Baker & McKenzie

Client Alert

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Securities and Exchange Act: Insider Trading - A New Regime with Wider Reach

Introduction

Up until now, Thailand has not been able to fully enforce its market misconduct regime enshrined in the Securities and Exchange Act B.E. 2535 (the "**Act**"). This is partly due to the fact that legislation does not clearly outline the elements of the offences, which leads to a broad interpretation and makes it difficult for the prosecutors to prove a contravention.

In addition, court rulings on market misconduct offences are rare in Thailand – meaning that there is a lack of jurisprudence in this area. Most of the cases thus far has been settled before the Securities and Exchange Commission's (the "**SEC**") Settlement Committee, which does not provide any interpretation of the law or rationale for its decisions.

In an attempt to address this issue, the National Legislative Assembly has passed the bill to amend certain provisions of the Act including the unfair securities trading practices in Chapter 8, and introduced a new civil penalty regime. The amendments will come into force after it has received royal assent and is published in the royal gazette.

The amendment in relation to the unfair securities trading practices are:

- the revision of the provisions on false dissemination, insider trading, and market manipulation;
- the introduction of new offences, namely: front running, flash cash, and nominee account; and
- the introduction of a civil penalty regime.

This newsletter will focus on the amendments in relation to the insider trading provisions.

Insider Trading

1. The Principle Remains the Same

First of all, it is important to note that the principle/policy remains the same. That is, a person who has obtained non-public price-sensitive information about particular securities should be prohibited from trading on that information and from communicating that information to others.

2. What are the Key Amendments?

There are two interesting amendments to the insider trading offence. First is the definition of an insider. Previously, to be an insider one needed to have

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held a position in which they had access to the inside information (i.e. directors, executives, or other personnel with control of the company). However, the new definition captures anyone who possesses inside information, regardless of their positions. This means that anyone who receives inside information (i.e. a tippee) and trades on this information would now be captured by the prohibition.

Following from the paragraph above, the key element is now **whether or not one possesses the inside information**. Normally, the burden of proof would be on the SEC to prove that the defendant had in their possession the inside information. However, there is a presumption that a prescribed category of defendants (the primary insiders) possesses such inside information. Here, the burden is on the defendant to rebut this presumption. Primary insiders include: directors, executives or other personnel with control of the company, auditors, financial advisors, legal advisors, and asset appraisers of the company.

A broader scope of defendants are now captured by a secondary presumption, but the prosecution must prove that the defendant has engaged in **unusual** trading before the presumption can apply. Those who are captured by this presumption include:

- shareholders holding > 5% of the paid up capital in the company (inclusive of interest held by their *de jure* and *de facto* spouse, and minor children)
- parents and heirs of a primary insider, those who adopt the child of a primary insider, and adopted child of the primary insider
- siblings of the primary insider who share the same mother or father
- *de jure* and *de facto* spouse of a primary insider

Secondly, the prohibition previously did not prevent an insider from trading in derivative agreements – it only referred to securities. The amendment has now been broadened to include derivative agreements.

3. Dos and Don'ts

As one can see, recent amendments have significantly broadened the scope of the offence, while at the same time extending its reach. It is, therefore, important to take preemptive measures to ensure that you and your business will not be the subject of an insider trading accusation, which could damage your and your business's reputation.

Dos	Don'ts
Keep inside information confidential and do not communicate them to anyone who is not in the working-team until it has become publicly available.	Do not communicate inside information to anyone who is not in the working-group, including your *de jure* and *de facto* spouse, siblings, parents and children. Also, avoid discussing non-public price-sensitive information with your colleagues in public places (e.g. in elevators).

Implement a "Chinese Wall or Ethical Wall" within your organization to ensure that price-sensitive information is confined to the working-group.	In order to mitigate risk, do not make suggestions to others as to which stocks to trade in, albeit without sharing or communicating the inside information.
If you fall into one of the categories of a primary or secondary insider, then you should consider investing through mutual or investment funds - rather than directly trading in stocks.	Do not trade or enter into agreements to do the same (including futures contracts) based on inside information (i.e. non-public price-sensitive information).
Before you trade in securities, ensure that you check with your internal compliance team and/or consult the company's general counsel.	If possible, avoid trading in securities of the company you or your family members are involved in – whether as a director, executive, employee and/or advisor, unless it is permitted by laws (e.g. ESOP).
If you come across conduct which you think is an act of insider trading, report it to the SEC and/or SET.	If you are a civil servant or work for a government authority, or a listed company, which, through your work and/or position, has access to inside information – it is recommended that you do not trade in securities of parties in which you are related to.

Tips

Conduct not considered as insider trading:

- trading in securities or derivative agreements **without the knowledge of the inside information**
- refraining from trading until the information becomes public, and the public has had the opportunity to digest that information for at least **24 hours if the information is widely available**, or 48 hours if the information is not widely available

Insider trading and M&A:

- In a mergers and acquisitions transaction, the acquisition of shares in a target company based on non-public price-sensitive information obtained through a due diligence will not be considered as insider trading. This is because inside information obtained through a proper due diligence process is obtained in good faith in order for the purchaser to make an informed business decision regarding the transaction.

Black-out period:

- It is advisable for all companies to implement, as company policy, a no trading black-out period one month before the company's financial statements are released. However, if trades, which occur out-side the

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black-out period, was made based on inside information – it would still be considered as insider trading.