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# The Evolution of Securities Laws in Thailand

Jinn-Min (Jimmy) Lin

## I. Introduction

Capital markets play an important role in any modern economy. They serve as a large-scale mechanism for the private sector to assimilate funds from dispersed sources of wealth among the general public. The infusion of capital allows companies to expand their operations and grow their businesses to unprecedented levels. This increases profitability, and in turn, accelerates nationwide economic growth. More importantly, aside from paying dividends or repurchasing shares, the capital will continue to remain in the companies as equity. This differs from debt financing where the funds are eventually returned to the investor or financial institution with interest payments. On the flipside, capital markets also provide private investors with more options to make productive use of their savings. This gives the general public an opportunity to participate in the industries and watch their wealth grow along with the economy.

In general, the functioning of capital markets requires a comprehensive and up-to-date system of securities regulation. Without effective laws and sanctions in place, fraud would become rampant and investors would lose faith in the markets. Thus, the primary goal of securities regulation is to prevent such fraud through adequate disclosure, establishment of standards, and prevention of abuses. Once the investors are able to differentiate between trustworthy investments and risky ventures, capital will naturally flow to the more efficient and productive uses. Another important goal of securities regulation is to anticipate and prevent systemic risk. Regulators should proactively address risk factors and impose safeguards against widespread market failure. Finally, as

the market progresses over time, securities regulation must also constantly evolve to address international standards, investment trends, and the constantly-changing risks<sup>1</sup>.

In emerging markets, capital markets and securities regulation become an integral part of economic growth and national development. Thailand is currently the 26<sup>th</sup> largest economy in the world with a gross domestic product of 438 billion USD<sup>2</sup>. The capital markets in Thailand have steadily expanded since the 1960s, channeling domestic funds and foreign investment into Thai industry and commerce. At the same time, securities regulation in Thailand has constantly evolved in response to market demands and the widespread risks stemming from domestic and international financial crises. These changes have focused on investor protection, prevention of systemic risk, and conformity to international standards. Faced with internal pressures and foreign influences, Thai regulators must constantly innovate to keep up with the constantly-changing market conditions.

The rest of the article is organized as follows. Section two briefly reviews the history of securities regulation in Thailand and summarizes the recent amendments to the Securities and Exchange Act B.E. 2535. Section three analyzes the current challenges and obstacles for securities regulation in Thailand. Section four presents different approaches to addressing the problems faced by Thai regulators and discusses countervailing views. Section five concludes and comments on the future of securities regulation in Thailand.

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<sup>1</sup> See generally Zahar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L. J. 711 (2006).

<sup>2</sup> *World GDP Ranking 2017*, Knoema, available at: <https://knoema.com/nwnfkne/world-gdp-ranking-2017-gdp-by-country-data-and-charts>

## II. History of Securities Regulation in Thailand

Under the guidance of foreign advisors, Thai securities laws have made remarkable progress over the past 60 years. The Thai system has been mainly based on the foreign models with a central regulatory agency sharing regulatory responsibility with a dominant stock exchange. In addition, the Asian Financial Crisis of 1997 and Global Financial Crisis of 2007 have also acted as catalysts for the improvement of securities regulation in Thailand. This section summarizes the important changes in Thai securities laws during this period and notes their aggregate effect on the Thai capital markets.

### a. Pre-SEC Regulatory Framework (1963 – 1992)

The roots of modern securities trading in Thailand can be traced back to the founding of the Bangkok Stock Exchange in 1963<sup>3</sup>. It was first established as a limited partnership, but transitioned to a limited company in 1963, adopting the name, Bangkok Stock Exchange Co., Ltd. (the BSE)<sup>4</sup>. However, the BSE lacked official government support, and investors on the whole did not have an adequate understanding of the nature of stock markets. Thus, the BSE had low trading volume and eventually closed down in the early 1970s<sup>5</sup>.

After the failure of the BSE, the Thai Government worked with foreign advisors and the Bank of Thailand to establish a new stock exchange as a quasi-governmental agency. In 1974, the Thai Government passed the Stock Exchange of Thailand Act B.E. 2517 (the '74 Act), which created the Securities Exchange of Thailand (the

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<sup>3</sup> *History & Roles*, Stock Exchange of Thailand Website, available at: [https://www.set.or.th/en/about/overview/history\\_p1.html](https://www.set.or.th/en/about/overview/history_p1.html) (last accessed on April 20, 2018).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

SET)<sup>6</sup>. Subsequently, the Thai Revenue Code was updated and trading officially began on April 30, 1975. In the beginning, trading experienced slow growth and low volumes similar to the predecessor, the BSE. Around 1987, the SET began to mobilize funds from private and corporate savings augmented by international investment on the SET<sup>7</sup>. Thailand attracted foreign capital by liberalizing the financial sector, maintaining high domestic interest rates, and pegging their currency to the US dollar<sup>8</sup>. These measures had a noticeable effect and the SET experienced continued growth during this period. In addition, the SET was also the primary regulator of securities markets until the creation of the Thai SEC in 1992 (discussed below).

