

# Corporate Fraud in Thailand\*

Deunden Nikomborirak  
Sirikarn Lertampainon  
Weerawan Paibunjitt-aree\*\*

If the definition of corruption in the public sector refers to the exploitation of public authority for personal gain, then the use of corporate authority by executives of a company to secure personal gain also could be considered as “corruption.” The global anti-corruption forum has been giving increasing importance to corruption and fraud in the private sector, in particular with regard to money-laundering. The United Nations Convention against Corruption, which more than 150 countries ratified as of March 2011, contains clauses addressing preventive and punitive measures to address fraudulent practices in the private sector.

This paper examines the nature of corporate fraud that occurred in the Thai stock market during the period 2000–2011 and assesses the efficacy of relevant laws and regulations for dealing with these practices in order to identify the remaining “gaps” in the supervision of business practices. This report finds that Thailand already has all the necessary rules and legislation required to handle corporate fraud but its enforcement record has been appalling. The financial penalty imposed on an infraction of the securities law in most cases is also insufficient to deter undesirable practices, and lengthy court cases have helped to further undermine the rule of law. Most interestingly, however, examination of selected cases of corporate fraud reveals that those cases that involved well-known politicians did not result in prosecution, indicating that political influence may be an important factor in determining whether the law is enforced or not.

To improve the rule of law regulating corporate practices, it may be necessary to (a) introduce a civil penalty in lieu of a criminal penalty in order to lessen the burden of proof required for legal prosecution; (b) grant the Securities and Exchange Commission (SEC) broader power to impose administrative measures in order to avoid lengthy and often unfruitful pursuit of legal sanctions; (c) provide for restitution/compensation for the injured parties; and (d) legislate class-action lawsuits in order to incentivize action by shareholders.

## 1. INTRODUCTION

The global anti-corruption forum that has been focusing on corrupt practices in the public sector has recently been paying increasingly more attention to fraud in the private sector. In this context, it may be asked: If the definition of corruption in the public sector refers to the exploitation of public authority for personal gain, could the use of corporate authority by directors and executives of a company to secure personal gain also be labeled as “corruption?” The only difference between the “corrupt” actors is that the damage caused by corruption in the public sector is borne by the entire nation, while that in the private sector is borne by a limited group of stakeholders, such as shareholders, employees or creditors. In the case of a publicly listed company, the range of affected parties can be rather broad. Moreover, systemic corruption in the private sector can have public implications. For example, widespread connected lending in the banking sector can undermine the stability and credibility of a country’s financial system.

The global anti-corruption forum has been giving increasing importance to corruption and fraud in the private sector, in particular with regard to money-laundering. The United Nations Convention against Corruption, which more than 150 countries ratified as of March 2011, contains clauses addressing preventive and punitive measures to deal with fraud in the private sector (United Nations 2003). Preventive measures include, for example, the establishment of good accounting and auditing standards, and punitive measures include the mandatory criminalization of bribery of foreign public officials and officials of public international organizations. The Convention also contains important provisions relating to international cooperation in the enforcement of law across borders, such as extradition, gathering and transferring evidence, seizure of assets and assisting investigations and prosecutions. Thailand ratified the Convention on March 1, 2011.

\* This paper is based on the report entitled “Corruption in the Private Sector: Preventive and Remedial Measures,” commissioned by the National Counter Corruption Commission, and conducted by Thailand Development Research Institute (TDRI); it was completed in August 2011.

\*\* Dr. Deunden is Research Director, Economic Governance; Ms. Sirikarn is Researcher; and Ms. Weerawan is Senior Researcher, Sectoral Economics Program, TDRI.

This paper examines the nature of corporate fraud in Thailand and the enforcement of the relevant laws. The second section provides a brief overview of the structure of corporate control among Thai companies, which will help explain the nature of fraud elaborated in the subsequent section. The fourth section provides a cost and benefit analysis of committing a corporate fraud in order to elucidate the relevant incentives or disincentives. The final section offers recommendations on how to improve the rule of law governing fraudulent corporate practices.

## 2. AN OVERVIEW OF THE THAI CORPORATE STRUCTURE

Most companies in Thailand are family owned. A study by the World Bank found that two-thirds of the listed companies in Thailand are controlled by business families, most of which are ethnically Chinese (Claessens and Djankov 1999). The share of family-owned public companies is comparably high in other East Asian countries as well, with the marked exception of Japan. While family-owned companies can make quick and flexible decisions, their management can be opaque and arbitrary, lacking proper checks and balances and participation from stakeholders; hence, they are prone to fraud. Since most publicly listed companies grew out of smaller family-run companies, the way such companies are managed is difficult to change.

