

AEC: Moving towards a common market

Published: 25/01/2013 at 12:00 AM

Newspaper section: Business

A common market for financial services will be one of the major components of the Asean Economic Community when it takes effect at the end of 2015. This will represent a significant change for securities regulation in Thailand, where the Securities and Exchange Act, subject to some exceptions, places substantial restrictions on the offering of foreign securities in Thailand.

The change is occurring in phases. As one of the early changes, an exception has been made with respect to the offering of foreign mutual funds _ or foreign collective investment schemes, as they are called in the SEC regulations.

Mutual fund management is among the securities businesses regulated under the Securities and Exchange Act. The Act defines mutual fund management as the management of investments under a mutual fund project by issuing investment units of each project for sale to the public, and using the proceeds to invest in, or seek profit from holding securities, derivatives, or any other properties, or to invest in or seek profit by other means.

The law provides that a securities business can be undertaken only by a limited company, a public limited company, or a financial institution established in accordance with other laws, after obtaining a licence from the finance minister on the recommendation of the SEC. The SEC licensing process is quite thorough, and there are numerous restrictions and requirements.

The securities company may set up and manage a mutual fund only when its application to set up the fund has been approved by the SEC in accordance with the regulations of the Capital Market Supervisory Board, which is also an extensive process.

Chapter 3 of the Securities and Exchange Act sets out the basic provisions for public offerings of securities. On the topic of mutual funds, it is written in a way that it does not apply to the offer for sale of newly issued investment units of a securities company licensed to manage mutual funds. However, in the case of a foreign company operating a foreign mutual fund, such company would not have undergone the licensing process, and thus would not be able to avail itself of the exception. Clearly, this would create a barrier to the cross-border offering of mutual funds within Asean.

To address this issue, a special exception exists for collective investment schemes established in certain Asean countries, which have been approved by their home regulators. The exception applies only to Asean countries whose securities regulators are members of IOSCO (the International Organisation of Securities Commissions) and signatories to its multilateral memorandum of understanding on consultation, cooperation and exchange of information.

In brief, the regulation provides an exemption from the requirements of Chapter 3 of the Thai Act, for those foreign collective investments that meet certain conditions. Importantly, all units of such funds can be offered only to institutional or high-net-worth investors (each as defined in SEC regulations).

Among other requirements, the foreign collective investment scheme has to have a brokerage firm (licensed by the Thai SEC) responsible for trading its units in Thailand, as an authorised representative. The fund must also have a representative in Thailand to handle disclosing and sending information to investors, as required by law or regulations of the relevant home regulator.

The local representative must also be appointed to receive notices, orders, warrants, and any other documents, on behalf of the foreign fund or the person responsible for operating it.

To meet the conditions for the exception, the foreign fund must be subject to regulation, which is similar to that provided by the Thai SEC. For example, it must have an investment policy that provides for investment in similar assets and investment ratios for mutual funds under the relevant SEC notification. The foreign fund must have actually been offered for sale in the jurisdiction in which it is regulated by its home regulator, and it must not be subject to a prohibition imposed by the home regulator with respect to trading in units of the scheme.

There are also requirements for the person responsible for undertaking the foreign collective investment scheme. This person must be subject to supervision by its home regulator, and the home regulator must have the authority to impose sanctions or order the responsible person to act or refrain from acting, in the case of any action likely to damage investors' interests. Such person must not be subject to a suspension or revocation order imposed by the home regulator, and must not have a record of violating laws or regulations pertaining to disclosure of material information to investors or to the home regulator.

Securities companies that act as authorised representatives for trading the securities are also subject to their own set of rules. Among these, a securities company may only offer those foreign funds that the Thai SEC has examined, approved and listed on its website. The verification process requires extensive documentation and information.

This regulation is a major step forward, in that it provides a pathway for foreign collective investment schemes to be offered lawfully in Thailand. Although the above is just a summary and other requirements apply, it is evident that the SEC's approach provides for freer trade in financial services, while maintaining investor protection. The ultimate winner is the investor, as more mutual funds will be offered in Thailand from sources across eligible Asean member countries.