

Nominee System and Abuses of Indirect Shareholding in Thailand's Capital Market

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1. Introduction

In Thai capital market, although there are various uses of indirect shareholdings, the official nominee system does not exist. The investors in Thailand use a kind of nominee for the only purpose of hiding their information, not of convenience reason. Depositary receipts and asset management funds such as mutual funds are alternatives, but unitholders of the mutual fund have no voting right in companies that the mutual funds have invested. In other words, unitholders of a mutual fund are not shareholders in the issuing company it invested. Instead, the mutual fund is the shareholder as beneficial owner of the company.

This paper is aimed at studying the nominee system in the capital market in which stockholders hold their shares of companies through intermediaries, such as banks or brokers. The specific purpose of studying the nominee system is to study the functioning of the system and the voting right of investors as beneficial owners which are obtained by the nominee system. Because the shareholders' participation in

the company is one of the most important factors to enhance corporate governance, the nominee system, unlike asset management fund, provides shareholders the rights to participate in the issuing company management, especially the voting rights. In other word, shareholders' interest depends on the company performance; some investors as the shareholders prefer to have rights to instruct the company in some degrees.

To understand the nominee system, this paper will illustrate the nominee systems of both the United States and the European Union which are the most advance capital market in the world. Specifically, shareholders' right to vote will be a key example of the system's procedures which will lead to discussion of strength and weakness of the system in their own capital markets. Subsequently, to promote corporate governance of capital market in Thailand, the nominee system could be introduced so as to allow investors participate in the management of company they invest. Given that there are examples

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of official nominee systems of the United States and the European Union, and the need for Thailand to resolve abuses of indirect shareholding problems, this paper will conclude that Thailand should consider the official nominee system as necessary mechanism to develop its capital market.

2. Official Nominee Systems

2.1 United States

Nowadays, there has been a large increase in the number of shares registered in street and nominee names and the concentration of much, if not most, of these shares in depositories in United States. Many years ago, there were a number of percentages of shares held by brokers and banks on behalf of their customers; the shares were placed in depositories. The percentage of securities of many public companies held of record by brokers, banks or their depositories has increased dramatically to where it now averages as well in excess of 70-80 percent of total outstanding companies' shares.

Generally, shareholders will seek to dispose of their securities for their convenience at some time in the future, to ensure a degree of anonymity and to be

able to participate in corporate management at the same time. Those objectives can be achieved by holding their shares in either "nominee name" or "street name" form. Legal title to nominee and street name shares rests on the shareholder's intermediary or broker (or a nominee of one of them). Under both forms, the shareholder is the beneficial owner of the shares. Therefore, "beneficial owner" means shareholders whose securities are registered in the name of a broker, dealer or other intermediary, or in the name of a depository, rather than in their own names.

There are two forms in nominee system. Firstly, "street name" refers to the form of nominee name that brokers use to register securities they hold for customers or for their own accounts. In other word, shares held in "street name" are held by a shareholder's broker. Secondly, "nominee name" refers to a partnership formed to act as a record holder of securities held by institutional investors and financial intermediaries, mostly banks, for their customers or for their own accounts. It means that shares held in "nominee account" are held by a financial intermediary, such as bank.

As the name of the ultimate beneficial owners are not maintained by companies, but by the brokers and banks of which they are customers, the securities laws, therefore, establish a process by which management contacts shareholders holding shares in nominee or street name form. There are two kinds of beneficial owners who are divided by their intention whether to declare their holding to public. In other words, the difference of them is related to communication between a company as the issuer and shareholders holding shares in nominee or street name form. First, non-objecting beneficial owners (NOBOs) refer to shareholders who do not want anonymity. It means that these shareholders do not object their intermediaries disclosing their ownership information. They may identify themselves and have their names and addresses included in their broker's or bank's list of non-objecting beneficial owners (NOBO list). A company's management may obtain the list and can communicate with these shareholders directly. However, in practice managers do not do so. Instead, they communicate with these shareholders through their intermediaries or brokers. Second, "OBOs" mean objecting beneficial owners, shareholders, who object to

providing their names and addresses to companies. Contrary to NOBOs, Securities and Exchanges Commission in United States (SEC) enacted rules to prohibit companies from communicating directly with OBOs.