During the “bubble economy” preceding the Asian financial crisis in 1997, corporate fraud was widespread as controlling shareholders tried to reap the most financial gain for both the company and for themselves. The most rampant and damaging corporate malpractice at that time was the extension by commercial banks of “clean loans,” loans without any collateral but only personal guarantees, to “connected” individuals or companies. As the economy plunged in 1997/98, that practice led to a rapid accumulation of non-performing loans which crippled many locally owned banks. Siphoning of funds from publicly listed companies to privately owned companies was also extensive in the 1990s because “tunneling” was less evident in the bubble economy when the price of assets continued to climb regardless of the fundamental factors.

The 1997 crisis wiped out virtually all family-controlled commercial banks and financial institutions, the equity of which had to be written down markedly. The SEC and the Stock Exchange of Thailand (SET) at that time passed many rules and regulations that would help prevent the types of corporate fraud and misconduct that had plagued the capital market before the crisis. Has corporate fraud in the Thai stock market been tamed as a result? If not, what is the nature of fraudulent practices today? And why do those practices persist?

## 3. THE FACE OF CORPORATE FRAUD IN THAILAND

While fraudulent behavior in the private sector can range from tax evasion and falsification of financial reports to non-compliance with state laws and regulations, this study concentrates only on the cases that involved the abuse of corporate control by the executives of publicly listed companies. As mentioned previously, executives of a publicly listed company are very much like *state* officials: they are supposed to protect the interests of all shareholders, just like state officials are accountable to all the people. Hence, the use of executive power in a private company to further win personal gain by company directors and executives can also be considered as “corruption.”

According to the Thai SEC, there were 90 cases of infraction of the Securities and Exchange Act B.E. 2535 (1992). Most of these cases were classified as failure to report vital information; falsification of information constituted 37.8 percent of the total number of violations, siphoning of corporate funds (27.8%), “violation of regulations” (24.4%), price manipulation (6.7%), and insider trading (3.3%). While these figures tell us about the type of corporate fraud that occurred in the Thai stock market, they do not tell the story behind each case. Who were the persons involved? How was the violation detected? What legal measures were taken?

This paper examines four case studies in detail. These cases were widely reported in the media and had a sufficient official documentation trail to tell a story. They are:

1. Sikarin PCL
2. Roynet PCL
3. Picnic Corporation PCL
4. S.E.C. Auto Sales and Services PCL

### 3.1 Sikarin PCL

Sikarin PCL was founded by the “Wongpaet” family of medical doctors. The company was engaged in a variety of health services, including the supply of medical equipment, hospital catering services and, most importantly, hospital services. In 1994, Juldis Development PCL, a property development business, bought 37 percent of Sikarin’s equity share. The original shareholders had thought that the new major shareholder would contribute to the company’s planned expansion of its hospital chain into provincial areas. Thereafter, the company increased its registered capital twice, reaching a total value of US\$ 26.6 million or about 670 million baht (US\$1 = about 25 baht at that time). The Wongpaet family entrusted the management of this investment to the Juldis Group. Three years later, the Wongpaet family discovered that the Juldis Group had channeled the funds to support its own property development business, which was experiencing severe financial problems as the

economy began its steep decline before turning into the full-blown Asian financial crisis in 1997. Many of these connected transactions, such as the purchase of Juldis PCL equity shares, 85 percent of whose value had to be written off later, the extension of loans to a company affiliated with the Juldis Group, or the purchase of land from the Juldis Group, were never reported to the board of directors.

The SEC found infractions of several sections of the Securities Act and thus referred the case to the Department of Special Investigation (DSI) for criminal action.<sup>1</sup> Charges made against the directors of the Juldis Group included misuse and misappropriation of the company's funds and falsification of the company's financial accounts. Until today, however, after more than a decade has passed, the case is still under investigation by the DSI.

It is interesting to note that in the year 1999, while the SEC was filing charges against the executives of the Juldis Group, a well-known lawyer who was working for Mr. Thaksin Shinawatra, who had been Minister of Foreign Affairs and Deputy Prime Minister during the mid to late 1990s, bought the entire equity share in Sikarin from the Juldis Group. In 2000, Mr. Thaksin became Prime Minister after a landslide victory of the Thai Rak Thai Party. In 2002, the lawyer sold all the shares back to the Juldis Group. Interestingly, the current shareholders of Sikarin consist of the Juldis Group and several prominent former Cabinet members of the Thaksin Government. The Wongpaet family, as expected, has completely divested itself from the company that it had founded.

