



# **Private Placement in Thailand**

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## 1 Introduction

Pursuant to Sections 33 and 65 of the Securities and Exchange Act 1992 (as amended) (the “**SEC Act**”) and the Notification of the Capital Market Supervisory Board No. ThorJor. 39/2559 dated 30 September 2016 (as amended), an offering of newly issued shares of a public limited company (the “**Company**”) to the public requires (i) approval from the Securities and Exchange Commission (the “**Thai SEC**”) and (ii) filing of a registration statement and draft prospectus with the Thai SEC, except where:

- 1.1 such offering is a rights offering (i.e. an offering of shares to the existing shareholders in proportion to their shareholdings);
- 1.2 such offering falls within any of the following “private placement” exemptions (the “**Private Placement**”):
  - (i) an offering of shares made to no more than 50 investors within any period of 12 months;
  - (ii) an offering of shares in an aggregate value of not exceeding Baht 20 million within any period of 12 months, provided that the calculation of the aggregate value of such offered shares shall be based on the offering price of the shares<sup>1</sup>;
  - (iii) an offering of shares made to qualified institutional investors<sup>2</sup>; or
  - (iv) a rights offering by a juristic person established under specific law<sup>3</sup>.

It is worth noting that the calculation of the number of investors referred to in item (i) above does not include the number of qualified institutional investors and the value of the offering referred to in item (ii) above does not include the value of offering made to qualified institutional investors. In other words, the Company can offer newly issued shares in reliance on the private placement exemptions by offering new shares with unlimited amount to unlimited number of institutional investors and, in addition to the issuance of shares to institutional investors:

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<sup>1</sup> Different from the Japanese securities regulations, no matter how many the number of offeree is, i.e. the securities are offered to general public, small amount offering is treated “private placement” under the Thai regulations.

<sup>2</sup> The qualified institutional investors under the private placement exemption are: (i) commercial banks; (ii) finance companies; (iii) securities companies holding securities for their own account or for management of private funds or investment projects established under the law relating to the undertaking of finance business, securities business and credit foncier business; (iv) credit foncier companies (companies which lend money on the security of a mortgage over immovable property in the ordinary course of business); (v) insurance companies; (vi) government agencies and state enterprises qualified under the law relating to budgetary procedures; (vii) The Bank of Thailand; (viii) international financial institutions; (ix) The Financial Institution Development Fund; (x) The Government Pension Fund; (xi) provident funds; (xii) mutual funds; or (xiii) overseas investors whose characteristics are similar to those investors mentioned in (i) to (xii) above.

<sup>3</sup> For example, Government Savings Bank and Bank for Agriculture and Agricultural Cooperatives

- (i) offering new shares with unlimited amount to no more than 50 non-institutional investors; *or*
- (ii) offering new shares with aggregate value not exceeding THB 20 million to unlimited number of non-institutional investors.

## 2 **Price Restriction for Private Placement**

A Private Placement is subject to the price restriction under the Notification of the Capital Market Supervisory Board No. ThorJor. 39/2559 dated 30 September 2016 (as amended), the Notification of the Capital Market Supervisory Board No. TorJor. 72/2558 and the Notification of the Thai SEC No. SorJor. 39/2551 dated 24 December 2008 (collectively, the “**SEC Regulations**”), which impose additional requirement where the offer price of the Private Placement is lower than 90% of the “market price” of the existing shares of the Company<sup>4</sup>.

### 2.1 **Market price**

Under the SEC Regulations, the “market price” means any of the following prices:

- (i) the weighted price (either an average or closing price, determined by the board of directors of the issuer) of shares of the Company traded on the Stock Exchange of Thailand (the “**SET**”) during at least seven consecutive business days, but not exceeding 15 consecutive business days, prior to the “Date of Price Determination” as decided by the board of directors of the Company (the “**Trading Price**”).

In this regard, the “Date of Price Determination” is the date determined by the board of directors of the issuer from either of:

- (a) the date on which the board of directors’ meeting passes a resolution to propose the issuance of new shares at an offer price below 90% of the market price to the shareholders’ meeting for approval<sup>5</sup>;
- (b) the date on which the shareholders’ meeting approves the issuance of new shares at an offer price below 90% of the market price<sup>6</sup>;
- (c) the first day of subscription application submission; or
- (d) the date on which the investor has the right to convert convertible bonds or purchase shares according to share warrants<sup>7</sup>;

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<sup>4</sup> Public offering at a price lower than 90% would be subject to a different set of rules.

<sup>5</sup> Available when the issuer intends to make a private placement at an offer price below 90% of the market price.

<sup>6</sup> Available when the issuer intends to make a private placement at an offer price below 90% of the market price.

<sup>7</sup> Available when the discount rate is fixed or foreseeable (e.g. the conversion price is 89% of the market price of the conversion date.)

