CHAPTER 5
DUTIES OF DIRECTORS AND RIGHTS OF SHAREHOLDERS

In this Chapter, we try to bring together the law relating to the duties of directors in private and public companies, and the corresponding rights of shareholders. This chapter should be cross-referenced to the matters discussed in Chapter 4. Business Organisations.

Liabilities of directors in private companies

Appointment and status of directors Directors must comply with the following requirements:

1. A director may only be appointed by a general meeting of the shareholders of a company. If there is a vacancy in the board of directors, the remaining directors may, unless prohibited by the company's articles of association, fill the vacancy for the unexpired term of that director.

2. A person who is twenty years of age, not incompetent or bankrupt, whether Thai or foreign, resident or non-resident, may be a director.

3. In a few special cases, the law requires that a company has a specified number of Thai and/or resident directors. For example, there are director nationality requirements for: companies engaged in businesses listed under Schedule 2 of the Foreign Business Act, telecommunications companies involved in holding a #2 or #3 license under the Telecommunications Act, and banks and financial institutions. As to public companies, a majority of the directors must be resident in Thailand.

4. In companies formed under the US –Thailand Treaty of Amity (see Chapter 2 *The United States - Thailand* Treaty *of Amity*) a majority of directors must be American or Thai nationals.

5. Only a general meeting of the shareholders may remove a director. However a director is automatically removed, if he becomes incompetent or bankrupt.

There is no such thing as a nominee director - all directors have legal duties and responsibilities.

Term of office Directors are normally elected for a three-year term but at least one third of the directors must retire annually. A retiring director is eligible for re-election. Some companies, to avoid difficult calculations, require that all the directors resign annually and then stand for re-election.

In the case of public companies, directors are elected by the shareholders at a general meeting. They may be removed from the Board by a resolution passed by 75% of the shareholders.

Directors as employees Directors are not considered to be employees, except where remuneration is paid periodically. Directors who are employees are entitled to compensation and severance pay and other benefits that employees are entitled to under the Labor Protection Act and associated legislation. Foreign directors who act as directors in Thailand require work permits. This rule is not strictly enforced for directors who do not act as employees, but there have been cases to the contrary. Foreign directors who sign certain documents, such as applications for telephone lines or customs card applications, must have a work permit for the company involved, otherwise the application will not be accepted by the governmental agency concerned.

Compensation Directors who act only as directors (rather than as employees) are only entitled to compensation approved by the shareholders, but may be entitled to expenses they incur on behalf of the company.

Authorized directors The board of directors, as a whole, has power to manage the company but the company may appoint one or more directors in any combination, to manage the company and to bind the company by their signatures. The powers of the directors who may bind the company are described in the company certificate (affidavit) issued by the Ministry of Commerce, upon which the public may rely.

Duties of a director The fundamental duty of a director is that he must in the management of the company and in his conduct of business, apply the diligence of a careful businessman. In addition, a director:

1. must not undertake commercial transactions of the same nature as, and competing with, that of the company, either on his own account or that of a third person, and

2. may not be a partner with unlimited liability in another commercial concern carrying on a business of the same nature as or competing with that of the company.

A general meeting of shareholders may pass a resolution permitting any director to undertake such commercial transactions, or allow a director to be a partner with unlimited liability in such other business entities. Such a waiver of conflict of interest may also be included in a company's articles of association.

Additional duties of directors Directors have joint responsibility to ensure that:

1. Payment for shares is made by the shareholders.

2. The regular keeping of books and documents prescribed by law.

3. The proper distribution of dividends and interest as prescribed by law.

4. The proper enforcement of resolutions of general meetings.

Duties of directors of public companies The directors of public companies are subject to different, more detailed and onerous duties: they have a duty to observe the Public Companies Act, the company's objects and articles of association. Directors may not engage in any business in competition with the company. Where a director purchases or sells property or does any business with the company, such transactions do not bind the company, unless approved by the board of directors. Loans to directors or employees may only be made after observing certain requirements imposed by the Public Companies Act. A director may not have characteristics indicating a lack of appropriateness in respect of trustworthiness in managing a business whose shares are held by the public.

