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INDEPENDENT DIRECTORS AND CORPORATE GOVERNANCE IN THAILAND: A NEW FRONTIER

LUKE NOTTAGE*

ABSTRACT

Asian companies' equity offerings and securities markets have grown significantly, including in Southeast Asia (Part I). Yet corporate governance is undergoing only a gradual transformation, especially where government and family-linked listed companies remain common. Foreign investors and international organizations (including ASEAN) have therefore been pressing for further reforms, including independent director (ID) requirements to monitor executives and others. Part II examines Thailand, building on recent comparisons of mostly larger Asian markets. Part II.A explores when and why ID requirements were introduced—as early as 1993. Part II.B examines how they were introduced—mandatory regulation, supplemented by comply-or-explain requirements, then encouragement through annual surveys. Part II.C examines what the ID requirements are—noting understandable disqualifications for substantial shareholders, but also an unusual ex ante disqualification if involved in a competing company. Part II.D explores who make up the now large group of Thai IDs. Original empirical analysis finds accounting and other business backgrounds but also engineering and military connections. Part II.E then explores where impacts arise from these IDs, now or potentially. Part III concludes that Thai IDs have made a growing difference especially over the last two decades but face ongoing challenges for effective monitoring and other roles, and deserve ongoing research.

KEYWORDS: Asian law, comparative law, corporate governance, securities regulation, law reform, Thailand, ASEAN

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I. INTRODUCTION:
GROWING ASEAN SECURITIES MARKETS

The ten member states of the Association of Southeast Asian Nations (ASEAN) bring together over 600 million people in a significant and growing part of the world economy.¹ ASEAN has weathered major economic shocks, both regional (notably the 1997 Asian Financial Crisis or AFC)² and world-wide (the 2008 Global Financial Crisis),³ and its regional production chains were impacted by the spread of Covid-19 virus from early 2020.⁴ ASEAN also faces more long-standing challenges due to considerable socio-economic and political system diversity among its member states.⁵ Nonetheless, since agreeing to the ASEAN Charter in 2008,⁶ it has started to formalize various aspects of its integration program. This move towards harder law (especially through treaties enforceable under international law) and regular consultations is more prominent in economic than security affairs, with Asian institution-building generally.⁷ This is exemplified by the creation of the ASEAN Economic Community from 2016, although this

1. LUKE NOTTAGE, JUSTIN MALBON, JEANNIE PATERSON & CARON BEATON-WELLS, *ASEAN CONSUMER LAW HARMONISATION AND COOPERATION: ACHIEVEMENTS AND CHALLENGES* (2019).

2. WING THYE WOO, JEFFREY SACHS & KLAUS SCHWAB, *THE ASIAN FINANCIAL CRISIS: LESSONS FOR A RESILIENT ASIA* (2000).

3. MASAHIRO KAWAI, MARIO B. LAMBERTE & YUNG CHUL PARK, *THE GLOBAL FINANCIAL CRISIS AND ASIA: IMPLICATIONS AND CHALLENGES* (2012).

4. *See, e.g., Anne Oeking, Coronavirus' Economic Impact in East and Southeast Asia*, EAST ASIA FORUM (Mar. 4, 2020), <https://www.eastasiaforum.org/2020/03/04/coronavirus-economic-impact-in-east-and-southeast-asia/>.

5. NOTTAGE ET AL., *supra* note 1, at 15–35.

6. WALTER WOON, *THE ASEAN CHARTER: A COMMENTARY* (2015).

7. SAADIA M. PEKKANEN, *ASIAN DESIGNS: GOVERNANCE IN THE CONTEMPORARY WORLD ORDER* (2016).

AEC's liberalization and harmonization agenda remains a work-in-progress especially for "behind the borders" impediments to cross-border trade and investment.⁸

Corporate law and governance have been barely mentioned in the Blueprints and other core AEC documents since 2008.⁹ Yet the ASEAN Capital Markets Forum (established in 2009) has promoted harmonization of aspects of securities law and practice (so far mainly among Singapore, Malaysia, and Thailand), including the ASEAN Corporate Governance Scorecard surveys published since 2013.¹⁰ ASEAN has not formally advanced harmonization of corporate law, although former British colonies like Singapore, Malaysia, and Brunei continue to monitor developments in each other's courts and law-making bodies.¹¹ Yet the Forum has promoted informal benchmarking by assessing larger companies listed on ASEAN's larger national securities exchanges against the ASEAN Scorecards.¹² These benchmarks draw on the Organization for Economic Co-operation (OECD) Principles of Corporate Governance published in 1999 (later revised in 2004 and 2014),¹³ promoted through the OECD's Asian Corporate Governance Roundtables beginning a few years after the AFC.¹⁴ The ASEAN Scorecard project was also supported by the Asian Development Bank (ADB) and the main directors' institutes in the six ASEAN states that now contribute to the annual review.¹⁵

8. See, e.g., RODERICK MACDONALD, *SOUTHEAST ASIA AND THE ASEAN ECONOMIC COMMUNITY* (2019).

9. ASEAN Secretariat, *ASEAN Economic Community Blueprint 2025*, ASEAN (2015), https://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf.

10. *OECD Equity Market Review Asia 2018*, OECD (2018), <https://www.oecd.org/corporate/OECD-Equity-Market-Review-Asia-2018.pdf> [hereinafter *OECD Equity Market Review Asia 2018*].

11. See generally, Kwai Ng & Brynna Jacobson, *How Global is the Common Law? A Comparative Study of Asian Common Law Systems – Hong Kong, Malaysia, and Singapore*, 12 *ASIAN J. OF COMP. L.* 209 (2017).

12. See, *Publications*, ASEAN Capital Markets Forum (2017), <https://www.theacmf.org/publications>; *ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2012–2013*, Asian Development Bank and Securities Commission Malaysia (2013), www.theacmf.org/images/downloads/pdf/ACGS_Country_report_1stEdition.pdf.

13. *G20/OECD Principles of Corporate Governance*, OECD Publishing (2015), www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en.

14. *OECD-Asian Roundtable on Corporate Governance*, OECD (2019), www.oecd.org/daf/ca/oecd-asianroundtableoncorporategovernance.htm#archives.

15. Asian Development Bank and Philippines Securities and Exchange Commission, *ASEAN Corporate Governance Scorecard Country Reports and Assessments 2015*, ADB (2017), <https://www.adb.org/sites/default/files/publication/375481/asean-cgscorecard-2015.pdf>; *Malaysia-ASEAN Corporate Governance Report 2017*, Minority Shareholders Watch Group, (2018), <https://www.mswg.org.my/sites/default/files/Malaysia-ASEAN%20CG%20Report%202017%20%28Website%29.pdf>.

Share markets have also been growing strongly in Southeast Asia. The share of Asian non-financial companies in global equity financing has expanded significantly between 2000 and 2017, relative to European and US companies. Much of this expansion has come through the share markets in Hong Kong and then mainland China, as well as Japan, Korea, and India. Yet Thailand, Malaysia, Indonesia, and Vietnam are also ranked in the top 20 markets worldwide for numbers of initial public offerings between 2008 and 2017 (with similar numbers to Germany and France).¹⁶

The Singapore share market remains the largest in Southeast Asia, by market capitalization (as at the end of 2017). Yet Thailand, Malaysia, and Indonesia are also significant, with Vietnam emerging too.¹⁷ Even the least developed ASEAN member states, like Cambodia (with Korean government and ADB support),¹⁸ have been establishing fledgling stock exchanges with securities and corporate law regimes.¹⁹ Supported by the World Bank and its International Finance Corporation (IFC), especially since the AFC, capacity-building for securities exchanges and related governance regimes have had several objectives. These include attracting foreign direct investment (FDI), diversifying and lowering the cost of finance, and (especially in less developed Asian economies) reducing corruption and advancing transparency (for example, around tax affairs).

In more developed ASEAN states like Thailand and Singapore, some policy-makers are also keen to promote share markets as pressures build on pension systems due to ageing populations.²⁰ Political scientists have emphasized this factor as a significant determinant in prompting wider transformations in securities markets and corporate governance systems, worldwide and specifically; for example, in Japan.²¹ Another important potential

16. See *OECD Equity Market Review Asia 2018*, *supra* note 10, at 11, 36, specifically Figures 2 and 27.

17. *OECD Equity Market Review Asia 2018*, *supra* note 10, at 37, Table 3. Thailand's stock market is also particularly liquid, with usually around twice the daily turnover of Singapore (and four times that of Malaysia) around Apr. 2020, see Stock Exchange of Thailand, SET Focus (2020), https://www.set.or.th/en/news/econ_mkt_dev/overview_p1.html.

18. Luke Nottage, *Fledgling Corporate Governance and Independent Directors in Cambodia's Securities Market*, 35 *AUSTL. J. OF CORP. L.* 208 (2020).

19. *Corporate Governance Frameworks in Cambodia, Lao PDR, Myanmar and Vietnam*, OECD (2019), <https://www.oecd.org/daf/ca/Corporate-Governance-Frameworks-Cambodia-Lao-PDR-Myanmar-Viet-Nam.pdf>.

20. WORLD BANK, *LIVE LONG AND PROSPER: AGING IN EAST ASIA AND THE PACIFIC 1–18* (2016), available at: <https://openknowledge.worldbank.org/handle/10986/23133>.

21. PETER A. GOUREVITCH & JAMES J. SHINN, *POLITICAL POWER AND CORPORATE CONTROL GOVERNANCE* (2005); LUKE NOTTAGE, *Perspectives and approaches: A framework for comparing Japanese corporate governance*, in *Corporate Governance in the 21st Century: Japan's Gradual Transformation* 21, 47–49 (Luke Nottage et al. eds., 2008).

influence is the growing proportion of foreign shareholders, notably, in Japan since the 1990s but also more recently in several ASEAN share markets.²²

However, the result of such factors in Japan so far has been a protracted “gradual transformation”²³ in corporate governance, although the cumulative effect over three decades has been considerable and the pace of change may now be accelerating.²⁴ Many Southeast Asian states seem even more unlikely to experience dramatic shifts in their corporate governance practices and regulatory regimes. This is because the largest (especially the top three) shareholders still hold so much equity in the largest listed companies.²⁵ High ownership concentration makes it hard for new and more dispersed shareholders to impact on the management of listed companies and generate momentum for supportive law reforms. This is especially likely when the government itself directly or indirectly owns large blocks of shares, and for wider political reasons has strong interests in maintaining the status quo. Government shareholdings in listed companies remain high especially in Malaysia, Vietnam, China/Hong Kong, Thailand, Singapore, and Indonesia.²⁶ Institutional ownership levels (including from growing foreign investors) are correspondingly low. The block holders, other than the government, in these Southeast Asian countries still mostly comprise family interests.²⁷

22. *Equity Market Review of Asia 2019*, OECD Capital Market Series, Paris (2019), <http://www.oecd.org/daf/ca/oecd-equity-market-review-asia.htm>. See also *Thailand 2015: Re-engaging Engines of Growth*, STOCK EXCHANGE OF THAILAND (July 2015), https://www.set.or.th/en/news/econ_mkt_dev/files/201507_Thailand2015.pdf; *Bursa Malaysia's Foreign Shareholdings*, BURSA MALAYSIA, http://bursa.listedcompany.com/foreign_shareholding.html (last visited Oct. 18, 2021).

23. Luke Nottage, Leon Wolff & Kent Anderson, *Chapter 1: Introduction: Japan's Gradual Transformation in Corporate Governance*, in *CORPORATE GOVERNANCE IN THE 21ST CENTURY: JAPAN'S GRADUAL TRANSFORMATION* 1, 1 (2008) (ebook), available at: <https://www.elgaronline.com/view/9781847209238.00007.xml>.

24. BRUCE ARONSON et al., *Corporate Legislation in Japan*, in *ROUTLEDGE HANDBOOK OF JAPANESE BUSINESS AND MANAGEMENT* (Parissa Haghirian ed., 2016); BRUCE ARONSON, *Japanese Corporate Law and Corporate Governance in Historical Perspective*, in *RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW* 401, 417 (Harwell Wells ed., 2018). An indication of a protracted transformation towards more emphasis being given to shareholders in Japanese corporate governance over recent decades is provided by Masayuki Tamura, *thirty years since Japan's stock market peaked, climb back continues*, NIKKEI ASIA (Dec. 29, 2019), <https://asia.nikkei.com/Spotlight/Datawatch/30-years-since-Japan-s-stock-market-peaked-climb-back-continues> (noting “Net profits of Japanese companies grew 630% from fiscal 2000 to 2018, . . . labor costs rose only 3%, but dividends jumped 440%”).

25. *OECD Equity Market Review Asia 2018*, *supra* note 10, at 46, Figure 31.

26. *Id.* at 12, Figure 4.

27. *E.g.*, in Indonesia, 54% of total market capitalization was held by firms belonging to a family business group in 2011, while families hold approximately 45% of shares in Malaysian companies: *OECD Survey of Corporate Governance Frameworks in Asia*, OECD (2017), <https://www.oecd.org/corporate/OECD-Survey-Corporate-Governance-Frameworks-Asia.pdf> [hereinafter *OECD Survey of Corporate Governance Frameworks in Asia*].

