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SECURITIES REGULATION IN THAILAND: LAWS AND POLICIES

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Abstract: This Article provides an overview of the new regulatory structure governing capital markets in Thailand as instituted by the Securities Exchange Act of 1992 ("SEA"). Special attention is given to the rules embodied in the SEA as they affect public offerings, fraud, securities businesses, and publicly held companies. The SEA introduces several new concepts to Thai regulation of securities, and these concepts are analyzed, to the extent they can be, given the lack of experience under the new Act.

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* The reader is advised that although citations to authority have generally been confirmed, the *Journal* staff was not able to obtain some SEC notifications referred to in this Article.

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I. INTRODUCTION

A new era in the regulation of the Thai capital markets began recently with the promulgation of the Securities and Exchange Act ("SEA") in May, 1992. The SEA substantially reorganized the regulatory structure of the Thai capital markets and introduced to Thai law several new concepts concerning securities regulation. This Article provides an overview of the new regulatory regime and some of its underlying policies.

A. *Development of Thai Laws Concerning Capital Markets*

Prior to the enactment of the SEA in 1992, Thai law regulating capital markets was scattered among several statutes. The Stock Exchange of Thailand Act of 1979 established the Stock Exchange of Thailand, while entrusting the Ministry of Finance with its oversight and regulation. Securities companies came under the regulatory authority of the Bank of Thailand pursuant to the Finance, Securities, and Credit Foncier Businesses Act of 1979. Public companies, however, were regulated by the Ministry of Commerce pursuant to the Public Companies Act of 1978. These different statutes and authorities caused a number of problems in the Thai capital markets. For example, when the Public Companies Act was first promulgated in 1978, public offerings of shares by private companies were prohibited. The purpose of the prohibition was to allow public offerings only by public companies. However, the Public Companies Act was not acceptable to the business sector because of its rigid and strictly regulated

provisions. Dissatisfaction was reflected by the number of public companies registered under the Act, less than twenty companies in thirteen years. Consequently, public offerings of shares were virtually non-existent due to the low number of public companies established. The Stock Exchange of Thailand, which was recently established at that time, was greatly affected by the scarcity of shares for investors to trade. The Ministry of Finance, which oversaw the Exchange, wanted to solve the problem by making it easier for companies to offer shares, but since the Public Companies Act was supervised by the Ministry of Commerce, the Ministry of Finance had little power over public offerings. The Ministry of Finance therefore had to amend the Stock Exchange Act in 1984 to allow listed companies, and companies applying for listing, to be eligible to offer shares to the public even though they were still private companies.

To remedy the problems created by such inconsistencies, a new policy to integrate the laws and the authorities concerning the capital market was introduced in the Fifth National Economic and Social Development Plan, which later culminated in the promulgation of the Securities and Exchange Act in 1992. The SEA can be considered a significant step in the development of Thai law relating to capital markets. The Stock Exchange of Thailand Act and the Finance, Securities, and Credit Foncier Businesses Act (only the part concerning securities business) were repealed, and the provisions of each have been newly drafted and unified into the SEA. Moreover, the Securities and Exchange Commission has been established, becoming the only government agency with the powers to control and supervise all capital markets. Several new provisions, concerning such matters as financial trustees and tender offers, have been included in the SEA.

B. Development of Thai Laws Concerning Publicly Held Companies

Publicly held companies in Thailand were originally governed by the Civil and Commercial Code, Book III of which contained provisions concerning the "limited company." Under the Code, limited companies could offer shares to the public by way of a prospectus. It was not until 1978 that the first Public Companies Act was enacted; it was enacted because the provisions of the Code were not adequate to protect the rights and benefits of minority shareholders. The new law allowed only public companies established under the Act to offer shares to the public, and from

the time the new law was promulgated, limited companies under the Code were prohibited from making a public offering. However, the 1978 Act was not acceptable to the business sector due to its prohibitive provisions.¹ In connection with the drafting of the Securities and Exchange Act, the Public Companies Act has been entirely revised to make it less restrictive, and to bring it more in line with the new securities law. This new Public Companies Act entered into force in 1992.

II. THE SECURITIES & EXCHANGE COMMISSION

The Securities and Exchange Commission ("SEC") was established by the SEA and has extensive powers to govern capital markets and securities businesses. These powers, formerly vested in several agencies, resulted in many inconsistencies in the regulation of the markets. The SEC has now become the only governmental agency with the power to control the whole Thai capital market. The SEC's powers extend to the control and supervision of securities businesses, stock markets, over-the-counter markets, public offerings, insider trading and stock manipulation, and tender offers.²

Under the SEA, the SEC consists of the following persons:³

- (1) the Minister of Finance (as Chairman);
- (2) the Governor of the Bank of Thailand;
- (3) the Permanent-Secretary of the Ministry of Finance;
- (4) the Permanent-Secretary of the Ministry of Commerce;
- (5) four to six qualified persons appointed by the Cabinet, with at least one legal expert, one accounting expert, and one financial expert; and
- (6) the Secretary-General of the Office of the Securities and Exchange Commission.

