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## Thailand

### Country Guides: Securities and Banking

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This article provides an overview of the regulatory framework in Thailand for the banking and securities sectors.

#### Banking

##### The Bank of Thailand

Financial institutions in Thailand are subject to strict licensing requirements and regulatory obligations. The Bank of Thailand (BOT) is Thailand's central bank and is responsible for:

1. Promoting monetary stability and formulating monetary policy;
2. Supervising and examining financial institutions;
3. Providing banking facilities for the government and acting as the registrar for government bonds;
4. Providing banking facilities to financial institutions;
5. Managing Thailand's foreign-currency reserves;
6. Printing and issuing banknotes and other security documents;
7. Managing the assets of the BOT;
8. Establishing or supporting the establishment of payment systems; and
9. Regulating foreign exchange in accordance with the Exchange Control Act.

The BOT is accountable to the Minister of Finance, but has considerable independence with respect to its operations, compared to other state agencies. It operates three regional offices, which are in charge of collecting, compiling and analysing economic and financial/monetary data and conditions for their respective regions, supervising financial institutions, and monitoring their activities, in their respective regions, namely Northern, Northeastern, and Southern. In addition, it has representative offices in New York, London, and Beijing, which are responsible for studying, monitoring, and analysing the general economic condition and technical developments abroad for the benefit of international reserve management, contacting financial institutions and foreign investors, and other assignments.

##### Forms of financial institutions

The main types of banking/financial institutions in Thailand can be classified as follows:

1. Deposit-taking financial institutions, which consist of: (1) commercial banks; (2) retail banks; (3) foreign bank branches; and (4) subsidiaries of foreign banks;
2. Finance companies and credit foncier companies;
3. Foreign bank representatives;



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4. Asset management companies and securities companies;
5. Specialized financial institutions, such as the Bank for Agricultural and Agricultural Cooperatives, the Export-Import Bank of Thailand, the Islamic Bank of Thailand, the Secondary Mortgage Corporation, the Small and Medium Enterprise Development Bank of Thailand, the Small Industry Credit Guarantee Corporation, the Government Housing Bank, and the Government Savings Bank; and
6. Credit card companies and personal loan companies.

#### Financial Sector Master Plan — Phase I

Following the 1997 financial crisis, after banking resumed profitability in 2001, the BOT began a new initiative, to further develop Thailand's financial system for greater resiliency in the face of competition from non-bank entities and foreign financial institutions. This resulted in the Financial Sector Master Plan (Phase I), which the BOT introduced in 2004.

The main goals of the plan were to increase the efficiency of the financial services sector, to broaden access to financial services, and to improve transparency and customer protection. This involved rationalizing the structure of Thailand's financial system to improve basic infrastructure, improve competitiveness of each financial institution, remove unnecessary regulatory barriers to development, and improve efficiency through market-based mechanisms.

This involved major licensing reforms and elimination of international banking facilities, much of which was codified in the new Financial Institutions Business Act B.E. 2551 (2008), and was bolstered by implementation of the "one-presence" policy. The end result was significant consolidation and reduction in the types and quantities of financial institutions. In addition, the blanket deposit guarantee is to be phased out, and the responsibility assumed by the Deposit Protection Agency (DPA), of which all commercial banks will be members; according to this plan, the maximum insured amount is gradually being reduced to THB 1,000,000 per depositor per financial institution.

The BOT also imposed requirements for banks to post interest rates on their websites and to submit such information to the BOT, so that consumers can easily compare it, and the BOT imposed limits on service charges and interest banks could charge on consumer loans.

#### *Banking regulations*

One of the major reforms was to provide for uniform regulation of financial institutions. Originally, the Commercial Banking Act B.E. 2505 (1962) and the Act on Finance, Securities and Credit Foncier Business B.E. 2522 (1979) applied two separate standards to their respective covered entities. As such, the Financial Institutions Business Act B.E. 2551 (2008) replaced these two Acts. The new regime imposed, inter alia, the following regulations with respect to financial institutions:

- Restrictions on shareholding.
  - A single shareholder may not hold more than 10 percent of the total shares in a financial institution, without the approval of the BOT. In addition, shareholding that exceeds five percent of the total shares must be reported to the BOT. These apply to both direct and indirect shareholding, and include shares held by related parties.
  - Foreign ownership of a financial institution must not exceed 25 percent of the total voting shares, and the proportion of foreign directors must not exceed 25 percent of the total directors. However, the BOT has the authority to approve an increase in the foreign ownership limit to 49 percent and the limit on foreign directors to less than 50 percent. Foreign majority shareholding and higher proportions of foreign directors are only possible with the approval of the Minister of Finance, following recommendation by the BOT. For the avoidance of doubt, restrictions on foreign shareholding and directors are not applicable to foreign bank branches or subsidiaries of foreign banks.
- Obtaining a licence to operate a financial institution.