Such concentrated ownership stakes create an extra tension or agency problem for more dispersed shareholders, which corporate boards need to try to address. This is in addition to the tension between dispersed or minority shareholders and professional executives engaged to run the company's business—the focus of corporate governance initiatives before growing importance of institutional and other block holding shareholders in the East and even recently in the West.²⁸ Accordingly, alongside international bodies like the OECD and ADB, new stakeholder groups in the region such as the Asian Corporate Governance Association (ACGA, established in 1999 with support from burgeoning foreign investors) have long pressed for corporate law reforms regarding directors aimed at alleviating both types of agency problems. One longstanding recommendation from ACGA has been to introduce stricter requirements for independent directors (IDs) on boards.²⁹ This probably explains why Japan has been recently marked down by ACGA, with Malaysia moving up correspondingly in their rankings between 2016 and 2018.³⁰ After all, Japan has retained a gradualist and comparatively cautious approach regarding ID requirements. This is driven partly by path dependence and conservatism. Yet Japan's caution also derives from some quite justifiable doubts about whether imposing more ID requirements is a uniformly effective corporate governance reform, even as pressures persist to expand such requirements.³¹

Despite pockets of reticence, as in Japan, rules or encouragement for greater numbers and/or proportions of IDs have

28. *See generally*, REINIER H. KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW* (3d ed. 2017) (discussing both agency tensions); *CORPORATE GOVERNANCE IN ASIA: A COMPARATIVE APPROACH* (Bruce Aronson & Joongi Kim eds., 2019) 25–29, especially Figure 1.2 (showing the rise in jurisdictions globally with concentrated shareholdings).

29. *See, e.g.*, JAMIE ALLEN, *BUILDING STRONGER BOARDS AND COMPANIES IN ASIA: A CONCISE REPORT ON CORPORATE GOVERNANCE POLICIES AND PRACTICES* (2d ed. 2000), <https://www.acga-asia.org/thematic-research-detail.php?id=163>.

30. CHARLES YONTS, et al., *Corporate Governance Watch 2018: Hard Decisions: Asia Faces Tough Choices in CG Reform*, CLSA (Dec. 5, 2018), <https://www.clsa.com/corporate-governance-watch-2018/>, cited in Ryushiro Kodaira, *Activist Funds Take Aim at Asia Inc's Complacent Boardrooms*, NIKKEI ASIA (Apr. 3, 2019), <https://asia.nikkei.com/Spotlight/Cover-Story/Activist-funds-take-aim-at-Asia-Inc-s-complacent-boardrooms>.

31. GEN GOTO, et al., *Japan's Gradual Reception of Independent Directors: An Empirical and Political-economic Analysis*, in *INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH* (Dan W. Puchniak, Harald Baum & Luke Nottage eds., 2017). On Apr. 6, 2021, the Financial Services Agency released its expert advisory group's recommendations for further revisions to Japan's Corporate Governance Code applicable to all listed companies (and Stewardship Code for institutional investors who choose to opt into that), including measures to further boost IDs on boards, see <https://www.fsa.go.jp/en/news/2021/20210406.html>. These include raising the number of IDs from at least two to at least one-third of the board for companies to be listed on the revamped "Prime Market", and where necessary for a majority to be IDs.

spread across Asia.³² The roots lie in the United States and then the United Kingdom, where shareholders were traditionally (but not necessarily now) more dispersed. Accordingly, the main tension facing directors was that between dispersed shareholders and professional managers, so the key factor excluding a director from qualifying as independent was an executive role in the company. As ID requirements were transplanted from the 1990s into the Asian context, with more concentrated shareholdings and therefore an extra agency problem, another disqualifying factor was usually added: an ID could not be a substantial shareholder.³³ However, there were exceptions, and definitions of substantial shareholders still differ considerably across ID requirements in Asia.³⁴

For example, Singapore initially had no exclusion for shareholders serving as IDs. Since those who were themselves substantial shareholders (such as family members), could not effectively mediate the tension with smaller shareholders, such IDs ended up playing somewhat unexpected and novel roles, including informal mediation of disagreements among other family members with significant shareholdings. However, with effect from 2015, Singapore introduced a disqualification for those holding ten percent or more of shares.³⁵ From January 1, 2019, this was tightened to five percent,³⁶ but this is still more liberal than most other Asian states that also have strong block holder traditions.³⁷ Nonetheless, even with such restrictions and even if boards often

32. *OECD Survey of Corporate Governance Frameworks in Asia*, *supra* note 27, at 41, Table 17.

33. Interestingly, this extra factor seems to have originated by reform proposals in the early 1990s in Australia, which has a significant block holder tradition: see FADY AOUN & LUKE NOTTAGE, *The Rise and Unlikely Demise of Independent Directors in Australia*, in *INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH* (Dan W. Puchniak et al. eds., 2017).

34. See *INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH* (Dan W. Puchniak, Harald Baum & Luke Nottage eds., 2017).

35. DAN W. PUCHNIAK & LUH LUH LAN, *Independent Directors in Singapore*, in *INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH* (Dan W. Puchniak et al. eds., 2017).

36. Lee Meixian, *SGX Amends Listing Rules after MAS Accepts Proposals to Enhance Corporate Governance*, THE STRAITS TIMES (Aug. 6, 2018, 9:55 AM), <https://www.straitstimes.com/business/companies-markets/sgx-amends-listing-rules-after-mas-accepts-proposals-to-enhance-corporate>.

37. See, e.g., VIVIENNE BATH, *Independent Directors in Hong Kong*, in *INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH* (Dan W. Puchniak et al. eds., 2017); HSIN-TI CHANG ET AL., *From Double Board to Unitary Board System: Independent Directors and Corporate Governance Reform in Taiwan*, in *INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH* (Dan W. Puchniak et al. eds., 2017). *But see*, KYUNG-HOON CHUN, *Korea's Mandatory Independent Directors: Expected and Unexpected Roles*, in *INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH* (Dan W. Puchniak et al. eds., 2017).

now are required or encouraged to have nomination committees containing mostly or all IDs to suggest candidates for directorships, the IDs appointed are likely to end up acceptable to larger shareholders, not just in Singapore but also across other Asian jurisdictions. This problem will remain if directors must be voted in by general shareholder resolutions, without special rules favoring smaller shareholders.

Asian jurisdictions also vary significantly in what other disqualifying (or sometimes qualifying) factors are set for IDs, and the means by which ID requirements are introduced and then enforced. This diversity is arguably related not only to types of shareholders, and functional substitutes or origins of specific legal provisions (e.g., related to two-tiered board structures), but also to broader patterns in political economy and even cultural norms.³⁸ Further variation is evident across Asia in what sorts of people usually end up serving as IDs. Jurisdictions reveal differing proportions for existing or former businesspeople (notably in Singapore), lawyers (e.g., in Japan), academics (Taiwan and especially mainland China)³⁹ and former prosecutors or other bureaucrats (Korea).

Despite this regional diversity, there is an unmistakable trend towards imposing more expansive ID requirements, aimed at producing a board of directors who are engaged more in neutral “monitoring” executives on behalf of all shareholders rather than an “executive board”. Some countries are also trying to make IDs more functional. For example, Indian corporate law reforms in 2013 notably requiring directors serving more than five years to be reappointed only by a special resolution obtaining a seventy-five percent majority of all shareholders. Yet there is some awareness that bolstering independence may come as a trade-off against experience for directors, and that statistical evidence is quite weak for more IDs generating significantly higher corporate performance over many firms.⁴⁰ Even the idea that boosting IDs is useful for risk aversion, by diminishing the scope for major corporate collapses, has

38. DAN W. PUCHNIAK & KON SIK KIM, *Varieties of Independent Directors in Asia: A Taxonomy*, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan W. Puchniak et al. eds., 2017). *See also*, BRUCE ARONSON, *Case Studies of Independent Directors in Asia*, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan W. Puchniak et al. eds., 2017).

39. XIN TANG, *Independent Directors in China: Facts and Reform Proposals*, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan W. Puchniak et al. eds., 2017).

40. VIKRAMADITYA KHANNA & UMAKANATH VAROTTIL, *Board Independence in India: From Form to Function?*, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan W. Puchniak et al. eds., 2017). *See also* AOUN & NOTTAGE, *supra* note 33, at 422–27.

been questioned by studies comparing outcomes in financial institutions around the GFC.⁴¹ Other commentators are concerned that boosting IDs is a relatively “cheap” measure, often introduced in the wake of corporate scandals, which diverts attention from more impactful but politically unpalatable responses such as changes to accounting rules.⁴² In Southeast Asia, for example, a more pressing reform initiative could be better enforcement even in jurisdictions that have enacted laws to ensure related party transactions are in the company’s overall best interests, not those of larger shareholders.⁴³

Against the backdrop of this pan-Asian trend towards more IDs, despite some resistance and significant diversity, this article adds to earlier studies across Asia an analysis of developments particularly in Thailand. The analysis focuses on listed companies, which generate more acute agency conflicts as well as large economic effects; but space precludes examination of financial institutions, for which different rules apply due to extra complexity in their markets and for the overall economy.⁴⁴ Thailand is interesting as it houses a major ASEAN economy and share market, bearing some significant similarities yet also differences with Singapore (which has already been subjected to a detailed study regarding IDs). Thailand also has a mixed legal system, derived from the civil law tradition, but in corporate and securities law showing influences from Anglo-American law (as explained below). The emergence of ID requirements and presence on boards suggest that legal tradition or origins may be less important than having to respond to strong traditionally “Western” and now more globally pervasive expectations regarding IDs, including from global institutional investors and their proxy advisors, albeit in the context of concentrated shareholdings and other local practices. Thailand is also interesting to compare because, like some other Asian share markets, it has some very large and well-run companies along with a smaller-capitalization listed companies, creating scope for diverse responses to corporate governance reform initiatives. In addition,

41. See generally, WOLF-GEORG RINGE, *Independent Directors: A Theoretical Framework*, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan W. Puchniak et al. eds., 2017).

42. FRANK CLARKE, THE UNACCOUNTABLE & UNGOVERNABLE CORPORATION: COMPANIES’ USE-BY-DATES CLOSE IN (Graeme Dean & Matthew Egan eds., 2014).

43. Dan W. Puchniak & Umakanth Varottil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, 17 BERKLEY BUS. L.J., no. 1, 2020, at 1.

44. Often these rules are stricter. See, e.g., J. Thomas Connelly & Piman Limpaphayom, *Board Characteristics and Firm Performance: Evidence from the Life Insurance Industry in Thailand*, 16 CHULALONGKORN J. OF ECON., no. 2, 2004, at 101.

like some but not all regional economies, Thailand was badly shaken by the 1997 AFC—opening up scope for new laws and practices.

This article therefore focuses on five sets of questions regarding Thailand,⁴⁵ which have also posed regarding neighboring Cambodia (albeit with a much less robust share market and economy):⁴⁶

- **When and why** were ID requirements introduced?
- **How** are they implemented?
- **What** are the requirements?
- **Who** are the IDs?
- **Where** do or could IDs have the most impact?

As well as revealing important features of contemporary corporate governance in Southeast Asia, the article aims to contribute to ongoing theoretical and practice-oriented debates regarding corporate and securities law reform and policy-making processes more generally.

II. CORPORATE GOVERNANCE AND INDEPENDENT DIRECTORS IN THAILAND

Thailand actively encouraged FDI, especially in manufacturing to fuel export-led economic developments from the 1980s, although like other ASEAN states (except for Singapore) has been more reticent about liberalizing market access in some services sectors.⁴⁷ Deregulation of financial markets over the 1990s led to real estate and other economic bubbles, triggering a currency crisis during the AFC of 1997.⁴⁸ International organizations like the World Bank and ADB⁴⁹ encouraged domestic policy-makers to promote corporate governance reforms as a means of addressing transparent and

45. See also generally, SOUICHIROU KOZUKA & LUKE NOTTAGE, *Independent Directors in Asia: Theoretical Lessons and Practical Implications*, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan W. Puchniak et al. eds., 2017).

46. PUCHNIAK & LAN, *Independent Directors in Singapore*, *supra* note 35; Nottage, *Fledgling Corporate Governance and Independent Directors in Cambodia's Securities Market*, *supra* note 18.

47. OECD *Investment Policy Reviews: Southeast Asia*, OECD (Feb. 26, 2019), <https://www.oecd.org/investment/oecd-investment-policy-review-southeast-asia.htm> (2019).

48. See generally, e.g., WOO ET AL., *supra* note 2.

49. See respectively, Pedro Alba, Stijn Claessens & Simeon Djankov, *Thailand's Corporate Financing and Governance Structures*, WORLD BANK (May 21, 1998), http://documents1.worldbank.org/curated/en/399271468764098295/124524322_20041117162558/additional/multi-page.pdf; Piman Limpaphayom & J. Thomas Connelly, *Corporate Governance in Thailand* (June 2004), available at: <https://ssrn.com/abstract=965300>.

potentially fragile crony capitalism.⁵⁰ However, State-owned enterprises (SOEs) and other government-linked companies (GLCs) still comprise a comparatively large part of the share market (as indicated in Part I above), and family interests are also considerable in many listed companies.⁵¹

This economic trajectory has remained quite consistent despite many political upheavals. Parliament has often become deadlocked, triggering military coups, including those against Thaksin Shinawatra (a populist business tycoon elected Prime Minister in 2001, but deposed in 2006) and his sister Yingluck Shinawatra (elected in 2011, deposed by a coup in 2014). As well as widespread awareness that foreign investment and a pro-business environment are important for the Thai economy, the nation has a more functional bureaucracy and court system than many other ASEAN states.⁵² However, Thailand still suffers from significant corruption overall.⁵³

A. Why and When Were ID Requirements Introduced?

Motivations for “legal transplants” are generally categorized by Miller into four main types,⁵⁴ which can be tentatively applied and ranked as follows for the introduction of ID requirements in Thailand. Arguably, these were primarily an “efficiency-driven” legal transplant. Rather like Singapore, commentators and policy-makers emphasized that having more IDs on board would encourage greater foreign (and local) investment by improving corporate performance.⁵⁵ Adopting or adapting provisions on IDs found in corporate governance regimes abroad can also be “efficient” in the sense of minimizing direct costs (compared to considering and

50. Nisha Kanchanapoomi, *Accelerating Corporate Governance Reform in Thailand: The Benefits of Private Reform Mechanisms*, 15 S. CAL. INTERDISC L.J. 165 (2005); Chatrudee Jongsureyapart, *Factors That Determine Corporate Governance in Thailand* (Nov. 2006) (unpublished Ph.D. thesis, Victoria University) (on file with Victoria University).