Thus, the SEC is largely composed of representatives of the governmental bodies which formerly had control over various aspects of capital markets, and supplemented by several professional experts. The Office of the Securities Exchange Commission ("the Office") was established by the SEA

¹ See *supra*, part I.A.

² The Securities and Exchange Act B.E. 2535 § 14 (1992) [hereinafter SEA].

³ SEA § 8.

to facilitate the work of the SEC by having the Secretary General, who is appointed by the Cabinet, responsible for the Office's operation.⁴

During the drafting the SEA in 1991, there was no controversy over the idea of bringing the regulation of the whole capital market under the power of one agency. The main issue was whether such an agency should be directly under governmental control or under the control of an independent administrative agency. Because of concerns over the bureaucratic inflexibility in the governmental system, it was finally agreed that the SEC should be an independent agency. Due to its independence, the Central Bank was selected as a model for the new agency, and the concept of constructing the agency in the form of a commission was adopted from other countries, the majority of which also use a commission.

The subsequent problem relating to the new Commission was whether the Minister of Finance should be the Chairman of the SEC. The debate centered on concerns about heavily involving politics in the operations of capital markets, because the Finance Minister is a political appointee. Nevertheless, it was ultimately concluded that the Finance Minister shall be the Chairman of the SEC. The rationale behind the conclusion was the Finance Minister's performances can be checked and reviewed by the Parliament because he is accountable to the Parliament under the Parliamentary System.

Addressing concerns over the extensive powers of the SEC, the SEA prescribes two important measures to balance them. The first measure concerns the SEC's power to issue regulations. The SEA provides that when generally applicable rules or directives are issued, the SEC must submit the matter to a sub-committee for consideration, and the recommendation of the sub-committee shall be proposed to the SEC.⁵ This decision-making structure is based on the idea that the sub-committee will help counter any harmful policies of the SEC. However, the sub-committee is likely to function instead as a working committee of the SEC.

The second balancing measure is the right to appeal. The SEA provides that any person who is directly affected by an order issued by the SEC, or is not satisfied with a decision or order of the SEC or the Office, may appeal to the Appellate Committee.⁶ The Appellate Committee

⁴ SEA §§ 17, 19, 23.

⁵ SEA § 15. The sub-committee is comprised of qualified persons in the related matter appointed by the SEC.

⁶ SEA § 261.

members are appointed by the Cabinet; they number at least five but not more than seven persons, among whom must be at least one highly qualified and experienced person from each of the fields of law, accounting, and finance.⁷ Despite the existence of this check on the power of the SEC, no appeal has yet been made to the Appellate Committee.

III. REGULATION OF PUBLIC OFFERINGS

There are three major requirements pertaining to the public offering of shares: the approval requirement, the disclosure requirement, and the distribution requirement.

A. *The Approval Requirement*

No public offering of newly issued shares may be without prior approval of the Office.⁸ An application for the offering of shares must be submitted to the Office. In considering the application for approval, the Office bases its consideration on four major criteria concerning the issuing company:⁹ the nature of the business, the performance of the business, the financial and shareholding structure, and the management.

The approval requirement for a public offering was one of the major issues disputed during the drafting of the SEA. Those espousing a liberal view preferred to have only the disclosure requirement, as in the United States, while those with a conservative view thought that the approval requirement was still necessary to protect the public from fraud. Ultimately, the approval requirement was accepted, and the Office is required to notify the issuing company of its decision within forty-five days from the date it receives the application.¹⁰

B. *The Disclosure Requirement*

Apart from the approval requirement, a public offering of shares can be made only after the registration statement and draft prospectus, filed with

⁷ SEA § 260.

⁸ SEA § 33.

⁹ Notification of the SEC Re: Rules, Conditions and Procedures for the Application for Approval of an Offer for Sale of Newly Issued Shares and Granting Approval, cl. 4 (May 18, 1992).