Executives of public companies An executive means a manager, or a person responsible for the management of a company, whether *de facto* or as authorized by the board. An executive must have qualifications, and not have prohibited characteristics indicating a lack of appropriateness in respect of trustworthiness in managing a business whose shares are held by the public. An executive who lacks qualifications or has prohibited characteristics will be removed from his position.

Duties of directors and executives Directors and executives must perform their duties with responsibility, due care and loyalty, and must comply with the company's objects, the articles of association, and board or shareholders' resolutions. A director or executive must act as an ordinary person undertaking like business under similar circumstances.

Where a director or executive is deemed to meet the required standard of care Where a director or executive, at the time of considering a matter, can prove that his decision met the following requirements, it will be deemed that he has performed his duties to the required standard:

(1) the decision was made with an honest belief, and on reasonable grounds that it was in the best interests of the company;

(2) the decision was made relying on information that was honestly believed to be adequate; and

(3) the decision was made, without his having any direct or indirect interest in the matter.

Factors to be taken into account In considering whether a director or executive has performed his duties, the following factors will be taken into account:

(1) the position held by the person in the company at the time;

(2) his scope of responsibility, and

(3) his qualifications, knowledge, capability, and experience and the purpose of his appointment.

Duties of directors and executives Directors and executives must:

(1) act in good faith in the best interests of the company;

(2) act with proper intentions and;

(3) not act in significant conflict with the interests of the company.

Actions that conflict with the interests of the company The following acts that provide a director, an executive or a related person with any financial benefit, other than that which could be ordinarily obtained, or which causes loss to the company, are presumed to be acts in significant conflict with the interests of the company:

(1) entering into a transaction between the company or subsidiary, and a director or related person, which does not comply with the rules regarding related party transactions (see below) or Capital Market Supervisory Board requirements;

(2) use of inside information, other than that already disclosed to the public or;

(3) use of assets or business opportunities of the company in contravention with the rules or general practice, as specified in regulations.

Rules regarding related party transactions A director, executive or related party may enter into any transaction with the company or subsidiary, only with approval from a shareholders' meeting, except for the following transactions;

(1) a transaction with the same commercial terms that an ordinary person would agree with any unrelated counterparty under similar circumstances, on the basis of commercial negotiation and without any dependent interest resulting from the status of the director, executive or related person. The commercial terms must have been approved by the board or comply with principles approved by the board;

(2) a loan made for the welfare of employees;

(3) a transaction in which the counterparty to the company, or both parties, are subsidiaries owned at least 90% by the company, or subsidiaries whose shares are held by directors, executives or related persons or where such a person has a direct or indirect interest, owning less than the shareholding limit specified in regulations;

(4) a transaction in a particular category, or with a value not exceeding that specified in regulations.

Regulations may also prescribe that specified transactions must be approved by the board.

The requirements above will apply, and the provisions of the Public Companies Act regarding directors entering into transactions with the company, will not apply to transactions between a director and the company or a subsidiary.

Regulations may be issued regarding related party transactions Where it is reasonable, considering the significant consequences of a transaction to the company, or the relationship between the transaction and the ordinary business of the company, regulations may be issued regarding the following matters, regarding transactions between the company or a subsidiary, and a director, executive or related person:

(1) the disclosure of information in relation to entering into such transaction to general investors, or in a notice calling a meeting of the board or shareholders;

(2) the votes required at a shareholders' meeting to approve entering into the transaction;

(3) rules governing shareholders' meetings, including the arrangement of ballot papers, arrangement of an inspector for the meeting or consideration of the special interests of shareholders not permitted to vote.

Reporting on interests held by directors Directors and executives must file a report with the company on their interest, or a related person's interest, in the management of the company or a subsidiary, as prescribed in regulations.

