

Introduction to The Amendments to the Securities and Exchange Act B.E. 2535 (1992)

The Securities and Exchange Act of 1992 (SEA) has been the fundamental law governing all aspects of the securities industry for more than 15 years. Now, the Thai capital market is facing the challenge of growing against the global backdrop of fast-changing, sophisticated markets. Such environment has given rise to the pressing issues of corporate integrity, investor protection and market confidence.

Increasingly, the principles of corporate governance (CG) has become a strategic guideline for all parties in the capital market to achieve such goals, from regulatory bodies like the Securities and Exchange Commission (SEC) and the Stock Exchange of Thailand (SET) to clearing and settlement agencies, securities issuers and securities business operators.

To ensure that the SEA will accommodate the effective implementation of CG principles and maintain transparency and fairness for all in today's market, the SEC has taken note of shortcomings that may have hindered effective enforcement of the securities law, and by extension, the overall development of the capital market. By such means as market monitoring, industry survey, foreign regulations studies and market assessment by the World Bank and IMF, the SEC has gathered comprehensive data and deemed the timing was ripe to propose the draft Amendments to the SEA for the best interest of the investing public and the market at large.

In October 2007, the SEA Amendments were approved in principle by the Cabinet and is now under the consideration of the National Legislative Assembly. The essences of the Amendments are categorized into three groups, as follows:

I. Investor Protection

1. To protect investors' rights to obtain sufficient information for making decisions to invest in a diverse range of products, from traditional instruments to more sophisticated alternatives, and to participate in their invested business through several channels to safeguard their own interest. The Amendments also grant increased protection for market participants, sets up robust mechanism and support system for services related to capital market investments to reduce associated legal risks, strengthen operational efficiency, and promote productive transactions in the capital market.

1.1 More protection channels and better CG standards of listed firms:

(1) company shareholders are entitled to file, on behalf of the company, the claim to disgorge ill-gotten benefits obtained by company directors or management in bad faith. The shareholders shall also have the right to receive reasonable litigation expenses from the company as ordered by the court since they act for the benefit of the company as a whole. In addition, investors who are detrimental from false statements or failure of company directors or management to disclose material facts that should have been stated may bring a civil action on their own behalf to claim for compensation from such directors or management who are involved in such wrongful actions;

(2) securities holders are entitled to jointly submit to the board of directors a proposal to include agenda items in the shareholders' meeting, which is a channel for investors to participate in the business of the company. However, the board of directors is permitted to reject the proposal under pre-identified specific conditions or circumstances. This is to create a balance between appropriate investor participation and uninterrupted business administration;

(3) investors are entitled to access sufficient information for their decision-making in such forms as shareholders' meeting notice, proxy solicitation and additional rules governing information disclosure and shareholders' voting on significant transactions;

(4) directors and management of companies in the capital market shall be provided with a clearer scope of duties and liabilities and those who perform their duties in good faith and with care to preserve their companies' interest shall be properly protected by law while persons with inappropriate characteristics – e.g., a bankrupt, an incompetent, exploiters of investors' interest and persons filed with criminal complaints or sentenced to imprisonment – shall be prohibited from becoming directors or management of such companies.

(5) company directors or management who commit dishonest acts or perform duties with gross negligence in such ways that cause listed companies to suffer damages or lose benefits that should have been gained shall be prohibited from clearing their name or obliterating their wrongful deeds by seeking resolutions at the shareholders' or the board of directors' meetings or ratification of obliteration after misdeeds have been committed, using false information or concealing material facts or misappropriating assets or interest of the company.

1.2 Any securities issuer, established in whatever form, shall receive an approval from the SEC and disclose pre-and post-offering information. This is to support fund raising of new types of entities established under the law of Thai or foreign jurisdictions except when the issued securities are deemed risk-free such as treasury bills, government bonds, the Bank of Thailand bonds, and debt securities whose principal and interest are fully guaranteed by the Ministry of Finance.

1.3 Provisions regarding the acquisition of securities for business takeovers are revised to provide investors with clearer information on controlling persons of the acquired company by means of:

(1) requiring any persons who hold securities or financial instruments issued by other persons to report the increase or decrease of their securities holding providing that such securities or instruments entitle the holders to receive securities of the acquired company. This is to provide investors with more comprehensive database that indicates movements of any persons with potential to become holders of a significant amount of shares in the acquired company;

(2) issuing additional rules for the acquisition of securities for business takeovers by "acting in concert" with other persons to gain control over a listed company. This is to reflect the effective control of the persons who act in concert to acquire and exercise such power over the acquired company;

(3) expanding the coverage of “associates” to include the sum of securities held by any controller of those obliged to report the acquisition or disposition of securities as well as those obliged to make a tender offer to purchase securities, as opposed to counting only the securities held by the controlled persons under the existing regulation; and

(4) increasing protection for shareholders of the companies in the capital market against the attempt of directors or management of such companies to employ anti-takeover mechanism. However, protective measures shall receive prior approval at the shareholders’ meeting under pre-specified rules. Company directors or management shall be subject to personal liabilities if they fail to comply with such measures.