51. *Id.*; Akira Suehiro & Natenapha Wailerdasak, *Family Business in Thailand: Its Management, Governance, and Future Challenges*, 21 ASEAN ECON. BULL. 81 (2004).

52. See Luke Nottage & Sakda Thanitcul, *The Past, Present and Future of International Investment Arbitration in Thailand*, SYDNEY LAW SCHOOL RESEARCH PAPER SERIES (Apr. 26, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770889, especially the Appendix of key political and economic events.

53. Ranked number 101 out of 180 countries in the 2019 Corruption Perceptions Index: *Corruption Perceptions Index 2019*, TRANSPARENCY INTERNATIONAL (2020), <https://www.transparency.org/cpi2019>.

54. Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839 (2003); See also KOZUKA & NOTTAGE, *Independent Directors in Asia*, *supra* note 45.

55. PUCHNIAK & LAN, *Independent Directors in Singapore*, *supra* note 35.

drafting new types of provisions) and indirect costs (such as those associated with unexpected consequences from adopting more idiosyncratic and novel reforms).

Second, Miller points out that legal transplants can also be “externally dictated,” for example in colonies. More recently, this type of transplant can be seen in Korea, when the International Monetary Fund (IMF) and World Bank mandated corporate governance reforms (including ID requirements from 1997) as a condition for bailing out that country after it too suffered heavily from the AFC.⁵⁶ Thailand also received World Bank support after its financial crisis, but there was no specific conditionality regarding specific reforms to corporate or securities laws, such as strengthening ID requirements. Instead, general improvements were urged at an APEC Finance Ministers meeting held in May 1998, for example, then discussed in a corporate governance symposium held in Sydney that same year.

This encouragement for all Asian countries was complemented by establishment of the OECD-Asian Roundtable on Corporate Governance, which held an inaugural conference in Seoul in 1999.⁵⁷ Annual roundtables have been held subsequently with involvement from Thailand, including presentations in 2000 at the second conference (held in Hong Kong) and the third (in Singapore).⁵⁸ The 2006 conference hosted in Bangkok had a session specifically on IDs, including a presentation on training and certifying IDs from Mr. Charnchai Charuvastr as president of the Thai Institute of Directors (TIOD).⁵⁹ Side meetings at OECD-Asian Roundtable events resulted in the informal establishment of “IDEA.net” (Institutes of Directors in East Asia–Network).⁶⁰ However, while offering new potential networking opportunities for current or

56. CHUN, *supra* note 37.

57. OECD–Asian Roundtable On Corporate Governance, OECD (2020), <https://www.oecd.org/daf/ca/oecd-asianroundtableoncorporategovernance.htm>.

58. See Kiattisak Jelatianranat, *Thailand's Corporate Governance Issues and Development*, OECD, <http://www.oecd.org/daf/ca/corporategovernanceprinciples/2ndoecdworldbankasiancorporategovernanceroundtablemay2000.htm> (2000); See Deunden Nikomborirak, *An Assessment of the Role of Board of Directors in Building Good Governance: The Case of Thailand*, OECD, <http://www.oecd.org/daf/ca/corporategovernanceprinciples/1872778.pdf> (2001).

59. Asian Roundtable on Corporate Governance, Bangkok, Thailand, OECD, <http://www.oecd.org/daf/ca/corporategovernanceprinciples/asianroundtableoncorporategovernancebangkokthailand.htm> (last visited Feb. 9, 2022).

60. As of 2011, this group was reportedly still rather new: see Jamie Allen, Secretary General of ACGA (PPTs also remarking generally that need to focus on quality around IDs, not just quantity/requirements) at Jamie Allen, *Recent Developments of Corporate Governance in Asia*, OECD <http://www.oecd.org/daf/ca/corporategovernanceprinciples/the3rdoecdworldbankasiancorporategovernanceroundtableapril2001.htm> (last visited Feb. 9, 2022).

future directors around Asia, IDEA.net struggled to find a specific role or agenda, and so has not endured. Instead, some participants pressed for and became involved in the ASEAN Corporate Governance Scorecard reports published since 2013 (mentioned in Part I above).

A third type of motivation identified by Miller generally for legal transplants comes from norm entrepreneurs. For corporate law reforms, including ID requirements, there is some evidence for such motivation among politicians in Japan.⁶¹ The impetus is arguably stronger in Thailand. Prime Minister Thaksin Shinawatra emphasized his business background a year after his election by declaring 2002 to be the “Year of Good Governance” and chaired a newly created Corporate Governance Council.⁶² Entrepreneurial legal transplantation can also be inferred from the creation of the TIOD in 1999, first led by Charnchai Charuvastr, a former IBM senior regional and Thailand executive who passed away in 2011).⁶³ He was succeeded by a senior economist who had served in Thailand’s central bank (1990-2010), Dr Bandid Nijathanworn,⁶⁴ until succeeded in 2019 by Kulvech Janvantavit.⁶⁵

TIOD began training directors from July 2000, with an ADB-supported report finding that by 2004, 800 individuals had completed 36 Directors Certification Program courses and TIOD membership had reached around 1100.⁶⁶ This emphasis on practical training was partly influenced by early contact with the Australian Institute of Corporate Directors, and by 2019 the TIOD had run over 260 Certification Program courses producing around 7000 graduates. The Institute had also around 4000 members by then. Approximately 85 percent sat on boards as directors (but not necessarily only in public listed companies), including around 70-80 in an “ID Club” established in 2018 for further peer support and networking specifically for IDs.⁶⁷ This is in addition to the TIOD’s

61. GOTO ET AL., *supra* note 31.

62. WICHIT CHAITRONG, *Economists Hedge Bets on Capital Inflow*, THE NATION (2001); K. I. Woo, *Good Governance Now a Global Issue*, THE NATION (2002); Limpaphayom & Connelly, *Corporate Governance in Thailand*, *supra* note 49 at 6.

63. Gregers Møller, *Khun Charnchai Charuvastr, Vice President of the Danish-Thai Chamber, Passed Away*, SCANDASIA (Feb. 13, 2011), <https://scandasia.com/8326-khun-charnchai-charuvastr-vice-president-of-the-danish-thai-chamber-passed-away>.

64. Short Biography of AMRO 2015–2019 Advisory Panel Member Dr. Bandid Nijathanworn, AMRO, <https://amro-asia.org/about-amro/dr-bandid-nijathanworn> (last visited Feb. 10, 2022).

65. Janvantavit joined TIOD from 2014, after a career including consulting for PwC: IOD NAMES KULVECH JANVATANAVIT AS CEO, THE NATION (Dec. 3, 2018), <https://www.nationthailand.com/Corporate/30359750>.

66. Limpaphayom & Connelly, *Corporate Governance in Thailand*, *supra* note 49.

67. Interview with Dr. Bandid Nijathanworn, former President and CEO of TIOD in Bangkok (Feb. 1, 2019).

“Chartered Director” program, established in 2005, which as of 2019 listed 52 individuals who currently serve exclusively as directors (not necessarily IDs) for specified types of firms.⁶⁸ The large cohorts graduating at least from the basic certification courses, and their business backgrounds or interests as well as focus on skills-training, seem to distinguish the TIOD’s activities from “elite networking” programs. The latter have grown in Thailand to bring together new and emerging leaders from private, public, and academic or other sectors.⁶⁹

The TIOD also worked with consultants McKinsey (and with World Bank funding) to produce in 2001 Thailand’s first baselining “Report on Corporate Governance”. This found, for example, that seventy-six percent of the 133 largest listed firms had majority non-executive directors (NEDs), 68 had between twenty-five and fifty percent independent NEDs. A follow-up report in 2002, of 200 firms covering eighty percent of market capitalization in the Stock Exchange of Thailand (SET), identified some “significant improvements” in corporate governance features generally.⁷⁰ The TIOD has continued conducting annual surveys, producing reports on “Best Practices” to encourage better benchmarking in corporate governance. These influenced the design of ASEAN Corporate Governance Scorecard comparison reports, and the TIOD now coordinates research contributing to those Scorecards.⁷¹

This successful norm entrepreneurship since 1999 from TIOD, led by presidents respected from private and public sector backgrounds successively serving for around a decade each, soon eclipsed another initiative. In 2002, Thai Rating and Information Services (established in 1993 to conduct credit ratings) began offering corporate governance rating services. Companies that chose to be rated were eligible for fast-track listing and discounts on SET fees. Yet uptake was low (only 4 companies by 2003),⁷² so the scheme was soon discontinued.

A fourth motivation for legal transplants is “legitimacy-enhancing,” typically through the prestige of particular national legal systems from which the legal provisions are borrowed. In

68. *Director Pool: IOCD Chartered Director*, THAI INST. OF DIRS., <http://www.thai-iod.com/en/chartered-director-profile.asp> (last visited Feb. 10, 2022).

69. PASUK PHONGPAICHIT ET AL., *UNEQUAL THAILAND: ASPECTS OF INCOME, WEALTH AND POWER* (Pasuk Phongpaichit & Chris Baker eds. 2016).

70. Limpaphayom & Connelly, *Corporate Governance in Thailand*, *supra* note 49, at 6–7.

71. *Projects: Corporate Governance Reports*, THAI INST. OF DIRS., <https://www.thai-iod.com/en/projects-2.asp> (last visited Feb. 10, 2022).

72. BOONCHAI HONGCHARU, *TRANSPARENCY AND ACCOUNTABILITY OF LISTED NON-FINANCIAL COMPANIES IN POST-CRISIS THAILAND* (Sakulrat Montreevat eds. 2005); Limpaphayom & Connelly, *Corporate Governance in Thailand*, *supra* note 49, at 39.

general, Thailand historically followed the European civil law tradition, including indirectly through Japanese law influences on its 1925 Civil and Commercial Code. Yet English law has also had some longstanding influence, especially in particular fields including evidence and aspects of commercial law, while attention is increasingly paid to developments in E.U. and U.S. law.⁷³ Thai corporate law was historically influenced partly by English law, but more disparate elements were evident when the Public Companies Act 1992 was enacted a few years before the AFC.⁷⁴ Thailand also enacted the Securities and Exchange Act 1992, establishing the Securities and Exchange Commission (SEC) to regulate IPOs, issuance of new shares, takeovers and market supervision (such as insider trading). This securities law statute was widely seen (as in Japan soon after World War 2) as following the U.S. model. However, the Thai enactment included some significant variations, including originally a more individualized (rather than disclosure-based) assessment of eligibility for listing shares on the stock exchange.⁷⁵

Intriguingly, however, 1993 SEC regulations added express requirements for IDs,⁷⁶ which were not then a topic for U.S. securities regulation. Instead, those aspects of the 1993 Regulations were likely influenced by the recommendations around IDs contained in the Cadbury Report on “Financial Aspects of Corporate Governance”, released the previous year in the U.K.⁷⁷ Further disparate influences on Thai policy-makers are evident in a research paper entitled “Enhancing Good Corporate Governance of Thai Listed Companies,” released in 1999 by the SEC.⁷⁸ The paper referred to recent recommendations and legal provisions around IDs ranging from South Africa and India, through to the U.K. (the Hampel Report) and the U.S. (Business Roundtable). Displaying similar ecumenicism, the latest 2017 Thai Corporate Governance

73. See generally, *Legal System in Thailand*, ASEAN L. ASS'N (Sep. 12, 2019), <https://www.aseanlawassociation.org/legal-system-in-thailand/>.

74. Nilubol Lertnuwat, *The Duties of Directors and Controlling Shareholders in Thai Listed Companies*, 26 AUSTL. J. CORP. L. 1 (2011).

75. See Pises Sethsathira, *Securities Regulation in Thailand: Laws and Policies*, 4 PAC. RIM L. & POL'Y. J. 783, 784–85 (1995); John Fagan, *The Role of Regulation Securities Regulation in the Development of the Thai Marketstock*, 16 COLUM. J. ASIAN L. 303, 307 (2003).

76. See Limpaphayom & Connelly, *Corporate Governance in Thailand*, *supra* note 49, at 17.

77. On the Report and its impact, but also some preceding discussions in the United States, see generally, HARALD BAUM, *The Rise of the Independent Director in the West*, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 21 (Dan W. Puchniak et al. eds., 2017).

78. *Enhancing Good Corporate Governance of Thai Listed Companies*, SEC. & EXCH. COMM'N (1999) (Thai.), <https://www.sec.or.th/EN/Pages/ResearchStudies.aspx>.

Code for listed companies, generated by the SEC in conjunction with the SET, makes references to counterpart Codes across various countries (such as the U.K., Australia, South Africa and Malaysia).⁷⁹ Yet, there is little discussion of jurisdictions traditionally influential in Thai law reform, generally (France, Germany or Japan) or even economically, as sources of foreign investment or with large share markets (such as New York, Hong Kong or Singapore).