The majority of publicly traded shares, about 70-80 percent of all public companies' shares are held in street name, meaning that they are not registered in companies' record. Instead, they are held of record by brokers, banks or their depositories. Most of street name shares are registered in the name of "Cede & Co.," the name used by the Depository Trust Company (DTC). The DTC then holds shares on behalf of such participant brokers and banks. These participant brokers and banks in turn hold the shares on behalf of their clients as the individual beneficial owners. Under this system, the DTC is the legal owner of the shares. Therefore, it possesses all of the rights incident to share ownership, including voting right. The DTC's responsibility is transferring its voting right to its participant brokers and banks. This voting right then passes through beneficial owner who actually possesses the shares of the company. However, companies with significant trading in their securities may also have several thousand shareholders

of record including several broker and bank nominees who do not clear through a depository. In this aspect, broker and bank are legally shareholders of the company. Brokers and banks will deliver proxy materials to beneficial owner and request voting right instructions. Finally, investors as beneficial owners can exercise their voting right by themselves. It means that they have ability to effectively participate in the decision-making process of the company they invest.

2.2 European Union

Similar to United States, there is nominee system in Europe. Even though there are some different functions in the system, their basic structures and general purposes are alike. In sum, the investors hold their shares through accounts they open with securities intermediaries. And the securities intermediaries, in turn, hold accounts with other securities intermediaries and central securities depositories in other jurisdictions. This chain is called "cross-border chains of shareholding".

According to the European Union intention to integrate securities markets

of all member to be a genuine single market in its Community, the directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC was enacted. In order to meet its purpose, European Union needs to ensure investors confidence through equivalent transparency throughout the Community by greater harmonizing of provisions of national law on periodic and ongoing information requirements for security issuers. The national laws have been amended to lead to a high level of investor protection throughout the community. To enhance both investor protection and market efficiency, the disclosure of accurate, comprehensive and timely information about security issuers are required for building sustained investor confidence and allowing an informed assessment of their business performance and assets. To that end, the issuers must ensure appropriate transparency for investors through a regular flow of information. To the same end, shareholders, or natural persons or legal

entities holding voting rights or financial instruments that result in an entitlement to acquire existing shares with voting rights, should also inform issuers of the acquisition of or other changes in major holdings in companies so that the latter are in a position to keep the public informed.

For cross-border shareholding, the directive also ensures the investors the effective protection. Investors who are not situated in the issuer's home Member State are put on an equal footing with investors situated in the issuer's home Member State, when seeking access to such information. That is because the home Member State has amended their legal provisions and adopted the measure compliance with minimum quality standards for disseminating information throughout the community, in a fast manner on a non discriminatory basis and depending on the type of regulated information in question.

Nowadays, in cross-border shareholding shares are typically held through securities accounts with intermediaries such as banks and brokers, who offer professional brokerage and custodial services. As a result, investors in shares either are not 'shareholders',

or are so far from the issuer that other participants in the chain - who are closer to the issuer - could, in theory at least, claim the entitlement to vote on their shares, without any recourse by the investor.² The main advantage of defining the 'ultimate investor' or ultimate accountholder (or beneficial owner) would be to enshrine his entitlement to direct how his shares are voted, instead of leaving this to contractual agreements. Therefore, the cross-border right of shareholders is the right to access to general meetings and other rights related to general meetings, especially exercise the voting right.

In the cross-border chains of shareholding, EU-citizens hold shares in a listed company situated in another Member state by using securities intermediaries as their nominees. The intermediaries in turn hold securities accounts with each other. Therefore, an investor in one member country can hold shares in companies in another member country via the securities holding system through chains of intermediaries.

