

# Legal Measures to Facilitate the Offering of Equity Crowdfunding \*

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## ABSTRACT

Crowdfunding, in general, is a means of raising fund for commercial and non-commercial purposes. Non-commercial crowdfunding comprises “donation-based crowdfunding” and “reward-based crowdfunding” while commercial crowdfunding consists of “lending-based crowdfunding” and “equity-based crowdfunding.” Crowdfunding begins with any person or entity posts a request for funding on a crowdfunding portal (normally in the form of website) with the specified details as to which project or product the persons raise money for and how they will use the money. They may indicate what investors will receive in return of their contributions or investment. When investors browse through projects shown on the crowdfunding portals and find projects of their interest, the investors then put money to finance that project. This thesis focuses on equity crowdfunding which investors receive shares of company in return of their investment.

Prior to May 16, 2015, the offer for sale of shares cannot be done without the approval from the Office of the Securities and Exchange Commission and only public limited companies are able to offer their shares to public. However, to provide an alternative and inexpensive source of funding for SMEs and to offer another investment choice to the investors; the Securities and Exchange Commission, the Capital Market Supervisory Board, and the Office of the Securities and Exchange Commission have issued a set of Notifications allowing public offering of shares of limited companies possible if conducted through crowdfunding portals, and also exempt public limited companies from filing of registration statement and prospectus if the offers are made through crowdfunding portals.

Still, there might be loopholes or hindrances to these notifications that make them inadequate to facilitate the offer for sale of securities through equity crowdfunding portals in Thailand effectively. This thesis aims to identify those possible loopholes by adopting a method of comparative study of the law concerning equity crowdfunding in the United States and the United Kingdom in order to provide recommendations for Thailand’s current regulations. In conclusion, this thesis proposes that some provisions in the current notifications should be amended to better provide funding for startups and at the same time offer suitable investor protection.

**Keywords:** Equity crowdfunding, Capital market, SMEs

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## บทคัดย่อ

การระดมทุนจากมวลชน หรือ Crowdfunding เป็นวิธีการระดมทุนที่มีวัตถุประสงค์ทั้งเพื่อประโยชน์ทางพาณิชย์และไม่ใช่เพื่อประโยชน์ทางพาณิชย์ การระดมทุนจากมวลชนที่ไม่ใช่เพื่อประโยชน์ทางพาณิชย์ได้แก่ การระดมทุนจากมวลชนเพื่อการกุศล (Donation-based crowdfunding) และการระดมทุนจากมวลชนที่ได้ผลตอบแทนเป็นสิ่งของหรือรางวัล (Reward-based crowdfunding) สำหรับการระดมทุนจากมวลชนเพื่อประโยชน์ทางพาณิชย์ประกอบด้วย การระดมทุนจากมวลชนในลักษณะกู้ยืมหรือตราสารหนี้ (Lending-based crowdfunding) และการระดมทุนจากมวลชนในลักษณะทุนหรือหุ้น (Equity-based crowdfunding) การระดมทุนจากมวลชนโดยทั่วไปเริ่มจากบุคคลหรือนิติบุคคลประการคระดมทุนผ่านผู้ให้บริการระบบหรือเครือข่าย อิเล็กทรอนิกส์ (Crowdfunding portals) ซึ่งมักอยู่ในรูปของเว็บไซต์ โดยในประการคระดมทุนจะระบุรายละเอียดต่างๆ เกี่ยวกับการระดมทุนนั้น เช่น จะนำเงินไปทำอะไร ต้องการเงินจำนวนเท่าไหร่ ผู้ลงทุนจะได้รับอะไรเป็นการตอบแทน โดยเมื่อผู้ลงทุนเลือกลงทุนให้กับโครงการที่ตนพอใจและโครงการนั้นระดมทุนได้ตามเป้าที่ตั้งไว้ เงินระดมทุนจึงจะโอนไปยังผู้ระดมทุน วิทยานิพนธ์ฉบับนี้มุ่งศึกษาการระดมทุนจากมวลชนในลักษณะทุนหรือหุ้น ซึ่งผู้ลงทุนจะได้รับผลตอบแทนเป็นหุ้นในบริษัท

ก่อนวันที่ 16 พฤษภาคม 2558 บริษัทมหาชนมีอาจเสนอขายหุ้นต่อประชาชนได้หากไม่ได้รับอนุญาตจากสำนักงานคณะกรรมการกำกับหลักทรัพย์และตลาดหลักทรัพย์ อย่างไรก็ตาม เพื่อช่วยให้กิจการขนาดเล็กเข้าถึงแหล่งเงินทุนได้ง่ายขึ้น และเพิ่มทางเลือกในการลงทุนให้กับผู้ลงทุน คณะกรรมการกำกับหลักทรัพย์และตลาดหลักทรัพย์ คณะกรรมการกำกับตลาดทุน และสำนักงานคณะกรรมการกำกับหลักทรัพย์และตลาดหลักทรัพย์ ได้ออกประกาศจำนวนหั้งสิบ ฉบับ เพื่ออนุญาตและวางแผนแนวทางเกี่ยวกับการระดมทุนจากมวลชนในลักษณะหุ้นทำได้ในประเทศไทย โดยยกเว้นการยื่นแบบแสดงรายการข้อมูลการเสนอขายหลักทรัพย์ของบริษัทมหาชนที่ได้ยื่นผ่านผู้ให้บริการระบบหรือเครือข่ายอิเล็กทรอนิกส์ รวมถึงอนุญาตให้บริษัทจำกัดเสนอขายหุ้นต่อประชาชนได้ หากเป็นการเสนอขายผ่านผู้ให้บริการระบบหรือเครือข่ายอิเล็กทรอนิกส์ด้วย