¹⁰ SEA § 36.

the Office, have become effective.¹¹ A registration statement and draft prospectus become effective by default forty-five days after the receipt of such statement and prospectus by the Office.¹² The company applying for an approval of any public offering of securities may either file the registration statement and the draft prospectus together with the application for approval or make such filing after the approval has been granted.¹³

Where the Office is of the opinion that the registration statement or the draft prospectus is incomplete, the Office has the power to order the person who files such statement or draft prospectus to file additional information or amend the same, provided that such order is given before the said filing documents become effective.¹⁴ After the date on which the registration statement and the draft prospectus become effective, the Office has the following powers with regard to disclosure.¹⁵ Where the Office finds that the statement or the prospectus is false or fails to disclose material facts that should have been stated therein, and which may cause damage to the purchasers of the securities, the Office has the power to order the suspension of the effectiveness of the registration statement and the draft prospectus. If the Office finds that the statement or the prospectus contain material facts which are incorrect, or there is an event which causes a material change in the information contained in the registration statement and the draft prospectus which may affect the investment decisions of the purchaser of securities, the Office has the power to order temporary suspension of the effectiveness of the registration statement and the draft prospectus until a course of action has been taken to make a correction. Finally, the Office has the power to order the person who files the documents to make corrections where it finds that the statement or the prospectus is incorrect in other aspects.

C. *Exemptions*

The SEC exempts certain transactions involving the offering of new shares from the approval and disclosure requirements. Transactions which

¹¹ SEA § 65.

¹² SEA § 67.

¹³ SEA § 68.

¹⁴ SEA § 73.

¹⁵ SEA § 76.

are exempted from both the approval and disclosure requirements are as follows:¹⁶

- (1) The offer for sale of newly issued shares with a total value not exceeding 20 million bahts within any twelve month period;
- (2) The offer for sale of newly issued shares to not more than thirty-five persons within any twelve month period;
- (3) The offer for sale of newly issued shares to any of the investors under the following categories:
 - (a) the Bank of Thailand;
 - (b) commercial banks;
 - (c) finance companies;
 - (d) securities companies for the purpose of dealing, for mutual funds, or for private funds;
 - (e) credit foncier companies;
 - (f) insurance companies;
 - (g) international financial institutions;
 - (h) juristic persons established under a specific law;
 - (i) governmental agencies and state enterprises;
 - (j) financial institution development funds;
 - (k) pension funds;
 - (l) provident funds;
 - (m) mutual funds;
 - (n) juristic persons with total assets of 500 million bahts or more;
 - (o) juristic persons the shareholders of which are persons under (b) to (n) who collectively hold shares in an amount not less than seventy-five percent of the total shares;
 - (p) each investor to whom the issuer offers to sell shares with a value of 10 million bahts or more; and
 - (q) investors who have no domicile in Thailand and who deposit investment money from foreign countries with a custodian and a manager.

Thus, in general, exemption from the approval and disclosure requirements exist where the SEC believes that an issuance of shares does not merit regulation due to the low total value of the shares being issued, the small

¹⁶ Notification of the SEC Re: Exemption from Filing Statement for the Offer for Sale of Shares and Draft Prospectus (May 18, 1992).

number of persons to whom the shares will be issued, or the special status, knowledge or purpose of the investor.

D. The Distribution Requirements

In addition to the approval and disclosure requirements, the SEC also requires that the distribution of shares in all initial public offerings ("IPOs") must satisfy the following conditions:¹⁷ First, at least thirty percent of the total amount of the shares offered must be allotted to "the small investors." "Small investors" are subscribers who subscribe at the following values: (1) less than 500,000 bahts when the IPO value is less than 1 billion bahts; (2) less than 1 million bahts when the IPO value exceeds 1 billion bahts but is less than 2 billion bahts; or (3) less than 2 million bahts when the IPO value exceeds 2 billion bahts. Second, the amount to be allotted to persons recommended by the major shareholders or the management of the company may not exceed ten percent of the total amount of the shares offered.

These requirements, which force underwriters to more widely distribute shares, were recently imposed by the SEC in response to complaints from the public that they were unable to subscribe to shares in the IPOs. Such requirements have made the IPOs more costly and complicated since the underwriters now must arrange for public distribution of the prospectus and subscription forms. In some popular issues, up to 100,000 people came to collect the forms and many of them had waited to do so since five o'clock in the morning. Given that the main purpose of the public offering is to mobilize funds rather than to distribute the shares, it is difficult to find any justification for such distribution requirements.

E. Civil Liability For False Statements or Omissions

In cases where the registration statement and prospectus contain false statements, or fail to disclose material facts that should have been stated therein, any person who (1) purchased shares from the issuing company; (2) is still the owner of such shares; and (3) suffered damage from purchase of the shares, has a right to claim compensation from the company.¹⁸ To have

¹⁷ Notification of the SEC Re: Subscription, Distribution and Allotment of Newly Issued Shares (July 5, 1994).