To be eligible for a licence to operate a financial institution, the applicant must be either a public limited company registered under Thai law or a foreign bank applying to establish a branch or subsidiary in Thailand. If approved, the Minister of Finance will grant the licence, following recommendation by the BOT.

It is unlikely that any licenses will be granted to operate finance companies or credit foncier companies. Although not explicitly prohibited under the Financial Institutions Business Act, the Financial Sector Master Plan reflects the BOT's plans to grant only commercial banking licences and retail banking licences.

Capital adequacy. As indicated in the BOT's Financial Institution System Development Plan, a commercial bank and a retail bank will be required to maintain tier one capital of at least THB 5 billion and THB 250 million, respectively. For a foreign bank branch, the figure is THB 3 billion, and for a foreign bank subsidiary, THB 4 billion. In addition, financial institutions must comply with the capital adequacy rules of the Bank for International Settlements. Basel II has been implemented, and plans for implementation of Basel III are in the works.

- Investment limitations.

Financial institutions are not allowed to engage in certain investments such as holding shares or share-related instruments of any other financial institution, or holding more than 10 percent of another company's shares, without the approval of the BOT, which may be subject to certain additional conditions.

- Ownership of real estate.

There are restrictions on ownership of immovable property by financial institutions. Financial institutions must not hold immovable property, except:

- property used as premises for the business of the financial institution or as places of residence or benefit for its officers and employees, as appropriate, upon the approval of the BOT, and subject to conditions that may be imposed by the BOT;
- property acquired as a result of a debt settlement, a guarantee in respect of credit granted, or the purchase of an immovable property mortgaged to the financial institution at an auction conducted pursuant to an order of a court or by an official receiver, but such immovable property must be disposed of within five years from the date of acquisition, unless an extension is granted by BOT, and subject to conditions that may be imposed by the BOT;
- property purchased or held by a finance company undertaking the housing finance business or by a credit foncier company, for business purposes, subject to conditions that may be imposed by the BOT.

Lending limitations.

- Single lending limit — a financial institution is prohibited from lending, investing, or incurring contingent liabilities with a single person (including such person's related parties) in excess of 25 percent of the financial institution's tier one capital.
- Related party limit — a financial institution is prohibited from lending, investing, or incurring contingent liabilities with each of its related parties in excess of five percent of the financial institution's tier one capital, or 25 percent of the financial institution's related parties' total liabilities, whichever is lower.

Interest rate and charges

Financial institutions are generally free to set their maximum interest rate and charges for their customers, subject to limits imposed by law and/or regulation. The Civil and Commercial Code caps the interest rate at 15 percent per annum. While interest on consumer loans is also capped at 15 percent per annum, interest plus other charges on consumer loans is capped at 28 percent per annum.

#### *Deposit insurance system*

In years past, Thailand has had a blanket deposit guarantee system. In future, the newly established DPA is gradually transitioning to a limited coverage system. The DPA is responsible for making compensation to depositors, managing failed financial institutions by acting as liquidator, reimbursing for compensation made, and making payment to other creditors according to their shares. It is a juristic body separate from the BOT, managed by the Deposit Protection Board.

Membership in the DPA is compulsory for commercial banks, foreign bank branches, finance companies and credit foncier companies. The law allows for the Deposit Protection Board to set premiums of up to one percent of a member's average insured deposits. At present, however, premiums are set at 0.4 percent for all members. In the future, the Deposit Protection Board may adjust rates, which may be the same across all financial institutions, or may be set differently according to the type or performance of each member.

Originally, the plan was to reduce coverage gradually from full guarantee to THB 1,000,000 per depositor per financial institution by 2015. However, the schedule has been accelerated to reach this goal by August, 2012.

#### Financial Sector Master Plan — Phase II

With Phase I largely successful, Phase II is now under way. The BOT noted that Thailand's average return on assets was lower than in other economies in the region, and also that several households continued to lack access to financial services. Thus, the major goals of Phase II can be summarised as (1) reducing system-wide operation costs; (2) promoting completion and financial access; and (3) strengthening financial infrastructure. Phase 2 will also focus on the potential entry of new players, and capital market development.

#### Foreign exchange regulations

The Exchange Control Act B.E. 2485 (1942) (as amended) and the regulations promulgated thereunder, including particularly Ministerial Regulation No 13 (as amended), provide the regulatory framework for exchange control in Thailand. On this basis, the Ministry of Finance and the competent officer of the BOT each issue regulatory notifications.