Given these seemingly diverse influences from national law, it is difficult to characterize the Thai ID requirements as a “legitimacy-enhancing” legal transplant. However, as national legal systems (starting with the U.S. and the U.K.) began promoting IDs, such initiatives did feed into related principles and recommendations from international organizations (like the OECD, and eventually ASEAN). In turn, their instruments gained prestige and therefore influence on local policymakers and law reformers, including arguably in Thailand.

Turning from the question of *why* to the question of *when* ID rules were introduced, Thailand is notable in enacting mandatory requirements through SEC Regulations as early as 1993. The UK Cadbury Report in 1992 had recommended IDs but only on a “comply or explain” basis. Arguably influenced by proposals in Australia, Hong Kong went further in mandating at least two IDs (with the Securities Commission able to order more depending on circumstances including board size), albeit through Listing Rule amendments in 1993. Singapore had instead amended its Companies Act as early as 1989 to require all listed companies to have an audit committee with a majority of IDs, but provided no definition of director independence so this had little impact in practice.⁸⁰ Thailand’s 1993 SEC Regulation not only required at least two IDs, but included a short definition excluding those holding more than five tenths percent of the company’s shares (as elaborated in Part II.C below).⁸¹ In 1999, the SEC also required an audit committee for listed companies for the purpose of scrutinizing company disclosures and financial affairs.⁸² Regulations in 2008

79. *Corporate Governance Code for Listed Companies 2017*, SEC. & EXCH. COMM’N (2017) (Thai.), <https://ecgi.global/node/6197>.

80. See, AOUN & NOTTAGE, *supra* note 33; BATH, *supra* note 37; PUCHNIAK & LAN, *Independent Directors in Singapore*, *supra* note 35.

81. Nikomborirak, *supra* note 58, at 3–4 (noting as of April 2001, that SEC (and SET) required at least two IDs, and that the “definition of independence according to the SEC is as follows (1) not an employee of the company, its subsidiaries or part of the same conglomerate; (2) do not own more than 0.5% of equity share and (3) not a relative to have special relations with insiders that may obstruct impartiality in forming duty.”).

82. See FAGAN, *supra* note 75; JELATIANRANAT, *supra* note 58; Nikomborirak, *supra* note 58; Darana Chudasri, *Retail Investors Need to Take Care to Protect Benefits*, BANGKOK POST, 1999.

required three IDs and at least one third IDs on the board, with a generally much tighter definition of director independence (although relaxing the exclusion to those holding more than one percent of shares).⁸³ Regulations in 2016 maintained the same minimum requirements and definition, and required an audit committee with at least three members who are all IDs.⁸⁴

The SET has carried over these SEC requirements into its own rules,⁸⁵ superimposing provisions on IDs for companies listing shares after the 1992 SEC Act and regulations were enacted, as well as extending these to companies listed or issuing shares earlier (not covered by the SEC rules).⁸⁶ The SET was quite active in promoting corporate governance even before the AFC,⁸⁷ but soon afterwards in 1998 released a “Code of Best Practice for Directors of Listed Companies.”⁸⁸ The SET has further issued various sets of principles from 2001 through to 2017, applying to all its listed companies generally on a comply-or-explain basis, as explained next.

B. How Were ID Requirements Introduced?

Overall, Thailand has developed three types of ID requirements:

- (i) mandatory regulations enacted by the SEC;
- (ii) requirements set by the SET that generally go further (until sometimes entrenched in later SEC regulations), but essentially on a comply-or-explain basis; and

83. Notification of the Capital Market Supervisory Board No. Tor Jor. 28/2551 Re: Application for Approval and Granting of Approval for Offering of Newly Issued Shares (SEC, dated 15 Dec. 2008). *See also* Notification Stock Exchange of Thailand Re: Qualifications and Scope of Work of the Audit Committee No. Bor.Jor./Ror. 01-04 (2008), https://www.set.or.th/en/regulations/rules/individual_files/BorJorRor0104_3_EN.pdf (summarizing audit committee member requirements at ‘Rules Summary’ (SET), available at https://www.set.or.th/en/regulations/simplified_regulations/AC_ID_p1.html, and related rules including for SET listed at ‘Related Regulations’ (SET), available at https://www.set.or.th/en/regulations/simplified_regulations/AC_ID_p5.html).

84. *See* Clause 17 of the Notification of the Capital Market Supervisory Board No. Tor Jor. 39/2559 Re: Application for Approval and Granting of Approval for Offering of Newly Issued Shares (SEC, notified 30 Sep. 2016 and in force from 16 Nov. 2016) at <http://capital.sec.or.th/webapp/nrs/data/7079se.pdf>, available with other translated regulations via ‘List of Laws and Regulations’ (SEC) http://capital.sec.or.th/webapp/nrs/nrs_viewall_en.php.

85. *See, e.g., Regulations*, SEC. & EXCH. COMM’N (2019) (Thai.), <https://www.sec.or.th/EN/Pages/LawandRegulations/SharePO.aspx>.

86. On this shared jurisdiction, *see generally* FAGAN, *supra* note 75; JELATIANRANAT, *supra* note 58.

87. Hongcharu, *supra* note 72, at 2 (From 1995 the SET itself had voluntarily adopted an audit committee, for example, and collaborated with Price Waterhouse in its 1996 PW survey of 202 listed companies that found poor practices).

88. *The SET Code of Best Practice for Directors of Listed Companies* No. Bor.Jor./Ror.26-00, STOCK EXCH. OF THAILAND (Jan. 19, 1998).

(iii) encouragement to go even further through participation in TIOD annual surveys (so perhaps not really “requirements,” yet influential in practice).

The first and strongest type of requirements, issued by SEC regulations, has been outlined above. As for the second, the 1999 SET Code of Best Practice aimed to improve corporate governance essentially on a comply-or-explain basis, including for example a minimum proportion of one-third IDs (even before that was added as a mandatory rule by the 2008 SEC Regulation).⁸⁹ However, there was some confusion over this novel type of regulatory tool from the SET, with some seeing the recommended practices as amounting to no more than guidelines or recommendations.⁹⁰ Accordingly, a 2001 SET Report on Corporate Governance⁹¹ set out Principles (things listed companies “should do,” initially on a comply-or-explain basis) distinguished from Best Practices (extra things companies might do), including regarding IDs. The SET further restated 15 Principles in 2002, including the requirements of at least three plus one-third IDs (Principle 8) as well as an independent Chairperson (Principle 9).

The SET later issued The Principles of Good Corporate Governance for Listed Companies 2012. Their preamble noted that this revision built on its 2006 Corporate Governance of Listed Companies: A Manual for Investors (mostly introducing important developments and best practices abroad),⁹² as well as a World Bank “Report on the Observance of Standards and Codes Related to Thai Corporate Governance”⁹³ and the new ASEAN Scorecard criteria (to “make Thai listed companies ready for competition in ASEAN”). The

89. Limpaphayom & Connelly, *Corporate Governance in Thailand*, *supra* note 49, at 18.

90. HONGCHARU, *supra* note 72, at 11.

91. Available via, Report on Corporate Governance, STOCK EXCH. OF THAILAND (2001), https://www.set.or.th/sustainable_dev/en/cg/principle_p1.html?printable=true. Compare for example (emphasis added): (a) Section 2 Principles and Recommendations, where 17 states the “general rule” proposing “that one-third of the total directors on the board are independent, with three as the minimum”; with (b) Section 4 Best Practices and Recommendations: The Board, which lists various specific and practical “Best Practices” for IDs.

92. *Corporate Governance of Listed Companies: A Manual for Investors*, CFA SOC’Y THAILAND (Nov. 30, 2006) (For example, this mentioned that recent good practices included having at least a majority of IDs, and to “have a lead Member if the Board chair is not Independent”).

93. See, e.g., THE WORLD BANK, REPORT ON THE OBSERVANCE OF STANDARDS AND CODES: CORPORATE GOVERNANCE COUNTRY ASSESSMENT – THAILAND (2013), <http://documents.worldbank.org/curated/en/598741468118443110/Thailand-Report-on-the-Observance-of-Standards-and-Codes-ROSC-corporate-governance-country-assessment>; THE WORLD BANK, REPORT ON THE OBSERVANCE OF STANDARDS AND CODES: CORPORATE GOVERNANCE COUNTRY ASSESSMENT – THAILAND (2005), <http://documents.worldbank.org/curated/en/560511468118458173/Thailand-Report-on-the-Observance-of-Standards-and-Codes-ROSC-corporate-governance-country-assessment>.

2012 Principles were to cover in general “all important issues concerning good CG, while the content in the recommended best practices offers supplementary descriptions or means to enable companies to implement the principles.”⁹⁴ The document outlined as follows a “comply or explain” approach, for companies’ annual statements to be filed from 2014:

SET recommends that the boards of directors and management teams of listed companies comply with the principles to improve their systems of corporate governance to be internationally comparable. The principles can be adapted by each company to best fit the individual firm’s functional needs. If they choose not to comply with any principles, they should explain thoroughly the reasons for not doing so.⁹⁵

It therefore seems important for this approach to determine what is stated in the principles themselves, but those in fact are expressed quite broadly compared to the recommended best practices. For example, under Section 5 Responsibilities of the Board, the principles include having a board “independent of management” and also having “independence in making decisions for the best interests of the company and all shareholders.”⁹⁶ Yet recommended best practice 1.3 relating to Board Structure states much more specifically:

The board should have independent directors who comment on the performance of the management independently. The number of independent directors should meet or exceed SEC requirements. The remaining directors should be representatives of each group of shareholders; the number of directors should be proportionate to the ownership of each group.

The independent directors should make up more than fifty percent of the Board where: (a) the chairman of the board (the “Chairman”) and the chief executive officer (or equivalent) (the “CEO”) is the same person; (b) the chairman and the CEO are immediate family members; (c) the chairman is part of the management team; or (d) the chairman is not an independent director.”

Other best practice recommendations are that the chair should be an ID anyway (1.7) and separate from the CEO (1.6).⁹⁷ A further recommendation curiously adds that: “The company’s definition of

94. The *Principles of Good Corporate Governance for Listed Companies* 55, STOCK EXCH. OF THAILAND (2012), <https://www.setsustainability.com/libraries/707/item/cgprinciple-2012>.

95. *Id.* at 56.

96. *Id.* at 88.

97. *Id.* at 92.

‘independent director’ should be carefully considered by the board as to whether or not the minimum qualification specified by the SEC and the SET is appropriate for the company.”⁹⁸ This scheme therefore seems to leave considerable scope not to be required to even explain non-compliance by declaring, for example, that the board complies with the broad principle of independence, even if there were fewer than half IDs on a board chaired by a non-ID.⁹⁹

The latest Corporate Governance Code 2017 (“CG Code”) suggests more influence from the SEC, although its principles “integrate the essence of principles and best practices of the G20/OECD Principles of Corporate Governance, the [2012 SET] Principles of Good Corporate Governance, principles of social and environment responsibilities for business, as well as the business leadership concept.”¹⁰⁰ Moreover, although the practical implications of the following distinction given in the CG Code are not obvious:

Implementation of the CG Code is on an ‘apply or explain’ basis; the board is encouraged to apply each Principle and Sub-Principle by means that are suitable for the company’s business. If any of the Principles or Sub-Principles cannot be applied or are not applicable, the board shall provide an explanation as appropriate. The Guidelines and Explanations in part 2 are for further clarification and contain recommended practices in relation to each Principle and Sub-Principle.

In contrast to a ‘comply or explain’ requirement, the ‘apply or explain’ basis intends to encourage the board to comprehensively apply the CG Code to the company’s business in the interest of long-term sustainable value creation.

The Principles and Sub-principles are also still quite general, for example regarding “Principle 3: Strengthen Board Effectiveness”:

Principle 3.1: The board should be responsible for determining and reviewing the board structure, in terms

98. *Id.* at 91.

99. AOUN & NOTTAGE, *supra* note 33, at 414–15 (In Australia, for example, the ASX Principles since 2003 recommend specifically a majority ID board for all listed companies, and any non-compliant company must therefore explain why it retains such a board structure [although it can also justify why it lists any director as “independent” despite relationships adversely affecting independence as identified in the Principles]).

100. Sec. and Exch. Comm’n of Thailand, *Corporate Governance Code 2017*, CG THAILAND, <https://www.sec.or.th/cgthailand/EN/Pages/CGCode/CGCodeIntroduction.aspx>; Sec. and Exch. Comm’n of Thailand, *Corporate Governance Code for Listed Companies 2017*, *supra* note 79, at 69.

of size, composition, and the proportion of independent directors so as to ensure its leadership role in achieving the company's objectives.

Principle 3.2: The board should select an appropriate person as the chairman and ensure that the board composition serves the best interest of the company, enabling the board to make its decisions as a result of exercising independent judgement on corporate affairs.¹⁰¹

Operational details such as having a majority of NEDs generally on the board, and a majority of IDs where the Chairperson is not an ID or also serves as CEO, are still relegated instead to Guidelines.¹⁰² However, the 2017 CG Code does require a board resolution not only explaining why it is not applying (sub)principles (which must also be disclosed to the SEC through Form 56-1), but also any alternative practices adopted to achieve them. This should encourage more active explanations being provided. Further, when assessing whether sub-principles 3.1 or 3.2 are met the board arguably should anyway need to consider too (and then explain) whether and why the more specific guidelines may not be met.