¹⁸ SEA § 82.

a right to claim compensation, a purchaser must have purchased the shares before false statements or omissions became apparent, and within one year from the effective date of the registration statement and draft prospectus.¹⁹ The right to make a claim for such compensation is limited to a time period of one year from the date on which the fact that the registration statement and prospectus contained false information was known or should have been known, but not exceeding two years from the effective date of the registration statement and the draft prospectus.²⁰

In case of false statements, the following persons are held jointly liable with the company unless they can prove that they are not aware of the facts or that by virtue of their positions they could not have been aware of the truthfulness of the information or the failure to disclose the facts required to be stated:²¹ (1) directors who have the power to bind the company and who signed their names in the registration statement and prospectus; (2) promoters of a public company who signed their names in the registration statement and prospectus; and (3) underwriters, auditors, financial advisors, or appraisers of assets who intentionally or with gross negligence signed their names to certify the information in the registration statement and prospectus. However, such persons are not liable for compensation where:²² (1) the subscriber knew or should have known that the statements were false or that there was a failure to disclose material facts required to be stated therein; or (2) damage did not arise from the result of the receipt of false information or the failure to disclose material facts required to be stated therein.

IV. REGULATION OF THE SECURITIES BUSINESS

A. *Types of Securities Businesses*

Under the SEA, securities businesses are divided into six categories for purposes of regulation: securities brokerage, securities dealing, investment advisory services, securities underwriting, mutual fund management, and private fund management.²³ "Securities brokerage" involves brokering or representing any person in the purchase, sale, or exchange of securities in

¹⁹ *Id.*

²⁰ SEA § 86.

²¹ SEA § 83.

²² SEA § 84.

²³ SEA § 3.

the normal course of business in consideration of a commission, fee or other remuneration therefrom. "Securities dealing" is defined as a purchase, sale, or exchange, outside the securities exchange or an over-the-counter market, of securities, for one's own account in the normal course of business. "Investment advisory services" are the giving of advice in the normal course of business to the public, whether directly or indirectly, concerning the value of securities or the suitability of investing in those securities or the purchase or sale of any securities in consideration of a fee or other remuneration excluding the giving of advice to the public in the manner as specified in the notification of the Securities and Exchange Commission. "Securities underwriting" refers to the underwriting of all or part of the securities from a company or owner of securities for sale to the public in consideration of a fee or other remuneration whether with or without any conditions. "Mutual fund management" is the management of investments under a mutual fund project by issuing investment units of each project for sale to the public and investing proceeds therefrom in securities or other properties or investing for profit by other means. Finally, "private fund management" is the management of funds of five or more persons, or one or more group of persons, to invest in securities for a fee or other remuneration, but excluding the management of funds under the law relating to provident funds. While the other securities businesses predated the SEA, private fund management is a new type of securities business established by the Act.

B. Securities Companies

Securities businesses can be undertaken only by the formation of either a limited company or a public limited company, and after having obtained a license from the Minister of Finance upon the recommendation of the SEC.²⁴ The licenses are granted separately according to the type of securities business to be operated. Most securities companies have been granted four licenses, including securities brokerage, dealing, investment advisory, and underwriting. Mutual fund management licenses are granted exclusively to "mutual fund management companies." The SEC is currently considering the criteria for granting private fund management licenses to existing securities companies.

²⁴ SEA § 90.

The SEA also provides the Minister of Finance the power to grant a license to any other type of financial institution including commercial banks. This provision exists because of the strong competition between financial institutions in Thailand and the emerging concept of universal banking. The Finance Minister has already allowed commercial banks to underwrite debt instruments, so it is conceivable that commercial banks will be further approved to carry on additional securities business.

1. *Capital*

A securities company must have a paid-up registered capital of not less than 100 million bahts.²⁵ In addition, the SEC is considering imposing requirements concerning the amount of the capital fund of a securities company in proportion to the size of its business.

2. *Management*

A securities company can appoint directors or managers, or enter into an agreement with other persons, giving them power, either in whole or in part, to manage the business of the company, but only with the approval of the Office.²⁶ There are limits, however, on who may participate in the management or advisory functions of a securities company.

Any person with any of the following characteristics is prohibited from being appointed to, or performing the duty of, a director, manager (or person with power of management), or advisor of a securities company:²⁷

- (1) being or having been bankrupt;
- (2) having been imprisoned by the judgment of a court which is final for an offense related to property committed with dishonest intent;
- (3) having been a director, a manager or a person with power of management of a financial institution which had its license revoked, unless an exemption has been granted by the SEC;

²⁵ SEA § 96.