- Foreign currencies — foreign currencies can be brought into Thailand without limit. A person who receives foreign currencies from abroad is generally required to sell such foreign currencies to an authorised financial institution or to deposit them in a foreign currency account with an authorised financial institution within 360 days from receipt. There is an exception for foreigners temporarily staying in Thailand for up to three months, foreign embassies, international organizations (including their staff with diplomatic privileges and immunity), and Thai persons who are permanent residents abroad or who are working abroad.

Purchase of foreign currency from authorized banks is generally allowed upon submission of documents indicating international trade and investment. Companies in Thailand can engage in derivatives transactions with authorized banks to hedge against foreign exchange risks, provided that supporting documents indicating future foreign currency receipts or obligations are submitted.

- Any person bringing into or taking out of Thailand foreign currency bank notes in an aggregate amount exceeding \$20,000 or its equivalent must make a declaration to a customs officer, accordingly. And the transfer of foreign currency exceeding \$20,000 or its equivalent requires filing/submission of a Foreign Exchange Transaction Form.
- Local currency — there is no restriction on the amount of Thai baht bank notes that may be brought into the country. A person who travels to Thailand's bordering countries (including Vietnam and the People's Republic of China (only Yunnan Province)) is allowed to take out up to THB 2,000,000 with a declaration to a customs officer if exceeding THB 450,000. A person who travels to other countries is allowed to

take out up to THB 50,000, respectively, without authorisation.

- Foreign currency account of non-residents — non-residents can open and maintain foreign currency accounts with authorised financial institutions in Thailand without limit. The accounts must be credited with funds that originate from abroad except in the case where non-residents temporarily working in Thailand convert their income into foreign currencies to deposit into the accounts. Payments from Thai residents or borrowing from authorized banks can be deposited subject to supporting evidence. Balances on such accounts may be transferred without restriction.
- Non-resident baht account — non-residents may open two types of baht accounts with authorised financial institutions in Thailand as follows:
  - Non-resident baht account: the account may be debited or credited for general purposes, (i.e. other than investment in securities) such as trade, services, foreign direct investment, and investment in immovable assets and loans.
  - Non-resident baht account for securities: the account may be debited or credited for the purpose of investment in securities and other financial instruments such as equity instruments, debt instruments, unit trusts, and financial derivatives transactions traded on the Thailand Futures Exchange and Agricultural Futures Exchange of Thailand.

The total daily outstanding balance for each type of account should not exceed THB 300 million per non-resident. Transfers between different types of accounts are not allowed.

- Exports — export proceeds in foreign currency that amount to \$50,000 or more must be brought into Thailand immediately upon receipt and in any case within 360 days after the date of export. When acquiring such foreign currencies, the exporters shall sell the foreign currencies to an authorised financial institution or deposit them in a foreign currency account with an authorised financial institution within 360 days of receipt thereof.
- Imports — importers may freely buy or withdraw foreign exchange from their own foreign currency accounts for import payments upon submission of supporting documents. Letters of credit may also be opened without authorization.
- Services — proceeds from the provision of services of at least \$50,000 must be brought into Thailand immediately on receipt and in any case within 360 days after the transaction. The proceeds must be sold to a financial institution or deposited in a foreign currency account with an authorised financial institution in Thailand, within 360 days after receipt thereof.

Outward remittances of amounts properly due to non-residents are permitted for items of a non-capital nature such as service fees, interest, dividends, profits, or royalties provided that supporting documents are submitted to an authorized bank. Travelling expenses or educational expenses of residents are also freely permitted upon submission of supporting documents.

- Foreign investments — transfers in foreign currency for direct and portfolio investments in Thailand are freely permitted. Foreign capital and loan proceeds transferred to Thailand must be sold to an authorised financial institution or deposited in a foreign currency account with an authorised financial institution within 360 days of receipt. Repatriation of investment capital and repayment of overseas loans can be remitted freely upon submission of supporting evidence to authorised financial institutions. For repatriation of investment funds, evidence of sale or transfer thereof must be submitted. For loan repayment, evidence of inward remittance of such loan and the loan agreement must be submitted.
- Reporting — any person purchasing, selling, depositing, or withdrawing foreign currencies with an authorised financial institution in an amount of \$50,000 or above must report such foreign exchange transactions with the authorized bank, in the form as prescribed by the Competent Officer.
- Others — outward remittances to Thai emigrants who are permanent residents abroad, provided that funds are derived from their own assets, from their families or relatives, or from their inheritances, are allowed up to \$1 million per recipient per year, for each purpose. Fund transfers to the public for donations are allowed up to \$1 million per person per year. Purchase of immovable properties abroad is allowed up to \$10 million per person per year. Purchase of shares, warrants and options of related companies abroad under employee benefit plans are allowed up to USD 1 million per person per year.