**b. SEC Establishment and Early Years (1992 - 1997)**

The Securities and Exchange Act B.E. 2535<sup>9</sup> (the '92 Act) delegated securities regulation responsibility to the newly-created Thai Securities and Exchange Commission (SEC) and tasked it with overseeing securities offerings, initial public offerings, investment companies, takeovers and tender offers in addition to preventing market manipulation and insider trading<sup>10</sup>. The SET, now renamed the “Stock Exchange of Thailand”, instead become the main regulator of the secondary market for the trading of already listed securities. Due to the role of American legal

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<sup>6</sup> *Id.*

<sup>7</sup> Kathryn C. Lavelle, *The Politics of Equity Finance in Emerging Markets* 136-37 (2004).

<sup>8</sup> *Id.*

<sup>9</sup> Securities and Exchange Act B.E. 2535 (1992), *available at*:

[http://www.sec.or.th/EN/SECInfo/LawsRegulation/Pages/Act\\_Royal\\_Enactment.aspx](http://www.sec.or.th/EN/SECInfo/LawsRegulation/Pages/Act_Royal_Enactment.aspx)

<sup>10</sup> *About the SEC*, The Thai Securities and Exchange Commission Website, *available at*:

<http://www.sec.or.th/EN/AboutSEC/Pages/Introduction.aspx#Tabcontent1> (last accessed on April 20, 2018).

scholars in the planning process, this model was largely based on the then prevailing US securities laws.

However, it's worth noting that the Thai securities laws deviated from the US approach in certain aspects<sup>11</sup>. First, the listing mechanism for new Thai securities involved a merit-based approval which differs from the US disclosure model<sup>12</sup>. The newly-created Thai SEC would evaluate the new companies and assess potential risks before approving them to list on the SET and issue stock. Second, the SEC commission members were directly appointed by various government agencies which could easily exert their influence on securities policies<sup>13</sup>. Finally, the Thai SEC was initially unable to bring civil cases like its US counterpart. Their scope of enforcement was limited to criminal and administrative sanctions<sup>14</sup>.

In the years following the creation of the Thai SEC, foreign investors were attracted by abundant cheap labor in Thailand as well as the growing manufacturing and construction industries. Now, with an investment framework and new regulations in place, foreign capital flooded into the Stock Exchange of Thailand<sup>15</sup>. From 1992 to 1994, the number of listed companies per million people in Thailand spiked from 5.45 to 28.76<sup>16</sup>. Even with a shockingly high average GDP growth rate of 8.5%, the stock market capitalization to GDP ratio rapidly climbed from 43.12% to 88.2% during this period<sup>17</sup>. By 1996, foreign reserves exceeded \$32 billion,

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<sup>11</sup> See Pises Sethsathira, *Securities Regulation in Thailand: Laws and Policies*, 4 PAC. RIM L. & POL'Y J. 783 (1995).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See Chris Baker & Pasuk Phongpaichit, *Thailand's Boom and Bust: Revised Edition* (1998).

<sup>16</sup> *Number of Listed Companies for Thailand*, Fred Economic Data, available at: <https://fred.stlouisfed.org/series/DDOM01THA644NWDB> (last accessed on April 22, 2018).

<sup>17</sup> *Stock Market Capitalization to GDP for Thailand*, FRED Economic Data, available at: <https://fred.stlouisfed.org/series/DDDM01THA156NWDB> (last accessed on April 22, 2018).

unemployment was at 2%, and inflation was 4.9%<sup>18</sup>. Overall, favorable conditions for foreign investment combined with a robust system for securities regulation helped Thailand skyrocket to become one of the “Asian Tigers” of the era.

**c. Asian Financial Crisis and Legal Reform (1997 - 2008)**

From 1997 to 1998, Thailand was hit hard by the Asian Financial Crisis. Increasing competition from China, a slowdown in the construction industry, and a rapid devaluation of the Thai Baht had created unfavorable conditions for sustainable economic growth<sup>19</sup>. Large loans had been extended to large family businesses with deep connections in the government without adequate assessment of credit risks<sup>20</sup>. With a lack of transparency, abuse of minority shareholders, and even fraudulent accounting practices, multiple businesses found themselves suddenly unable to fulfill their debt obligations<sup>21</sup>. Foreign investors and creditors began a rapid withdrawal of capital, leading to a large-scale implosion of the Thai investment economy. The effects on the stock market were devastating: the SET Stock Market Index plummeted from a high of 1385 at the start of 1996 to a record low of 231 in 1998<sup>22</sup>. Securities regulation had failed to protect shareholders from substantial losses, and the stock market crashed due to investor panic and mistrust<sup>23</sup>. To make

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<sup>18</sup> Jeffrey Hays, *Economic History of Thailand, Post-War Boom and the Thaksin and Post-Thaksin Years* (2008).

<sup>19</sup> See Narisa Laplamwanit, *A Good Look at the Thai Financial Crisis in 1997-98*, Columbia University Report (Fall 1999), available at: [http://www.columbia.edu/cu/thai/html/financial97\\_98.html](http://www.columbia.edu/cu/thai/html/financial97_98.html)

<sup>20</sup> Arthur M. Mitchell & Clare Wee, *Corporate Governance in Asia Today and Tomorrow*, 38 INT'L L. 1, 3-4 (2004).

