

Insider trading: Time for reform and tougher penalties

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Recent headlines in Thailand and abroad have drawn attention to a spate of high-profile cases involving insider trading and the inadequate punitive action that follows. Many have called into question the efficacy of sanctions imposed by the Thai Securities and Exchange Commission (SEC) to deter insider trading. This article will look at the law surrounding insider trading in Thailand, how it is enforced and whether the law is effective.

The Securities and Exchange Act: The Securities and Exchange Act of 1992 clearly prohibits trading on the securities exchange or an over-the-counter centre directly or indirectly "in such a way 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 or she has access by virtue of his or her office or position, and whether or not such act is done for his or her own or another person's benefit, or to disclose such information so that he or she will receive consideration from the person who engages in the aforesaid act".

The Act further defines an insider as:

a director, manager, person responsible for the operation or an auditor of the company;

a person who holds more than 5% of the registered capital of the company;

a state agency personnel or director, manager or officer of the securities exchange or an over-the-counter centre who holds an office or position with access to information which is material to changes in the price of securities; and

any person involved in securities and/or trading securities in the securities exchange or an over-the-counter centre.

Sanctions for insider trading include imprisonment for a term not exceeding two years and/or a fine not exceeding two times the benefit received or which should have been received but not less than 500,000 baht.

The SEC also has the authority to order the offenders to deliver the benefit they gained from trading the securities within a six-month period from the date on which they gained access to the insider trading information.

The company may itself bring an action in court against directors and executives found in dereliction of their duties for disgorgement. A shareholder or shareholders, having the right to vote amounting to not less than 5% of the total voting rights of the company, may also issue a notice to the company to bring the action. If the company fails to bring an action within one month from the date of notice, the shareholder(s) may bring an action on behalf of the company.

Enforcement: The Act has only criminal penalties, and the SEC's role is limited to the preliminary stage of investigation. The SEC determines whether to refer the matter to the Settlement Committee or police for criminal prosecution.

Offences the SEC deems are compoundable and not far-reaching in effect are referred to the Settlement Committee, which has the authority to fine insider trading offenders criminally. The committee comprises three persons appointed by the finance minister, one of whom is an investigating officer under the Criminal Procedure Code. A case is regarded as settled once the offender has paid the fine within the specified period of time.

Offences deemed non-compoundable or where settlement could not be reached or the matter has far-reaching social effect are referred to the police. The SEC does not have power to initiate criminal proceedings against wrongdoers in its own name -- it must file a criminal complaint with the Royal Thai Police for further investigation, in accordance with the Criminal Procedure Code.

After the investigation is completed, the investigating officer will issue an opinion to the public prosecutor making a recommendation for or against prosecution. If the prosecutor decides to prosecute, the matter will go to trial. Only when the case is filed with the Criminal Court are the wheels of criminal justice set in motion.

How effective are the laws? The SEC tends not to pursue criminal proceedings due to the lengthy criminal process, which may not even result in prosecution if the prosecutor or court does not share the SEC's views.

In fact, of the 47 insider trading cases reported by the SEC from 2009-15, only eight criminal complaints were filed, while only two eventually went to trial. The Criminal Court imposed a fine of 1.25 million baht in one case and a jail sentence and fine in the other.

In the context of the recent increase in public awareness of this issue, there may be an impetus for hastening legal reform. The penalties for insider trading are currently inadequate, and urgent reform is needed to instill a greater sense of deterrence.