²⁶ SEA § 104.

²⁷ SEA § 103.

- (4) being a director, a manager or a person with power of management of any other securities company;
- (5) having been removed from a position of chairman, director or manager pursuant to section 144 or section 145²⁸ in accordance with the provisions of other laws;
- (6) being a political official;
- (7) being a government official with responsibility for supervision of securities companies, an officer of the Bank of Thailand or of the Office, except in cases where:
 - (a) an appointment is made with the approval of the SEC for the purpose of assisting in the operation of a securities company; or
 - (b) an appointment is made in accordance with section 145; or
 - (c) the securities company is a state enterprise under the law relating to budget procedures.
- (8) being a manager or a person with power of management of a partnership or a limited company in which such person himself or any person or partnership or limited company as specified in section 258(1) - (6) is a partner or a shareholder, except:
 - (a) when an advisor or a director of a securities company who has no power of management in the securities company;
 - (b) where the exemption has been granted by the SEC as being necessary to rectify the condition or operation of the securities company;
 - (c) where an appointment is made in accordance with section 145;
 - (d) where the holding of contribution in such limited partnership is less than one percent of the total amount of the contribution of that limited partnership; or
 - (e) where the shareholding in such limited company is less than one percent of the total amount of the shares sold of that company;

²⁸ SEA § 144 (removal by the company in compliance with order of the Office), § 145 (removal by the Office).

- (9) being a person not having educational qualifications, work experience or other qualifications as specified in the notifications of the SEC; or
- (10) having other prohibited characteristics as specified in the notification of the SEC.

Where it later appears that persons appointed as directors, managers, or persons with the power of management have the prohibited characteristics, the Office has the power to withdraw its approval of such persons and the securities company must propose other persons for approval by the Office within fifteen days from the date of the withdrawal.

C. *Prohibited Activities*

There are numerous prohibitions on the types of activities in which a securities company may participate. Pursuant to the SEA, a securities company may not:²⁹

- (1) reduce its capital without approval from the SEC;
- (2) engage in any act which may mislead its customers or the public in any matter concerning the price, value and nature of the securities involved;
- (3) engage in any act which may cause damage or constitute an unfair advantage to its customers or other interested persons as specified in the notifications of the SEC;
- (4) purchase and sell futures and options on securities whether in its own name or for customers unless the SEC issues a notification allowing such transaction;
- (5) sell securities without having possession, or without receiving an order to sell from another person, unless the SEC issues a notification allowing such transaction;
- (6) accept purchasing or selling orders from customers outside its head office or branch offices unless otherwise specified by the Office;

²⁹ SEA § 98.

- (7) purchase or hold shares, except:
 - (a) those acquired in the course of securities dealing, securities underwriting, or other securities businesses as specified in the notifications of the SEC; or
 - (b) those acquired upon a permission from the Office and in accordance with the rules, conditions and procedures as specified in the notifications of the SEC;
- (8) engage in any other business which is not a licensed securities business, except when approval has been granted by the SEC:

Other business under the first paragraph does not include the lending of money for purchasing, selling or exchanging securities in the course of securities brokerage or securities dealing business or the purchase and sale or exchange of securities in the Securities Exchange and in an over-the-counter centre by a securities company licensed to undertake securities dealing business;

- (9) relocate its head office or branch offices without an approval from the Office;
- (10) advertise its business, unless such advertisement is carried out in accordance with the rules, conditions, and procedures as specified in the notifications of the Office.

Basically, securities companies are prohibited from carrying on any business which is not involved with "securities." Such restrictions are based on the concept that securities companies are a type of financial institution that can only engage in business activities which are approved by the relevant authority. This concept has created some startling anomalies. For example, securities companies are prohibited from trading in derivatives because they are not "securities" within the meaning of the SEA, but ordinary companies can trade in derivatives because no law restricts them from doing so.

The scope of some of the more vague prohibitions is unclear due to a lack of precedent cases and SEC notifications. There is no precedent concerning what kind of actions are considered to be misleading to customers pursuant to provision (2) above. Moreover, with regard to those activities prohibited by provision (3) above, the SEC has yet to issue any

notification prescribing which acts are considered to damage or be unfair to customers. It is likely that some conflicts have occurred between customers and brokers, but these were probably settled privately between the parties, and hence there are no guidelines for interpreting these provisions.

V. ANTIFRAUD PROVISIONS

The antifraud provisions of Thai securities laws are found in chapter 8 of the SEA, entitled "Prevention of Unfair Securities Trading Practices." These provisions can be grouped into three main categories: false or misleading information, insider trading, and market manipulation.