Taking action against public company directors If a director is in breach of such duties, then the company may sue the director. If the company fails to do so, then any shareholder(s) holding at least 5% of the shares of the company may issue such proceedings, and also request that the Court removes such director from office. Directors are forbidden to carry on a business of the same nature as, and in competition with that of the company. Once again, the company may sue a director who is in breach of this duty. If the company does not do so, shareholders holding at least 5% of the shares of the company may do so.

Directors must notify the company if they have any interest in a contract, or hold shares or debentures in the company or any affiliate.

Action for disgorgement of benefit In addition to any action taken against directors under the Public Companies Act for breach of duty or for operating a competing business, where a director breaches his duties, enabling a director, executive or related person to obtain undue benefit, the company may bring an action against the director for disgorgement of such benefits.

Where a shareholder(s) holding shares carrying not less than 5% of total voting rights, issues a written notice directing the company to bring an action under the previous paragraph, and the company fails to take such action within one month from the notice, the shareholder(s) may bring an action for disgorgement of benefits on behalf of the company. In such a case, if the court holds that the action was brought in good faith, it may order the company to compensate the said shareholder(s) for costs.

These provisions also apply where executives are guilty of breach of duty or fail to disgorge profits obtained.

Liability of directors and executives for false statements or concealing facts Directors and executives of public companies are jointly liable for losses arising from disclosures to the shareholders or the public which contain false statements or conceal material facts which should have been stated in the following cases, unless the directors or executives can prove that they could not have been aware of the lack of truthfulness of the information or the lack of information which should have been given:

(1) providing information in order to seek a shareholders' resolution;

(2) financial statements and reports concerning the company’s financial condition and business operations, or other reports required to be disclosed under the SEC Act;

(3) an opinion on the business, where a person makes a general tender offer to purchase shares;

(4) providing information or other reports in relation to the business prepared by the company, for the purpose of disclosure to shareholders or the public, as specified in regulations.

Any action must be issued within two years from the date when an injured person knew of the disclosure of the false statement or concealment of facts, or five years from the date when such act was committed.

Where public companies make loans Public companies are subject to detailed rules concerning the making of loans by the company to directors or to company employees. If the articles do not contain provisions relating to directors remuneration, then the remuneration of directors must be approved by at least two thirds of the shareholders at a meeting.

Civil liability The relationship between the directors, the company, and third parties is governed by the law of agency. A company may bring proceedings against a director for any loss that he causes to the company. Since the directors are normally the only persons who have authority to issue legal proceedings, the Civil and Commercial Code provides that any shareholder or creditor of the company may initiate such a claim against a director.

As to public companies, any one or more shareholders holding an aggregate of at least 5% of the shares may bring such an action.

If a director, acting within the scope of his proper authority, causes loss to a third party, then that director will not be personally liable to the third party because his actions will bind the company. If a director acts without authority or beyond his authority and the company does not ratify such act, then the director will be personally liable to the injured third party. If a director acts with authority but his act is improper (because his conduct falls below the standard of a "*careful businessman*") then the company will be liable to the third party, but the company may claim indemnity against the director.

Criminal liability With regard to criminal liability, a person charged with a criminal act must be found to have committed the act intentionally or negligently. The burden of proof lies on a director to prove his innocence, once the prosecutor has established to the court's satisfaction that a criminal act has been committed. Criminal liability can be imposed for failure to act, such as failure to file a required report or a failure to file a balance sheet. A common case of criminal liability is for bad cheques signed by a director, even though the cheques were company cheques. Directors may be liable for false statements contained in official documents that they sign on behalf of the company. Directors are sometimes arrested, where there is a fire or accident causing serious injury, on the basis that the director, by his mismanagement, caused the accident or loss. Where a statute provides discretionary power to prosecute or settle out of court, usually cases are settled out of court.

Liability of foreign directors Foreign directors of a company are liable in the same manner as Thai directors.