The 2017 CG Code therefore arguably strengthens the need for assessments and disclosures around IDs, but it also relaxes some requirements. For example, if the board chair is also the CEO (or they are family members) Guideline 3.2.4 states that the board should either have a majority of IDs (as under the 2012 SET Principles), or there should be appointed a “designated independent director to participate in setting the board meeting agenda” as alternative means to “ensure the balance of power and authority of the board and between the board and management.”¹⁰³ This may suggest more concern for greater functionality, rather than for form (numbers of IDs on boards), and tracks the emerging practice or rule to identify and support a “senior” or “lead” ID (e.g. in the UK, USA and Australia).¹⁰⁴ In addition, Principle 3.3 of the 2017 CG Code

101. Sec. and Exch. Comm'n of Thailand, *Principle 3: Strengthen Board Effectiveness*, SEC (2017), https://www.sec.or.th/cgthailand/EN/Pages/CGCode/CGCodePart01_3.aspx.

102. See Sec. and Exch. Comm'n of Thailand, *Corporate Governance Code 2017, Part 2: Guidelines and Explanations*, SEC (2017), https://www.sec.or.th/cgthailand/EN/Pages/CGCode/CGCodePart02_1.aspx.

103. See also Stock Exch. of Thailand, *Corporate Governance Code 2017, Concept*, SEC (2017), <https://www.sec.or.th/cgthailand/en/pages/cgcode/cgcodeintroduction.aspx> (mentioning this as a significant difference from the 2012 SET Principles); Sec. and Exch. Comm'n of Thailand, *Corporate Governance Code for Listed Companies 2017*, *supra* note 79, at 96.

104. E.g., RYAN KRAUSE et al., *Compromise on the Board: Investigating the Antecedents and Consequences of Lead Independent Director Appointment*, 60 ACAD. OF MGMT. J. 2239 (2017); CFA SOC'Y THAILAND, *supra* note 92, at 12 (The idea of a “lead” ID, if the Board chair

requires “that the policy and procedures for the selection and nomination of directors are clear and transparent resulting in the desired composition of the board,” with Guideline 3.3.1 recommending a nomination committee with its chair and majority of members being IDs—whereas best practices under the 2012 Principles recommended all IDs.¹⁰⁵ Guideline 3.4.1 similarly requires a remuneration committee with its chair and majority of members being IDs, unchanged from the 2012 Principles best practices.

Both nomination and remuneration committees, exercising functions where the board is more likely to be conflicted and therefore threatening its overall independence, are not yet required by SEC regulations. However, arguably they must be established with this minimum composition or otherwise be explained, under the 2017 CG Code. In addition, Guideline 6.2.1 for Principle 6.2 requires an audit committee with at least three directors, all IDs but with required qualifications as mandated by SEC regulations and SET listing rules.

A third type of looser norm-setting, in addition to mandatory SEC regulations and extra (broadly “comply or explain”) SET requirements, comes from the TIOD. It has conducted a survey every year since 2001, with SET support, to generate the “Corporate Governance Report of Thai Listed Companies.” Most listed companies voluntarily complete the survey, answering questions across five areas (roughly tracking those in OECD Principles and now the ASEAN Scorecard surveys) that are then standardized into aggregate scores for respondent firms. The scores in 2017, for example, were as follows.¹⁰⁶

is not independent, was also briefly mentioned in the 2006 SET Manual, providing general guidance for investors and therefore Thai companies).

105. See Thai Inst. of Dirs. Ass’n, Corporate Governance Report of Thai Listed Companies 2017 (2017), at 39, <https://www.thai-iod.com/en/projects-2-detail.asp?id=391> (The 2017 TIOD survey report gave a bonus to only 13% of its 620 respondents for answering positively question E89 (sic): “does the Nomination Committee comprise entirely of IDs?”); SEC. AND EXCH. COMM’N OF THAILAND, *Corporate Governance Code for Listed Companies 2017*, *supra* note 79, at 96.

106. *Id.* at 35–37, 40.

Table 1:
TIOD Corporate Governance Report (2017)
Questions and Scores

	Average	Median	Bonus Qs	Penalty Qs
A. Rights of Shareholders (22 base Qs)	93	95	1	5
B. Equitable Treatment of Shareholders (12 base Qs)	92	96	3	4
C. Role of Stakeholders (26 base Qs)	78	82	1	2
D. Disclosure and Transparency (51 base Qs)	84	86	1	1
E. Board Responsibilities (97 base Qs)	71	71	10 (+1)	6 (+1)
Overall (208 base Qs)	80	81	16 (+1)	18 (+1)

Based on the individual overall score across the five categories, each respondent firm is then recognized with logos as Excellent (scoring on average 90-100: 110 out of 620 firms in 2017), Very Good (80-89: 226 firms), Good (70-79: 171), Satisfactory (60-69), Pass (50-59) or without logo (less than 50), in its corporate governance practices. Companies recognized as Excellent, Very Good or Good, are then disclosed in the TIOD Report, listed, and divided into respective categories for which they are listed alphabetically. Such recognition provides an incentive for listed companies to improve their practices and signal their attractiveness to investors (and others, such as regulators).

However, there are limits to this signaling potential, especially for smaller investors, and therefore the (quasi-)regulatory role played by this (SET-supported) annual analysis by the TIOD. First, not all firms take part (only 620 in 2017 out of around 688 listed companies in 2017.¹⁰⁷ Second, respondent firms who score less than “Good” (113 of 620 in 2017) are not disclosed in the TIOD report.

107. MAI TBX Statistics (Yearly), STOCK EXCH. OF THAILAND (2020), https://www.set.or.th/en/market/market_statistics.html.

Third, even those “Good” and above are not ranked by individual score (highest to lowest) within each category, but only alphabetically, so each firm can only be compared generally against the entire set of companies listed in the higher or lower category.

Fourth, the TIOD reporting does not detail the methodology for generating an individual firm’s score out of 100. As indicated in the first column of Table 1 above, there were overall 208 base questions (not for example 100), especially focused on the fifth category E for Board Responsibilities (97). It is unclear whether a base score (say 200) is simply transformed into a score out of 100 (thus becoming $200/208=96$), or whether more weighting might be given for good scores in the other four categories (A-D).

Fifth, the picture is further complicated by bonus and penalty questions (and one hybrid question that could augment or decrease scores), as indicated for Board Responsibilities in columns 4 and 5 above. The bonus questions, for example, are singled out to “recognize and reward companies with enhanced internationally-accepted governance standards”.¹⁰⁸ Hardly any of the penalty questions generate significantly negative responses. An exception is E12 (“Does the company have any IDs who have served for more than nine years”) for which fifty-seven percent attracted a penalty, so those respondent firms must have had such IDs, and therefore presumably had some (but unspecified) mark deducted from their overall score.¹⁰⁹ Several of the bonus questions, which are concentrated on Board Responsibilities (as are the base questions), instead show significant positive responses. An example is E97 (“Does the company have at least one female ID?”) for which fifty-one percent of respondent firms attracted some bonus.¹¹⁰ Accordingly, changing the bonus/penalty questions and their weighing across categories or for overall firm scores may have a significant impact on the respondent’s final ranking and aggregate score.

Finally, it is unclear how responses even to the base (219) questions are translated into a firm’s score out of 100. Most questions have only two possible answers, such as E96 (“Does the board of directors comprise at least five members and no more than twelve members?”), for which eleven percent of firms’ responses were found to be “poor” (so the answer was presumably “no”, thus perhaps gaining no points) and eighty-nine percent were “excellent” (so “yes”, thus perhaps gaining one point?). But other questions have three answers, generating responses judged “poor”, “good”, or

108. Thai Inst. of Dirs. Ass’n, *supra* note 105, at 9–35.

109. *Id.* at 37.

110. *Id.*

“excellent” (perhaps the latter gain two points?). Three examples relevant to IDs are given below, in addition to several further questions where only two answers seem to have been made possible:¹¹¹

Table 2:
Responses to TIOD Report Survey
Questions Affecting IDs

Question	Assessment Criteria	“Poor” response firms	“Good” (or n/a) response	“Excellent” response firms
E98	How many board members are non-executive directors?	0%	29%	71%
E99	Among the board of directors, how many are independent directors?	2%	85%	13%
E100	Does the board of directors provide the definition of 'independence' for identifying independent directors in public communication?	3%	72%	25%
E101	Are the independent directors independent of the management and major shareholders?	3.4%	n/a	96.6%

111. Adapted from Thai Inst. of Dirs. Ass'n, *supra* note 105, at 31–33.

Question	Assessment Criteria	“Poor” response firms	“Good” (or n/a) response	“Excellent” response firms
E72	Audit Committee exists? If yes, are the following items disclosed?	0%	n/a	100%
E75	Is the Committee composed entirely of independent directors?	0%	n/a	100%
E81	Remuneration Committee exists? If yes, are the following items disclosed?	29%	n/a	71%
E83	Is the Committee composed of a majority of independent directors (more than 50%)?	52.6%	n/a	47.4%
E84	Is the Chairman of the Committee an independent director?	41.6%	n/a	58.4%
E87	Nomination committee exists? If yes, are the following items disclosed?	30%	n/a	70%

Question	Assessment Criteria	“Poor” response firms	“Good” (or n/a) response	“Excellent” response firms
E90	Is the Committee composed of a majority of independent directors (more than 50%)?	54.5%	n/a	45.5%
E91	Is the Chairman of the Committee an independent director?	42%	n/a	58%
E70	Is the Chairman of the board also the CEO (CEO duality)?	12%	n/a	88%

It is unclear on which basis for example the TIOD assessed a firm’s response as “good” (eighty-five percent) as opposed to “excellent” (only thirteen percent) regarding question E99 asking how many directors are independent. Perhaps the former meet only the SEC regulation minimum requirements outlined above (at least three IDs plus at least a third of the board). Perhaps the “excellent” companies exceed them, for example by meeting the 2017 CG Code “apply or explain” extra requirement of a majority IDs if the board’s Chair is also the CEO. The question E70 responses suggest the latter situation occurs in twelve percent of respondent firms, while question E69 suggests only thirty-nine percent of board Chairs are IDs. Both findings match those from an earlier 2015 SET analysis of 602 listed firms: thirty-six percent had ID chairs, another thirty-nine percent had NED chairs, thirteen percent had Executive Chairs not CEOs, twelve percent had Executive Chair and CEOs.¹¹²

112. Adapted from Thai Directorship 2015, STOCK EXCH. OF THAILAND, (2016), <https://www.setsustainability.com/download/a3q47c6sxbu82yf>.

This 2015 SET analysis also found that twenty-five percent had half or more IDs among the largest 100 firms (SET100, making up almost all the SET market capitalization) and eighteen percent for the others (Non-SET100), with average board size and ID numbers for each category as follows:¹¹³

Table 3:
SET Thai Directorship 2015

Market	Board size	IDs (numbers)	Market capitalization (million Baht)
SET100	11	5	89,770
Non-SET100	10	4	6,837
MAI	9	4	2,617

Despite such uncertainties for readers of the TIOD survey reports, at least larger or institutional investors may be able to seek clarification directly from particular respondent firms regarding corporate governance issues of particular interest. Even small retail investors may steer clear of listed firms not disclosed in these annual TIOD survey results, or at least focus on “Excellent” or high-category respondent firms.

In addition, the TIOD’s annual analysis first encourages Thai listed companies to comply with mandatory legal requirements, to bolster their scores and therefore public rankings. Those include having the correct number of directors (question E96, as required by the Public Listed Companies Act 1992), as well as sufficient IDs generally (seemingly questioned by E99-1010 reproduced above) and an audit committee with all IDs (questions E72 and E75).¹¹⁴ Given sometimes patchy enforcement of Thai securities regulation,¹¹⁵ adding a “carrot” to the statutory “stick” may make a significant difference to corporate governance in practice.

Second, the annual TIOD exercise can encourage better compliance or application (respectively) of the SET 2012 Principles or 2017 CG Code. As introduced above, those instruments recommend (but do not mandate) establishment of key committees to nominate and remunerate directors. However, the 2017 TIOD Report shows that still only around thirty percent of (self-selected)

113. *Id.* (The “MAI” category refers to the SET’s “Market for Alternative Investment”).

114. Thai Inst. of Dirs. Ass’n, *supra* note 105 at 9–35.

115. JINN-MIN LIN, *The Evolution of Securities Law in Thailand*, Univ. of Chicago Int’l Program Papers, Working Paper No. 82 (2018), https://chicagounbound.uchicago.edu/international_immersion_program_papers/82/.

respondent firms have such committees, and only around half of them have recommended majorities and chairs that are IDs (questions E81, E83-84, E87, E90-91).¹¹⁶ The 2015 SET analysis of 602 listed companies (not necessarily the same ones which responded to the TIOD survey in 2017) found that 100 largest listed firms were considerably more likely to have both committees (sixty-eight percent), compared to fifty-percent for non-SET 100 firms—as well as a risk committee (fifty-two percent compared to forty-one percent), also recently encouraged in Thailand).¹¹⁷

Third, the TIOD analysis can help push (at least the better, typically larger) respondent companies to go even beyond the 2017 CG Code, for example by asking (bonus) questions such as whether the firm has at least one female ID. As indicated in Part II.E below, the 2017 CG Code (let alone SEC regulations) have little to say about gender diversity on corporate boards in Thailand.