A. *False or Misleading Information*

The first provision in this category is section 238 of the SEA which pertains to false or misleading statements. Section 238 applies to securities companies, any person responsible for the operation of a securities company or the issuing company, and any person having an interest in the relevant securities. It prohibits these people and companies from imparting any false statement or any other statement with the intention of misleading any person concerning facts relating to the financial conditions, business operation, or trading prices of securities of a company whose securities are listed in the securities exchange.

The second provision, section 230, concerns the dissemination of information to the public. Applicable to the same persons and entities as section 238, section 239 prohibits the dissemination of news concerning any information which may cause any other person to believe that the price of any security will increase or decrease. This prohibition does not apply when the information has already been reported to the Securities Exchange.

The third provision—probably the most extraordinary of its kind—is section 240. This provision is aimed at preventing the spreading of rumors that may affect securities prices, a phenomenon that is common in emerging markets. Section 240 provides that no person shall disseminate any false news which may cause any person to understand that the price of any security will increase or decrease.

B. Insider Trading

Insider trading is an offense under section 241 of the SEA. Unlike its counterpart under the American common law system, insider trading in Thailand is a statutory offense. Section 241 defines insider trading as the purchase or sale of listed (or over-the-counter) securities by any person so as to take advantage of other persons by using information material to changes in the prices of securities which has not yet been disclosed to the public and to which information he has access by virtue of his office or position. To avoid confusion about who is an insider, section 241 defines the term "any person" as it is used in the section to include any: (1) director, manager, or person responsible for the operation or auditor of a listed company; (2) shareholder who holds shares in any listed company, the par value of which is more than five percent of the registered capital of that company; (3) state agency employee, or director, manager, or officer of any exchange who is in an office or position with access to information which is material to changes in the price of securities; or (4) any person involved in securities and/or trading of securities in any exchange. Despite this attempt at clarification contained in the statute, the actual scope of the offense in Thailand remains uncertain since no insider trading case has been instituted.

The SEC, however, recently revealed that it is considering a new version of section 241. According to the SEC, the new version will clearly specify who "insiders" are and what kind of information is "material." The proposed amendment appears to derive from concern over the subjective interpretation of the market manipulation provisions of the SEA by the Court in the *Sia Song* case, discussed below.

C. Market Manipulation

The provisions concerning the prevention of market manipulation are divided into two categories under sections 243(1) and (2). Section 243(1) covers collusion or agreement between two or more persons in the purchase or sale of listed securities in concealment. Concealment, in such instances, is aimed at misleading the general public to believe that such securities are purchased or sold in great volume, or that the price of such securities has changed (or not changed) at any time or during any period in a manner which is not consistent with the normal market conditions.

The following cases are specifically deemed by section 244 of the SEA to be collusion to mislead the general public: (1) a purchase or sale of securities where the person who finally receives benefit from such purchase or sale is the same person; (2) an order to purchase securities of the same category, type, and of the same company, with the knowledge that he himself or jointly with any other person has ordered the sale or is going to order the sale, provided that the order shall be in proximate amount, price, and time; and (3) the order to sell securities of the same category, type, and of the same company, with the knowledge that he himself, or jointly with any other person, has ordered the purchase or is going to order the purchase, provided that the order shall be in proximate amount, price, and time.

Section 243(2) concerns the continuous trading of listed securities by any person, either independently or jointly with another person, which results in the purchase or sale of such securities which is not consistent with the normal market conditions. Such trading must be made with the intent to lure the public into purchasing or selling such securities. However, where such trading is made in good faith to protect a lawful benefit, the trader will not be held liable for breaching this provision.

In 1993, the first stock manipulation case was brought by the SEC against Mr. Song Wacharasriroj (this case is publicly known as the "Sia Song" case). The SEC accused Mr. Song of manipulating the share price of the Bangkok Bank of Commerce ("BBC") between October 2 and October 29, 1992. Before this period, BBC shares were being traded at around 12 bahts (approximately US\$0.50) per share at an average trading volume of 1.9 million shares per day. However, the price and trading volume of BBC shares had substantially increased after Mr. Song and his group continuously bought the shares. The price went up to around 40 bahts (approximately US\$1.60) per share with an average trading volume of 14.15 million shares per day. The SEC claimed that Mr. Song had colluded with eleven other persons to manipulate BBC shares. The allegation was based on the following facts: (1) the group bought more than forty percent of the trading volume; (2) the eleven persons were related Mr. Song in certain ways, some being his relatives; (3) the payments for the shares they bought were from the same source; and (4) their orders to buy the shares were made from the same place. Surprisingly, the criminal court, which is the court of first instance, rejected the SEC's allegation on the ground that none of these facts was sufficient to show any manipulative act. The court of appeals

recently rendered its decision on May 9, 1995, affirming the decision of the criminal court with similar a rationale.