<sup>21</sup> Scott B. MacDonald, *Transparency in Thailand's 1997 Economic Crisis: The Significance of Disclosure*, 38 Asian Surv. 688, 689 (1998).

<sup>22</sup> *Thailand SET Index*, Market Watch, available at:

<https://www.marketwatch.com/investing/index/set?countrycode=th>

<sup>23</sup> See Laurids S. Lauridsen, *The Financial Crisis in Thailand: Causes, Conduct and Consequences*, 26 WORLD DEV. 1575-91 (1999).

matters worse, there were no successful prosecutions for securities fraud or insider trading, and investors had no viable legal recourse to seek compensation.

In response to the crisis, the Thai Government increased taxes, cut public spending, privatized several state-owned businesses, and raised interest rates<sup>24</sup>. The rampant abuses and lack of transparency in the stock market also led to the 1999 and 2003 amendments to the '92 Act, seeking to conform Thai securities law to what was deemed to be the international best practices set forth in the Washington Consensus<sup>25</sup>. These standards, advocated by the US, the IMF, and the World Bank, were based on the concept of efficiency in the free market. The approach primarily involved disciplining corporate management and providing information for investors to make rational decisions<sup>26</sup>. This would entail improving the quality of accounting and disclosure through tighter regulation and better oversight by regulators, independent company directors and auditors<sup>27</sup>.

With the amendments to the '92 Act, the SEC departed from its initial merit-based approval process for new companies wishing to list on the SET. Instead, the SEC allowed these companies to directly list upon meeting certain disclosure requirements. They would then be subject to heightened scrutiny regarding the timeliness and accuracy of their statements<sup>28</sup>. In 1998 alone, the SEC required 38 listed firms to revise their financial statements, penalized 79 companies for late or faulty disclosure, and fined 14 securities companies a total of 15.5 million baht<sup>29</sup>. The

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<sup>24</sup> *Id.*

<sup>25</sup> John Fagan, *The Role of Securities Regulation in the Development of the Thai Stock Market*, 16 COLUM. J. ASIAN L. 303, 312 (2003).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Shawn W. Crispin & Mark Mitchell, *Market Free for All*, FAR EASTERN ECON. REV. (June 1, 2000).

<sup>29</sup> Matthew Montagu-Pollock, *Thai Stock Market Cleans Up Its Act*, AsiaMoney (May 2000).

SEC also required listed companies to form independent audit committees by the beginning of 2000 to scrutinize company disclosures and accounting procedures while pushing firms to appoint at least two independent directors to their boards<sup>30</sup>. These measures resulted in a slow, but steady recovery, with the SET Index climbing to 525 in 1999, then dipping down a bit before hitting 753 at the start of 2004<sup>31</sup>.

With securities regulation on the right track, the SEC turned its attention to the regulation of derivatives, such as futures, options, swaps and other financial instruments. In 2003, the Derivatives Act B.E. 2546<sup>32</sup> (the '03 Act) was promulgated to increase protection for investors, and it established the Thailand Futures Exchange (the TFEX) in 2004 under the supervision of the SEC. The goals of the TFEX are to provide investors, fund managers, financial institutions and the general public with the necessary tools to manage their portfolios effectively<sup>33</sup>. In addition to licensing and registration requirements, the '03 Act also has provisions about the reporting, operator shareholding/personnel requirements, operational restrictions, sales practices, unfair practices, risk management/disclosure, advertisements, client asset management and protection, financial integrity, audit control, and civil/criminal sanctions<sup>34</sup>.

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<sup>30</sup> *Id.*

<sup>31</sup> Market Watch, *supra* note 22.

<sup>32</sup> Derivatives Act B.E. 2546, *available at*:

[www.sec.or.th/EN/SECInfo/LawsRegulation/Documents/actandroyal/deri\\_act\\_codified\\_en.pdf](http://www.sec.or.th/EN/SECInfo/LawsRegulation/Documents/actandroyal/deri_act_codified_en.pdf)

<sup>33</sup> See Patcharaporn Pootranon & Nattaya Tantirangsi, *Capital Markets Review – Thailand*, Weerawong, Chinnavat & Partners Ltd. Report (2017), *available at*: [www.weerawongcp.com/data/know/72.pdf](http://www.weerawongcp.com/data/know/72.pdf)

<sup>34</sup> Dennis Campbell, *International Protection of Foreign Investment*, Volume II, THA 2-3 (2009).

#### d. Recent Amendments and Developments (2008 - )

In the last ten years, the Thai Government has continued to improve its securities laws to address potential risks and perceived problems. The US Subprime Mortgage Crisis in 2007 had led to a worldwide recession, prompting many governments to update their securities laws. In the US, the Dodd-Frank Act of 2010 created a new oversight council to oversee risk, vamped up disclosure and transparency requirements for securities, and introduced a whistleblower program to expose corporate fraud<sup>35</sup>. The Thai Government was quick to respond to the Global Financial Crisis of 2007 with “vigorous fiscal pump priming”<sup>36</sup>, and their economy did relatively well with the exception of lowered exports and the withdrawal of some foreign companies. Nevertheless, the Thai SEC sought to follow the developments of international best practices and updated the Thai securities laws accordingly.