Accordingly, my summary of Thailand's hard and soft mechanisms for promoting IDs on listed companies' boards, as detailed above, is as follows:

Table 4:
Hard and Soft Mechanisms Encouraging IDs

Mandatory	“Comply or Explain”	“Best Practices”
1993: SEC Act/ regulations (at least 2 IDs)		
1997: Asian Financial Crisis		
	2001-2: SET Principles (at least on third IDs)	2001: TIOD Corporate Governance reports /surveys
2008: Revised SEC Act/regulations (at least 3 and one third IDs)		
	2012 and 2017: SET (and SEC) revisions (at least half IDs)	

116 Thai Inst. of Dirs. Ass'n, *supra* note 105 at 31–32.

117. STOCK EXCH. OF THAILAND, *supra* note 112.

C. What Are the ID Requirements?

The previous analysis has already begun to explain *what* constitutes Thailand's main definitions and other rules regarding IDs, in discussing why, when and how ID requirements were introduced. The now-detailed definition in clause 17(2) of the current SEC Regulation¹¹⁸ is reproduced below (emphasis added). IDs are those appointed directors who are:¹¹⁹

1. **Holding no more than 1% of total voting shares*** including the shareholding of persons related to the independent directors
2. **Not currently be or never been the company's executive** director, worker, employee, salaried consultant, or controlling parties*. Exception: It has been at least two years after the person has held the position.
3. **Not by blood or legally registered with other directors**, executives, major shareholders, controlling parties, or persons who will be nominated as directors, executives, or controlling parties of the company or subsidiary.
4. **Not currently having or never had any relations with the company* in the way that such relation may impede the person from having independent views.** Also, the person should not currently be or never be a significant shareholder or controlling person for persons having business relations with the company*. Exception: It has been at least two years after the person has held the position.
5. Not currently being or never been the **company's auditor***. Also, the person should not currently be or never be a significant shareholder, controlling person, or partners of current auditor's auditing firm*. Exception: It has been at least two years after the person has held the position.
6. Not currently be providing or never **provided professional services**, legal consulting, nor financial consulting services to the company with a fee more than THB 2 million per year*. Also, the person should not currently be or never be a significant shareholder,

118. *Notification of the Capital Market Supervisory Board No. Tor-Jor. 39/2559, supra* note 84.

119. See Rules Summary, STOCK EXCH. OF THAILAND, https://www.set.or.th/en/regulations/simplified_regulations/AC_ID_p1.html.

controlling person, or partners of current service providers. Exception: It has been at least two years after the person has held the position.

7. Not currently a **director appointed to represent the company's directors, major shareholders, or the shareholder related to major shareholder.**
8. **Not currently be operating under similar business nature and significant competition to the company or subsidiary;** or not a significant partner of the partnership, executive director, salaried worker, employee, or consultant; or holding more than 1% of voting shares of any other companies operating under similar business nature and significant competition to the company and subsidiary.
9. **Not under any conditions that may impede the person from having independent views** towards the company's operations.
 - * Including the parent company, subsidiary, affiliate, major shareholder(s), or controlling parties of the company

As already mentioned, and building on the much simpler definition in the 1993 SEC Regulation, the statutory regime addresses two key agency conflicts by excluding from IDs both executives and significant shareholders, as well as now related connections through family or corporate group connections. There is also a catch-all exclusion for relations or circumstances impeding the directors from exercising independent judgement. The current regulation above (and its 2008 predecessor) adds specific examples of such situations: serving as auditor or provider of extensive professional services or having done so (albeit within the last two years). All these are quite similar to statutory and/or comply-or-explain governance instruments found in other Asia-Pacific jurisdictions.¹²⁰

However, two idiosyncrasies should be noted. First, the substantial shareholder disqualification for IDs was relaxed in 2008 to one percent, from five tenths percent in the original 1993 Regulation, although this is still quite strict compared to other Asia-Pacific jurisdictions.¹²¹ A SEC Working Group research report as early as 1999, reviewing then recent developments abroad (South Africa, India, US and US) had noted that those regimes (at least

120. See, e.g., AOUN & NOTTAGE, *supra* note 33; See generally PUCHNIAK & LAN, *Independent Directors in Singapore*, *supra* note 35.

121. *Id.*

around that time, and still in the US) placed less emphasis on a specific number of IDs (as under the then Thai regulatory regime). Instead, they arguably put more emphasis on independence from executives, rather than from major shareholders – who by serving as IDs might even be incentivized to work harder for the company as a whole:¹²²

[M]ore emphasis is usually given to the ratio of non-executive directors rather than the independence from the major shareholders. This may be because having equity stake in a company does not always constitute conflict of interest in monitoring the management. Shareholders who own substantial shares are also in a good position to safeguard their own interest as long as they are not inside management

...

The Working Group then noted how the SET had transposed the SEC regulation excluding five tenths' percent shareholders from IDs, making up at least three members of the newly required audit committees for its listed companies, but urged a modified definition as follows (emphasis added):¹²³

• Not a major shareholder (holding shares more than 10%) or have direct or indirect relationship with the major shareholders or the management, and not a relative or acting as a representative of those persons. However, the requirement on maximum shareholding of 0.5% should be lifted as it reduces the availability of qualified candidates. The Working Group views that this increased permissible shareholding will not create potential conflict of interest of audit committee members as long as they are independent from the management.

• Free from any past (for the period of one year) direct or indirect financial or other interest in the management or the business of the company or its affiliates in such a way that the person cannot make independent judgement.

• Not an executive, employee, worker or consultant who receives salary or other regular benefit from the company or its affiliates.

122. SEC. EXCH. COMM'N OF THAILAND, *supra* note 78. This incentivizing effect is also emphasized recently by commentators such as Prof Peter Swan in Australia, see AOUN & NOTTAGE, *supra* note 33, at 425–26.

123. Thai Sec. Exch. Comm' n of Thailand, *supra* note 78.

- Able to perform the assigned duties independently without being influenced by any person.

These recommendations seem to have eventually influenced the revised SEC regulation, applicable to all IDs (not just on audit committees), including relaxing the shareholding threshold but to one percent rather than ten percent.

Second, the current SEC Regulation (summarized above) disqualifies a director from being an ID if engaged (directly or as a director etc.) in a similar and competitive business with the company or its subsidiary. Such an ex-ante prohibition is rarely found in Asia-Pacific corporate law or governance instruments. Instead, IDs, actually or potentially in such relationships, are subject to various ex post mechanisms to manage conflict of interests on a case-by-case basis.¹²⁴ The Thai approach may have been influenced by IFC recommendations especially for jurisdictions with strong family interests in corporate groups.¹²⁵ It may also be preferable if courts are less functional and/or (as in Thailand) the economy lacks a robustly enforced competition law.¹²⁶

Beyond what is expressly addressed in the SEC regulation on IDs, it is interesting to compare how the Thai corporate governance regime addresses several problems that other jurisdictions have increasingly grappled with regarding what the requirements should be for disqualifying (or qualifying) IDs. One is the two-edged sword of multiple directorships. This phenomenon can reflect and enhance experience and expertise for directors, but also make them too busy and thus diminish their capacity to conduct an effective monitoring role. There is no specific reference to this issue in the SET's 2002 15 Principles, or even the 2006 SET Manual offering general advice for investors (and therefore Thai firms) by reference to global best practices.¹²⁷ However, writing for the ADB in 2004, some commentators had remarked that for bank directors, Thai law sets a mandatory limit of five board memberships.¹²⁸

The 2012 SET Principles, under Responsibilities of the Board, do however recommend that: "The structure of the board should

124. ROSEMARY TEELE LANGFORD, *COMPANY DIRECTORS' DUTIES AND CONFLICTS OF INTEREST* (2019).

125. SANAA ABOUZAIID, *IFC Family Business Governance Handbook (English)*, WORLD BANK GROUP (2008), <http://documents.worldbank.org/curated/en/461311468313533527/IFC-family-business-governance-handbook>.

126. See, e.g., SAKDA THANITCUL, *Competition Law in Thailand: A Preliminary Analysis*, 1 WASH. U. GLOBAL STUD. L. REV. 171 (2002) (describing historical weaknesses in Thai competition law and practice).

127. *But see* STOCK EXCH. OF THAILAND, *supra* note 92, at 7. (The manual suggests a definition of independence that includes excluding "any entity which has a cross-directorship relationship with the Company").

128. Limpaphayom & Connelly, *Corporate Governance in Thailand*, *supra* note 49, at 18.

consist of directors with various qualifications, which are skills, experience, and expertise that are useful to the company. Directors should commit to their responsibilities and put all their efforts to creating a strong board.”¹²⁹ Recommended Best Practices 1.8 elaborates (emphasis added):

To ensure that directors have sufficient time to perform their duties, the board should consider the extent to which having multiple board memberships lessens the effectiveness of directors. Thus, the board should set a limit of **five board seats in listed companies**, which an individual director can hold simultaneously. Also, the company should disclose information about board memberships of individual directors to the public.¹³⁰

This is expressed to apply to all directors, not just IDs, but Best Practices 1.9 adds that the company should state a policy not only about the number of other board positions but “in terms of director type ([i.e.,] executive, outside, independent”).

Similarly, 2017 CG Code Principle 3.5 recommends that directors “allocate sufficient time to discharge their duties and responsibilities effectively”, and Guideline 3.5.2 adds (emphasis added):

The board should set and publicly disclose criteria limiting the number of director positions directors can hold simultaneously in other companies, and should consider the effectiveness of directors who hold multiple board seats. The number of companies of which a person can simultaneously be a director should be appropriate to the nature and types of businesses involved but should not exceed **five listed companies**.¹³¹

Nonetheless, the TIOD’s 2017 survey report finds sixty-two percent “poor” responses to question E08 (asking whether the board states a policy limiting directors’ board memberships to five listed companies). Only five percent get a bonus for question E09 (limiting memberships to three),¹³² although that question again creates an incentive for respondent companies to limit multiple memberships beyond SET recommendations. (It should also be noted that the survey, and SET CG Code, focus anyway on multiple directorships

129. Thai Inst. of Dirs. Ass’n, *Good Principles*, STOCK EXCH. OF THAILAND (2012).

130. *Id.*

131. Thai Inst. of Dirs. Ass’n, *Corporate Governance Report of Thai Listed Companies*, STOCK EXCH. OF THAILAND 99 (2017), <http://www.thai-iod.com/imgUpload/CGR%20Report%202017.pdf>.

132. Thai Inst. of Dirs. Ass’n, *supra* note 105, at 37.

only in listed companies.) Nonetheless, despite mostly poor statement of a policy limiting board memberships to five, the SET analysis of 602 listed firms in 2015 found that ninety-one percent of directors in both the largest 100 as well as the other listed firms had five or fewer board memberships.¹³³

Another practical problem around directors, but especially IDs, is their potentially long tenure. This too can promote experience but inhibit critical monitoring and interventions as directors get too familiar with executives or complacent about the company's operations. Best practices recommendation 1.5 for the 2012 Principles provided that "the board of directors should clearly state a policy that independent directors who have served on the board beyond nine years from the date of their first appointment should be subject to particularly rigorous review of their continued independence".¹³⁴ Similarly, the 2017 CG Code Guideline 3.2.5 recommends that ID tenure should not exceed nine years, but can continue to serve thereafter "subject to the board's rigorous review of his/her continued independence". Yet the 2017 TIOD Report found ninety-two percent "poor" responses to Question E11 (asking whether the board sets a tenure limit of nine years), and fifty-seven percent suffered a penalty to Question E13 for answering they in fact had any IDs serving more than nine years.¹³⁵ These responses suggest that long-tenured (independent) directors remains a significant enduring phenomenon in Thai listed companies.

Lastly, reflecting awareness of potential tension between expertise and independence (highlighted for example by the GFC),¹³⁶ the 2012 SET Principles urged "prior working experience", while the 2017 CG Code Guideline 3.1.1 recommends that "at least one of the NEDs should be experienced and competent in the company's main industry". The 2017 TIOD survey reports "excellent" (presumably positive) responses in 92% of respondent firms to question E18: "does at least one NED have prior working experience in the major industry the company is operating in?"¹³⁷

Additional positive requirements are set for directors serving on audit committees. As mentioned above, clause 17(3) of the SEC Regulation¹³⁸ requires at least three, all IDs, with "adequate

133. STOCK EXCH. OF THAILAND, *supra* note 79.

134. Thai Inst. of Dirs. Ass'n, *Good Principles*, STOCK EXCH. OF THAILAND (2012).

135. Thai Inst. of Dirs. Ass'n, *supra* note 105, at 27, 37.

136. *See generally* RINGE, *supra* note 41.

137. *See generally* Thai Inst. of Dirs. Ass'n, *supra* note 105.