At present, when an investor in one Member state holds shares in a company

²Fostering an 'Appropriate Regime for Shareholders' Rights,

<http://ec.europa.eu/internal_market/company/docs/shareholders/consultation2_en.pdf>

with registered office in another Member state, there usually is a chain of intermediaries in different Member states between the investor and the company. The investor holds his shares in an account with an intermediary in his Member state; that intermediary may hold an account with a large international depository bank in other Member state; the international depository bank holds an account with a local custodian in Member state of the company; the local custodian is registered in the share register of the company. This shareholding chains between investors and the companies where they invest are often much longer, more complicated and involving even more jurisdictions. In general, the intermediaries in this chain do not organize accounts with other intermediaries to register the shares held for each individual customer. Instead, they use "omnibus accounts" by combining their holding on behalf of all their customers into the accounts in their name with another intermediary.

In the cross-border shareholding system, as investors as shareholders in an issuing company are beneficial owners in the company, they possess the shareholders' right in the company,

especially the right to be furnished the proxy material and the right to vote. This requires that all of the intermediaries in the chain between the investors and the company provide voting services. Each of custodian in member state of the issuing company, the international depository bank in other member state, the intermediary of in investors' member state have an account with either the company or with an intermediary confirming his/her entitlement to the shares. Under the national rules applying in each member state to the relation of the intermediary and his/her customers, the customers usually will have an entitlement to exercise he rights attached to the shares administered in the account with the intermediary. As a result, there will be multiple rights to exercise the rights attached to the shares in the various accounts in this chain due to the multiple customers.

In receiving a proxy material in cross-border shareholding system, there is an alternative approach to assure that investor can vote on the share held by an intermediary as their nominees. The approach provides the investor the proxy which is a power of attorney to vote. The

proxy is transmitted by the local intermediary in Member state of the issuing company. In this chain, the intermediary which is registered in the share register of the issuing company is legally entitled the voting authority. For example, the request for a proxy must be transmitted to custodian C from investor A. Therefore, custodian C has to furnish a proxy to investor A directly. However, custodian C may provide the proxy to depository Bank B in member state B. In the latter distribution of the proxy, the proxy must be sent together with the right to grant a further proxy to its customers, intermediary A, who in its turn should obtain the proxy to investor A.

After the process of distributing the proxy to request vote from investors as beneficial owners, the process of transmitting voting instruction by the investors begin. For example, an intermediary A in member state A must accept the voting instructions received from its investor A, as its customer. In addition, it must transmit the voting instructions to a depository bank B in member state B. The depository bank B

must forward the voting instructions to custodian C in member state C. According to the instructions provided to it by the depository bank B, the custodian C must then vote the shares it holds on behalf of investor A, as beneficial owner, in an issuing company which locates in member state C.

However, the securities industry has an interest in ensuring that the physical certificates and their handling are limited as much as possible due to the expensive and cumbersome problems. To limit the problems associated with physical certificates, the immobilization of the securities is the effective measure. Today, the physical securities are held almost exclusively by professional custody firms, and not by individual investors. The custodians in turn often place the certificates in the custody of a central institution, generally referred to as Central Securities Depositories ("CSDs"). In Europe, there are the number of CSDs such as Crest³ in the UK, Euroclear France in France (formerly SICOVAM), Clearstream Banking in Germany (formerly Deutsche Borse Clearing) and Nedigef in the Netherlands.

³ CREST is the central system for electronic transfer of shares in the UK and Ireland. Personal membership enables a non-professional to be registered as an owner of securities on this system (and thus on the company register) so long as he has the sponsorship of a professional member.

Instead of physically holding their own share certificates, investors hold a securities account with their brokers or banks in which the number of shares they have placed in custody are administered. These brokers and banks are either affiliated to the CSD themselves, or have a securities account with a broker or bank that is affiliated with the CSD. In such a securities holding system shares are transferred by means of book-entries, by crediting the account of the buyer and debiting the account of the seller, rather than by the physical movement of the securities between the buyer and the seller.

In the European Union, there are at present a large number of CSDs. Each has played an important role in their own securities holding system, usually constricted to their national markets. However, to make cross-border clearing and settlement possible, the CSDs in the various member states have entered into alliances with each other to facilitate cross-border shareholding. In this system, they function by holding securities accounts with each other. As a result, an investor in one country can hold shares in companies in

another country in their community via the securities holding system.