In 2008, the '92 Act was amended once again to enhance investor protection and support effective enforcement of securities laws<sup>37</sup>. The amendments imposed stringent fiduciary duties for the directors and management of listed companies, enabled minority shareholders to bring derivative suits and civil actions, and required mandatory approval for transactions with related parties<sup>38</sup>. On the enforcement side, the securities laws protected whistleblowers and rewarded them with up to 30% of

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<sup>35</sup> See generally *Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, Davis Polk Report (July 21, 2010), available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h4173enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt.pdf)

<sup>36</sup> Shawn W. Crispin, *Eye on Thailand: The Global Financial Crisis*, The Green Political Foundation (February 19, 2009), available at: <https://www.boell.de/en/navigation/economy-6199.html>

<sup>37</sup> Yingyong Karnchanapayap, *Amendments to the Securities and Exchange Act B.E. 2535 (A.D. 1992)*, Tilleke and Gibbins Report (December 2008), available at: <http://www.tilleke.com/resources/amendments-securities-and-exchange-act-be-2535-ad-1992>

<sup>38</sup> *Id.*

the related fines<sup>39</sup>. A new Capital Markets Supervisory Board (CMS Board) was created to assist the SEC in governing day-to-day operational matters such as securities businesses, securities offerings, and tender offers<sup>40</sup>. On top of that, new criteria were established for SEC and CMS Board member selection, adjusting their composition, individual qualification requirements and terms of office<sup>41</sup>.

The next set of amendments to the '92 Act came in 2016. These changes focused on market misconduct by defining a clearer scope for insider trading and price manipulation rules<sup>42</sup>. New civil sanctions and procedures were also provided for these offenses. This was deemed to be an important improvement to enforcement mainly because civil suits have a lower burden of proof and lead to a much faster penalty. Furthermore, the amendments expanded the range of persons who would fall under insider trading restrictions<sup>43</sup>. Rather than just those who are employed by the listed company, anyone who exploits the confidential information for personal gain as well as those who held and dispersed the inside information could be found liable<sup>44</sup>. On top of that, the Thai SEC also issued a notification regarding bans for individuals found guilty of certain unfair trading offenses from being directors or executives in issuing or listed companies for 3 years<sup>45</sup>.

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *National Legislative Assembly Approves New Amendments to Securities Law*, SEC News Release No. 86/2016, available at:

[http://www.sec.or.th/en/Pages/News/Detail\\_News.aspx?tg=NEWS&lg=en&news\\_no=86&news\\_yy=2016](http://www.sec.or.th/en/Pages/News/Detail_News.aspx?tg=NEWS&lg=en&news_no=86&news_yy=2016)

<sup>43</sup> Sasithorn Ongdee, *SEC Given More Legal Power*, *The Nation* (September 17, 2016), available at:

<http://www.nationmultimedia.com/news/business/EconomyAndTourism/30295527>

<sup>44</sup> *Id.*

<sup>45</sup> Theppachol Kosol & Boonyaporn Donnapee, *Thai SEC Imposes Immediate Ban on Fined Unfair Trading Directors and Executives*, *Baker McKenzie Global Compliance News* (September 7, 2016), available at:

<https://globalcompliancenews.com/sec-imposes-immediate-ban-fined-unfair-trading-directors-executives-20160907/>

During this period, the SET index nearly quadrupled, rebounding from the mid-400s to a high of 1804 on April 23, 2018<sup>46</sup>. In 2017, the Stock Exchange of Thailand had a total of 656 listed companies and a market capitalization of 437.4 billion USD<sup>47</sup>. While the capital markets in Thailand have definitely come a long way since their humble beginnings, various systemic and regulatory problems persist in Thai securities regulation (later discussed). In addition, the future of Thailand's economy remains uncertain as crude oil prices fluctuate and a trade war between China and the US looms in the distance<sup>48</sup>. The evolution of Thai securities laws is far from complete, and much room for improvement remains.

### **III. Current Challenges for the Thai Securities Market**

In the introduction, we discussed how the core aims of securities regulation are protecting investors, promoting efficient use of capital, and preventing systemic loss. Within Thailand's regulatory landscape, these aims are threatened by enforcement obstacles and weak corporate governance. External factors such as new technologies and political instability also create unique challenges for Thai regulators. In this section, we discuss the root causes of these problems and how they affect the development and utilization of capital markets in Thailand.

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<sup>46</sup> Market Watch, *supra* note 22.

<sup>47</sup> *Stock Exchange of Thailand*, Sustainable Stock Exchanges Initiative Website, *available at*: <http://www.sseinitiative.org/fact-sheet/set/> (last accessed on April 23, 2018).

<sup>48</sup> *Win Streak Expected to End for the Thai Stock Market*, NASDAQ (April 2, 2018), *available at*: <https://www.nasdaq.com/article/win-streak-expected-to-end-for-thai-stock-market-20180402-01152>

**a. Enforcement Obstacles**

Despite steady growth in the stock market, actual enforcement under the amended securities laws have had limited success. Out of the 47 insider trading cases reported by the Thai SEC from 2009-2015, only eight criminal complaints were filed, while only two actually went to trial<sup>49</sup>. The Thai Criminal Court imposed a fine of 1.25 million baht in one case and a jail sentence and fine in the other<sup>50</sup>. In contrast, the US SEC filed a total of 754 enforcement actions in 2017 alone<sup>51</sup>. While the US SEC manages a far larger and more complicated securities market, this sharp contrast in enforcement activity reflects the difficulties faced by Thai authorities in responding to violations of securities laws.