VI. REGULATION OF PUBLICLY HELD COMPANIES

A. *Tender Offers*

First introduced by the SEA in 1992, the regulation of tender offers is a relatively new phenomenon in Thailand. The SEC issued the first set of rules concerning tender offers in May, 1992 ("the old rules"). However, after a score of tender offers made in the past two years, the SEC has replaced the old rules with new ones in April, 1995 ("the new rules"). The new rules are aimed at providing minority shareholders with more protective measures and at making the bidding procedure more flexible.

1. *Disclosure by Five Percent Owners*

The first type of requirement concerns ownership disclosure. Whenever any person acquires the shares of any public company and thereby increases the number of shares held by that person or other persons in such company to a number which in the aggregate reaches any multiple of five percent of the total number of shares sold of that company, such person must report to the Office within the next business day.³⁰ This reporting requirement also applies where any shareholder disposes of the shares he holds in any public company to a number which in the aggregate reaches any multiple of five percent of the total number of shares outstanding in that company.³¹

2. *Tender Offer Requirements*

Whenever any offer to purchase (or any other act) results in any person acquiring or holding up to twenty-five percent or more of the total number of securities of any public company, such person is required to make a tender offer in accordance with the rules and procedures prescribed by the SEC.³²

³⁰ SEA § 246.

³¹ *Id.*

³² SEA § 247.

3. *100% Tender Offers*

The new rules require 100% tender offers in certain circumstances. The rules apply to any person who purchases or does any other act which results in holding specified amounts of any public company at any day's end. A person who acquires 25, 50, or 75 percent or more of a company, other than by a tender offer, and who did not previously hold 25, 50, or 75 percent respectively, is required to make a tender offer for all shares of the company. The same requirement applies to a person who, by means other than a tender offer, acquires more than five percent of all the shares sold of that company, within the twelve months before the acquiring date, which results in that person's holding less than fifty percent but more than twenty-five percent of all the shares sold of that company.³³ The 100% tender offer requirements under the new rules are aimed at providing minority shareholders of a target company an opportunity to sell their shares equal to the majority. They also provide majority shareholders with the right to sell their controlling blocks directly to the bidder.

There are, however, several exemptions to the 100% tender offer requirements. Persons who are required by the SEC rules to make a 100% tender offer are exempted from the requirement where the shares are acquired: (1) by inheritance, (2) by the exercise of right under warrants or convertible debentures where the acquisition of such warrants or debentures is by inheritance, (3) by subscribing to the right issues according to the proportion he held, and (4) by receiving an exemption from the Office.³⁴ An exemption also can be obtained by complying with the SEC's requirements concerning the disposition of shares not acquired by a tender offer.³⁵ In addition, the Office may grant an exemption for a 100% tender offer where, among other instances, the acquisition does not affect the power to manage the company or the purpose of the acquisition is to rehabilitate the company.³⁶

³³ Notification of the SEC Re: Rules, Conditions and Procedures for Acquisition of Securities for Business Take-overs, cl. 4 (March 6, 1995) [hereinafter Take-over Notification].

³⁴ Take-over Notification, cl. 6.

³⁵ *Id.*

³⁶ Take-over Notification, cl. 7.

4. *Publicly Announced Intent*

Another feature added by the new rules concerns publicly announcing one's intention to acquire shares of a public company. The rule applies to any person who announces an intention to acquire shares of any public company by mentioning details concerning the bidder, and the amount of shares to be acquired will result in his acquiring shares up to twenty-five percent or more of the total number of shares sold of that company. Such announcement may be made by (1) publication in the mass media, (2) informing the director or manager of the target company, (3) informing one or more shareholders who in the aggregate hold up to ten percent of the shares sold of the target company, (4) informing the Stock Exchange or any over-the-counter market (in the case that such shares are listed securities), or (5) informing the Office. Any person who makes such an announcement will be deemed to have announced to the public his intention to acquire shares,³⁷ and is therefore required to submit a form so stating to the Office within three working days,³⁸ and to make a tender offer within seven working days from the day after the announcement date.³⁹ The purpose of these rules concerning public announcement of intentions is to prevent the manipulation of stock prices by making an early announcement concerning a tender offer but failing to prescribe its timing.

