

Legal Update

Lifting of the Reserve Requirement on Short-term Capital Inflows

On 29 February 2008, Mrs. Tarisa Watanagase, Governor of the Bank of Thailand (**BOT**), announced the lifting of the unremunerated reserve requirement on short-term capital inflows, effective 3 March 2008. The details are summarized as follows:

BOT has introduced the unremunerated reserve requirement (URR) on short-term capital inflows since 18 December 2006 to deter short-term capital inflows and one-way speculation on the Thai Baht that led to excessive volatility of the Thai Baht that might have caused wider economic instability particularly at the time when domestic demand was moderating and robust export growth was the main driver of the economy.

The URR measure has lessened the pressure of Thai Baht speculation and been pivotal in ensuring the Baht stability and its movement more in line with regional currencies. Aware of the adverse effects of the URR measure on financial costs of businesses that need to raise funds from abroad, BOT has therefore relaxed the measure over time. BOT has also been communicating consistently the intention to use this measure only temporarily and to lift it when the situation is appropriate.

After careful consideration of changes in the environment and factors, BOT deems that it is now the appropriate time to lift the URR measure for the following reasons:

- Economic data in the fourth quarter of 2007 and January 2008 indicates a healthier recovery in domestic demand along with continued robust export growth. Moreover, additional fiscal stimulus by the government that helps boost confidence will further lend support to the continuation of this recovery.
- Foreign exchange inflows/outflows have become more balanced from moderating trade account surplus in January 2008, increasing amount of Thai investment abroad, and regulations that permit residents to deposit foreign currencies effective early February 2008.
- Real sector and exporters have been adjusting well to the appreciation of the baht through a much greater amount of foreign exchange hedging and improvements in production efficiency, management, and market diversification.
- BOT has more instruments to manage liquidity and the currency under the new Bank of Thailand Act. In addition, plans by the Ministry of Finance to adjust the structure and management of public debt along with consideration to make use of the soon-effective Public Debt Management Act will further improve the balance of capital flows.
- Recently, there have been widespread expectations of the lifting of the URR measure and market participants have adjusted their behaviors in line with these expectations. This has eroded the effectiveness of the URR measure.

Vickery & Worachai Ltd.

Lawyers

16th Floor, GPF Witthayu Towers A, 93/1 Wireless Road, Bangkok 10330, Thailand
Telephone: (66) 02-256-6311, 02-650-9691, Fax: (66) 02-256-6317/8
Email: vwlaw@loxinfo.co.th, Website: www.v-w.co.th

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To help manage the inflows/outflows of capital after the lifting of the URR measure, BOT deems appropriate the following supporting measures:

- 1) Encourage portfolio investment abroad by increasing the foreign investment limit for the Securities and Exchange Commission (**SEC**) to USD 30 billion to allocate to securities companies, mutual fund companies, and individual investors (through investments with private funds or securities companies).
- 2) Improve the measures to prevent Thai baht speculation
 - 2.1) Revise the rule for domestic financial institutions to borrow baht from non-residents by reducing the limit for transactions with no underlying trade or investment for all maturities to no more than 10 million baht outstanding balance per group of non-residents so as to limit channels of speculation.
 - 2.2) Revise the rules regarding the provision of Thai baht liquidity by domestic financial institutions to non-residents by expanding each institution' limits for transactions with no underlying trade or investment to no more than 300 million baht outstanding balance per groups of non-residents so as to increase demand for purchases of foreign currencies and two-way flows.
- 3) Revise the structure of Non-resident Baht Account (**NRBA**) by segregating into Non-resident Baht Account for Securities (**NRBS**) and Non-resident Baht Account (**NRBA**) so as to help monitor fund flows of non-residents. Under the new structure, the transfer of baht between the same types of accounts is allowed while the transfer between different types of account is prohibited.

To support the adjustment and improve the production efficiency of SMEs, BOT has launched the following temporary supportive programs:

1. Program to support production efficiency improvement of SMEs by providing soft loans through financial institutions totaling 40,000 million baht for a period of three years.
2. Facility to purchase (back-to-back) foreign currency that SMEs sold forward to financial institutions for a period of 6 months.

BOT is confident that the implementation of the aforementioned measures under the managed float regime will ensure that the Thai baht moves in line with economic fundamentals without excessive volatility.

Source: <http://www.bot.or.th>

Vickery & Worachai Ltd.

Lawyers

16th Floor, GPF Witthayu Towers A, 93/1 Wireless Road, Bangkok 10330, Thailand
Telephone: (66) 02-256-6311, 02-650-9691, Fax: (66) 02-256-6317/8
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The Amendments to the Securities and Exchange Act B.E. 2535

In December 2007, the Securities and Exchange Act (**SEA**) Amendments were approved by the National Legislative Assembly (**NLA**). The amended SEA shall take effect upon His Majesty the King's signature and publication in the Government Gazette. In order to allow market participants to make necessary preparations, each revised provision provides a certain lead time before it becomes effective.

SEA of 1992 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.

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 (Section 89/18-89/19). 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 (Section 89/20);

(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 (Section 89/28);

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Lawyers

16th Floor, GPF Witthayu Towers A, 93/1 Wireless Road, Bangkok 10330, Thailand
Telephone: (66) 02-256-6311, 02-650-9691, Fax: (66) 02-256-6317/8

Email: vwlaw@loxinfo.co.th, Website: www.v-w.co.th

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(3) investors are entitled to access sufficient information for their decision-making in such forms as shareholders' meeting notice (Section 89/27), proxy solicitation and additional rules governing information disclosure and shareholders' voting on significant transactions (Section 89/29 and 89/31);

(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 (Section 89/7-89/13 and 281/2); and

(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 (Section 89/20).