1.4 Investor confidence shall be enhanced with the requirement that the assets of securities company clients and those of clearinghouse members shall be protected and unaffected by the bankruptcy or the execution of the court judgment where such companies or clearinghouses are debtors and that the clearing and settlement system for securities trading shall receive increased protection.

1.5 The supervisory framework of securities companies shall be relaxed in support of the changing financial business structure toward the conglomerate form by allowing securities companies to appoint management of other securities companies as their management (cross director). Also, the prohibition that securities company management shall not be managing partners or managing directors of the partnerships or companies where they or their associates are partners or shareholders shall be repealed;

1.6 The secondary market supervisory framework shall be revised in agreement with international standards and in preparation for the rapidly evolving financial market environment by empowering the SEC Board to direct the SET to issue new rules or revise or repeal existing ones in cases where such rules are insufficient or incapable of conforming to the current situation;

1.7 Transactions in the capital market shall flow more flexibly and efficiently. For instance, creditors shall be entitled to enforce their claim by selling listed securities pledged by debtors as collateral via the SET or by auction; the Bank of Thailand shall be allowed to transfer securities via the scripless system when acting as a securities depository center, clearinghouse or securities registrar. In addition, securities depository centers operated by any persons other than the SET shall be allowed to apply the scripless system to their securities depository services.

II. SEC Organization

2. To re-organize the SEC structure to enhance its operational flexibility in response to the dynamics of the global financial market and its independency from politics. On the other hand, the SEC’s exercising of power shall be monitored under an appropriate checks and balances system, as categorized below:

2.1 revising the criteria for selecting the SEC Board including its composition, qualifications, term of office, and expiration. In essence, the Amendments specify that the SEC Board chairman shall be appointed from experts instead of ex-officio Minister of Finance as currently the case, and expert members of the SEC Board shall be selected by the Nominating Committee, comprising former government officials and former executive

officers of government agencies. Rules and procedures governing the nomination, consideration and selection shall be transparent and open for examination. The SEC Board chairman and expert members shall hold office for a term of six years and shall not be reappointed;

2.2 setting up a separate supervisory board (the Management Board), which shall concentrate on the issuance of rules and regulations governing day-to-day operational matters. This is to enhance the SEC's operational flexibility and leave the responsibility of policy making regarding the supervision and development of the overall market to the SEC Board (the Principal Board). The Management Board shall be chaired by the SEC Secretary-General while the SEC Deputy Secretary-General and the Director-General of the Fiscal Policy Office shall be board members, and external experts shall be majority board members who shall be nominated and selected under the same procedure for selecting the Principal Board expert members. Since the Supervisory Board shall be closely involved with the issuance of operational rules and regulations, its members shall file the report of their securities holding with the SEC upon their appointments and whenever there are changes in their securities holding to prevent conflicts of interest;

2.3 prohibiting former secretaries-general of the SEC from working for any persons or entities regulated under the SEA for a period of one year to prevent them from using the information received by virtue of his or her position to seek personal benefits after leaving the office;

2.4 improving the mechanism for examining the internal control of the SEC Office whereby the Audit Committee shall verify the financial report and financial information of the SEC Office, coordinate with the Office of the Auditor General, and check the SEC's compliance with governing regulations.

III. Effective Enforcement

3. To add a supportive mechanism for effective enforcement of the securities law and increase channels for seeking coordination for suppressing international economic crimes by means of:

3.1 prohibiting securities companies or listed firms from persecuting or engaging in unfair practices against whistleblowers who are company officers, employees or persons hired to work for the companies including consultants or auditors who, in good faith, provide the authorities with clues relating to unlawful acts under the securities law. Any such companies violating the rule shall be subject to criminal liability while the whistleblowers shall receive immunity from civil and criminal liabilities that may arise as a result of their reporting of such clues;

3.2 requiring securities company auditors to report to the companies' audit committee when they find any activities suspicious of violating the securities law. The audit committee shall report such activities to the SEC under a specified period;

3.3 empowering the SEC to cooperate with foreign regulators in the areas of examination and information exchange to seek foreign cooperation for the suppression of international economic crimes;

3.4 entitling arresters, informers or any persons who provide information on insider trading or market manipulation to receive reward money that shall be funded by the settlement fine. Members of the SEC Board and the Supervisory Board as well as the SEC Secretary-General, the SEC officers and the SET personnel, who all have the statutory duty to perform under the SEA, shall not have the right to receive such rewards.

The SEA Amendments reinforce the SEC's continued efforts and commitment to the corporate governance development of all parties in the capital market and the efficiency of the SEC supervision for the benefit of the investing public and the market at large.

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