



# The pursuit of equilibrium

Faced with a new economic climate, Yingyong Karnchanapayap of *Tilleke & Gibbins* explains why Thailand's government is striving to balance the liberalisation of the country's capital markets sector with investor protection.

**T**he current global economic crisis, the worst since the Great Depression, has financial regulators changing their views on how capital markets should be regulated. Whilst it is important, and perhaps mandatory, to strive for greater market liberalisation for the benefits of investors, 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 towards increased transparency and investor protection.

In light of shifting attitudes, this article examines recent measures taken by the Thai government and the country's regulator in attempting to achieve a greater balance for market liberalisation and yet maintain the protection needed for the investing public.

## Overview of regulatory framework

Capital raising through the offering for sale to the public of newly issued shares and other securities (which include ordinary shares, preferred shares, debentures, corporate bonds, warrants, options etc.) is regulated by the *Securities and Exchange Act B.E. 2535*, as amended. Falling under the regulatory supervision of Thailand's Securities and Exchange Commission (SEC), such capital raising must be undertaken in compliance with the rules and regulations issued by the SEC Board and the Capital Markets Supervisory Board.



In principle, in offering newly issued securities for sale to the public, the offering company must generally apply for approval from the SEC, and fulfill pre-offering information disclosure requirements by filing a registration statement and a draft prospectus with the SEC. However, the offering of certain types of securities may be exempted from such requirements if they do not affect the general public. Examples would include the offering of fully-paid ordinary shares to existing shareholders (*i.e.* rights offering) and the offering of employee stock options.

After offering securities for sale to the public, offering companies shall undertake securities settlement with the

holders in accordance with the SEC regulations and disclose information on a continual basis. Post-offering reporting requirements include: (a) report of securities selling; (b) report of rights exercising on convertible securities (*i.e.* warrants and convertible debentures); (c) report of financial condition and operational performance, consisting of financial statements and annual reports; and (d) report of securities holding by the issuing company's management.

In addition, there are requirements for the reporting of an acquisition or disposal of securities which causes the aggregate holding of the securities of a person and his/her connected persons to reach or pass a multiple of 5 percent of the voting rights of the company, as well as the requirement to make a tender offer in the event of a change of control of a company.

### Market liberalisation

#### *Overview of recent developments*

While companies continue to seek new venues to raise capital, traditional ways of raising funds in domestic markets – such as issuing shares and debt instruments – are now being increasingly supplemented by initiatives to raise funds from overseas, thus allowing the issuers of shares or debt instruments to tap into the wider global market. From an investor's perspective, this also means that more investment options are available from which to choose for their own risk profile.

In a trend towards greater market liberalisation, Thailand has opened up as a venue for issuance and offering of foreign debt securities. Until recently, the issuance and offering of foreign equity-based securities was prohibited except when offered only to limited groups of recipients, such as offering foreign securities to employees of the foreign issuer or its subsidiaries in Thailand under an employee stock option plan, or rights offering of foreign shares.

Effective 1 December 2009, foreign equity-based securities (*e.g.* shares and warrants on shares) listed on a home exchange (foreign stock exchange) are now permitted to be listed on the Stock Exchange of Thailand (SET), if certain requirements are fulfilled. The benefits of this are at least twofold. Firstly, Thai investors will have access to foreign blue-chip shares to be listed on the SET. Secondly, Thailand will no longer only be on the receiving end of global investment – regardless of whether they have operations



Yingyong  
Karnchanapayap

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in Thailand, world-class companies can now view the jurisdiction as a place to raise funds. At this stage, however, listing securities of non-listed foreign issuers on the SET, as a primary offering and listing, is still not permitted.

#### *Requirements for listing of foreign securities*

The SEC requires that the following criteria be met for listing of foreign securities on the SET:

- (i) that the home exchange is a member of the World Federation of Exchanges, and that the shares in question are listed on the main board of that exchange;
- (ii) that the home regulator is a member of the International Organization of Securities Commissions (IOSCO) and a full signatory to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, or other comparable memorandum of understanding;
- (iii) that the foreign issuer has a contact person in Thailand;
- (iv) that the value of the shares to be issued in Thailand are within the Bank of Thailand's limit; and
- (v) that approval of the home regulator, or evidence that the issuance and offering of securities in Thailand does not breach any home exchange regulation, is obtained.