### 3.2 Roynet PCL

Roynet PCL was founded in 1997 by the "Yaowapruet" family. Its main business was the retail sale of dial-up Internet cards. The company was listed in 2001 in the newly established "Market for Alternative Investment" (MAI), which is a second stock market then designed for smaller corporations that were seeking funding from the capital market but were not able to meet the stringent listing conditions imposed by the country's main stock exchange, the SET. The listing conditions for MAI were more relaxed; for example, the minimum paid-up capital for a company listed on the MAI was 40 million baht compared with 200 million baht for listing on the SET. The requirement that the listing company must record a profit for three

consecutive years before listing was also relaxed. Thus, Roynet was able to be listed on the MAI with paid-up capital of 40 million baht despite its four consecutive years of no profit.

After listing on the MAI, the company's financial performance improved remarkably. As can be seen from Table 1, the company recorded a net profit of 11.87 million baht in the third quarter of 2002 compared with a loss of 7.29 million baht in the previous year. The figures for the previous nine months are even more startling. The chairman of the executive board justified the massive financial turnaround by explaining that there had been a surge in the sale of Internet cards. The spectacular performance no doubt pushed the price of the company's rosy stock from 0.92 baht to 2.26 baht per share within one week after the disclosure of the quarterly financial report. However, shortly afterwards, the SEC ordered that the company revise the report as it found that the company had registered all Internet cards distributed to various retailers as sales although those cards had not yet been sold to final consumers, with the result that no real income had been earned. The SEC then put up a "notice pending" sign on the company's stock to inform investors about the pending revision of the financial report, but all these moves were too late. The revised report showed a net loss of 36 million baht instead of a profit of 22 million baht for the previous nine months. The stock price fell sharply from its peak of 2.29 baht to 0.79 baht per share.

In February 2003, the SEC filed charges against the company and its Chairman, Kittipat Yaowapruet, for falsification of information, failure to report changes in the company's equity holding and insider trading. In July of the same year, the DSI decided to file a lawsuit for this case. In March 2011, the Southern Bangkok Criminal Court found Mr. Kittipat Yaowapruet guilty and handed him a sentence of 8 years and 8 months' imprisonment and fined him 1.88 million baht. As a result, in view of the Roynet case, the SEC has also revised the listing criteria for the MAI. First, companies that would like to list on the MAI must now register a net profit in the year preceding the application to register and must have been in operation for at least two years before doing so. Second, the company's financial advisor and audit committee are required to scrutinize thoroughly the financial report before its official release. Third, the SEC coordinates with the SET in issuing warnings for financial reports that contain extensive reservations made by the auditor.

**Table 1 Financial Report of Roynet (third quarter of 2002)**

(unit: millions of baht)

	3 <sup>rd</sup> quarter		Past 9 months	
	2002	2001	2002	2001
Net profit (loss)	11.87	-7.29	22.08	-18.48
Profit (loss) per share	0.19	(0.89)	0.36	(2.25)

Source: Bangkok Business Newspaper, January 22, 2003.

To conclude, the Roynet case illustrates a situation whereby the stock market was used merely as a means by which to make quick financial returns through share price manipulation. The latter was done usually by falsifying quarterly financial reports in order to temporarily inflate the company's stock price, which would enable the instigator to reap capital gains from insider trading.

### 3.3 Picnic Corporation PCL

Picnic Corporation was founded in 2003 by the Lapwisuthisin family, one member of which, namely Suriya Lapwisuthisin, served as the Deputy Minister of Commerce in the Thaksin Shinawatra Government in 2005. The company's main business involved wholesale distribution of cooking gas. After its listing, the company reported a jump in revenues from 2,263 million baht in 2003 to 7,023 million baht in the following year.

The SEC decided to examine in detail the sources of the surge in revenue and found the following. First, the company had booked the deposit on gas tanks as revenue, thereby artificially boosting the sales figures. Second, the company sold gas to its affiliated gas retailing companies at an elevated price (again, in order to boost the sales figures). The company also inflated its asset value as it appeared on the balance sheet. For example, it bought shares in World Gas Co., Ltd., and an affiliated company at prices that were well beyond their respective book values by booking the difference as "goodwill" that was later written down almost entirely.