5. *Tender Offer Procedures*

When making a tender offer, the bidder must submit a copy of the offer, together with the form of acceptance, to the Office. The offer must be prepared by a financial advisor who is approved by the Office.⁴⁰ After the offer has been received by the Office, the bidder shall forthwith submit the same to the target company and all of its shareholders.⁴¹ The bidder must also advertise the offer in at least two Thai language newspapers and one English language newspaper for not less than three consecutive days.⁴²

³⁷ Take-over Notification, cl. 10.

³⁸ Take-over Notification, cl. 11.

³⁹ Take-over Notification, cl. 12.

⁴⁰ Take-over Notification, cl. 16.

⁴¹ Take-over Notification, cl. 17.

⁴² *Id.*

6. *Traffic Rules*

Many rules, such as those described below, largely serve an organizational purpose. For instance, a bidder shall start to purchase shares within three working days from the day the Office receives the offer, and the offer must be kept open for at least twenty-five working days, but not more than forty-five working days.⁴³ A shareholder who tenders to a bidder has the right to withdraw his shares from the tender at any time within twenty working days of the offering period.⁴⁴ The bidder shall offer to purchase at least ten percent of the total shares sold of the target company.⁴⁵ Upon expiration of the offering period, if the amount of shares being offered for sale exceeds the amount specified in the offer, the bidder shall purchase such shares in any of the following manners:⁴⁶ (1) purchase the whole amount of shares offered, (2) purchase at the amount equal to the amount specified in the offer, or (3) purchase at the amount not exceeding the maximum amount specified in the offer. Where the bidder has acquired shares of the target company at an amount exceeding twenty percent of the amount specified in his offer, within ninety days before the Office receives the tender offer and after the expiration of the offering period, and the amount of shares being offered for sale is in excess of the amount specified in the offer, the bidder is required to purchase all such shares.⁴⁷

Additionally, the bidder shall have only one fixed offering price. In case the bidder has acquired the shares of the target company during the period of ninety days before the Office receives the tender offer, the offering price shall not be less than the highest price of the shares which the bidder acquired during such period.⁴⁸ If the bidder wishes to increase the price before the expiration of the tender offer, he is required to pay this increased price to every shareholder who previously made the offer for sale before the price increase.⁴⁹

43 Take-over Notification, cls. 19, 21.

44 Take-over Notification, cl. 20.

45 Take-over Notification, cl. 34.

46 Take-over Notification, cl. 35.

47 Take-over Notification, cl. 36.

48 Take-over Notification, cl. 28.

49 SEA § 253.

7. *After-Tender-Offer Requirements*

Regulations apply to the activities that stem from a tender offer even after an acquisition is made. For instance, if the bidder has acquired fifty percent of the total shares sold of a target company, he is prohibited from acquiring any more shares of that company at a price higher than the offering price within six months of the expiry of the tender offer.⁵⁰ Also, if the bidder has acquired the shares of a target company by the tender offer but without having to purchase the whole amount being offered for sale, he is prohibited from acquiring shares of that company in excess of twenty percent of the amount specified in the tender offer within ninety days of the expiration of the tender offer.⁵¹

B. *Proxy Solicitation*

There is no comprehensive regulation of proxy solicitation in Thailand. Proxy solicitation is not presently a serious problem in Thailand due to the facts that the number of shares floated to the public by most listed companies is rather insignificant (the average is around thirty percent of the shares issued) and shareholders tend to lack enthusiastic interest in the company's affairs (in most listed companies less than twenty-five persons attend the annual general meeting).

There are, however, a few provisions in the Public Companies Act of 1992 governing proxies. The Public Companies Act provides that the proxy form must contain at least the number of shares held by the shareholders, the name of the proxy, and the serial number of the meeting which the proxy is authorized to attend and at which the proxy is authorized to vote.⁵² In spite of the lack of formal regulation, the powers of the SEC under the Securities and Exchange Act can be regarded as broad enough to include the power to regulate proxy solicitation.

VII. CONCLUSION

The development of Thai capital markets spans less than two decades, and the history of its regulation is even shorter. The concepts contained in

⁵⁰ Take-over Notification, cl. 41.

⁵¹ Take-over Notification, cl. 42.

⁵² The Public Companies Act §§ 34, 102 (1992).

the Securities and Exchange Act of 1992 can be regarded as significant changes, but they are also the first of their kind in Thailand. It is therefore rather difficult at this stage to comment on the appropriateness of the underlying policies of the Act and related regulations due to their newness and the lack of precedent-setting cases. It may take some time for Thai capital markets to accumulate experience under the new regulatory regime. As the markets are developing to an international level, a more critical study of new regulatory concepts is necessary if the modernization of Thai securities regulations is to keep pace with the changing business environment.