In 2002, the Thai SEC filed an enforcement action against executives of the Brinton group who engaged in boiler room operations, selling worthless shares of overseas companies at inflated prices<sup>52</sup>. Thai prosecutors found evidence that the Brinton representatives were unqualified to sell securities and give investment advice. Despite domestic and international pressures, the Thai prosecutors were unable to meet the high burdens of proof for criminal convictions of these executives. It is said that there is a “traditional reluctance in Thailand to prosecute elite members of society, such as business or political leaders, for any crimes whatsoever, let alone a crime so difficult to prove as securities fraud<sup>53</sup>.” More recently in 2016, the chairman of Siam Global House Public Company Limited (GLOBAL) was alleged to be in

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<sup>49</sup> Cynthia M. Pornavalai, *Insider Trading: Time for Reform and Tougher Penalties*, Bangkok Post (May 2, 2016), available at: <http://www.tilleke.com/resources/insider-trading-time-reform-and-tougher-penalties>

<sup>50</sup> *Id.*

<sup>51</sup> *Division of Enforcement 2017 Annual Report*, US SEC Website, available at: [www.sec.gov/files/enforcement-annual-report-2017.pdf](http://www.sec.gov/files/enforcement-annual-report-2017.pdf)

<sup>52</sup> *Conviction on Boiler Room Case—The Brinton Group*, Thai SEC Press Release No. 42/2004.

<sup>53</sup> Fagan, *supra* note 25, at 331.

violation of the insider trading under the '92 Act<sup>54</sup>. While criminal convictions are unlikely to happen, under the new amendments to the '92 Act, the SEC was fortunately able to impose administrative fines for those who abused the confidential information and also ban a perpetrator from assuming executive roles in the financial sector for three years<sup>55</sup>.

These difficulties arise from various factors. First of all, similar to the US, criminal charges must be proven “beyond a reasonable doubt”<sup>56</sup>. This makes it almost impossible to establish scienter in securities fraud, insider trading, and market manipulation cases without any hard evidence. Second, even if there is sufficient evidence to prove misdealing or securities fraud, public prosecutors, either because of a lack of experience or a lack of incentive to prosecute the well-connected elites, eventually drop the cases<sup>57</sup>. Finally, while the 2016 amendments introduced administrative fines and other direct sanctions, it is unclear whether they actually result in effective deterrence. In addition, there is the concern that penalties such as suspending trading or removal of certain officers might actually harm the stockholders more than the violators<sup>58</sup>.

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<sup>54</sup> Thailand Fines Executives for Insider Trading, Reuters (March 26, 2016), *available at*: <https://www.reuters.com/article/thailand-insider-trading/thailand-fines-executives-for-insider-trading-idUSL3N16O3WS>

<sup>55</sup> *Id.*

<sup>56</sup> Fagan, *supra* note 25, at 327-28.

<sup>57</sup> See Nisha Kanchanapoomi, *Accelerating Corporate Governance Reform in Thailand: The Benefits of Private Reform Mechanisms*, 15 S. CAL. INTERDISC. L.J. 165 (2005).

<sup>58</sup> Fagan, *supra* note 25 at 329-30.

## b. Weak Corporate Governance

Outside of government intervention and enforcement, corporate governance can also act as an effective mechanism to prevent abuses in the capital markets.

However, in Thailand, dispersed shareholder ownership is uncommon, and the controlling shareholders tend to operate companies to secure profits for themselves and other insiders often at the expense of minority shareholders<sup>59</sup>. These controlling shareholders typically consist of members from dominant and well-connected business families in Thailand. While Public Limited Company Act B.E. 2535<sup>60</sup> contains various shareholder rights, such as shareholders' meetings, proxy voting, and election of directors, in the end, the decisions of independent directors and audit committees are often heavily influenced by these dominant families<sup>61</sup>.

Under these circumstances, retail investors have little incentive to engage in long-term investment and participate in corporate management. Thai investors are thus unlikely to take on an activist role to resist abuses of securities laws. Furthermore, the cost of seeking legal redress for individual investors is prohibitively high, and mechanisms for overcoming collective action problems are relatively new and limited. As such, short-term speculation becomes the best way for these investors to reduce the risk of losing their investment<sup>62</sup>. Few investors have the incentive to engage in fundamental analysis of business models and profitability, leading to a

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<sup>59</sup> See J. Thomas Connelly et al., *Corporate Governance, Family Ownership and Executive Compensation: Evidence from Thailand* (2015).

<sup>60</sup> Public Limited Company Act B.E. 2535 (1992), available at: [http://www.dbd.go.th/dbdweb\\_en/ewt\\_news.php?nid=3932](http://www.dbd.go.th/dbdweb_en/ewt_news.php?nid=3932)

<sup>61</sup> Fagan, *supra* note 25, at 332.