Besides uncovering the accounting manipulations used to dress up the income statement and the balance sheet of the company, the SEC also found that the executives of the company had siphoned the company's assets by (a) extending loans to two companies, which later repaid the loans not to Picnic Corporation PCL but to its executives' personal bank accounts; and (b) signing business contracts with terms and conditions that placed Picnic Corporation PCL at a clear disadvantage. For instance, one of the contracts indicated that, if Picnic Corporation PCL failed to repay a loan worth 75 million baht, the creditor would then have the right to confiscate the company's entire shareholding in World Gas Co., Ltd., the second largest distributor of cooking gas in Thailand, which was worth 1.1 billion baht at the time. As expected, Picnic defaulted on the loan and the shares were seized. Several creditor company's and Picnic's directors were later accused by the SEC of colluding to defraud the company.

The SEC filed three separate charges against several executives of the company, only one of which made it to court, while the other two remained under investigation. The charges concerning accounting manipulation to record deposit payments as income and falsification of the loan extension contract, however, were later dropped by the criminal court in 2006 due to insufficient evidence.

### 3.4 S.E.C. Auto Sales and Services PCL

S.E.C. Auto Sales and Services PCL was founded in 1992. Its main business was the sale of imported luxury cars. The company was listed on the SET in 2006. After listing, its financial performance remained sound with sales of 2.8 billion baht and an annual profit of 121 million baht. However, the company's profit dropped to 62 million baht in the following year amid the rumor that the company was on the verge of bankruptcy owing to a large amount of bad loans and that the chairman of the company had already fled overseas. As a result, the SEC launched an investigation into the matter and found that:

1. The company had extended a loan to an affiliated company called SECC Holding, which in turn lent the sum to four individuals, one of whom was Suriya Lapwisuthisin, a former politician whose name also appeared in the Picnic Corporation PCL case discussed previously. The Board of Directors claimed that it was not aware of the lending as the extension of the loan was never reported to the board. However, the SEC insisted that the directors were nevertheless accountable for the fraudulent practice as they had a fiduciary duty to the company according to the law.
2. The stock of imported cars that constituted the bulk of the company's assets did not exist. According to the balance sheet, there were 501 imported cars parked at a warehouse located in the shipping yard, but the investigating team found only eight cars at that site. The Customs Department also confirmed that the company did not import any cars during the period 2007-2008.

The SEC investigation revealed infraction of several sections of the Securities Act and hence made a referral of criminal charges against the executives of S.E.C. Auto Sales and Services PCL and SECC Holding Company to the DSI. The charges included the siphoning of the company's fund through the falsification of import documents, the extension of loans to four individuals through a subsidiary company and falsification of the company's financial report. The SEC issued an order to freeze the assets of the accused (for the first time) and asked the court to prohibit them from traveling overseas. However, several of the accused had already left the country by that time. As of September 2011, this case is still pending investigation at the DSI.

### 3.5 Conclusion

The nature of corporate fraud in Thailand has not changed over the years. All four cases involved: (a) the siphoning of a listed company's assets from a public company to family-owned unlisted companies; and

(b) the manipulation of share prices in order to generate capital gains from equity trade.

The tunneling of a listed company is often conducted through (a) connected transactions that disadvantage the company, such as the use of the company's fund to invest in a family-owned business or to purchase overpriced assets owned by the major shareholder, (b) connected lending to related individuals that eventually default on the loan, and (c) the falsification of documents, such as invoices, in order to divert the company's fund to individual perpetrators.

Because siphoning will no doubt lead to a deterioration of the company's financial health, which will be evident to shareholders and potential investors, it is also necessary to cover up the company's financial performance by means of accounting manipulation. Here, from the cases reviewed, several accounting manipulations were used. These include, for example, the booking of unsold products as revenue to prop up sales figures, the exploitation of "goodwill" to justify purchases of "overpriced" assets and to inflate the company's asset value, or the outright falsification of non-existent revenue or inventory through fake order forms or import documents. When misleadingly optimistic financial reports result in higher stock prices, the perpetrator would then capitalize the gains by selling off the equity shares before the actual financial situation of the company is revealed to other shareholders or investors.

It is interesting to note that, of the four cases examined, only one case was subject to a court decision. The others are still pending investigation even after the passing of many years. It would appear that, although the SEC found infractions of the law, for most of the cases, a formal criminal complaint was never filed. This is because, when a matter is referred for criminal action, it must be reviewed by the DSI because, under Thai law, SEC staff are not considered criminal investigators. SEC estimates that approximately 20 percent of SEC criminal referrals are dropped at this stage. A case may also be dropped by the Public Prosecutor on the basis of insufficient evidence.

