

Implications of SEC Act amendments

The current global economic crisis, the worst since the Great Depression, has financial regulators changing their views on how capital markets should be regulated. The school of thought which held widespread support prior to the crisis that market deregulation would lead to more efficient growth of wealth has been heavily challenged by a more cautious approach, with a push toward increased transparency and investor protection. The Thai government has been adopting the latter and steps have been taken to enact laws to address these concerns.

The Securities and Exchange Act 1992 (the SEC Act) was recently amended by the Securities and Exchange Act (No. 4). The updated legislation sets forth changes to three important areas of securities laws: reorganisation of the structure of the Securities and Exchange Commission (SEC), creation of supportive mechanisms for more effective enforcement of securities laws, and enhancement of mechanisms related to investor protection and transparency. This last area will be the main focus of this article.

The amended SEC Act is primarily intended to increase investor protection and corporate transparency, as well as address concerns over conflicts of interest at the director/management level. While company directors/management will be protected from prosecution if they perform their duties in good faith, for the best interests of the company, and based on information that they honestly believe to be sufficient for decision making, those who commit dishonest acts or perform duties with gross negligence will be prohibited from destroying/covering up their wrongful deeds by seeking resolution/ratification at shareholders' or board meetings.

In terms of investors' rights, shareholders, either individually or jointly, holding shares with voting right in aggregate of 5% or more, may now file a claim on behalf of the company to expel ill-gotten benefits obtained by company directors/management and claim for reasonable litigation expenses from the company. Shareholders may also bring a civil action on their own behalf to claim for compensation/damages from directors/management who disclose false information or fail to disclose material facts that should be disclosed.

Provisions regarding the acquisition of securities for business takeovers have also been revised. The amended SEC Act clarifies that the voting percentage of shares held in a company (instead of the shareholding percentage) will now be used as the basis for calculating the 5% reporting requirements on acquisitions and disposals of shares and the thresholds to trigger a tender offer, i.e. 25%, 50%, and 75%. These revised rules also expand the coverage of

securities to include those that entitle the holder to receive securities of the acquired company such as derivatives warrants, and so on.

Holdings of securities by both a controlling person and controlled person will now be taken into consideration to ensure that the securities held by related persons with a 30% shareholding relationship, both downwards and upwards throughout the corporate chain, are counted for the purpose of calculating the reporting requirements on acquisitions and disposals of shares and the thresholds to trigger a tender offer. In addition, persons who act together/collaborate to acquire and exercise power over an acquired company will be regarded as acting in concert, and their voting rights shall be counted together for the purpose of calculating these reporting requirements.

In terms of corporate transparency, any attempt by management to employ anti-takeover measures will now require obtaining prior approval at a shareholders meeting in accordance with pre-specified rules; otherwise, such anti-takeover measures will not have a binding effect on the company and management will be personally liable to a third party acting in good faith and for value.

Furthermore, transactions between directors, management, and the company or its subsidiary company, as well as material transactions such as the acquisition or disposal of assets, will also necessitate obtaining prior approval at a shareholders meeting in accordance with pre-specified rules. In failing to do so, such transactions will be regarded as materially in breach of conflict of interest rules.

The board of directors will now have the responsibility to appoint a company secretary to perform certain duties on behalf of the company/board, the most relevant of which is maintaining reports on directors/executives who have a vested interest in relation to a resolution. As with management, the company secretary must also adhere to the principles of business judgment, loyalty, and conflict of interest, breach of which could expose both management and the company secretary to criminal sanctions.

Although it is yet to be seen whether the amended SEC Act will achieve its intended purposes, it is viewed as a step in the right direction toward greater investor protection and corporate transparency a timely implementation given the current economic situation. If successful, these changes to securities laws could help to foster much needed investor confidence and, in turn, lead to a better overall capital market.

By Yingyong Karnchanapayap and Michael Yukubousky, Commercial Department, Tilleke & Gibbins International Ltd. Please send comments or suggestions to Marilyn Tinnakul at marilyn.t@tillekeandgibbins.com.