3. Indirect Shareholding System in Thailand

As this study aiming to focus on proxy procedures of nominee systems in Thailand, it could be noted that Thailand has developed its system of indirect shareholding in order to relieve investors of regulatory and administrative burden, and to allow them to focus their attention on investment decisions and portfolio performance. The system helps indeed increase institutional investors' interest in emerging capital markets of Thailand. Thailand has no exact similar system of nominee as such in the United States; however, Thailand's indirect shareholding system could be considered as an emerging system of the nominee system. Specifically, a matter of voting right will be studied and illustrated its development. Indirect shareholding can be provided by various types of participants such as financial institutions including brokers, custodians, funds, etc. and official entities established and affiliated by the SET to provide a specific service; however, there are two types of participants involving in the matter of voting right: Thai NVDR Co., Ltd. and Asset Management Funds.

A. Thai Non-Voting Depository Receipts

Under Thai laws, the percentage of shares that can be held by non-Thai individuals or entities in a company listed or to be listed on the Stock Exchange may be limited. Foreigners who are interested in making investments in these companies are often prevented from doing so because of these foreign ownership restrictions. This restriction led to the creation of Thai NVDR Co., Ltd. (Thai NVDR) authorized by the Securities and Exchange Commission, Thailand (SEC) in accordance with the SEC notification No. GoJor. 34/2543 re: Specification of Additional Type of Securities (No.4), dated August 25, 2000.

Thai NVDR was established in 2000, with a registered capital of THB 10 million. The Stock Exchange of Thailand (SET) is the major shareholder, holding 99.99% of the total shares. Thai NVDR is responsible for issuing and selling Non-voting Depository Receipts (NVDRs) to investors. Thai NVDR is responsible for executing the purchase or sale of those listed company shares whose investors wish to trade through NVDRs. This service is offered to all, irrespective of the number of securities held or the holder's nationality. NVDR

holders receive the same full financial benefits as they would receive had they invested directly in shares (i.e. dividends, rights, and warrants). Therefore, in this viewpoint, Thai NVDR is functioning similar to the DTC and CREST as the legal owner of shares. The only difference between investing in NVDRs and company shares is related to voting. Unlike ordinary shareholders, NVDR holders cannot be involved in company decision-making. Additionally, although the NVDRs are designed mainly to ease foreign investment barriers, SET does not prohibit Thai investors from using this instrument⁴. The further explanation is follow.

(1) Issuance of the Thai Non-Voting Depository Receipts

The NVDRs represent an investment alternative that allows foreign investors to receive the Financial Benefits associated with the ownership of Securities in a company whose shares are listed or to be listed on the Stock Exchange without being concerned about the foreign shareholding limitations. Under the NVDRs scheme, the Investor will inform the Issuer of the number of NVDRs (representing the financial benefits of the relevant securities

⁴ Thai NVDR Company Limited, "About Thai NVDR Co., Ltd.", <<http://www.set.or.th/nvdr/en/about/whatis.html>>

of that target company) it would like to purchase. The Issuer shall, in accordance with the Terms, proceed to purchase the securities through the agent at the same price and in the same quantity as the NVDRs the Investor wishes to purchase from the Issuer. Once the issuer has purchased the relevant securities, it will issue to the investor the NVDRs representing those Securities. Through its ownership of the NVDRs, the investor will obtain all of the financial benefits in and to the relevant securities. The issuer will be the registered and legal owner of the securities. However, in case where NVDRs represent shares, the investor will not have any voting rights with respect to the shares as specified in Condition 8 of the Term⁴. In this way, foreign ownership limitation will be complied with and the investor will be able to gain the financial benefits of investing in the target company.

After the investor has placed an order to purchase the NVDRs with the issuer and the issuer has purchased the securities, the issuer will deliver the NVDRs to the investor in accordance with the

procedures set out in Condition 4. The issuance of NVDRs can be categorized into two types regarding their issued dates: (1) issuance of NVDRs representing existing securities, and (2) issuance of NVDRs representing new shares or warrants.