อย่างไรก็ตาม อาจจะมีซึ่งให้หรืออุปสรรคในประการเหล่านี้ ที่ทำให้การเสนอขายหุ้นผ่านผู้ให้บริการระบบหรือเครือข่ายอิเล็กทรอนิกส์ในประเทศไทยยังไม่เหมาะสมเพียงพอ วิทยานิพนธ์ฉบับนี้ต้องการระบุซึ่งให้หรือเหล่านั้นโดยการศึกษาเปรียบเทียบกับกฎหมายเกี่ยวกับการระดมทุนจากมวลชนในสหรัฐอเมริกาและสหราชอาณาจักรเพื่อหาข้อเสนอแนะ สรุปได้ว่า บทบัญญัติบางประการในบางประการในปัจจุบันควรได้รับการแก้ไขเพื่อให้การระดมทุนจากมวลชนทำได้โดยมีประสิทธิภาพสูงสุดและมีระดับการคุ้มครองผู้ลงทุนที่เหมาะสม

**คำสำคัญ:** การระดมทุนจากมวลชน, ตลาดทุน, เอสเอ็มอี

## 1. Introduction

Small and medium businesses play a role in Thailand's economy. In 2010, there are 2.91 million small and medium enterprises in Thailand, representing about

99% of all entrepreneurs nationwide.<sup>1</sup> In addition to the significant number of SMEs in the country, small and medium businesses also contribute to 37.1% of Thailand's national GDP in 2010.<sup>2</sup> SMEs are responsible for 1.75 trillion Baht of the country's exports, representing 28.4% of total exports; and 1.77 trillion baht, representing 30.4% of total imports.<sup>3</sup> Moreover, SMEs are also very crucial to the employment of the country. The workers in SMEs are accounting for approximately 10.51 million people, or about 77.9% of the nationwide labors. Even though the figures look impressive, but when compared with small and medium businesses in developed countries—such as Japan, South Korea, France and Germany—the SMEs in these countries contribute more than 50% to the economy.<sup>4</sup> This illustrates that the Thai SMEs are still able to increase their role and contribute more to the national economy if the government provide supportive policy and easy access to capital formation.

Even though the number of SMEs in Thailand is high, the survival rate of SMEs is not as impressive. The Office of SMEs Promotion has compiled the amount of SMEs which are legal entities from the data provided by DBD and the number of SMEs which are non-legal entities from the Office for National Statistics. During the year 2010 there are 2,924,912 SMEs in Thailand while in the year 2011 the number of SMEs decreases to 2,652,854 which are 9.3% decrease.<sup>5</sup> The main reasons are knowledge and skills in financial management of enterprises.<sup>6</sup> Efficient working capital policy raises businesses' liquidity and competitiveness thus, boosting survival chance of such businesses.<sup>7</sup>

There are many sources of finance for business startups and SMEs; for example personal savings, angel investors, venture capital, and bank-based lending.<sup>8</sup> Personal savings from the retained earnings might not be enough and it takes longer time to acquire. While angel investors—wealthy individual—is limited and tend to invest on larger businesses<sup>9</sup> which is quite similar to venture capital. To get loans from banks is challenging for business startups and SMEs because they may lack collaterals and the transaction cost can be quite high. As for innovative business, it is difficult to evaluate the intangible assets, such as intellectual property rights, which the businesses possess. Furthermore, laws and regulations that govern fund-raising through capital market do not favor small enterprises.

Crowdfunding is a generic term refers to the mechanism of pooling small contributions, often in form of money, from a large group of people to fulfill common goals usually through the internet by means of online intermediary called crowdfunding portals. There are crowdfunding for non-commercial purpose and crowdfunding for commercial purpose. Non-commercial crowdfunding comprises

<sup>1</sup> EXIM Bank, “บทบาทของ SMEs ต่อเศรษฐกิจไทยและเปรียบเทียบศักยภาพในเวทีอาเซียน” (2012), <http://www.exim.go.th/doc/newsCenter/38795.pdf>

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> ศิริวรรณ วงศ์วิรุณ, ผศ. อารามณ์ รัชวินทร์ “เงินทุนหมุนเวียน ทางเลือกและทางรอดของ SMEs” [http://www.bu.ac.th/knowledgecenter/executive\\_journal/jan\\_mar\\_13/pdf/aw02.pdf](http://www.bu.ac.th/knowledgecenter/executive_journal/jan_mar_13/pdf/aw02.pdf)

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, **Colum. Bus. L. Rev.** 5 (2012).