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In addition, SET requirements must also be fulfilled. The foreign issuer must: (a) be a listed company on the home exchange for not less than three years; (b) have market capitalisation in the top quartile of all listed companies on the home exchange, or not less than THB 10 billion (approximately US\$308.2 million); and (c) have market capitalisation in Thailand of not less than THB 300 million (approximately US\$9.24 million) or 5 percent of its registered capital, whichever is lower, or otherwise have proof that there will be sufficient trading volume and liquidity.

Foreign companies wishing to issue equity-based securities have to submit an application to the SET and simultaneously file an application to obtain approval from the SEC, in addition to filing a registration statement and draft prospectus to disclose information to the investing public. If the SET is satisfied that all qualifications are met, it will issue a Certification of Qualification for submission to the SEC. After the application, all supporting documents, and the above filing steps are completed, there will be a cooling-off period of at least fourteen days. Once SEC approval and the aforementioned filing become effective, the shares can be offered for sale to the public through an underwriter(s) – which must be completed within six months from SEC approval – and then listed on the SET.

Once foreign securities are listed on the SET, if the company wishes to issue new securities but does not wish such securities to be listed, it may do so by merely submitting an application and filing to the SEC. In addition, if the

offering qualifies as a private placement – for example, the offering of securities is made to less than fifty investors, the value of the offering is less than THB 20 million (approximately US\$616,238), or the offering is made only to institutional investors – the filing requirement will be exempted.

After the securities are listed, the foreign issuer must comply with its home exchange regulations such as submission of financial statements, rules for transactions with related parties, reporting on material transactions, reporting on shareholding of directors/management/auditors, rules of takeovers, and so forth.

The offering of existing shares by shareholders (as opposed to the offering of new shares) for listing on the SET is also allowed, provided that the foreign issuer has obtained pre-approval from the SET. Such offering shall be subject to the same qualifications as the offering of new shares. The company must issue a written acknowledgement of the offering and provide representation that it will comply with all requirements, such as those concerning disclosure.

### **Protection of investors**

The *Securities and Exchange 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 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 warrants particular attention.

The amended Act is primarily intended to increase investor protection and corporate transparency, as well as address concerns over conflicts of interest at the director and management level. While company directors and management will be protected from prosecution if they perform their duties in good faith, in the best interests of the company, and based on information which 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 or covering up their wrongful deeds by seeking resolutions or ratifications at meetings of the shareholders or board of directors.

In terms of investors' rights, shareholders holding shares – either individually or jointly – with voting right in aggregate of 5 percent or more may now file a claim on behalf of the company to expel ill-gotten benefits obtained by company directors or 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 and/or damages from directors or management who disclose false information or fail to disclose material facts that should be made known.

Provisions regarding the acquisition of securities for business takeovers have also been revised. The amended *Securities and Exchange Act* clarifies that the voting percentage of shares held in a company will now be used (instead of the shareholding percentage) as the basis for calculating the 5 percent reporting requirements on acquisitions and disposals of shares and the thresholds to trigger a tender offer (i.e. 25, 50, and 75 percent). These revised rules also expand the coverage of “securities” to include those which entitle the holder to receive securities of the acquired company (such as derivatives warrants, among others).

Holdings of securities by both a “controlling person” and a “controlled person” will now also be taken into consideration to ensure that the securities held by related persons with a 30 percent 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 or 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 that prior approval be obtained at a shareholders’ meeting in accordance with pre-specified rules. Failure to gain such approval means that 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. Such transactions will be regarded as materially in breach of conflict of interest rules if this prior approval is not sought and obtained.

The board of directors will now also have the responsibility to appoint a company secretary to perform certain duties on behalf of the company or board, the most relevant



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of which is maintaining reports on directors and 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.

### **Expanding liberalisation**

Aside from the opening up of the Thai market for foreign listed securities, Thailand has recently started to liberalise activities in other areas, such as derivatives. Undoubtedly, market liberalisation offers more products and greater opportunities for the investing public in Thailand, which could be used as a diversification tool to mitigate country risk or, in the case of derivatives, as an instrument for hedging.

However, as the scope of investment vehicles expand, it is essential to ensure that there are mechanisms in place to protect investors from unscrupulous investments. Although investor protection measures may be cumbersome and may consume time and resources, the existence of such mechanisms should be beneficial to the overall capital market in the long run. If the liberalisation is proven to offer more benefits to the investors, the Thai regulator and the investing public will be more inclined to accept an even greater degree of liberalisation, which will in turn lead to even greater investment products and venues for capital raising in Thailand.

[yingyong.k@tillekeandgibbins.com](mailto:yingyong.k@tillekeandgibbins.com)  
[www.tillekeandgibbins.com](http://www.tillekeandgibbins.com)