(2) Voting Right

As the registered holder of the shares, the Issuer has the right to vote at its discretion at the meeting of the shareholders of the target company as specified in Condition 8. The investor shall have neither voting rights nor any right to instruct the issuer how to vote in the meeting of the shareholders of the target company unless otherwise specified in Condition 8. The Condition 8 provides that:

*The investor has no voting rights with respect to their Shares. The Issuer, as the registered and legal owner of the Shares, shall reserve the right to attend the meeting of the shareholders of Target Company but shall not vote unless the meeting has been called specifically to consider de-listing of the Shares from the Stock Exchange. In such a case, the Issuer shall, as soon as possible upon the receipt

⁴ Thai NVDR Company Limited, "Thai NVDR-Prospectus", Part 5-Terms and Conditions of the NVDR, Condition 4-Purchase, Sale, Transfer and Exchange of NVDR

of the invitation letter to the relevant shareholders meeting, notify the investors in writing of such a delisting event and ask for written voting instructions from the investors. The Issuer Thai NVDR Company Limited, "Thai NVDR -Prospectus", Part 5 -Terms and Conditions of the NVDR, Condition 4-Purchase, Sale, Transfer and Exchange of NVDR shall receive such voting instructions according to the voting procedures for shareholders stipulated by the Target Company*.

Because of the Thai NVDR's objectives to allow participation of foreign investment in the business that might be restricted, Thai NVDR then foreclose both its right to vote and its passing of voting right in compliance with those restrictions on foreign business ownership. This is the major difference in comparison to the DTC and the CREST.

Today NVDR become popular. There were a number of NVDRs on shares of 366 companies out of 395 listed companies⁶. As of April 2007, there are 196 companies with NVDRs out of 520 listed companies. However, voting right becomes a major controversy in two aspects: (1) None of

participation in shareholders meeting and voting right of Thai NVDR will cause unreasonable cost to companies in trying to set up the meeting according to the rule 1/3 of shareholders; (2) Some foreign investors and funds who have a duty of fiduciary in protecting rights and benefits of their investors cannot invest in NVDR; because they requires voting right in accordance with their fiduciary duties. Some proposed that Thai NVDR should be able to vote independently only for a stake more than 5% in a manner of best mutual benefit and publish details of its particular voting. Nonetheless, this reflects the importance and concerns arising from the lack of its voting right in Thailand.

B. Asset Management Funds

(1) Mutual Fund Management

The management of mutual funds is in accordance with an approved mutual fund scheme. Mutual funds raise money by selling investment units of the fund to the public; money received from the sale of investment units is invested in securities or other assets or used to seek a return by any other means. A mutual fund is an investment vehicle suitable for retail

* Securities and Exchanges Commission of Thailand, "Handout for Public Hearing in regard of enabling voting right for Thai NVDR", (November 28, 2002), <<http://www.sec.or.th/th/infocenter/hearing/nvdr.doc>>

investors who have a limited amount of money, lack of experience, knowledge, skill, or time⁷. They collect funds from investors and pool them for the purpose of building a portfolio of securities according to stated objectives. Similar to the United States, investment companies are regulated by the Securities and Exchange Commission under the Securities and Exchange Act B.E.2535 (1992) (SEC Act).

The management company is responsible for selecting an investment portfolio that is consistent with the objectives of the fund as stated in its prospectus and managing the portfolio in the best interest of the shareholders. The management company may set up and offer for sale a mutual fund only when its application to establish the fund has been given approval by the SEC. Generally, the mutual fund scheme contains key features of the fund such as investment policy, investment objectives, management fee, relevant expenses, responsibilities of parties involved in managing the fund, and rights of the unitholders.

(2) Private Fund Management

The management of funds of a person or group of persons has authorized the management of investment to acquire benefit from securities, whether or not investment in other assets is also made, which management is conducted as an ordinary course of business, in consideration of a fee or other remuneration, excluding the management of investment as specified in the SEC notification⁸. The management company (1) shall manage a private fund with honesty and care to preserve the interests of the customer with professional knowledge and competence; (2) shall be in accordance with investment policy and restrictions as mutually agreed in the agreement; (3) shall organize a "Know Your Customer" procedure to gather customer information regarding financial status, financial responsibilities, investment time horizon, investment experience, acceptable risk level and expected return, which are used for analyzing and determining investment policy suitable for each customer.