Liability of directors in the case of bankruptcy or liquidation Directors have no special liability for the debts of the company in the case of bankruptcy or liquidation, unless they personally caused loss to the company, in which case they are liable as indicated above. However, under the 1998 amendment to the

Bankruptcy Act (see Chapter 25 *Bankruptcy, Liquidation and Corporate Restructuring*), directors are criminally liable if they fail to cooperate with a bankruptcy receiver or planner, fail to submit explanations required, fail to report false claims or make false statements.

Indemnity and ratification An indemnity for criminal liability is void and unenforceable, because it is contrary to public order.

An indemnity for civil liability is permissible. A director may be relieved of liability to the company for any acts ratified or approved by a general meeting of shareholders. A director is also relieved of liability to any shareholder who voted to ratify his acts, but remains liable for six months to shareholders who did not vote for ratification.

Where ratification for acts of public company directors is not permitted A director or executive who acts or fails to act in bad faith or with gross negligence causing loss to the company, or who causes the company to lose benefits that should have been obtained, is not permitted to obtain approval or ratification from a shareholders' or board of directors' meeting to release him from his liabilities. An act or omission includes the following cases:

(1) requesting a shareholders' or board resolution by presenting a false statement or concealing material facts that should have been notified;

(2) misappropriation of the company's assets or benefits;

(3) exploiting the company's assets for benefit.

Duties of directors and executives also apply to other persons The general duty of care of directors and executives of public companies and the scope of that duty also applies to: interim managers, planners, plan administrators and interim plan administrators, in cases of debt restructuring. Where such person is a juristic person, it includes relevant directors and executives. The duties also apply to liquidators.

Duties of directors and executives of subsidiaries The general duty of care of directors and executives of a public company and the scope of that duty, also applies to directors and executives of subsidiaries. These duties also apply to interim managers, planners, plan administrators and interim plan administrators, in cases of debt restructuring of subsidiaries. Where such person is a juristic person, it includes relevant directors and executives. The duties also apply to liquidators of subsidiaries.

Duties of directors of public or private companies under specific statutes There are numerous statutes under which the liability of a company extends to *"any director, manager or person in charge"* equally with the company, *"unless*

he can prove that he had no knowledge of the act concerned." The wording varies from Act to Act, but the words italicised in the previous sentence are indicative. Each statute must be analysed and the particular words used considered carefully.

Duration of a director's duties A director's duties continue for a period of two year after resignation.

Rights of shareholders

Rights of shareholders in private companies The rights of shareholders in private companies are governed by the Civil and Commercial Code. Firstly, in order to exercise their rights as shareholders, a shareholder must be registered as the owner of the shares, and in compliance with the Code, at least 25% of the par value of the shares has been paid.

Ownership of at least 75% or more of the shares Ownership of at least 75% or more of the shares of a company will give a shareholder absolute control of all the decisions to be made at shareholders meetings, subject to the general law. Such a shareholder will be able to: amend the articles of association; amend the memorandum of association; increase the capital, reduce the capital; pass a resolution to place the company in liquidation, or to merge the company with another company. This is because under the Code, a resolution to take any of these major decisions must be passed at a shareholders meeting by a 75% majority. These provisions of the Code cannot be excluded. This applies except in the case where a resolution has been passed by a 75% majority of shareholders, which adopts an article providing that resolutions of shareholders must be passed by those shareholders holding at least 76% of the total issued shares.

Ownership of at least 50% of the shares, but less than 75% Ownership of at least 50% of the shares of a company but less than 75%, will enable a shareholder to pass resolutions to carry out all ordinary business at a shareholders' meeting. However, he will not be able to take the major decisions mentioned above, unless he has the support of the minority shareholders.

Ownership of at least 20% of the shares, but less than 50% The rights of minority shareholders owning at least 20% of the shares but less than 50%, are very limited. They have a right to require the company to convene an extraordinary meeting of shareholders, but that is all. At such a meeting, they will be able to vocalise their complaints in the presence of other shareholders, but they have no additional voting or other rights at such meeting.