#### 4. INCENTIVES TO COMMIT FRAUD

In order to understand why corporate fraud persists despite the myriad of laws and regulations designed to prevent and combat the undesirable behavior, it is

necessary to examine the costs and benefits of committing a corporate crime.

The incentive to commit fraud is determined by the size of the financial gains that the perpetrator expects to reap. However, this must be weighed against the possibility or probability of being convicted of the crime and the severity of the relevant sanctions, as shown in equation 4.1.

From the four case studies, one can approximate the "actual" size of the financial gain generated by the fraudulent behavior, as shown in Table 2.

As for the probability of conviction,  $p$ , that variable can be calculated from the number of directors and executives whose names have been referred by the SEC to the DSI for criminal action. Statistically, for the past 17 years since the implementation of the Securities Act in 1992, the SEC has filed charges against 212 executives of listed companies. Among those, only 12 (or 5%) received a court sentence. One third of them are still pending investigation by the DSI or are under consideration by the public prosecutor regarding whether or not to launch a lawsuit; for 40 percent of the executives, charges were never filed because the Public Prosecutor dropped their cases on the basis of (a) insufficient evidence (usually in the case of stock price manipulation, which is difficult to prove "beyond reasonable doubt") (about 27%), and (b) the accused fled the country (13.18%), as shown in Table 3.

When substituting the value of the actual financial gains and the probability of being convicted,  $p$ , into equation 4.1, the size of the financial penalty that would deter fraudulent behavior can be calculated. As can be seen in Table 4, the minimum financial penalty is in the millions of baht. However, the size of the financial penalty as stipulated in the law is much lower than the calculated threshold shown in Table 5. The maximum penalty is normally only twice the size of the benefits gained, which does not compensate for the very low probability of being convicted. It should also be noted that private actions for violations must be brought as breaches of contract or breaches of fiduciary duty rather than private rights of action under the securities law. One exception is the right of a shareholder in a publicly listed company to bring private action against the company or its directors. Class-action lawsuits are not authorized. Because of the limitations on private legal action, the expected cost of contravention of the securities law in Thailand is rather low.

$$\text{Fraud will be committed when } E(\text{gain}) > E(\text{loss}) \quad (4.1)$$

Where  $E(\text{gain})$  = financial gain from fraudulent conduct  
and  $E(\text{loss})$  =  $p$  (penalty), where

$p$  refers to the probability of being convicted, and  
penalty refers to the legal sanctions if convicted.

**Table 2 Financial Benefit from Fraudulent Conduct**

Cases/amount involved	Financial benefit
Sikarin PCL (1,003 million baht)	– The purchase of the Juldis Group’s equity share of 214.05 million baht
	– The extension of loans to a company affiliated with the Juldis Group (total = 758.85 million baht)
	– The provision of a deposit to guarantee an affiliated company (total = 20 million baht)
	– The transfer of shares in an affiliated company to an individual (in the amount of 10 million baht)
Roynet PCL (24.6 million baht)	– The value of shares sold by the director and his family (in the amount of 24.6 million baht) to reap capital gains from insider trading through falsification of a quarterly financial report
Picnic Corporation PCL (3,019 million baht)	– Extension of loans to two companies which later repaid the loans to the executive’s personal bank account (total = 85 million baht)
	– Writedowns of initially inflated valuation of small gas tanks (valued at 1 billion baht) and of non-performing loans (valued at 454 million baht)
	– Embezzlement of the company’s shares and assets and signing of business contracts that put Picnic Corporation PCL at a disadvantage (total = 761 million baht)
S.E.C. Auto Sales and Services PCL (914.9 million baht)	– Falsification of purchase of imported cars (in the amount of 597.9 million baht) in order to trigger payment from the company
	– Extension of loans to four individuals (total = 245 million baht)
	– Embezzlement of assets of a subsidiary company (in the amount of 30 million baht)
	– Embezzlement of the company’s cash to purchase equity shares (total = 42 million baht)

Source: *The SEC Newsletter*, Vols. 34/2544, 6/2546, 67/2548, 49/2549, 69/2549, 84/2551, 28/2552, 78/2552.

