlled and supervised by the Commission. The definition of some types of securities businesses have been amended to restrict their scope, *i.e.*, "dealing" has been amended to the business of trading securities outside the stock market only. It is important to note that the Act has also provided room for other types of financial institutions (*e.g.*, commercial banks) to take part in securities businesses with the approval of the Commission.

The rules and conditions governing securities businesses provided in the Act are similar to those formerly prescribed in the Finance, Securities and Credit Foncier Businesses Act with some modifications, *e.g.*, securities companies are required to maintain an adequate capital fund as prescribed by the Commission.²⁴

¹⁸ SEA, s. 247.

¹⁹ *Ibid.*

²⁰ SEA, s. 250.

²¹ SEA, s. 251.

²² SEA, s. 252.

²³ SEA, s. 255.

²⁴ SEA, s. 97.

Mutual Fund

A mutual fund can be set up and managed by a securities company (having a mutual fund licence) with the permission of the Office. In applying for permission, such securities company must submit to the Office details concerning the fund *i.e.*, powers, duties and liabilities of the fund manager, management fee, rights of the unit-holders, *etc.*²⁵ The fund manager must also appoint a commercial bank (or another financial institution prescribed by the Office) to be the fund's supervisor. The "supervisor" will be the fund's custodian and is the equivalent of a trustee. In a case where the fund manager has failed to perform any of his obligations in managing the fund, the supervisor is entitled to enter a claim against the fund manager for the benefit of all the **unit-holders**.²⁶

After receiving approval, the mutual fund can be offered to the public and then registered with the Office. A registered mutual fund will obtain a juristic person status and be considered as having the same nationality as the fund manager.

Private Fund Management

In addition to the present five types of securities businesses (*i.e.*, brokerage, dealing, investment advising, underwriting and mutual fund), the Act will introduce private fund management as a new type of securities business.

In the Act, "Private Fund Management" is defined as "the business of managing the funds of any person as from five persons or a group of persons under a contract and in consideration of a service fee or commission but not including the management of a fund regulated under the law concerning provident funds."²⁷

The definition is rather confusing in relation to the number of persons whose funds can be managed together. However, it is understood that the management of up to four individual funds can be made without a licence.

Securities companies are prohibited from managing any private fund of the following types:²⁸

- (1) any fund owned by a group of persons which consists of more than 10 persons;
- (2) any fund owned by an individual which has capital of less than 1 million baht;

²⁵ SEA, s. 119.

²⁶ SEA, s. 127.

²⁷ SEA, s. 4.

²⁸ SEA, s. 134.

- (3) any fund owned by a group of persons which has a capital of less than 10 million **baht**.

Any covenant to be made by the private fund manager concerning minimum profit or loss protection is **prohibited**.²⁹

Stock Market

The existing Stock Exchange of Thailand will be transformed from being an institution under its own statute to an exchange under this new law. The management structure of the transformed Exchange will be similar to the present one, *i.e.*, the Board of Directors comprises eleven persons where five persons are appointed by the Commission, the other five elected by the members and a President who is appointed by the Board.

Under the Act, the Stock Exchange of Thailand will only be a trading centre while the power to control and supervise the activities concerning securities will be transferred to the Commission. However, the power to grant listing approval which is currently with the Minister of Finance will be vested in the Stock Exchange, although if a public offering is also made this will require the consent of the Office.

The Act also provides for the procedure to set up an over-the-counter market. The market can be formed by at least 15 securities firms (which need not be the present members of the Stock Exchange) with the permission of the **Commission**.³⁰ The market will be managed and operated by the Board of Directors which is wholly elected by its members. Unfortunately, the chapter concerning the Futures and Options Market in the Act has been deleted by the Special Commission of the National Assembly during its deliberations.

In addition, the Act makes provisions for the establishment of securities related businesses such as a securities clearing house, share depository centre and registrar **services**.³¹

Criminal Liabilities

The provisions concerning insider trading, stock manipulation and other criminal offences formerly contained in the Stock Exchange of Thailand Act are now included in the Act. There are some modifications to the penalties

²⁹ SEA, s. 139.

³⁰ SEA, s. 204.

³¹ SEA, ss. 219-229.

for certain offences. Offences concerning the spreading of rumours have also been added to the **Act**.³²

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³² SEA, s. 240.

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