Ownership of less than 20% of the shares Those holding less than 20% of the shares do not even have the right to call an extraordinary general meeting of shareholders. The only rights they might have are considered below.

General rights of shareholders against directors Regardless of the percentage of shares owned, the directors of a company are subject to general duties imposed under the Code, and additional duties that may be imposed under the articles of association. The most important duties of a director of a private company are set out in the Code:

1. Directors must in the conduct of their business apply the diligence of a careful businessman. In particular they are responsible for:

    - the payment of shares by the shareholders being actually made
    - the existence and regular keeping of books and documents prescribed by law
    - the proper distribution of dividends and interest as prescribed by law
    - the proper enforcement of the resolutions of general meetings.

2. A director may not, without the consent of a general meeting of shareholders, undertake commercial transactions of the same nature as and competing with that of the company, either on his own account or that of a third person, nor may he be a partner with unlimited liability in another commercial concern carrying on business of the same nature as and in competition with that of the company. The foregoing provisions also apply to a person representing a director.

A company may bring an action against the directors for their breach of duty. If the company refuses to act, then a shareholder is entitled to bring such an action.

Additional shareholders rights under the articles or a shareholders' agreement There is no objection in principle to the granting of additional rights to minority shareholders under the articles of association, or under a shareholders' agreement. The sort of matters that minority shareholders may be concerned about, in addition to the major transactions considered above, are such matters as:

1. A decision to close a subsidiary, or commence new business.

2. Limitations on the company's powers to sell or purchase goods.

3. Limitation on the company's borrowing powers, or powers to give guarantees.

4. Approval of the remuneration of directors or senior executives.

Additional articles of association can be drafted, so that matters such as these must be passed by a super majority of shareholders, or not without the consent of specified shareholders.

It is also generally possible to structure the share capital into two classes of shares, with ordinary shareholders holding a majority, but minority shareholders holding preference shares carrying additional voting rights. In this way, the minority shareholders may have the majority of voting rights at the shareholders meeting.

Rights of shareholders in public companies Shareholders in public companies have similar rights to those in public companies, and certain additional rights, due to the greater regulatory standards that apply to public companies. The Public Companies Act (1992) sets out the basic law that applies to public companies. Under the Act, different supporting majorities may be required to transact certain business, the directors are subject to additional duties, and the shareholders may have additional rights and protections. The Securities Exchange Commission Act Amendment Act (2008) also imposes duties of corporate governance.

Voting majorities required for major transactions Generally speaking, only a simple majority of the votes cast at a shareholders meeting is necessary to pass a resolution. However the PCA specifies that certain major transactions require a higher majority:

1. Amendment of the memorandum.

2. Amendment of the articles.

3. Increase or reduction of capital.

4. The issue of debentures.

5. A decision to amalgamate.

6. A decision to dissolve the company.

7. The sale or transfer of the business, in whole or a substantial part thereof.

8. The purchase or acceptance of transfer of the business of another company.

9. Entering into, amending or terminating a lease of the business in whole or in an essential part.

9. Entrusting another person with the management of the company.

10. Amalgamating the business with another company with a view to sharing profits and losses.

11. Dissolution of the company.

All the above matters may only be sanctioned by a resolution passed by 75% of the shareholders. In addition, at least 50% of the shareholders must attend a general meeting to constitute a quorum, and a shareholder who has a special interest in any matter has no right to vote on such matter, except in the election of directors.

