



Thailand: Takeover and 5% Reporting Rules

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Acquisition of securities listed on the Stock Exchange of Thailand (the “**SET**”) for the purpose of business takeovers (i.e. a tender offer) is mainly regulated by the Securities and Exchange Act B.E. 2535 (1992), as amended, and the Notification of the Capital Market Supervisory Board No. ThorJor. 12/2554 re: Rules, Conditions and Procedures for the Acquisition of Securities for Business Takeovers, as amended (the “**Takeover Rules**”).

1 Introduction

Tender offers can be categorized into: (1) mandatory tender offers; (2) voluntary tender offer; (3) partial tender offers; and (4) tender offers for de-listing purposes.

1.1 Mandatory Tender Offers

The requirement for mandatory tender offer, which shall be reported or submitted to the Securities and Exchange Commission (the “**SEC**”) in the Form 247-4, is triggered when any person, together with its related persons and/or concert parties, acquires voting rights at or in excess of 25%, 50% or 75% (each, the “**Trigger Point**”) of all voting rights in a listed company, provided that the acquisition may be: (a) direct, through the acquirer’s ownership of the target company’s securities; (b) indirect (by application of the so-called “chain principle”); or (c) a combination of direct and indirect acquisition. Under Thai securities regulations, “related persons” include a spouse, minor child and person who holds more than 30% of the voting rights in the acquirer or disposer. On the other hand, “concert parties” refers to those who have mutual intention to exercise their voting rights in the same direction, which may be evidenced from their agreement in relation to an exercise of their voting rights and an agreement to restrict the right to sell securities in the case of a tender offer, among others.

There are a number of exemptions from the mandatory tender offer requirement, including:

- the Trigger Point was reached as a result of a target company share repurchase;
- the Trigger Point was reached through inheritance of securities, stock dividends, rights offerings, tender offers or certain types of business restructuring;
- the acquirer reduces its shareholding or controlling interest to below the relevant Trigger Point within seven business days; and
- a waiver is granted by the SEC or a specially-convened takeover panel. In this regard, the SEC may grant a waiver on a number of grounds, including where the acquisition does not result in a change of control, the acquisition is made for purposes of providing support to or rehabilitating a business, or the acquisition is made pursuant to a shareholder resolution (i.e. whitewash).

1.2 Voluntary Tender Offers

A voluntary tender offer is an elective offer to purchase the target company's outstanding shares. As with a mandatory tender offer, a voluntary tender offer must be made for all outstanding securities of the target company. However, as it is voluntary, the offer may be made on a conditional basis, including by specifying that the offer will only be consummated if a certain number of securities are tendered.

1.3 Partial Tender Offers

A Partial tender offer is a tender offer for some but not all of the target company's securities. A partial tender offer must be an offer for at least 10% of the target company's shares and requires a waiver from the SEC which may be granted if:

- (1) the offer will not result in the offeror, including its related person, owning 50% or more of the voting rights of the target company;
- (2) the shareholders' meeting of the target company resolves to approve the offer with at least 50% of the total votes of the shareholders present at the meeting and having the right to vote,
- (3) the offeror, including its related persons, does not vote in the shareholders' resolution to approve the offer; and
- (4) over the six-month period prior to the offer, the offeror, including its related persons, has acquired (i) the total shares of no more than 5% of the number of shares intended for the offer from any particular person; and (ii) voting rights of no more than 20% of the total voting rights in respect of the shares which are intended for the offer.

1.4 Tender Offers for De-Listing Purposes

Tender offers carried out for the specific purpose of de-listing a public company from the SET are subject to a slightly different set of rules, most of which relate to pricing. De-listing tender offers also need to comply with a separate set of the SET rules relating to de-listing.

It is worth noting that the Takeover Rules do not provide for any tender offer "squeeze-out" provisions. Therefore, after de-listing, there may remain certain numbers of minority shareholders and the acquirer may not be able to freely control and manage the de-listed company after the de-listing.

2 Pricing

The following three general pricing principles apply to all tender offers covered by the Takeover Rules:

- (1) the consideration offered to all holders of securities of the same class must be in the same form;
- (2) the tender offer consideration may be expressed in more than one form, but must include a cash-only alternative (except in one specific business restructuring scenario); and

- (3) if the offer is made in non-cash form, its cash equivalent must be appraised by a financial advisor.

2.1 Mandatory, Voluntary and Partial Tender Offers

Pricing of mandatory, voluntary and partial tender offers is generally set by reference to recent target company-related share or business acquisitions by the acquirer, its related persons, its concert parties and the related persons of its concert parties. The tender offer price for securities of each class of the target company shall be no less than the highest price paid for any such securities by the aforementioned persons (if any) within the past 90 days prior to the date on which the offer document is submitted to the SEC.

In the case where a tender offer is made pursuant to application of the “chain principle”, the tender offer price shall be no less than the higher of: (i) the cost of acquiring a “controlling” interest in the relevant intermediate company; and (ii) the highest price paid for any shares acquired during the past 90 days. If securities of only one class have been acquired within the past 90 days, the tender offer price for securities of all other classes is determined by the higher of: (i) the weighted average market price of such securities for the five business days preceding such acquisition; and (ii) the fair value of such securities appraised by a financial advisor. However, in the case of a mandatory tender offer where the offeror fails to submit tender offer documents within the required period, the tender offer price shall comply with the pricing specified in Article 40/1 or 40/2 of the Takeover Rules.