<sup>62</sup> Fagan, *supra* note 25, at 343.

general disregard for accurate disclosures and transparency<sup>63</sup>. This lack of due diligence results in a vicious cycle as more abuses go undetected and retail investors have even less incentive to invest in the capital markets<sup>64</sup>.

### c. Emerging Technologies and Political Instability

Technological change presents another unique and formidable challenge for Thai securities regulators. Cryptocurrencies have rapidly gained popularity among investors worldwide with securities and tax laws rushing to catch up. Initial coin offerings (ICOs) closely resemble the issuance of new securities fundraising for a project<sup>65</sup>, and governments are now struggling to regulate ICOs to prevent fraud and protect investors. The US SEC has snared cryptocurrencies under the *Howey Test* as an “investment contract” and has constantly been releasing additional guidance on the matter<sup>66</sup>. In Thailand, J Ventures recently became the first Thai company to launch a successful ICO, raising 660 million baht within 55 hours. The Thai government subsequently put all ICO-related processes on hold before regulations and enforcement can catch up with the developments<sup>67</sup>. In March, a draft decree has just been issued to define cryptocurrencies and digital tokens<sup>68</sup>, but many questions remain unanswered. As it may take years for the regulatory authorities to approve

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<sup>63</sup> Celia R. Taylor, *Capital Market Development in the Emerging Markets: Time to Teach an Old Dog Some New Tricks*, 45 AM. J. COMP. L. 71 (1997).

<sup>64</sup> Nisha, *supra* note 57.

<sup>65</sup> Bitcoin Magazine, *What is an ICO?*, NASDAQ Website (August 10, 2017), available at:

<https://www.nasdaq.com/article/what-is-an-ico-cm830484>

<sup>66</sup> Michael Del Castillo, *A 'Howey Test' for Blockchain? Why the SEC's ICO Guidance Isn't Enough*, CoinDesk (August 6, 2017), available at: <https://www.coindesk.com/every-token-snowflake-secs-ico-guidance-isnt-enough/>

<sup>67</sup> Stephen O'Neal, *Thailand's Government Battle With Crypto Enters Decisive Phase*, CoinTelegraph (March 21, 2018), available at: <https://cointelegraph.com/news/thailands-government-battle-with-crypto-enters-decisive-phase>

<sup>68</sup> Kevin Helms, *Thailand Approves Draft Decree on Crypto*, Bitcoin News (March 30, 2018), available at: <https://news.bitcoin.com/thailand-approves-draft-decree-crypto/>

such digital asset transactions, progress is impeded and investment opportunities lost.

Political instability poses yet another external threat for the capital markets of Thailand. Since 1932, when the absolute monarchy was abolished, Thailand has had 25 general elections and 19 coups d'état, 12 of them successful<sup>69</sup>. Due to frequency of these military coups, the markets and currency are accustomed to the transitions of power and do not experience large fluctuations<sup>70</sup>. However, with the formation of each new government, new ministers are appointed and legal reform is initiated to address alleged corruption issues. During the transition phase, securities enforcement and various capital markets operations are put on halt. As such, the political instability constantly affects the effectiveness of securities laws in Thailand and impedes the progress of new regulation. As securities laws lag behind, foreign capital flows away to nearby countries and Thai companies may even start considering cross-listing their shares on foreign exchanges instead<sup>71</sup>.

#### **IV. Solutions and Implementation**

The unique challenges for Thai securities regulation require tailored solutions, taking into account the ownership structures of Thai companies, judicial systems, local business culture, and existing laws. Simply put, we cannot simply transplant the securities laws of other developed capital markets, hoping to achieve identical results. In this section, we

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<sup>69</sup> Patrick Brown, *Thailand's 19th Coup Underscores Country's Fatal Flaw*, CBC (May 30, 2014), available at: <http://www.cbc.ca/news/world/thailand-s-19th-coup-underscores-country-s-fatal-flaw-1.2658846>

<sup>70</sup> Linda Yueh, *Thailand Coup: Effect on the Markets*, BBC News (May 23, 2014), available at: <http://www.bbc.com/news/business-27537580>

<sup>71</sup> John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757 (2002).

discuss the recent efforts made by the Thai government in responding to the problems and threats within their capital markets. We then propose changes and new initiatives to address these issues, referencing the approaches taken by other countries while also considering the unique characteristics of the capital markets in Thailand.

#### **a. New Tools for Enforcement**

As discussed in the last section, successful enforcement of securities laws is impeded by the difficulty of criminal convictions, the relative inexperience of Thai prosecutors, and the ineffectiveness of administrative sanctions. Recent amendments to the Thai securities laws have provided monetary penalties and suspension of professional licenses as options for some regulatory enforcement<sup>72</sup>. These act as far more effective enforcement tool because they can target a wider range of offenders and do not require “proof beyond a reasonable doubt” as for criminal charges. Also, these penalties are less costly to implement and may even result in administrative revenue in the case of monetary fines. Therefore, the Thai government should make these penalties available for more types of offenses and also calculate amounts according to the severity of the offense and the profitability of the company. These enforcement tools should not replace criminal prosecutions, but instead, be implemented together with existing sanctions.