138. Notification of the Capital Market Supervisory Board No. Tor Jor. 39/2559, *supra* note 84, at 11. *See also* Stock Exch. of Thailand, *Independent Director and Audit Committee Rules Summary*, 5 (2020), https://www.set.or.th/en/regulations/simplified_regulations/files/20200914_AC_ID.pdf.

knowledge and experiences to perform duties as an audit committee member, provided that at least one member of the audit committee shall have adequate knowledge and experiences to **review the reliability of financial statements**” (emphasis added). The 2017 CG Code’s Principle 6.2 states that **“the board shall establish an audit committee that can act effectively and independently,” with Guideline 6.2.1 simply adding that its members must** have required qualifications and comply with applicable legal requirements, including those promulgated by the SET (listing rules) and SEC. The 2017 TIOD survey report seems again to look further, with question E78 asking (emphasis added): “Does at least one of the Audit Committee members have **accounting expertise** (accounting qualification or experience)?” Almost two thirds of respondent firms (61%) were ranked “excellent” in this respect (presumably by answering “yes”), although one third (39%) were ranked “poor” (presumably by answering “no”).¹³⁹

By comparison, in 2000 (after listed companies were required to have audit committees including IDs) three-fourths of the respondents in audit committees for 353 (out of then 390) listed companies were found to be “financially literate.” Almost all of these companies had at least one member of the audit committee with significant experience in accounting or in financial matters. The same survey added: “About 90 percent of the audit-committee respondents agreed to the definition of “independence” according to the SET’s current regulation [following the 1993 SEC Regulation]. However, some noted that such a definition was difficult to understand and complicated so they had difficulties in finding committee members. Also, it was impractical because the culture, education and environment of Thai business society were far from such a definition.”¹⁴⁰

D. Who Are the IDs?

Despite ID requirements being introduced through the 1993 SEC regulation, there is still remarkably little data and research into features of these directors and how those might be evolving over time. Although the SEC receives reports on directors once appointed, it does not seem to ask what constitute their main backgrounds or areas of expertise, let alone disclose any attempted analysis.

139. Thai Inst. of Dirs. Ass’n, *supra* note 105, at 31.

140. Stock Exch. Thailand, A Survey Report – Audit Committee in Thailand: Problems and Practices, SET (2000).

Nonetheless, since audit committees were required for listed companies by the SET from 2000, and perhaps further after the SEC Regulation was revised from 2008, we might expect a greater proportion of IDs expert in accounting or financial reporting. A small sample of sixty-six listed companies (covering around twenty percent of the market capitalization) confirmed in 2004 that almost all had one or more directors with “accounting/finance expertise.”¹⁴¹ Some would have formal qualifications in accounting, but others probably have expertise in finance from wider business experience.

Directors outside the audit committee may also developed expertise in financial affairs by serving on other boards. This again raises the question of the extent to which Thai directors typically hold multiple directorships. As indicated in Part II.C above, the SET analysis of 602 listed companies found 9% had at least one director serving on more than the maximum of five other listed company boards. SET data on 240 non-financial firms in 2002 had reportedly found thirty percent on average had directors sitting on other boards (but without indicating how many). However, this was at a time (a few years after the AFC), when there was a “severe shortage of qualified directors,” particularly because prominent executives and directors from “failed banking and finance companies” were “marked by the public as those from the ‘old regime’, where cronyism and nepotism prevailed.”¹⁴² It is likely, based also on the 2017 TIOD survey reports, that multiple directorships have become quite prevalent, and this may favor appointments from those with predominantly business backgrounds. Nonetheless, the pervasiveness of this background (compared to others) deserves a more comprehensive study.

As a starting point, an Online Appendix¹⁴³ examines already the boards of the top fifteen companies by market capitalization as reported in their annual reports in 2019. Caveats are necessary first because the corporate governance practices of larger firms differ significantly from those of smaller ones, and by sector (with several banks in the top fifteen). This is evidenced by the higher average proportion of IDs in top 15 firms (summarized in Appendix column 2) as well as by the 2017 TIOD survey report, and larger listed firms generally may attract more of the now large proportion of foreign investment into SET-listed firms.¹⁴⁴ Second, several of the top

141. Limpaphayom & Connelly, *Corporate Governance in Thailand*, *supra* note 49, at 21.

142. Nikomborirak, *supra* note 58, at 4.

143. Available as Appendix B at <https://ssrn.com/abstract=3599705>.

144. Thai Inst. of Dirs. Ass'n, *supra* note 105, at 57–59 (noting also improved corporate governance for larger companies). By 2019, foreign investment was approaching a third (a

fifteen companies have greater direct or indirect government ownership (Appendix column 6) than listed Thai companies as a whole. Some of such larger listed companies are SOEs (such as PTT PCL, which in turns owns much of Thai Oil PCL), or can have significant shareholdings acquired through the Thai Royal Family's holding company or sometimes even directly by the King (such as Siam Commercial Bank and more recently Siam Cement).¹⁴⁵

Nonetheless, summary Table 555 below shows that there are 216 directors (14.4 averaged over the top fifteen companies), including 109 specified as IDs (7.3 per board) so about half IDs. Of the 216 directors, twenty-eight (around thirteen percent) have degrees in accounting and another sixty-eight (thirty-two percent) have MBA, economics or management degrees, suggesting at least forty-five percent have predominantly business backgrounds. (Another 50 of the 216 directors, or twenty-three percent, have degrees in engineering, which could be characterized as a quasi-business background.) These proportions are almost the same for the subset of 109 IDs. As well as businesspeople and accounting experts, legal professionals are another quite common type of (independent) directors found in other jurisdictions, including in Asia (such as Japan, as mentioned in the Introduction above). In Thailand's top fifteen companies, twenty-eight of the 216 directors (thirteen percent) held LLB or other law degrees (similarly fourteen percent of the IDs subset).

A further category is (former) government officials (notable for example in Korea), or politicians (as in Malaysia, especially before the advent of a cadre of more professional company directors).¹⁴⁶ For the top 15 Thai companies, 17 of the total 216 directors seem to fall into this category (eight percent). Within this group, a distinctive feature is that 12 are senior military or police personnel (six percent), often declared to be IDs (10 individuals or nine percent), who do not have any accounting, other business, engineering or legal qualifications. Others have such qualifications but are senior officers. This significant sub-group of military personnel serving on large company boards needs to be viewed in the context of long-lived military coups even in the 21st century (2006-2007, and since 2014, as mentioned above). There is no specific disqualification for military personnel from serving as ID in the detailed current SEC

similar percentage now to Japan), especially in the banking, energy and utility sectors, IT and communications sectors. Foreigners own 30% of Thai Stocks, see THE NATION THAILAND (Aug. 28, 2019), <https://www.nationthailand.com/business/30375458>.

145. *Thai King Extends Corporate Reach with Stake in Industrial Firm*, REUTERS (Mar. 15, 2018), <https://www.reuters.com/article/us-thailand-king-stake-idUSKCN1GR1Z7>.

146. See, e.g., EDMUND TERENCE GOMEZ ET AL., MINISTER OF FINANCE INCORPORATED OWNERSHIP AND CONTROL OF CORPORATE MALAYSIA (2018).

regulation requiring and defining IDs, although they might fall foul of the catch-all: “having any other characteristics that cause the inability to express independent opinions on the business operations” of the company (clause 17(2)(i)). The regulation does expressly provide that an ID cannot be or have been (in the last two years) an executive director or employee or advisor (remunerated monthly) or “controlling person” of the company or its affiliate or “controlling person,” but there is an exemption where an ID “used to be a government official or advisor of a governmental agency which is a major shareholder or controlling person” of that company (clause 17(2)(b)). More generally, as early as 2001 at an OECD Asian Corporate Governance Roundtable, a presenter from the Thailand Development Research Institute had remarked: “High-ranking bureaucrats—some retired, some still in the middle of their career—also [are popular on boards] of directors of Thai companies, in particular for companies that operate in a heavily regulated environment. Indeed, connections can prove much more valuable than competence in a culture of patronage and in an environment where the rule of law is unclear and not properly enforced.”¹⁴⁷

Lastly, given the significant role played by academics on boards in some other Asian countries, it is worth considering how many full-time professors appear to be serving on top fifteen SET companies: only six directors (or three percent of the total 216), or four IDs (four percent of all IDs). A similar analysis by main likely category of background can be conducted for the total of fifty-two individuals publicized in the 2019 TIOD Chartered Directors Handbook. There is even more dominance of accounting and other business backgrounds (combined sixty-three percent) and more professors (thirteen percent), with similar proportions having engineering backgrounds (23), but fewer with legal (seven percent) and especially government or military backgrounds (two percent) compared to the directors in top fifteen companies:

147. Nikomborirak, *supra* note 58, at 4.

Table 5:
Backgrounds of (Elite) Directors in Thailand

Type of Background	TIOD Chartered Directors	SET Top 15 Companies
Accounting	13 (25% of total)	28 of which 13 IDs (13% of total directors/12% of total IDs)
Other Business	20 (38%)	69 of which 34 IDs (32% of total directors/31% of IDs)
Engineering	12 (23%)	50 of which 25 IDs (23% of total directors/23% of IDs)
Legal	4 (7%)	28 of which 15 IDs (13% of total directors/14% of IDs)
Government	n/a	5 of which 3 IDs (2% of total directors/3% of IDs)
Military	1 (2%)	12 of which 10 IDs (5% of total directors/9% of IDs)
Not categorized	4 (8%)	24 of which 9 IDs (11% of total directors/8% of IDs)
TOTAL	52	216 of which 109 IDs (14 directors or 7 IDs per board)
Academics	7, of which all have ID experience (so 13% of total)	6 / of which 4 IDs (3% of total directors / 4% of IDs)
Female	6, of which 4 have ID experience (12% of total, or 8% of IDs)	32 / of which 19 IDs (15% of total directors / 17% of IDs)

Again, however, this data needs to be interpreted with caveats. Chartered Directors serve exclusively as directors and are probably

more elite or networked than most Thai directors. The Chartered Directors, moreover, do not distinguish between IDs and non-independent directors, as they currently do or may serve as both. Still, this analysis of both datasets offers preliminary pointers to the backgrounds of (independent) directors in larger Thai companies, which can be linked to their current or likely impacts (Part II.E below) and serve a baseline for more comprehensive analysis by the SEC, SET and/or other future researchers.

The last line of Table 3 above also singles out female (independent) directors. Thus, 32 of all directors in the SET top 15 companies are female (fifteen percent of all 216 directors), and of these 19 are IDs (comprising seventeen percent of all 109 IDs). The average number of female directors per board is 2.1 (with 1.3 female IDs per board), with the median per board being 3 (2 IDs). This can be compared with the 2015 SET statistical summary of directors across 602 listed companies that provided sufficient data.¹⁴⁸ At least one female director was found on 79 percent of the 602 boards (with the median being two), but at least one female ID only on 48 percent of them (close to 51% in the 2017 TIOD survey report). However, only 12 percent of the 602 listed firms analyzed by the SET in 2015 had a female CEO.

Promoting gender diversity on corporate boards in Thailand does not yet appear to be as high-profile a policy issue as in other large share markets even in Asia, including recently in Malaysia.¹⁴⁹ As mentioned above, the 2017 CG Code Guideline 3.1.4 does urge listed companies to disclose in annual report and website “its diversity policies and details relating to directors, including directors’ age, gender, qualifications, experience, shareholding percentage, years of service as director, and director position in other listed companies.” However, the thirty-four percent of the responses were “poor” in the 2017 TIOD survey report question E31 (“Does the company disclose a board diversity policy (e.g., diversity of dexterity, expertise and gender?”).

E. Where Are the (Likely) Impacts from Thai IDs?

Writing for the ADB in 2004, a few years after the 1997 AFC, Limpaphayom and Connelly observed that corporate governance reform in Thailand had experienced “an evolution rather than a

148. See STOCK EXCH. THAILAND, *supra* note 107.

149. See Securities Commission Malaysia, Corporate Governance Monitor 2019 (2019), <https://www.sc.com.my/api/documentms/download.ashx?id=98f99389-e438-4546-85e4-754717fa56ed>.

revolution.”¹⁵⁰ The contemporary analysis above suggests a further gradual transformation over the ensuing 15 years or so. Corporate governance rules and practices have evolved to partly address key issues highlighted during and after the AFC:

- Over-investment and over-borrowing by (often family-owned) listed companies.
- Family interests or other larger shareholders taking advantage of smaller and more dispersed shareholders.¹⁵¹

Enhancing board independence, as one countermeasure, began with 1993 SEC Regulation requiring at least two IDs, as outlined in Part II.A above. This was strengthened when audit committees were required to have at least three members, all IDs. The 2002 SET Principles then promoted not only at least three IDs, but also a least a third of directors being IDs overall on the board, albeit on a comply-or-explain basis. The first TIOD report in 2001 (with McKinsey, based on annual reports and regulatory filings by the 133 largest companies in 2000) found sixty-eight percent had twenty-five to fifty percent IDs.¹⁵² Yet compliance with the Principles was generally weak, explanations given to the SET for non-compliance were quite poor, and there was uncertainty over what was meant by independence (by the SET as well as under the 1993 SEC Regulation).¹⁵³ From 2008, the SEC provided a much more detailed definition in its Regulation. This was generally stricter in disqualifying directors as being IDs, except by relaxing somewhat a shareholding threshold from five tenths to one percent. The SET 2012 Principles, and the 2017 CG Code developed seemingly with more influence from the SEC, tried to promote even further board independence (e.g., by promoting a majority of IDs on listed company boards), but again through a comply/apply or explain approach. The annual TIOD survey reports add further encouragement, by asking leading questions suggesting best practices even beyond the SET/SEC norms, and by extensively training and certifying directors. By 2015, SET data on 603 firms

150. Limpaphayom & Connelly, *Corporate Governance in Thailand*, *supra* note 49, at 5.

151. *Id.* at 4. See also PIMAN LIMPAPHAYOM, *Thailand*, in CORPORATE GOVERNANCE AND FINANCE IN EAST ASIA (Juzhong Zhuang et al. eds., 2001) (suggesting “founding family members use debt extensively to finance investments because they want to preserve control of their firms [so they] tend to become over-leveraged, making them vulnerable to external shocks”).

152. Limpaphayom & Connelly, *Corporate Governance in Thailand*, *supra* note 49, at 7. A majority of NEDs was found in 76% of the 133 companies.