⁷ Securities and Exchange Commission, "Mutual Fund", <http://www.sec.or.th/en/asset/mutual/rule/rule_mf_a.shtml>

(3) Provident Fund Management

Provident Funds was encouraged and promoted in the Fifth National Economic and Social Development Plan (1982-1986) in order to establish provident fund in all industries for savings after retirement. In 1987, the Provident Fund Act B.E. 2530 (1987) (Provident Fund Act) was enacted prescribing that the Minister of Finance shall be in charge and control of the execution of this Act and shall be conferred general power to exercise a supervision of the management of the fund. Provident fund management was under the supervision of the Fiscal Policy Office, Ministry of Finance, whereas mutual fund and private fund management are under the supervision of the Office of the SEC. Having two different regulatory authorities supervising asset management businesses, discrepancies in standards and rules governing such businesses inevitably existed.

In order to harmonize rules and regulations governing provident fund to be on par with mutual fund and private fund, on December 9, 1997, the Cabinet approved

the transfer of regulatory power in supervising provident fund management business from the Fiscal Policy Office, Ministry of Finance, to the office of the SEC. The Provident Fund Act and the SEC Act were amended to accommodate such regulatory change. These two-revised Acts have been effective since March 30, 2000, with one year grace period for existing provident funds to gradually adjust to new regulations. From March 30, 2001 onward, all provident funds must comply with both the Provident Fund Act and the SEC Act. While the Provident Fund Act prescribes regulations regarding the establishment of the fund, payments to employees from the fund and dissolution of the fund, the SEC Act prescribes regulations governing provident fund management. As such, provident fund industry is under the sole supervision of the SEC.

In addition, there is another type of Derivatives Fund Management. Derivatives Fund management is the management of funds belonging to other persons by seeking profit from derivatives transactions or contracts, but shall not include the

* Securities and Exchange Commission, "Private Fund", <http://www.sec.or.th/en/asset/private/rule/rule_pf_e.shtml>

managing of mutual funds regulated under the securities and exchange legislation⁹.

It is general that the indirect investment in asset managements will not allow shareholders participating in its management including how to vote. However, asset management still possesses the right to vote by itself. By virtue of Section 123¹⁰ of the SEC Act and Clause 2(1), Clause 8, Clause 10, Clause 12, Clause 18(6) and Clause 19 of the Notification of the Securities and Exchange Commission No. KorNor. 30/2547 regarding the best practice and disclose of information, the SEC had issued the Notification of the Office of the Securities and Exchange Commission No. SorNor. 1/2548 Re: Rules for the Exercise of Fund's Voting Rights at the Shareholders' Meeting by the Management Company and Information Disclosure. However, without a specific reason, the Notification is not in force now¹¹.

C. Thailand Securities Depository

In addition to foregoing types of participants, there is also the Thailand Securities Depository Co., Ltd. (TSD), a subsidiary of The Stock Exchange of Thailand (SET). The TSD was established on November 16th, 1994 and officially began its operations on January 1st, 1995. The main objective of the TSD is to develop and promote the back-office systems in Thailand in order to attain the highest level of efficiency and meet the international standards. These are considered to be an important role in promoting the related institutions in the Thai capital market to be more competitive in the international markets¹². The after-trade services provided for the members of the TSD can be divided into five main areas; its service relating to this study is central securities depository using a secured and efficient scripless system by Securities Depository Center (SDC). Services provided are

⁹ Securities and Exchange Commission, "Derivatives Funds Management", <http://www.sec.or.th/en/asset/der/rule/rule_der_a.shtml>

¹⁰ The offer for sale of investment units to the public shall be made only after a securities company has delivered or distributed a prospectus containing the date of approval for the setting up and the management of the mutual fund. The prospectus shall be in the form as specified in the notification of the Office and wherever there are corresponding particulars in the prospectus and the details of the mutual fund project, the material facts stated therein shall be the same.