However, regulators must abide by certain principles when utilizing these administrative sanctions<sup>73</sup>. There should be clear guidance on the use of monetary

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<sup>72</sup> *Administrative Sanction*, Thai SEC Website, available at: <http://www.sec.or.th/EN/Enforcement/Pages/AdministrativeSanction.aspx> (last accessed on April 24, 2018).

<sup>73</sup> See Sakda Thanitcul & Tir Srinopnikom, *Monetary Penalties: An Empirical Study on the Enforcement of Thai Insider Trading Sanctions*, *Kasetsart Journal of Social Sciences* (March 9, 2018), available at: <https://www.sciencedirect.com/science/article/pii/S2452315117301571>

penalties and a clear range of discretion for regulators<sup>74</sup>. In addition, the regulator should not receive any benefit from the offender's payment, and the offender should be given an adequate opportunity to appeal these sanctions<sup>75</sup>.

Another way to overcome the hurdles of criminal prosecution for securities violations is for the SEC itself to initiate civil suits. This has become a possibility under the recent amendments to the '92 Act in 2016<sup>76</sup>. Under the new law, the Civil Sanction Committee will allow the SEC to pursue civil cases for certain types of violations<sup>77</sup>. Recently in September 2017, the Civil Sanction Committee imposed a civil sanction of 500,000 baht on a director of Siam Sport Syndicate Public Company Limited for a securities purchase based on a non-disclosed, material fact. The civil sanctions work to supplement administrative penalties by targeting certain offenses that require more proof and due process. To effectively utilize this tool, the government must clearly define the punishable offenses and hire experts in this field to track down and pursue claims.

However, like administrative fines, these sanctions generate revenue for the government but fail to compensate shareholders and parties harmed by the violation. This leads to our next recommendation on class actions. In 2015, the civil procedure rules of Thailand were modified to allow class actions for the first time in Thai history<sup>78</sup>. In class actions, members of a class are effectively automatically

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Enforcement*, Thai SEC Official Website, available at:

<http://www.sec.or.th/EN/Enforcement/Pages/Introduction.aspx> (last accessed on April 25, 2018).

<sup>77</sup> *Id.*

<sup>78</sup> Peter Shelford & Soham Panchamiya, *Class Actions Lawsuits Have Arrived in Thailand*, DLA Piper Report (November 7, 2016), available at: <https://www.dlapiper.com/en/australia/insights/publications/2016/11/class-actions-lawsuits-have-arrived-in-thailand/>

represented in the relevant litigation case unless a member exercises their option to exit the class<sup>79</sup>. This overcomes collective action problems and the financial difficulties for individual plaintiffs to seek remedies and compensation. These mechanism is especially effective for securities violations where a large class of plaintiffs were harmed, such as in insider trading, securities fraud, and even market manipulation. In the early years of class action litigation in Thailand, lawyers may be reluctant to take these cases because they have little precedent to work with. Thai law should thus incorporate certain features to facilitate this process, such as extending standing to subsequent holders of securities, stretching statute of limitations, and allowing higher contingent fees for lawyers taking these cases. Although this may result in higher insurance premiums for companies exposed to new risks<sup>80</sup>, this actually forces the companies to internalize the negative externalities caused by their riskier operations and mismanagement.

#### **b. Empowering Minority Shareholders**

In companies with dispersed ownership, minority shareholders can assume activist roles to investigate fraudulent activity, report abuses, and even bond together to steer the company away from potential securities violations. However, these roles will not take effect if shareholder rights under the Public Limited Company Act are nullified by unduly influenced independent directors and audit committees.

Empowering these minority shareholders works to reinforce existing securities laws

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<sup>79</sup> *Id.*

<sup>80</sup> Kasamesunt Teerasitsathaporn, *Class Actions Arrive in Thailand: Will the Law of Unintended Consequences Prevail?*, Bangkok Post (May 15, 2015), available at: <http://www.tilleke.com/resources/class-actions-arrive-thailand-will-law-unintended-consequences-prevail>

and enable them to take on these activist roles<sup>81</sup>. After all, the primary purpose of securities regulation is to protect investors, and what better way is there than to give them tools to protect themselves?

The easiest way to empower these outside shareholders is to grant them additional rights to compensate for their relative lack of power. These could include guaranteeing them extra seats on the board, allowing them to veto certain related-party transactions, and giving them higher sums of compensation if oppressed. However, this may backfire if the minority uses these heightened rights to influence corporate policy for their own personal gain. A different approach involves incentivizing institutional investors to purchase minority stakes in companies. These institutional investors, such as funds or investment banks, are capable of conducting detailed analyses and exercising shareholder rights to protect their investment<sup>82</sup>. Furthermore, they will be more likely to demand enforcement for violations and protest undue influence in committees<sup>83</sup>. On the other hand, the companies are also more willing to cooperate with these institutional investors to utilize their business connections and professional expertise both domestically and overseas. These new investors can be brought in through the availability of better enforcement tools (discussed in the previous subsection), mandatory ownership thresholds, tax incentives, or a combination of any of the above.

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<sup>81</sup> Mary Siegel, *Fiduciary Duty Myths in Close Corporate Law*, 29 DEL. J. CORP. L. 377 (2004).

<sup>82</sup> See Yunyong Thaicharoen & Nasha Ananchotikul, *Thailand's Experiences with Rising Capital Flows: Recent Challenges and Policy Responses*, 44 *Financial Globalisation and Emerging Market Capital Flows* 427 (2008).