**Table 3 Total Number of Executives Accused from 1992 to 30 September 2009**

Criminal action	Accused (number)	No prosecution			Pending investigation	Dismissed by court		Penalized by court	
		Barred by prescription	Fled	No prosecution order		Pending	Final	Pending	Final
A director and an executive who did not perform duties with responsibility, due care and loyalty (Section 89/7)	3	-	-	-	3	-	-	-	-
Falsification of information (Sections 238-240)	5	-	-	-	1	-	-	4	-
Insider trading (Section 241)	5	-	-	4	1	-	-	-	-
Price manipulation (Section 243)	79	-	15	39	4	-	13	6	2
Improperly taking over a business (Section 247)	3	-	-	2	-	-	-	1	-
Corruption in corporate administration (Sections 307-312)	75	-	-	15	45	10	-	2	3
Doing business without permission (Section 289)	50	-	14	-	22	7	-	-	7
<b>Total</b>	<b>220</b>	<b>-</b>	<b>29</b>	<b>60</b>	<b>76</b>	<b>17</b>	<b>13</b>	<b>13</b>	<b>12</b>

Note: This information excludes the whistle-blower notification to inquiry officials.

Source: Securities and Exchange Commission.

**Table 4 Financial Benefit and Penalty Comparison**

Cases	Financial benefit	Penalty
Sikarin PCL	1,003.0	18,403.7
Roynet PCL	24.6	451.4
Picnic Corporation PCL	2,300	46,000
S.E.C. Auto Sales and Services PCL	914.0	16,770.6

(unit: millions of baht)

Source: Data collected by the authors.

**Table 5 Penalties According to the Offense Committed**

Offense(s)	Provisions	Penalties
Siphoning of corporate funds	<p>Sections 307, 308, 311</p> <p>Any director, manager, or person responsible for the operation of any juristic person under this Act, who is entrusted to manage the property of such juristic person, or property of which such juristic person is a co-owner, who dishonestly violates his duties by any means and causes damage to the usefulness in the nature, as being a property, of such juristic person,</p> <p>Any director, manager, or person responsible for the operation of any juristic person under this Act, who possesses property belonging to such juristic person, or of which such juristic person is a co-owner, and dishonestly converts such property to himself or a third party,</p> <p>Any director, manager, or person responsible for the operation of any juristic person under this Act, who acts or omits to act in order to obtain unlawful gains for himself or another person and causes damage to such juristic person,</p>	<ul style="list-style-type: none"> <li>- Imprisonment for a term of 5-10 years</li> <li>- Fine from 500,000 baht to 1 million baht</li> </ul>
	<p>Section 313</p> <p>Any director, manager, or person responsible for the operation of a company or a juristic person whose securities are listed in the Securities Exchange or traded in any over-the-counter centre, and who contravenes Section 307, Section 308, Section 309, or Section 311,</p>	<ul style="list-style-type: none"> <li>- Imprisonment of 5-10 years</li> <li>- A fine of two times the price of the property or benefit which the person obtains through the contravention of such Sections, as the case may be, but such fine shall be not less than 500,000 baht</li> </ul>
Falsification of information	<p>Section 56</p> <p>A company which issues securities in accordance with Section 32, Section 33 or Section 34 shall prepare the following financial statements and reports concerning the financial condition and the business operation of the company and submit them to the Office,</p>	<ul style="list-style-type: none"> <li>- Fine not exceeding 100,000 baht and a further fine not exceeding 3,000 baht for every day during which the contravention continues (Section 274)</li> </ul>
	<p>Section 238</p> <p>No securities company or any person responsible for the operation of a securities company or company which issues securities or any person having an interest in the securities shall impart any false statement or any other statement with the intention to mislead any person concerning the facts relating to the financial condition, the business operation or the trading prices of securities of a company or juristic person whose securities are listed in the Securities Exchange or are traded in an over-the-counter centre,</p>	<ul style="list-style-type: none"> <li>- Imprisonment for a term not exceeding two years, or</li> <li>- Fine not exceeding an amount two times the benefit received or which should have been received by such person as a result of such contravention but such fine shall be not less than 500,000 baht, or both (Section 296)</li> </ul>
	<p>Section 312</p> <p>Any director, manager, or person responsible for the operation of any juristic person under this Act, who commits or permits another to act so as to:</p> <ol style="list-style-type: none"> <li>(1) Damage, destroy, alter, abridge, or falsify accounts or documents or collateral of such juristic person or one related to such a juristic person;</li> <li>(2) Make false entries or fail to enter any material statement in the accounts or documents of such a juristic person or one related to such a juristic person; or</li> <li>(3) Keep incomplete, incorrect, out-of-date, or inaccurate accounts,</li> </ol>	<ul style="list-style-type: none"> <li>- Imprisonment for a term of 5-10 years</li> <li>- Fine of 500,000 baht to 1 million baht</li> </ul>
Insider trading	<p>Section 241</p> <p>In the purchase or sale of securities which are listed in the Securities Exchange or traded in an over-the-counter centre, no person, whether directly or indirectly, shall purchase or sell, offer to purchase or sell or invite any other person to purchase, sell or offer to purchase or sell securities which are listed in the Securities Exchange or traded in an over-the-counter centre in such a way as to take advantage of other persons by using information material to changes in the prices of securities which has not yet been disclosed to the public and to which information he has access by virtue of his office or position, and whether or not such act is done for his own or another person's benefit, or to disclose such information so that he will receive consideration from the person who engages in the aforesaid acts.</p>	<ul style="list-style-type: none"> <li>- Imprisonment for a term not exceeding two years</li> <li>- Fine not exceeding two times the benefit received or which should have been received by such person as a result of such contravention but such fine shall be not less than 500,000 baht, or both (Section 296)</li> </ul>