Additional transactions that must be approved by shareholders In addition, the following transactions must be approved by a shareholders' meeting, if significant to the company, as specified in regulations:

(1) acquisition or disposal of assets, whether the asset is owned by the company or a subsidiary;

(2) transfer or abandoning a right, interest or claim against a person who has caused loss to the company, whether the right, interest or claim is related to an asset of the company or a subsidiary;

(3) entering into, amending or terminating a lease or hire-purchase of the business or an asset, in whole or in part, whether the business or asset is operated by the company or a subsidiary;

(4) appointing others to manage the business, in whole or in part, whether the business is operated by the company or a subsidiary;

(5) merger with another entity, which is likely to affect the management structure of the company;

(6) lending money, providing credit facilities, guarantees, engaging in juristic acts that bind the company to increase its cost of capital where a third party lacks liquidity or is unable to perform its obligations, or giving financial assistance to others by any other means, not in the ordinary course of business, whether the act is done by the company or a subsidiary;

(7) other actions, as specified in regulations.

Regulations may impose additional rules governing: disclosure of information to investors concerning the operation of the company, or information in a written notice calling a board or shareholders meeting, or the amount of votes required for approval of the said transactions.

Shareholders' entitlement to vote At a shareholders' meeting, a shareholder may vote if his name is recorded in the shareholders' register as at the date determined by the board. The amount of shares which each shareholder has the right to vote shall be in accordance with the shareholders' register as at the same date. Such shareholder's rights shall not be affected, even though the information in the shareholders' register at the date of the shareholders' meeting has changed.

The date determined by the board of directors must not be more than two months prior to the date of the shareholders' meeting, but not prior to the date which the directors approved to call for the meeting. When the board determines the date when the recorded shareholders may attend the meeting, that date cannot be altered.

Information to be contained in notices for shareholders meetings Regulations may specify the type or details of information that the board must notify to shareholders in the notice of meeting, and the period for delivery of the notice to shareholders.

Shareholders right to submit proposals for inclusion in the agenda A shareholder(s) who holds not less than 5% of the total voting rights, may submit a written proposal requesting the board to include items in the agenda for a shareholders' meeting. The proposal must indicate whether it is a matter proposed for information, approval or consideration, and include details of the matter for consideration, as specified in regulations. The board shall include the matter proposed by the shareholders in the agenda of the shareholders' meeting.

In the following cases, the board may refuse to include the proposal in the agenda:

(1) the proposal does not comply with the requirements of the paragraph above;

(2) the proposal applies to ordinary business operations, and the facts given by the shareholders do not indicate reasonable grounds to suspect irregularity in such matters;

(3) the proposal is beyond the company's powers to produce the proposed result;

(4) the proposal was previously submitted to a shareholders' meeting within the previous 12 months, and received supporting votes of less than 10% of the total voting rights, unless facts relevant to the matter have significantly changed from the previous shareholders' meeting;

(5) other cases, as specified in regulations.

In cases where the board of directors refuses to include the matter proposed by the shareholders in the agenda, this shall be notified as a matter of information in that shareholders' meeting and there shall be specified the reasons for such refusal.

Where the shareholders resolve, by a majority vote of the total shareholders present and having the right to vote, to include the matter proposed by the shareholder in the agenda, the board shall include such matter in the agenda at the next shareholders' meeting.

Non-compliance with rules regarding meeting notices and voting If in a shareholders' meeting, there is contravention of the rules regarding the sending of notices for meetings or voting, a shareholder(s) holding not less than 5% of the total voting rights may apply to the court to order cancellation of a resolution passed at such meeting. The provisions of the Public Companies Act concerning applications to the court to order cancellation of a resolution shall apply *mutatis mutandis.*

Solicitation to appoint proxies Any solicitation, inducing or doing any act towards shareholders with a view to enticing them to grant a proxy to a person to do an act, or to attend and vote at a meeting, shall be in accordance with regulations.

Additional rights of shareholders Shareholders may assert their interests by asserting any of the following rights:

1. *Extraordinary shareholders' meeting* Shareholders holding at least 10% of the shares or at least one third of the shares (this change was made in 2017), can request the Board to convene an extraordinary shareholders' meeting. As in the case of private companies, this only enables the shareholders to vocalise their complaints.

2. *Challenging the agenda* At shareholders meetings, the Chairman must conduct the business in accordance with the agenda, unless at least two thirds of the shareholders at the meeting request him to do otherwise.