¹¹ Securities and Exchange Commission, "Laws & Regulations", <http://www.sec.or.th/en/enforce/regulate/contentact_e.shtml>

¹² Thai Securities Depository, "Overview", <<http://www.tsd.co.th/>>

securities depository, withdrawal, transfer, pledge, and redeeming. Investors can do the transactions through Participants whose duties include controlling securities holding proportion of foreign investors traded in the stock market both on the Main Board and Foreign Board to ensure that they comply with rules and related regulations¹³. Unlike the DTC in the United States, SDC does not possess any ownership of deposited securities. The depositors still maintain their ownerships of securities in scripless accounts with SDC. TSD or SDC then does not involve in the proxy process and voting right of the securities owners.

Interestingly, foreign holding proportion is in the scope of depository service by TSD. Foreign investor's trades are categorized into two types:

(1) Foreign Board Securities Trade
Foreign investors will receive securities under foreign account; and

(2) Main Board Securities Trade
Participants will transfer securities from Thai securities account to foreign securities depository account for investors so that

foreign investors are entitled for the complete benefits as stock dividend and voting right in a stockholder meeting.

In the event that there is a remaining holding proportion in the registered company in which foreign investors are allowed to buy, it can be done forthwith. If such proportion is full and an investor wants to be a stockholder, participant could transfer the securities for queuing. Once the holding proportion is available, the participant will transfer the securities to the foreign securities depository account. TSD is responsible for controlling securities holding proportion traded both on the Main Board or the Foreign Board in SET and ensuring that they comply with rules and regulations regarding common securities holding of foreign investors.

4. Problems on Indirect Shareholding and Voting Right in Thailand

Nominee and voting right have been in the very high concern of the public in Thailand since the wake of the Shin Corp' Temasek sale¹⁴; because it has shown abuses of indirect shareholding in violating a number of legal restrictions including foreign ownerships and taxation.

¹³ Thai Securities Depository, 'Securities Depository Service', <<http://www.tsd.co.th/>>

¹⁴ AsiaMedia, 'THAILAND: Thaksin's family sells Shin stake to Temasek', <<http://www.asiamedia.ucla.edu/article.asp?parentid=37744>>

Nonetheless, it is a generally accepted business practice that foreign companies and individuals doing business in Thailand by using "indirect shareholding" for a long time to circumvent the legal restrictions, especially that limit levels of foreign ownership in Thai businesses to 49.99%¹⁵. The general interpretation is that restrictions are applied only for the company and its shareholders, but not necessary be traced to its beneficial owners or ultimate accountholders unless it is reasons of bad faith and specific intent¹⁶. Then foreigners generally hold preferred shares that give them voting rights over Thais, even if they own shares of only 49.99%, they may have effective control of the company according to the 1999 Foreign Business Act.

The use of indirect shareholders by foreigners who want to own businesses in

Thailand have been a part of this developing issue in Thai businesses. Then, Thai NVDR has emerged with well-designed to cope with this issue by separate ownerships and benefits for foreign investor to comply with the legal restriction. It could be noted that, after the sale of Shin Corp-Temasek, it has been reported that there will be about 1,300 companies today with indirect shareholders of foreign investors expected to be affected if they were to be discovered from their indirect shareholding veils¹⁷. This reflects a negative meaning of nominees and sees all kinds of indirect shareholders as nominees which are not in the positive meaning of nominees as herein studied.

However, this phenomenon has brought Thailand into two major reconsiderations: (1) maximum amounts of foreign shareholdings in a company; and

¹⁵ Foreign Business Act B.E. 2542 (1999) § 4 provides that: "In this Act: "alien" means:

(1) a non-Thai natural person;

(2) a juristic person not registered in Thailand;

(3) a juristic person registered in Thailand and having the following characteristics:

(a) a juristic person at least one-half of whose share capital is held by persons under (1) or (2), or a juristic person at least one-half of whose total amount of capital is invested by persons under

(1) or (2);

(b) a limited partnership or a registered ordinary partnership whose managing partner or manager is a person under (1);

(4) A juristic person registered in Thailand at least one-half of whose share capital is held by persons under (1), (2) or (3), or a juristic person at least one-half of whose total amounts of capital is invested by persons under (1), (2) or (3).