Source: Securities and Exchange Act B.E. 2535.

## 5. WHAT HAS BEEN DONE AND THE WAY FORWARD

Since the start of the Asian financial crisis in 1997, the SEC and SET have put in place many rules and regulations to prevent corporate fraud, such that Thailand received a ranking of fourth place in corporate governance (CG) from *CG Watch 2010* compared with a ranking of eighth in 2007, or just three years earlier, as shown in Table 6. Thailand's score improved by 8 points from 47 to 55, the largest improvement among the 11 Asian countries surveyed. The SEC has done much to improve accounting and auditing, which in this study was identified as the weakest regulatory link. However, the score for enforcement, 42, remains low, indicating that the enforcement problems revealed in this report have not yet been solved. It should also be noted that the score for CG culture is also rather low. This seems to indicate that the drive for better corporate management will rely heavy on state supervision rather than the initiation of the businesses themselves. However, this phenomenon is common among all countries surveyed.

Much of the improvement in the CG score for Thailand can be attributed to the revised Securities Act, which was passed during the government administration in 2009, which had been put into place following the 2006 coup d'état. The new Act contains several provisions to facilitate the detection and exposure of corporate fraud. However, the legal amendment has had only a limited effect, as will be elaborated in greater detail below.

### 5.1 Whistle-blower Protection

In the past, the SEC often received anonymous letters revealing fraudulent practices, which are helpful in detecting fraud; however, because criminal

enforcement requires a high standard of proof, cooperation from a company's insiders is essential for successful prosecution. Since Section 89/2 of the amended Securities Act provides a whistle-blower protection clause whereby employees, auditors or advisors of a company that cooperate with the SEC in the investigation into an alleged corporate fraud will be protected against possible retaliation, such as unfair transfers or dismissal. However, an interview regarding this matter with responsible persons at the SEC revealed that most informants were anonymous or former employees of the company concerned, indicating that the provision has not succeeded in empowering the current employees of a company to step forward to report a fraudulent practice in their respective work place.

### 5.2 Accounting Audit

From the case studies presented, it can be observed that the falsification of financial statements and manipulation of accounting techniques are commonplace in committing a corporate crime. Section 89/25 of the amended Securities Act stipulates that auditors must report the preliminary result of the audit to the company's audit committee if fraud is suspected. The committee must then inform the SEC of the matter within 30 days. If the committee fails to do so, then the auditor is obligated to report the matter directly to the SEC. This additional provision was put into use in the case of Blisstel PCL. In 2010, the auditor of that company notified the audit committee about a suspiciously large cash payment for advertising services. Although the audit committee investigated that matter and tried to clarify the auditor's concerns, the latter maintained reservations as appeared in the auditor's report. As a result, the SEC ordered the company to carry out a "special audit" and disclosed the result to the public online.

**Table 6** *CG Watch Scores by Category*

Ranking	Country/area	Overall scores	CG rules & practices	Enforcement	Political & regulatory environment	Accounting and auditing	CG culture
1	Singapore	67	65	60	69	88	53
2	Hong Kong	65	59	63	67	80	54
3	Japan	57	45	53	62	75	53
4	Taiwan	55	50	47	56	78	46
4	Thailand	55	56	42	54	73	49
6	Malaysia	52	49	38	60	80	32
7	India	49	46	36	54	63	43
7	China	49	47	36	56	75	30
9	South Korea	45	43	28	44	78	33
10	Indonesia	40	39	28	33	67	32
11	Philippines	37	35	15	37	75	25

Source: CLSA Asia-Pacific Markets in collaboration with the Asian Corporate Governance Association, *CG Watch 2010: Corporate Governance in Asia*.