3. *Challenging the calling of a meeting or challenging a resolution* If a meeting was convened or a resolution passed which was *ultra vires* the articles or the Act, then not less than five shareholders or shareholders holding at least 20% of the shares, may request the Court to revoke such resolution.

4. *Questioning of the auditor* The auditor has a duty to give explanations to the shareholders meeting, and must attend shareholders' meetings where the balance sheet or the profit and loss account or accounting problems are discussed.

5. Inspection of accounts Shareholders may ask to inspect the accounts of the company during working hours, and obtain a copy thereof. The Annual Report together with the financial statements, must be sent to all the shareholders.

6. Appointment of an inspector Shareholders holding at least 5% of the shares or at least one third of the shareholders in number (this change was made in 2017), may request the Registrar of Partnerships and Companies to appoint an inspector to examine the affairs and finances of the company, and to examine the operations of the Board.

7. Request dissolution Shareholders holding at least 10% of the shares may request the Court to dissolve the company on specified grounds, including failure to comply with requirements concerning statutory meetings, preparation of company reports, breach of regulations concerning payment of dividends, and other matters; or on the grounds that the company is making a loss and there is no prospect of revival of the company.

Additional protection for minority shareholders In the same way as for private companies discussed above, there is no objection to additional protections for minority shareholders being included in the articles, or in a shareholders' agreement, provided that that such restrictions do not contravene the Public Companies Act or other relevant law. For example, it is not possible to impose restrictions on the transfer of shares in a public company, unless such restriction is necessary to maintain a permitted level of foreign ownership under the Foreign Business Act (see Chapter 1 *Foreign Business Restrictions).*

Reporting requirements of the Securities Exchange Commission

Reporting major events The Securities Exchange Commission Act (1992) as amended, and regulations or notifications issued by the Securities Exchange Commission (*the regulatory authority*) or the Securities Exchange of Thailand (*the stock market*) require companies that intend to make public offerings and companies already listed to submit reports to the SEC without delay, when any of the following events occur:

1. When the company suffers serious loss.

2. When its operations are partially or completely interrupted or suspended.

3. When the company's objects or business activities change.

4. When the company's operations or management is partially or wholly handed over to a third party by contractual arrangement.

5. When the company is involved in a takeover bid, as defined by the SEC Act.

6. When there is an incident of such a type and magnitude that it will have a bearing on the rights of securities holders or will affect investment decisions or the prices of securities.

The above requirements are in addition to the regular reporting requirements to which public companies are subject.

Reporting requirements regarding connected persons Directors, officers, managers and auditors of a company that has offered shares to the public must report to the SEC the amount of shares they hold in the company, in combination with their respective spouses and minor children. They are also required to file reports when there is a change in their shareholdings.

Reporting changes in shareholdings in certain cases If an individual's shareholding in a company increases or decreases by an amount equivalent to 5% or more of the total shares issued, the change in shareholding must be reported to the SEC on the following business day, and a copy of the report sent to the SET. If warrants or convertible instruments covering 5% or more of the issued share capital are acquired or disposed of, a report must also be submitted on the business day after the transaction. The reporting rules also apply to (a) a spouse of a shareholder and (b) a connected person (as defined in the Securities Exchange Commission Act). The securities within the reporting rules are all shares and also convertible securities, i.e., warrants, convertible debentures, transferable subscription rights and derivative warrants. There are certain exemptions to the reporting requirements.

Takeover rules The takeover rules require that any person acquiring shares to take control over the business must make a tender offer that will provide a fair exit for all shareholders. In making a tender offer: all securities holders must be treated equally; all information must be disclosed accurately and completely; and all securities holders must be given sufficient time to make a decision.

Trigger points In a general case, the trigger points are when a person acquires 25% of the voting rights, 50% of the voting rights or 75% of the voting rights. The total number of the issued shares of a business used in the calculation of the shareholding proportion excludes treasury stocks.