For the purpose of this definition, shares of a private limited company that has bearer certificates shall be regarded as shares of aliens, unless otherwise provided by ministerial regulations.

¹⁶ Foreign Business Act B.E. 2542 (1999) § 36

¹⁷ Money Channel, "M&W vol. Feb'08 FBA in turning point of Thai economy", <<http://www.moneychannel.co.th/Menu/TradingHour/tabid/88/newsid480/12255/Default.aspx>>

(2) definition of foreign business company by considering its voting right. Today there is an attempt in trying to amend the Foreign Business Act of 1999 but without clear direction¹⁸. Many arguments and controversies are out there¹⁹. Nevertheless, it is noticeable that Thailand now requires a transparent system of its indirect shareholding system in order to prevent abuses in the future. The foregoing comparative study has shown that the United States and the European Union have also tried to make effective and transparent nominee system. An effective and transparent system would help identify any wrongdoing that might occur. In case of Thailand, this would be a high time to introduce such an effective and transparent nominee system. By developing regulations of the SEC, it would be proper to have official nominees system.

For the abuses, it is clearly responsible of every participant in Thai capital market who collectively accepts the practice of circumventing legal restrictions by indirect shareholding. Reconsidering the voting right as an element of foreign business' definition is out of scope in this study. However, this reflects the importance of investor's intention and determination which cannot be avoided. Thai NVDR could still be a proper solution for the foreign investors who do not wish to take control businesses in Thailand; otherwise it should be objectively clarified investors' intention. In addition, foreign investors who bought NVDR are accounted as 5% of Thailand's market cap²⁰ since 1997. Besides Thai NVDR, there are also exceptions from the Board of Investment of Thailand (BOI)²¹. A concern of foreign dominance over domestic market is not more significant than transparency. Indeed,

¹⁸ On Oct 26, 2006, the Commerce Ministry appointed a 10 member committee to study and propose any amendments to the FBA that it considered necessary and appropriate for the present economic environment. The committee held eight meetings and completed its deliberations within the 60day period assigned. It made its recommendations to the ministry on Dec 26, which then formed the basis for the draft language of the amendments. On Dec 26, 2006, the first draft was tabled for consideration by economic ministers. Several comments were made, which the ministry then incorporated into the second draft, which was submitted to the full cabinet in January 2007 and was approved in principle. The draft is now under consideration by the Council of State.

¹⁹ Manager Online, "Foreigners' ask Gov for clear direction of FBA", <<http://manager.co.th/aspbin/PrintNews.aspx?NewsID=950000040913>>

²⁰ Money Channel, *supra* note 38

²¹ <www.boi.go.th/english/>

the recognition and transparent proxy procedures on voting right would also help develop market as a key flagship of corporate governance in doing business in Thailand²².

5. Conclusion

Thailand's indirect shareholding have emerged and well-established; however, the lack of nominee system causes investors as an ultimate beneficiary losing their rights, especially voting right. As a result, this undermines the capacity in managing business as they wish. Alternatives of investment in Thailand are limited today. Investors need to handle its portfolio with best effort; otherwise they leave their investments to others and wait for expected benefits such as in NVDR and

Asset Management. The alternative in the middle which allows some degrees of participation including right to vote is not available. Therefore, official nominee system, as in the United States and European Union, should be established in order to induce this kind of investments. To enhance good corporate governance in the public company in Thai capital market, investors as beneficial owners should be kept informed about the company and about opportunities to have their voices in the board of directors, even though they are not able to attend it in person. As a result, the nominee system will bring more transparent and verifiable procedures to Thai indirect shareholding which help develop good corporate governance and help prevent misuses in the future.



²² Nikomborirak, Duenden, Chaiyasit Anuchitworawong, "Governance of Thai Companies and the Development of the Stock Market after the Crisis", <http://www.tdri.or.th/ye_02/ye06rept/g2/dd_ca.pdf>