- (ii) the price determined by a comparison of demand and supply of the new shares of the Company, e.g. by surveying the demand for the securities of the Company (book building) (the “**Book Building Price**”)<sup>8</sup>; or
- (iii) the fair price as appraised by a financial advisor in the list of approved financial advisors of the Thai SEC (the “**Fair Price**”).

In order to determine whether the offer price of the Private Placement is lower than 90% of the market price, the Company may choose any of the Trading Price, Book Building Price or Fair Price as the reference “market price”. For example, if the Trading Price is Baht 100 per share but the Book Building Price is Baht 90 per share, the Company can choose to use the Book Building Price at Baht 90 per share as the reference “market price” even though it is lower than the Trading Price. In this example, the additional requirements discussed in paragraph 2.2 below would not apply if the offer price of the Private Placement is not lower than Baht 81 (i.e. 90% of the Book Building Price at Baht 90 per share) even though it is lower than 90% of the Trading Price.

It should be noted that the SEC Regulations do not specify the criteria for determining the Book Building Price. In practice, the Thai SEC may request the underwriter who handles the book building process to explain the book building process in order to ensure that the Book Building Price is not used as a way to avoid the additional requirements discussed in paragraph 2.2 below. Similarly, the SEC Regulations do not specify the criteria for the determination of the Fair Price and, in practice, the financial advisor who determines the Fair Price would usually be required to explain the basis for its determination to the Thai SEC<sup>9</sup>.

## 2.2 **Additional requirements**

The offering of shares through a Private Placement must be proposed for approval of the shareholders’ meeting. Usually, the agenda items that will be tabled to the shareholders’ meeting will include (i) the increase of registered capital<sup>10</sup> and the amendment to the Memorandum of Association of the Company to reflect the new registered capital, which requires the special resolution at the shareholders’ meeting<sup>11</sup>, and (ii) the allocation of the new

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<sup>8</sup> Under the Thai regulations, provision of offering-related information during a book-building process does not constitute “offering” or “solicitation” and does not trigger the filing requirement of a registration statement.

<sup>9</sup> How underwriters/financial advisors explain it depends on the responsible SEC officer. They may require a meeting or letter, or both.

<sup>10</sup> Registered capital is a share capital of the company that is to be represented by shares to be issued by that company while paid-up capital is the share capital which the company has issued as shares. There is a scenario that the public company can issue shares without the capital increase, i.e. when the public company has the registered capital more than the paid-up capital - the gap amount which is the authorized but unissued capital can be used for an offering.

<sup>11</sup> The resolution must be passed by at least 75% of the votes of the shareholders attending and having the right to vote, in the shareholders’ meeting where a quorum is constituted by attendance of not less than 25 shareholders and their proxies (if any) or not less than one half of the total number of shareholders of both voting and non-voting shares, with the aggregate number of both voting and non-voting shares of not less than one-third of the number of both voting and non-voting shares issued and outstanding.

shares<sup>12</sup> and the offer price (or an authorization for the Board or authorized directors or certain member(s) of the Board to determine the offer price), which requires a resolution of the shareholders meeting<sup>13</sup>.

However, in the case where the offer price of a Private Placement will be lower than 90% of the market price, the SEC Regulations impose the following additional requirements:

- (i) the notice of the shareholders meeting must contain certain information as required by the SEC Regulations (e.g. the objective of the offering at a price below 90% of the market price, the details of shares to be issued including the number of shares offered and the offer price in which a fixed price or a maximum discount is indicated, and the effects on shareholders as a result of the offering indicating at least price dilution and control dilution); and
- (ii) the resolution of the shareholders meeting approving the Private Placement at a price below 90% of the market price must be passed in a quorate meeting with attendance of not less than 25 shareholders and their proxies (if any) or not less than one half of the total number of shareholders of both voting and non-voting shares, with the aggregate number of shares of not less than one-third of the number of both voting and non-voting shares issued and outstanding, by not less than 75% of the votes of the shareholders attending the meeting and having the right to vote without any objection from 10% or more of the votes of the shareholders attending the meeting and having the right to vote.

*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.*

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<sup>12</sup> In the case of the allocation of shares to institutional investors, it is not necessary to specify the names of subscribers (only mentioned the type of investors). However, in other cases, the allocation would need to specify the name of each subscriber to provide sufficient information to shareholders.

<sup>13</sup> The resolution must be passed by simple majority of the votes of the shareholders attending and having the right to vote, in the shareholders' meeting where a quorum is constituted by attendance of not less than 25 shareholders and their proxies (if any) or not less than one half of the total number of shareholders of both voting and non-voting shares, with the aggregate number of shares of not less than one-third of the number of both voting and non-voting shares issued and outstanding.

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