1.2 Any securities issuer, established in whatever form, shall receive an approval from 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 (Section 4 and 33).

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 (Section 246);

(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 (Section 247);

(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 (Section 258); 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 (Section 250/1).

1.4 Investor confidence shall be enhanced with the requirement that the assets of securities company clients (Section 111/1) 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 (Section 223/1-223/5).

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Lawyers

16th Floor, GPF Witthayu Towers A, 93/1 Wireless Road, Bangkok 10330, Thailand
Telephone: (66) 02-256-6311, 02-650-9691, Fax: (66) 02-256-6317/8

Email: vjaw@loxinfo.co.th, Website: www.v-w.co.th

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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 (Section 103(4) and (8)).

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 (Section 170/1).

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 SET or by auction (Section 196); the Bank of Thailand shall be allowed to transfer securities via the scriptless system when acting as a securities depository center, clearinghouse or securities registrar (Section 229). In addition, securities depository centers operated by any persons other than the SET shall be allowed to apply the scriptless system to their securities depository services (Section 228/2).

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 four years and may be reappointed but shall not hold office for more than two consecutive terms (Section 8-11, 13 and 31/3-31/7).

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 (Section 16/1-16/7).

2.3 prohibiting former secretaries-general of the SEC from working for any persons or entities regulated under the SEA for a period of two year to prevent them from using the information received by virtue of his or her position to seek personal benefits after leaving the office (Section 22/1).

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 (Section 14/1-14/2).

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Lawyers

16th Floor, GPF Witthayu Towers A, 93/1 Wireless Road, Bangkok 10330, Thailand

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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 (Section 89/2 and 281/1);

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 (Section 89/25 and 281/8);

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 (Section 264/1); and

3.4 entitling the public prosecutor shall have power to file a motion with the court for the payment of bounty to the informer or the persons who provide information on insider trading or market manipulation and gratuity to the arrestor from the fine paid to the court by the wrongdoer. 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 (Section 315/1).

Source: <http://www.sec.or.th>

4 Businesses Eased of Foreign Business Act

Ministry of Commerce (**MOC**) has a plan to study the possibility of allowing more foreign investment in 12 businesses under Schedule 3 of the current Foreign Business Act (**FBA**). Businesses under review by MOC included beverage and food retailing, hotels, advertising, brokerage or agent businesses computer services, logistics and domestic transport, management business for company subsidiaries, pawnshops, schools and cinemas.

The study in determining the impact and preparedness of Thai people for competition if greater foreign investment is allowed to operate such businesses is expected to be finalized in August 2008 and submitted to the Foreign Business Board for further processes of withdrawal of those businesses from the protected businesses under FBA if it is considered that Thai enterprises are capable of competing such businesses with foreign investors.

Although the proposed amendments to the FBA will soon fall into the hands of a new government, MOC still insists that it will press ahead with the investigation of some of 400,000 companies, in order to determine whether they have breached provisions of the current FBA or not.

Source: *Matichon and The Nation - December 2007*

Vickery & Worachai Ltd.

Lawyers

16th Floor, GPF Witthayu Towers A, 93/1 Wireless Road, Bangkok 10330, Thailand

Telephone: (66) 02-256-6311, 02-650-9691, Fax: (66) 02-256-6317/8

Email: vlaw@loxinfo.co.th, Website: www.v-w.co.th

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Amendments to Civil and Commercial Code, Act Prescribing Offences Relating to Registered Partnership, Limited Partnership, Limited Company, Association and Foundation and Public Limited Companies Act

In November 2007, the National Legislative Assembly (**NLA**) approved the three latest drafts, as proposed and amended by the Ministry of Commerce (**MOC**) which will take effect after His Majesty the King's signature and after the lapse of prescribed period after publication of same in the Government Gazette. Certain amendments are intended to facilitate and gain more flexible to Thailand's business system.

Certain provisions of the three drafts are summarized respectively as follows:

Civil and Commercial Code Amendment Act

- Promoters to form a limited company shall consist of at least three persons (formerly, seven persons).
- It is only one day long for the registration of the company incorporation (formerly, nine days).
- There is no need to submit copies of the memorandum and articles of association to the Registration Office at the time of registration.
- A special resolution is passed by only one successive general meeting (formerly, two consecutive meetings) and take only at least 15 days long (formerly, at least 30 days long).
- A Partnership can transform into a limited company without any dissolution before establishing the company.
- Notice for a general meeting shall be published at least once (formerly, twice) in a local paper and shall be sent to the shareholders via registered AR mail.
- When a company proposes to reduce its capital, the creditor's objection is needed to be raised within the period of 30 days (formerly, three months), and 60 days for amalgamation (formerly, six months).
- Notice of any dividend must be given in writing to each shareholder (any other methods cannot be done).
- The registration of the company needs only an Affidavit; a certificate of incorporation is cancelled.

Act Prescribing Offences Relating to Registered Partnership, Limited Partnership, Limited Company, Association and Foundation

- Imposing penalty and fine for not proceeding with partnership's transformation into limited company in compliance with the Civil and Commercial Code Amendment Act .
- Imposing penalty and fine for using name of the partnership or company, which is already cancelled, on running business.

Public Limited Companies Act

- A certificate of incorporation is cancelled; an Affidavit is the only one in use.

Source: MCOT- November 2007

Vickery & Worachai Ltd.

Lawyers

16th Floor, GPF Witthayu Towers A, 93/1 Wireless Road, Bangkok 10330, Thailand
Telephone: (66) 02-256-6311, 02-650-9691, Fax: (66) 02-256-6317/8
Email: vwlaw@loxinfo.co.th, Website: www.v-w.co.th