153. See, e.g., NASHA ANANCHOTIKUL ET AL., *Do Firms Decouple Corporate Governance Policy and Practice?*, 16 EUROPEAN FIN. MGMT. 712 (2010).

reported on average 5/11 IDs on SET100 boards (forty-five percent) and 4/10 on non-SET100 boards (forty percent).¹⁵⁴

Nonetheless, even if gradually being diminished in some respects, five impediments to functional independence of boards are likely too similar to those identified by Limpaphayom and Connelly based on their 2004 survey responses from sixty-six Thai listed firms.¹⁵⁵ The CEO can significantly influence selection of directors (especially given the still limited establishment of ID-led nomination committees). This is true too for director tenure, although perhaps to a lesser extent. Concerns over personal relationships with other directors can impede IDs from expressing critical views. Directors, possibly especially IDs, openly objecting to management proposals may still be against cultural norms, including saving face.¹⁵⁶ Lastly, independent monitoring may be impacted because the CEO and management are seen to be better informed and thus able to make better judgements. As observed presciently also by Nikomborirak for an OECD roundtable in 2001, when Thailand was embarking down the path of promoting more board independence, Thai companies have had significant proportions of executive directors and CEOs, who are themselves or personally connected to major (often family) shareholders. In addition, “it is difficult to legislate ‘independence’, as one can never exclude all types of personal ties, especially in an environment where patronage is a way of life”.¹⁵⁷

Despite such ongoing practical issues, Thai policymakers have persisted in promoting board independence based on the theoretical intuition that it should help promote overall corporate performance. This has been somewhat supported empirical studies, but the results are not strong. For example, regression analysis of corporate performance (measured by Tobin’s Q as indicator of a firm’s market value) against corporate governance practices for sixty-six companies, by Limpaphayom and Connelly for the ADB in 2004, found no positive statistical correlation, although they suggested this was due to the small size and other features of the sampled companies. From the TIOD review of top 234 SET listed companies in 2002, they did find a positive relationship between corporate performance and corporate governance practices by quartile—albeit

154. See *Stock Exch. of Thailand*, *supra* note 110.

155. Limpaphayom & Connelly, *Corporate Governance in Thailand*, *supra* note 49, at 20.

156. See *generally*, LARRY PERSONS, *THE WAY THAIS LEAD: FACE AS SOCIAL CAPITAL* (2016).

157. Nikomborirak, *supra* note 58, at 4; See also JELATIANRANAT, *supra* note 58, at 15.

with some different dependent variables.¹⁵⁸ Subsequent TIOD research has continued along this path: for example, its 2017 survey report notes that corporate practices correlate with corporate governance practices divided instead into three groups although control variables are unclear.¹⁵⁹ Their sample also excludes 27 outliers with very high Tobin's Q, so the survey includes 593 companies, and are all based on voluntary responses rather than considering all listed companies.

A more sophisticated analysis comes instead from Kouwenberg in 2006, using SET data reporting on the extent to which all listed companies had implemented towards the end of 2003, the 2002 15 Principles that were promoted for listed firms (albeit on a comply-or-explain basis). He found, for example, that greater firm size was correlated with statistically significant greater adoption of the Principles overall, but not by much, and that adopting the Principles related to shareholder rights (yet not board composition and independence) was positively correlated with greater Tobin's Q, but also not by much. A further regression analysis however found that 2003 adoption of Principles overall, but also those relating to board composition and independence, had a positive effect on Tobin's Q market value over 2003-05.¹⁶⁰ A methodological difficulty remains, as partly acknowledged, because correlation does not necessarily mean causation, and especially because of potential endogeneity in the variables: rather than better corporate governance practices causing better performance, better performing firms may choose to adopt such practices (for other reasons). The best test would be to check what happens to market value after all firms are required to adopt, for example, considerably new rules on independent directors, rather than having a choice (even encouraged by a comply-or-explain code or set of principles).¹⁶¹ However, there has been

158. Limpaphayom & Connelly, *Corporate Governance in Thailand*, *supra* note 49, at 31–36. The former regression added variables controlling for past sales growth and fixed capital to total sales.

159. Thai Inst. of Dirs. Ass'n, *supra* note 105, at 60–61.

160. See ROY KOUWENBERG, *Does Voluntary Corporate Governance Code Adoption Increase Firm Value in Emerging Markets? Evidence from Thailand* (Nov. 2006), available at: <https://ssrn.com/abstract=958580>, especially Tables 4 and 5 respectively.

161. See generally AOUN & NOTTAGE, *supra* note 33, at 425–26 (discussing also other methodological challenges). Further highlighting endogeneity issues, see WANPEN KLINPHANICH, *Impact of Business Nature on Corporate Governance Report through a Degree of Independence of Board of Directors: A Case Study of Listed Companies in the Stock Exchange of Thailand*, 7 POL. SCI. ASS'N OF KASETSART U. INT'L J. OF INTERDISC. RES. 210 (2018). This study found that the nature of a firm's business correlated significantly with Board and Audit Committee independence, which in turn correlated with submitting corporate governance reports as recommended under SET guidelines in 2016.

such clear exogenous shock generating detailed empirical studies in Thailand, and other research results are not robust or easily comparable.¹⁶²

There has also been little detailed discussion about whether boosting board independence, even if not increasing aggregate corporate performance, may at least prevent more major corporate collapses. One recent study found that firms having more IDs on boards overall did not significantly impact on the numbers of cases of corporate misconduct (admittedly, as measured by successful prosecutions by the SEC, which may understate potential problems in firms).¹⁶³ However, significantly more misconduct cases arose in firms with directors having (a) longer tenure (although with tenure averaging 5.24 compared to already 3.9 years), or (b) more appointments to other boards (albeit for 1.97 compared to 1.25 companies, so also not a very large difference in director characteristics).¹⁶⁴ If and when long tenure and/or multiple directorships (discussed above) become a stricter part of ID requirements, fewer misconduct prosecutions and therefore corporate collapses may be forthcoming.

As for other possible, even unexpected, roles played by IDs, there seems to be no discussion about them helping to mediate intra-family disputes (as in Singapore, especially before 2015 when it allowed IDs to be major shareholders, making them less likely to look out for minority shareholder interests).¹⁶⁵ For example, this mediating role is not mentioned in the 2016 TIOD report on how best to resolve disputes on boards. Of its survey respondents, twenty-three percent indicated “[d]ifferences in [v]iew on [o]rganizational [g]oals or [s]trategic [f]ocus” as second-ranked cause, while twenty-nine percent acknowledged “[d]irectors’

162. Compare for example JIRA YAMMEESRI & SIRIYAMA HERATH, *Board Characteristics and Corporate Value: Evidence from Thailand*, 10 CORP. GOVERNANCE: THE INT’L J. OF BUS. IN SOC’Y 279 (2010) (no significant positive effect from independent directors on improvement in firm value) with Suchada Jiamsagul, *The Performance Effects of Transparency and Disclosure, and Board of Directors: The Case of SET100 Thailand* (Oct. 2007) (D.B.A. Dissertation, Thammasat University) (positive effect from board composition, for SET100 firms).

163. See Puritud Inya et al., *The Relevance of Western Corporate Governance in Mitigating Management Misconduct in Thailand*, 54 EMERGING MAR. FIN. AND TRADE 1425 (2018). See also generally ANANCHOTIKUL ET AL., *supra* note 153, finding that among the 240 non-financial SET listed firms in 2002, those adopting more of the SET 15 Principles in 2003 were significantly less likely to violate SET or SEC rules (against fraud, non-disclosure, financial reporting) over 2003–6.

164. *Id.*

165. PUCHNIAK ET AL., *supra* note 34.

[p]ersonalities” as a second-ranked “[f]actor” for disputes.¹⁶⁶ Both might in turn reflect intra-family tensions and consequently a wider mediating role for IDs.¹⁶⁷ However, the TIOD instead encourages such issues to be resolved among shareholders, e.g., through establishing Family Councils, and runs separate training programs on “Family Business Governance”.¹⁶⁸

Further qualitative research would be useful in this respect. To determine other impact from IDs, future case studies should investigate media or other reports where IDs either appeared to do their jobs well by monitoring management for all shareholders and/or monitoring larger shareholders on behalf of smaller shareholders, as well as situations where IDs seem to have failed. For example, in 2016 a Bangkok op-ed suggested that two scenarios fell into the latter category, one involving CP-All (part of a huge family-owned conglomerate, in this case operating 7-11 convenience stores in Thailand) and another involving a large Thai bank.¹⁶⁹ By contrast, seemingly reflecting positive results, some SEC News Releases indicate situations where IDs have publicly gone against the recommendations of the major insiders.¹⁷⁰

As for other existing or potential impacts from introducing ID requirements, these are hard to ascertain but could be or could become quite significant. First, thanks to the SEC and SET mandating minimum numbers and types of IDs on boards, the SET and TIOD encouraging even more, and then the TIOD providing entry-level training courses to many candidates (as well as more advanced courses and qualifications), a new cadre of professionals may help advance other corporate governance reform initiatives.¹⁷¹ These include important and often long-standing issues, such as appropriate rules and enforcement on related party transactions or takeovers,¹⁷² for which IDs can play major roles. They may also become more natural allies for the SEC as it seeks to keep improving

166. Thai Inst. of Dirs., *Managing Conflicts in the Boardroom* (2016), <http://thai-iod.com/imgUpload/Survey%20Result-Managing%20Conflicts%20in%20the%20Boardroom.pdf>.

167. Media reports do at least sometimes uncover intra-family tensions, see, e.g., Jongsureyapart, *supra* note 50, at 73.

168. See, e.g., Thai Inst. of Dirs., *Family Business Governance* (2020), <http://www.thai-iod.com/en/director-training-detail.asp?id=94&type=2>.

169. See Teera Phutrakul, *Independent Directors & Failure of Corporate Governance*, BANGKOK POST (Apr. 12, 2016), available at: <https://www.bangkokpost.com/learning/advanced/929753/independent-directors-failure-of-corporate-governance>.

170. See, e.g., SEC Advises SSE and SPACK Shareholders to Exercise Prudence in Casting Votes on EPCO Share Acquisition, SEC (July 28, 2010) (warning that the audit committee recommended against share purchases and/or borrowing involving connected persons [even though it was recommended by fellow directors]).

171. See, e.g., Thai Inst. of Dirs., *supra* note 168.

172. See, e.g., WORLD BANK GROUP, *supra* note 92.

its enforcement powers and achievements.¹⁷³ Second, having already “exported” expertise through the TIOD survey reports for the ASEAN Corporate Scorecard project, Thai experts may start to impact developments in particular countries in Southeast Asia. For example, the SEC is already supporting regulatory counterparts in Cambodia, which moreover has recently amended its securities regulation to add being a competitor firm or its director as a disqualifying relationship for becoming an ID.¹⁷⁴

III. CONCLUSIONS

This pioneering analysis of IDs in Thailand’s listed companies shows that the nation has joined the Asian bandwagon in introducing ID requirements. They emerged in 1993, very early on by regional standards, but it took the 1997 AFC to propel a loosely “externally-driven” but also “entrepreneurial” and especially “efficiency-aimed” legal transplant (as elaborated in Part II.A above). The requirements rely on approaches (explained in Part II.B) that are mandatory (SEC Regulations), comply-or-explain (originally developed by the SET), or encouraging of perceived best practices (through TIOD surveys). The ID requirements disqualify major shareholders (and others such as their family members), which makes sense given persistent block holdings in Thai listed companies, although the comparatively early definition (by 1992 SEC Regulation) set a threshold of 0.5% that was somewhat relaxed to 1% from 2008 (Part II.C). Otherwise, the SEC Regulation has become stricter about who can serve as IDs, including the innovative disqualification of individuals in “competing” companies (understandable perhaps given historically weak competition law).

The monitoring role of Thai IDs, scrutinizing executives on behalf of all shareholders as well as large shareholders on behalf of smaller shareholders, seems to have been growing as the numbers and training of IDs have increased over the last two decades. Yet there are limits caused by relying on only comply-or-explain provisions (and still low compliance) for IDs on nomination and remuneration committees. It is also unclear what roles are being played by the government, and especially military or police personnel who quite often serve as IDs on the boards of at least the largest listed companies (as highlighted in Part II.D). This and other

173. See generally LIN, *supra* note 115.

174. See Prakas No. 011/18 on the Corporate Governance for Listed Companies, <http://csx.com.kh/laws/prakas/listPosts.do?MNCD=2030>; see generally Nottage, *Fledgling Corporate Governance and Independent Directors in Cambodia’s Securities Market*, *supra* note 18.

aspects of what functions are actually being conducted by IDs, in a securities market with significant government-linked or family-owned listed companies, comprise a particularly promising area for ongoing research.

Otherwise, there is some, but not much, statistical evidence that having more IDs contributes to better corporate performance generally (Part II.E). Their impact can also be seen occasionally in reports of boards voting against executive proposals, but the potential impact of IDs in limiting corporate collapses or even malfeasance remains to be fully investigated. There is little evidence that IDs play a significant role in mediating intra-family tensions, as in Singapore where IDs could initially be large shareholders so they had fewer other roles to play, in the many still family-dominated listed companies in Thailand. The early and professional training of now thousands of directors, through the TIOD, may have helped them focus on other roles in Thai listed companies. That training, and group now invested in professional roles on boards, should also underpin efforts to keep improving substantive rules and especially enforcement of corporate and securities laws. Thailand's "gradual transformation" in these fields is already having a wider impact on other ASEAN states, including Cambodia, and deserves ongoing scrutiny for that reason as well.