#### Banking secrecy

Pursuant to section 154 of the Financial Institutions Business Act, whoever, in the performance of his duty upon the power and duty prescribed under the law or in the performance of assisting those performing their duties upon the power and duty prescribed under the law, having acquired knowledge of the business of a financial institution which, in a normal business, is to be held in confidence, discloses such knowledge to other persons shall be liable to imprisonment for a term of up to one year and/or a fine of up to THB 100,000.

The provision under the first paragraph shall not apply to disclosure under the following circumstances:

1. disclosure in the performance of his duty or for the purpose of investigation or trial;
2. disclosure of the commission of an offence under this Act;
3. disclosure to the auditor of such financial institution or to the domestic and foreign authorities having powers and duties to supervise such

financial institution;

4. disclosure of information to facilitate the performance of duty of the domestic and foreign authorities having powers and duties to supervise financial institution or financial business in accordance with the agreements signed by them.
5. disclosure for the purpose of rectifying the condition and operation of such financial institution;
6. disclosure for the purpose of granting credits of the financial institution;
7. disclosure of confidential information of a customer of the financial institution that had already been disclosed to the public;
8. disclosure of confidential information of a customer of the financial institution with the consent of the customer;
9. disclosure to companies within the financial business group of such financial institution;
10. disclosure for the purposes of compliance with the laws.

Section 155 goes on to provide that whoever, in the performance of the duty of the person with power of management or an officer of a financial institution, has acquired or obtained the confidential information of such financial institution and discloses such confidential information in a manner likely to cause damage the other persons or the public, shall be liable to imprisonment for a term of up to one year and/or a fine of up to THB 100,000.

The provision under the first paragraph shall not apply to any disclosure as prescribed in the second paragraph of Section 154.

#### Outsourcing

There are restrictions on outsourcing by financial institutions; approval of the BOT would be necessary prior to outsourcing certain functions. As a general matter, outsourcing to affiliates (i.e. referring to the headquarters and its branches) would be subject to a lower level of scrutiny than would outsourcing to unaffiliated third parties, though the regulations are applicable to both. The law requires that a formal written agreement be in place for outsourcing both to affiliates and to unaffiliated third parties. Such contract must specify duties and liabilities of parties, including clear conditions for provision of the services, and:

1. Details of the types of services, scope of responsibilities, risk management, internal control system, data, and properties of the financial institution protection system;
2. Service level agreement;
3. Business continuity plan;
4. Protection of data/information, including the protection of customers' personal data;
5. The outsourcing service fees should be reasonable;
6. Steps of monitoring, examining, and assessing the outsourcing providers' performances;
7. Scope of the parties' responsibilities and alignment of emergency plans between the financial institution and the outsourcing provider;
8. Rights of the financial institution to amend the contract, including changes in contract term, renewal, and termination, so as to provide for flexibility in adjusting the services, if necessary;
9. Provision which provides that outsourcing providers who are subcontractors must be subject to the terms and conditions under this agreement;
10. Any other necessary conditions such as location of service provision, insurance provision, and services rendered to customers outside of Thailand, etc.;
11. The agreement should not obstruct the outsourcing providers to provide services to any other financial institutions;

12. The parties must comply with any other related rules and regulations;

13. Provision for the financial institution, internal controller, external inspector, and/or any governmental authority to inspect the performance and/or internal control system of the outsourcing provider and/or its subcontractor(s);

#### Anti-money laundering

The Anti-Money Laundering Act B.E. 2542 (1999) established the Anti-Money Laundering Office (AMLO). Its primary function is to analyse the information it receives from financial institutions and other government entities, including the BOT, and conducting investigations accordingly. The Act also sets requirements for personal details to be provided to financial institutions, prior to account opening. It also requires financial institutions to report all cash transactions of greater than THB 2 million, all property transactions of greater than THB 5 million, and all transactions that are "suspicious".

#### Securities

The Securities and Exchange Commission, Thailand

The Securities and Exchange Commission, Thailand, with the status of an independent state agency, is responsible for the supervision and development of Thai capital markets.

#### Securities exchange

At present, the Stock Exchange of Thailand (SET) is the only organised securities market in Thailand. The establishment of any other organised securities trading centre would require a licence from the SEC. The SET has national exchange status with several business units:

1. Market for Alternative Investment — the exchange for small and medium-sized enterprises.
2. Bond Electronic Exchange — the exchange for Thailand's secondary bond market.
3. Thailand Futures Exchange PCL — a subsidiary of the SET which engages in derivatives exchange.