<sup>83</sup> *Id.*

### c. Self-Regulating Organizations

Self-Regulating Organizations (SROs) are one way for the system to respond quickly to recent developments, independent of political changes in the government. As they consist of industry participants who have direct knowledge of the risk and costs of the new issues, they will be able to promulgate more efficient rules without the expensive oversight and delay of government regulators<sup>84</sup>. Across the globe, the allocation of securities regulation responsibility between centralized regulators and SROs depend on factors such as market history, business culture, legal system, the concept of public interest, the corporate form, the political system, forces of internationalization<sup>85</sup>. Thus, there is no definite answer as to how SROs should be utilized in securities regulation.

In the case of Thailand, where securities laws have lagged behind and the government is constantly overthrown, SROs have the potential to take on an extremely important role. The two main SROs for Thai securities are the Thai Bond Market Association (ThaiBMA)<sup>86</sup> and the Association of Thai Securities Companies (ASCO)<sup>87</sup>. Thai BMA monitors the conduct of its bond traders to prevent unfair trading and establish good market practices. ASCO supervises securities dealers and brokers in addition to issuing rules subject to the approval of the SEC or SET. Both SROs may enforce their rules through disciplinary action, including but not limited to warnings, probations, fines, suspension, and revocation of licenses. These

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<sup>84</sup> Cally Jordan & Pamela Hughes, *Which Way for Market Institutions: The Fundamental Question of Self-Regulation*, 4 BERKELEY BUS. L. J. 205 (2007).

<sup>85</sup> *Id.*

<sup>86</sup> *About ThaiBMA*, ThaiBMA Official Website, available at: <http://www.thaibma.or.th/EN/About/Background.aspx> (last accessed on April 26, 2018).

<sup>87</sup> *ASCO Profile*, ASCO Official Website, available at: <http://www.asco.or.th/about.php> (last accessed on April 26, 2018).

associations are also engaged in actively education investors and professionals regarding market trends, current issues, and ethical conduct. While the two Thai securities markets SROs have only taken on these self-regulatory roles in the past decade, they are rapidly gaining traction and expanding their operations.

By allocating more responsibility to these two SROs, the capital markets in Thailand can take advantage of their specialized expertise and efficiency in regulation<sup>88</sup>. The self-regulating role can be further reinforced by allowing SROs to issue temporary, but binding rules before the SEC promulgates official regulations on new issues. The SROs should also be given a degree of policing power and adequate resources to initiate enforcement action. On the other hand, SROs have been criticized for lacking transparency and creating conflicts of interest<sup>89</sup>. To address these concerns, the SROs should be required to provide detailed reports behind their proposals to both the government agencies and the general public. The affiliations and personal investments of independent directors and arbitrators should be scrutinized before they assume their roles and constantly monitored. Finally, the various regulatory and self-regulating entities will need to coordinate the allocation of authority so as to prevent jurisdictional overlap and other redundancies.

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<sup>88</sup> See John Carson, *Self-Regulation in Securities Markets*, World Bank Policy Research Working Paper (January 2011), available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/3313/WPS5542.pdf>

<sup>89</sup> Sherree DeCovny, *The Future of Self-Regulatory Organizations*, CFA Institute Magazine (May/June 2014)

## V. Conclusion

Since 1963, capital markets in Thailand have grown rapidly and there have been major changes to Thai securities laws. The Securities and Exchange Act B.E. 2535 (1992) created the Thai SEC and established a regulatory framework for securities listing, disclosure, and enforcement. In recent years, there have been five major amendments to the '92 Act, responding to global financial crises and reflecting international best practices. However, Thai regulators have been faced with various enforcement obstacles while weak corporate governance exacerbates fraud and other abuses. In addition, securities regulation been slow to respond to fast-paced market changes and emerging technologies. To add to the struggle, frequent military coups and administrative shutdowns have further stalled innovation and plans for progress.

To respond to these ongoing problems, this paper presents a three-pronged approach. First, Thai regulators must utilize new tools for enforcement, such as monetary penalties, class actions, and civil sanctions. In doing so, clear guidelines must be established, and the shareholders must be incentivized and educated to make use of these new remedies. Second, we can address weak corporate governance by empowering minority shareholders to fulfill their monitoring and balancing roles. This can be done either through changes to the Public Limited Company Act or having large institutional investors acquire minority stakes. Lastly, with their efficiency and professional expertise, self-regulating organizations in the securities market can respond quickly to new changes while isolated from political instability. Thai regulators should allocate more responsibility to these organizations while maintaining transparency and avoiding conflicts of interest.

While securities regulation in Thailand has come a long way since its humble beginnings, there are still many opportunities for improvement. The three-pronged approach will address the current challenges faced by Thai regulators and help to ensure

investor protection, market efficiency, and prevention of systemic failure. However, the future remains uncertain for Thai securities markets, as they are faced with a wide range of international and domestic pressures. As such, the evolution of securities laws in Thailand is not complete, nor will it ever be. Overall, Thai regulators must constantly innovate to keep up with the new changes, keeping in mind the unique business culture, judicial systems, and existing laws of Thailand.