Where a share buyback causes any person's shareholding to reach a trigger point, that person has the duty to make a tender offer upon acquisition of any number of additional shares.

Business takeover via chain principle A business takeover via the chain principle is subject to mandatory tender offer a in the following cases:

- Acquisition of shares or control equal or exceeding 50% in another juristic person (including nominees or control over a significant number of directors);
- The holdings of a juristic person and related parties as specified by the SEC Act amount to a total equal or exceeding 25% of the business.

Securities subject to tender offer The types of securities that are subject to tender offer are shares, warrants and convertible debenture. Those exempted from such duty are treasury stock, warrant or convertible debentures that possess any of the following characteristics:

- The exercise price is higher than or equal to the offer price, and the offeror has not acquired such securities during the period of 90 days prior to the date when a tender offer is submitted to the SEC;
- The offeror cannot exercise the conversion right because the right expires before the end date of the offering period or the exerciser is subject to certain limitations, e.g., the right reserved to directors or employees of the business;
- The nomination is in a foreign currency.

Any person who has acquired or become a holder of shares in a business in such a way that his shareholding reaches or exceeds any trigger point is exempted from the duty to make a tender offer for all securities of a business if any of the following circumstances apply:

Exemptions Any person acquiring or becoming a shareholder of a business reaching the tender offer trigger point will be exempt from such duty under the following circumstances:

• Acquisition by way of inheritance as a result of law, not the acquirer's intention to control the business;
• Acquisition as a result of the business distributing stock dividend or exercise of rights under a right offering;
• The acquirer is a person who has no intention to control the business, e.g., Thai Trust Fund and NVDR, which in normal circumstances do not exercise their voting rights at the shareholder's meeting;
• The acquirer reduces its holding below the trigger point within seven days from the date when they have to file an acquisition report with the SEC, and do not exercise their voting rights for the excessive portion beyond the trigger point.

Application for waiver of tender offer Any shareholder or person wishing to acquire shares of a business at the amount reaching or crossing a trigger point may apply for a waiver of tender offer if the following conditions are met:

• The change in the shareholder structure does not affect control of the business;
• The change is for rehabilitation of the business;

• The change is approved by the shareholders' resolution (whitewash)
• Any other case similar to those previously considered by the Takeover Panel;
• There are necessities and reasonable grounds;
• Any other cases deemed appropriate by the Takeover Panel.

Application for waiver of tender offer To provide information for shareholders' decision making, when a business receives a tender offer, it must appoint a shareholder's advisor to prepare a recommendation statement with respect to the offer and send it to shareholders within 15 business days. If there is an amendment to the offer, the business must prepare a new recommendation statement with respect to the offer and send it to shareholders within five business days following the day when the business received such amendment to the offer.

Exemption from preparation of recommendation statement Where the offeror improves the terms of the offer and the business has already recommended the shareholders to accept the previous offer or recommended a minimum price that the shareholders should accept, the business does not need to prepare a new recommendation statement.

Exemption from appointment of shareholders' advisor to prepare a recommendation statement In the case of a repeated tender offer, for example, for the purpose of delisting, if the second offer does not change materially and the offer price is not inferior to that of the previous offer, the business is not required to appoint a shareholders' advisor to prepare a recommendation statement with respect to the repeated offer.

Takeover Panel The Takeover Panel has power to scrutinize company takeovers. It may also:

- Grant a waiver in the event of the chain principle applying, in which the acquirer takes over a juristic person without an intention to control the business;
- Grant a waiver of price setting and price reduction in case of tender offer for delisting and in case of critical events affecting the business;
- Order the ceasing of a tender offer temporarily;
- Recommend or advise the SEC concerning business takeovers;
- Grant a waiver of enforcing any takeover regulations as deemed appropriate by the SEC.

Private placement Where a company wishes to make a private placement of shares, rather than offering the shares to the public as a whole, this is permitted, subject to observance of detailed SEC regulations in connection with private placement.

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