The tender offer price may be adjusted to account for dividend payments, changes in par value and similar events, and the takeover panel is permitted to approve exceptions to the general pricing principles.

2.2 De-Listing Tender Offers

De-listing tender offers are subject to a different set of pricing rules which take into account the fact that if the de-listing goes ahead, the tender offer may be the last opportunity for shareholders to sell their shares. For de-listing tender offers, the offer price may not be less than the highest of:

- (1) the highest price paid for securities of the target company purchased by the acquirer, its related persons, its concert parties and the related persons of its concert parties (if any) within the past 90 days prior to the date on which the offer document is submitted to the SEC;
- (2) the weighted average market price of securities during the five business days prior to the earlier of: (i) the date that the board of directors resolves to propose the de-listing to shareholders for consideration; or (ii) the date on which the shareholders resolve to de-list;
- (3) the net asset value per share of the target company; and

- (4) fair value as determined by an independent financial advisor.

Acquirers are also permitted to apply to the takeover panel to reduce the tender offer price if any event occurs which has a material adverse effect on the business.

3 Post-Tender Offer Requirements, Obligations and Restrictions

The offeror is required to make preliminary and final reports of the results of the tender offer. The preliminary report is required to be made one business day after the last day on which securities holders are permitted to withdraw their tenders or, if earlier, three business days prior to the close of the offer period. The final report is required to be made within five business days from the close of the offer period.

In addition, an offeror that has passed through any of the Trigger Points will be subject to the following lock-ups:

- (1) for a period of six months from the close of the offer period, the offeror shall be prohibited from acquiring securities of the target company at a price higher than the tender offer price, except in the case of newly-issued securities or securities from an approved tender offer; and
- (2) for a period of one year from the close of the offer period, the offeror shall be prohibited from taking any action materially different from that specified in the tender offering document, unless approved by the shareholders of the target company.

In addition, the offeror will be prohibited from making any subsequent tender offers for a period of one year following the close of the previous tender offer period, other than a tender offer to complete the de-listing of the target company. In the case of a partial tender offer, the offeror may not acquire securities in the target company for a period of six months following the close of the offer period, unless such acquisition falls under one of the automatic exemptions from making a mandatory tender offer, is for newly-issued shares, or is approved by the SEC.

4 5% Reporting Requirement

4.1 Shares

In the case of an acquisition or a disposal of shares in the company listed on the SET, the acquirer or disposer shall be obliged to submit a report to the SEC in the Form 246-2 if such acquisition or disposal increases or decreases the aggregate number of listed shares held by the acquirer or disposer and its related persons and/or concert parties by any multiple of 5% of the total number of voting rights of the listed company.

The shareholding percentage shall be calculated in accordance with the following formula:

$$\frac{\text{The total number of voting rights of shares held} \times 100}{\text{The total number of voting rights of the target company}}$$

4.2 Convertible Securities

In the case of convertible securities, an acquisition that results in the acquirer (including its related persons and/or concert parties)'s aggregated interest increasing by any multiple of 5% of the total voting rights (if all convertible securities held are to be exercised in accordance with the following formula) will trigger the disclosure requirements:

$$\frac{\text{The total number of voting rights of shares to be acquired} \\ \text{if all convertible securities held are exercised} \times 100}{\text{The total number of voting rights of the target company}}$$

4.3 Exemptions

Any acquisition or disposal of securities in the following manners, reaching or passing the 5% trigger point, shall be exempted from the 5% reporting requirement:

- (1) disposal of convertible securities;
- (2) acquisition of securities by stock dividend payment or exercise of a rights offering;
- (3) acquisition or disposal of securities in a securities borrowing and lending (the "SBL") transaction made with a licensed SBL business operator or securities depository with one of the following characteristics:
 - (i) as a lender, the SBL agreement specifies that the securities can be recalled by the lender at any time throughout the period of an agreement;
 - (ii) as a borrower, the securities must be delivered within five business days from the date of borrowing; and
 - (iii) as a borrower, the securities must be returned within five business days from the date of receiving the securities;
- (4) granting or receipt of securities ownership as collateral in respect of the SBL described above;
- (5) acquisition or disposal of securities in a listed company by the issuer of depository receipts, which the SET establishes and holds no less than 75% of its total paid-up capital (e.g. Thai NVDR Company Limited).

It should be note that the exemptions in items (3) and (4) above do not include the acquisition or disposal of securities as a result of the breach of SBL agreement; or

- (6) acquisition or disposal of securities as a result of restructuring the shareholding of a business in accordance with the conditions under Clause 9(5) of the Takeover Rules.

It is worth noting that a change in the total number of issued equity securities that consequently alters a person's shareholding percentage will not trigger the 5% reporting requirement.

4.4 Disclosure Deadline and Form

Disclosure must be made to the SEC using the Form 246-2 within three business days following the date of the acquisition or disposition (i.e. T + 3). As of September 2019, Form 246-2 is required to be submitted through an online system of the SEC only.

This is intended merely to provide a regulatory overview and not to be comprehensive, nor to provide a legal advice. Should you have any questions on this or on other areas of law, please contact any of the authors on this.

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