### 5.3 Shareholders Empowerment

Sections 89/18 and 89/19 of the revised Securities Act allow shareholders, whose collective voting share amounts to not less than 5 percent of the total voting shares, to take action against the directors and executives of any company that has violated its fiduciary duty should the company fail to do so after one month. Expenses related to the pursuit of legal measures will be reimbursed if the court decides that the action was taken in good faith. However, until today, there have been no known cases which invoked these particular provisions. This is because remedial measures prescribe only financial compensation to the company and not to the particular shareholders that made the effort to take legal action. However, Section 89/20 allows investors to file for private damages from executives and directors in cases where the losses made were associated with the disclosure of false statements or concealment of material facts. In the absence of a class action lawsuit, however, the provision has had a limited impact on deterring fraudulent behavior.

In addition to Sections 89/18, 89/19 and 89/20, Section 89/28 also allows shareholders, whose collective voting share amounts to not less than 5 percent of the total voting shares, to propose an agenda for the shareholders' meeting. This particular provision was taken up by 75 shareholders of the Thoresen Thai Agencies, a strategic investment holding company with three primary business groups: transport, energy, and infrastructure. Those shareholders, whose combined shareholding amounted to 10.2 percent of the company's total equity share, requested an extraordinary shareholders' meeting to consider matters concerning the issuance of warrants to existing shareholders and a change in the accounting year.

Besides the previously mentioned sections, the amended Securities Act 2007 also contains additional provisions designed to prevent or detect corporate fraud. For example, a director's fiduciary duty was codified and made more stringent, and the board of directors is obligated to appoint a "company secretary" to prepare and maintain the register of directors, the minutes of meetings, and the company's annual report, as well as report on directors and executives who have a vested interest in relation to a resolution. Also, an additional provision was provided to entitle persons who furnish information and those involved in the prosecution — bar the SEC officials — on insider trading and market manipulation to a monetary reward funded by the settlement fine or the financial penalty ordered by the court in an amount not exceeding 30 percent of such fine or penalty.

### 5.4 Promotion of Better Enforcement

The revised Securities Act did not solve the enforcement problem, however. If the rate of prosecution

remains extremely low and the penalties are not sufficiently high to compensate, then the incentive to commit fraud will remain intact. If so, prescribing more stringent fiduciary duties for directors, empowering small shareholders to take legal action against directors and executives, or imposing additional duties on the auditors to raise a "red flag" would be futile as, in the end, the perpetrator will go free. To promote better enforcement, it is necessary to:

(a) Introduce civil penalties and authorize the SEC to file civil charges without the need for referral to any other organization;

(b) Broaden the SEC's authority to impose administrative sanctions (currently, administrative fines can be used for violations where the jail term does not exceed two years). An out-of-court settlement can be a more efficient alternative to criminal sanction, and would help increase the prosecution rate while reducing the time delays involved in the referral of the criminal process. Ultimately, however, this would raise the expected cost of corporate fraud;

(c) Legislate class action lawsuits and amend the Securities Act to allow the SEC or the civil court to order restitution/compensation for injured parties for all types of corporate fraud committed;

(d) If enforcement remains ineffective, even after the above recommendations have been implemented, then it may be necessary to consider allowing individual shareholders/investors to file private lawsuits for any contravention of the Securities Act in order to bypass the bottlenecks that stand between them and the court of justice. However, this alternative will place heavy demands on the resources of the court and thus must be thought out very carefully.

### ENDNOTE

- <sup>1</sup> SEC does not have civil enforcement authority. Although it has the authority to impose administrative sanctions for minor violations of the law, all corporate fraud cases that are subject to criminal prosecution must be referred to the Department of Special Investigation (DSI), which then refers such matters to the Public Prosecutor.

### REFERENCES

- Claessens, Stijn, and Simeon Djankov. 1999. *Who Controls East Asian Corporations?* World Bank Policy Research Working Paper No. 2054. Washington, D.C.: World Bank.
- United Nations. 2003. General Assembly Resolution 58/4 of October 31, 2003.