In addition, the Agricultural Futures Exchange of Thailand was established in 2001, under the Agricultural Futures Trading Act B.E. 2542 (1999) (as amended).

#### Clearing house and securities depository centre

All trading transactions are cleared within three consecutive business days following trading. The Thailand Securities Depository Company (TSD), which is the only central securities depository in Thailand and a wholly-owned subsidiary of the SET, manages the clearing and settlement process. For derivatives transactions, the Thailand Clearing House Co, Ltd, a subsidiary of the TSD, performs the clearing and settlement process.

#### Securities regulations

The Securities and Exchange Act B.E. 2535 (1992) (as amended) (the SEC Act) is the primary law under which Thai capital markets are regulated, and under which the SEC operates. The Act has undergone several amendments, and there are numerous regulations promulgated thereunder. The SEC's current goals are maintaining an orderly market, providing for investor protection, promoting business innovation, and promoting competition.

Also of importance is the Derivatives Act B.E. 2546 (2003) (as amended), which provides a regulatory framework for derivatives contracts and derivatives markets and intermediaries, and empowers the SEC to oversee the financial integrity of the markets and take action to prevent adverse effects to the system. Types of derivatives contracts or transactions not subject to the Derivatives Act are: (1) securities-related contracts; (2) depository contracts; and (3) trading contracts with respect to goods whereby payment and delivery will take place in the future but which are such that the parties could not offset price discrepancy or close-out position.

#### Securities issuance

Under the SEC Act, the issuance of equity or hybrid instruments is only allowed for public limited companies, including incorporators of public limited companies that can issue and offer equities. Both public limited companies and limited companies can issue debt instruments (private limited companies cannot issue debentures). Issuers that wish to make a public offering of securities must first obtain approval from the SEC and must file a registration statement and draft prospectus, as well as report updated information for public disclosure. Companies that offer securities to the public are required to disclose quarterly financial statements in addition to audited annual financial statements.

#### Substantial shareholding/business takeover

Takeover and substantial shareholding is regulated under the Public Limited Company Act B.E. 2535 (1992) (as amended), as well as the SEC Act. A person who acquires or disposes of: 1) shares; 2) share warrants; or 3) convertible securities that can be converted into shares of companies which have their securities listed on the SET or MAI, or of a public limited company, must file an acquisition or disposition report to the SEC the next business day when such acquisition or disposition causes the aggregate holding of the same type of security to reach at least five percent of the total issued securities in the business.

Subject to certain exemptions, a person who acquires at least 25 percent, 50 percent, or 75 percent of the outstanding shares in a company must issue a tender offer to provide all securities holders with an equal opportunity to sell their securities at the same price. The computation excludes

treasury stock. Regulations set requirements with respect to the information and advice other securities holders are to be provided to assist them in making such a decision, as well as relevant time frames.

The offer price for the tender offer must be the same for all shareholders or securities holders and must not be less than the highest price at which the acquirer had acquired such securities within 90 days prior to the tender offer. Aside from the mandatory offer requirements, a person may also make a voluntary offer to purchase and hold 25 per cent or more of the securities of a listed company.

#### Securities businesses

Under Section 4 of the SEC Act, "securities businesses" includes securities brokerage, securities dealing, securities underwriting, investment advisory services, mutual fund management, private fund management and other businesses that relate to securities as the Minister of Finance may specify upon SEC recommendation, which currently include securities borrowing and lending, securities financing, inter-dealer brokerage, and venture capital fund management.

The SEC Act requires all operators of securities businesses to be licensed. Licence requirements include initial capital adequacy, a fit-and-proper capability for management, characteristics of directors and controlling shareholders, and an assessment of internal controls, risk management and supervisory systems. Among their continuing compliance requirements, securities businesses also have reporting obligations under the Anti-Money Laundering Act.

#### Investment by foreigners in the SET

Foreigners who wish to invest directly in listed Thai securities may follow the five-step guideline as set out below:

1. Appoint custodians, correspondent banks and brokers. Local commercial banks usually provide both custodian and correspondent services.
2. Inward remittance of funds into Thailand. As earlier indicated, such inward remittance can be freely made for any amount, subject to reporting obligations.
3. Place orders through a broker.
4. Clearing and settlement on the third business day after trading.
5. Repatriation of funds. The correspondent bank typically requires presentation of evidence by the investor of the sale of the securities.

## Tilleke & Gibbins

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