

**BANKING AND FINANCE
PRACTICE GROUP**

IMPACT ON GRANTING OF CREDIT BY FINANCIAL INSTITUTION UNDER THE NEW ACT

The recent enactment of the Financial Institutions Businesses Act B.E. 2551 (2008) (the “Act”) replaces and consolidates a number of laws e.g. the Commercial Banking Act B.E. 2505 (1962) (as amended) and the Act on the Undertaking of the Finance Business, Securities Business and Credit Foncier Business, B.E. 2522 (1979) (as amended). The Act, among other things, defines “financial institutions businesses” to mean commercial banking business, finance business, securities business and credit foncier business and the business of specialized financial institutions; increases the applicable single shareholding limit and changes the circumstance in which the single shareholding limit can be waived; and provides the procedures to accommodate the merger of financial institutions, etc.

Among many main purposes of the Act, the Ministry of Finance (“MOF”) and the Bank of Thailand (“BOT”) intends to enhance the risk management measures of the financial institutions and to ensure the exercise of prudent lending practice by financial institutions to protect the damage which may result from the financial institutions undertakings. It also aims to maintain economic stability and to protect depositors and public by prescribing the good governance rules for any person who perform the duty of a director, a manager, an officer or a person with power of management of financial institutions and making the provisions with respect to the granting of credit more restrictive.

Restriction on granting of credit under Section 48(1)

Section 48(1) of the Act states that no financial institution shall directly or indirectly grant credit, do any transaction which is similar to granting of credit, or guarantee any debts of its director, manager, deputy manager, assistant manager or any person who has the equivalent position but named in different title, any person who has the power to manage the financial institution or a “Related Person” of the mentioned person, except granting of credit in the form of credit card according to the rate as prescribed by BOT, or granting of credit as a benefit for such person in accordance with the rules prescribed by the BOT.

According to the Act, Section 48(1) extends the restriction on the granting of credit to the second level executive e.g. manager, deputy manager and assistant manager and also includes a “Related Person” of the director and such second level executive in the scope of the restriction.

Definition of “Related Person” under Section 4

“Related Person” means any person who has one of the following relationships with other persons:

- (1) a spouse of such person;
- (2) a minor child or adoptive child of such person;
- (3) the company in which such person or person under (1) or (2) has the management power;

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- (4) the company in which such person or any person under (1) or (2) has the power to control the majority voting rights of the shareholder's meeting;
 - (5) the company in which such person or any person under (1) or (2) has the power to control the appointment or dismissal of the director;
 - (6) the subsidiary of the company under (3) or (4) or (5);
 - (7) the affiliate with the company under (3) or (4) or (5);
 - (8) the principal or agent; or
 - (9) the person with other characteristics as prescribed by the BOT.

In the case that any person directly or indirectly holds more than 20% of the issued shares of another company, it shall be a presumption that such company is the Related Person of such person unless he can prove otherwise.

Granting of credit to financial institution's director, second level executive or his Related Person is now prohibited.

With this new Act, the financial institution cannot grant credit to any of its directors, managers, deputy managers, assistant managers or any person who has the equivalent position but named in different title, a person with power of management of financial institutions, or Related Person of the aforementioned persons. This restriction raises concern to many commercial banks and their significant customers as to whether the wording "Related Person" shall apply and to what extent the definition of "the management power" under the definition of Related Person (3) shall be interpreted.

For instance, is it possible for Bank A to grant a credit facility to Company Z in which a wife of Bank A's manager is also Company Z's manager? In this circumstance, the wife may be regarded as the Related Person of Bank A's manager since she is a spouse of Bank A's manager and has a management power over Company Z. Therefore, Bank A may not be able to grant a credit facility to Company Z.

In this regard, the Act provides no specific definition of "the management power". The closest meaning of "the management power" is the definition of "a person with a management power" under Section 4 of the Act.

Definition of "a person with the management power" under Section 4

"A person with the management power" means

- (1) a manager, deputy manager, assistant manager, director who is an executive of the financial institution or company, as the case may be, or any person who has the equivalent position but named in different title;
- (2) a person who has made a contract with the financial institution or company to have all or part of the administration power; or
- (3) a person who *de facto* has a power to control or dominate a manager or director or the management of the financial institution or company to follow his command in setting up policies or operation of the financial institution or company.

If this broad definition is applied to the above circumstance, Bank A will not be able to grant a credit facility to Company Z.

At this stage, it is uncertain as to how the BOT shall interpret the provision and how restrictive it will apply the relevant provisions to each circumstance for the granting of credit facilities by financial institutions. This will depend, by and large, on the case by case basis. On the safe side, each financial institution needs to check all the cases that they have some doubts with the BOT. Further official and precise clarifications from the BOT are required so that the customers of the financial institutions will be able to plan themselves appropriately to seek a source of fund from available financial institutions.

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**THERE IS ALWAYS A
SOLUTION.**

Important Note and Disclaimer

The content of this Newsletter is prepared as of 20 January 2009.

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