<sup>9</sup> *Id.* at 5.

“donation-based crowdfunding” and “reward-based crowdfunding” while commercial crowdfunding consists of “lending-based crowdfunding” and “equity-based crowdfunding.” This paper focuses on equity-based crowdfunding or equity crowdfunding which investors receive shares of company in return of their investment.

Commercial crowdfunding may, and oftentimes, fall under the application of securities laws. In this case, the issuers—the project initiators—and the intermediaries— websites that facilitate financial return crowdfunding called crowdfunding portals—will have to comply with the burdensome requirement of securities offering. So, this has become an issue many capital market regulators around the world take into consideration. Some proactive regulators such as those of the United States, the United Kingdom, Canada and Italy have already come up with specific laws concerning this matter. Many more are in the process of drafting, public hearing, or finalizing their laws and regulations.

Prior to May 16, 2015, the offer for sale of shares in Thailand cannot be done without the approval from the Office of the Securities and Exchange Commission and only public limited companies are able to offer their shares to public. However, in order to provide an alternative and inexpensive source of funding for start-up businesses and to offer another investment choice to the investors; the Securities and Exchange Commission, the Capital Market Supervisory Board, and the Office of the Securities and Exchange Commission have issued a set of notifications allowing public offering of shares of limited companies possible if conducted through crowdfunding portals, and also exempt public limited companies from filing of registration statement and prospectus if the offers for sale of shares are made through crowdfunding portals.

Still, there might be loopholes or hindrances to these notifications that make them inadequate to facilitate the offer for sale of securities through equity crowdfunding portals in Thailand effectively. This paper aims to identify those possible loopholes by adopting a method of comparative study of the law concerning equity crowdfunding in the United States and the United Kingdom in order to provide recommendations for Thailand’s current regulations.

## **2. Background of Equity Crowdfunding**

### **2.1 Types of crowdfunding**

Crowdfunding can be mainly divided to non-commercial and commercial crowdfunding. Non-commercial crowdfunding comprises “donation-based crowdfunding” and “reward-based crowdfunding” while commercial crowdfunding consists of “lending-based crowdfunding” and “equity-based crowdfunding.”

(1) Donation-based crowdfunding, as the name indicates, expects nothing in return for the contributions that have been made to such donation crowdfunding projects.

(2) Reward-based crowdfunding and pre-purchase model crowdfunding are two similar models of crowdfunding and often appear together; the reward-based crowdfunding offers something (from memento, backstage access or having the contributors’ names appeared in the credit) to the investors in return for the

contribution but does not offer interest or earnings of the business; the pre-purchase model offers the end-product that the crowdfunding project creator is making in return for the contributions.

(3) Lending-based crowdfunding is a crowdfunding model that contributors provide loans to the initiators of lending crowdfunding with the expectation of repayment, either with or without interest.

(4) Equity-based crowdfunding offers shares of companies that raised financial capital from the crowd via equity crowdfunding intermediary called funding portal. Equity crowdfunding is quite obvious to notice, if investors receive corporate shares in return of their investment—it is the purchase of shares which section 4 of the Securities and Exchange Act defines as securities. Prior to May 16, 2015, the offer for sale of share to public must be made by public limited companies which obtain the approval from the Office of the Securities and Exchange Commission. However, in order to provide an alternative and inexpensive source of funding for start-up businesses and to offer another investment choice to the investors; the Securities and Exchange Commission, the Capital Market Supervisory Board, and the Office of the Securities and Exchange Commission have issued a set of notifications allowing public offering of shares of companies, both public and limited companies, via crowdfunding portals possible.

## **2.2 Equity crowdfunding procedures**

Crowdfunding begins with a company posts a request for funding on a crowdfunding portal (normally in the form of websites) with the specified details as to which project or product the persons raise money for and how they will use the money.<sup>10</sup> The issuing company may indicate what investors will receive in return of their contributions. When investors browse through projects shown on the crowdfunding portals and find projects of their interest, the investors then put money to finance that project.<sup>11</sup> The amount of contributions varies according to the investors' wishes. However, some crowdfunding websites, such as Kickstarter.com, allow projects to be funded only if the funding goals are reached, this is called the all-or-nothing funding model.<sup>12</sup> While other sites, such as IndieGoGo.com, allow entrepreneurs to immediately pull money which is given to their projects without having to reach the stated funding goals.<sup>13</sup> The exchanges of funds; either as the initial funding to the entrepreneurs or as paybacks to the investors; are normally facilitated by the escrow agents that are appointed by mutual agreement of issuing companies and crowdfunding websites which announced the request for funding.<sup>14</sup>

## **2.3 History of equity crowdfunding**

Even though crowdfunding through the internet only recently becomes popular, the concept of raising money from the crowd is not new.<sup>15</sup> It can be said that the concept of crowdfunding develops from the combination of two antecedent concepts: crowdsourcing and microfinance.<sup>16</sup> Crowdsourcing is the collections of

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<sup>10</sup> Bradford., *supra* note 8, at 10

<sup>11</sup> *Id.* at 10.

<sup>12</sup> *Id.* at 19.

<sup>13</sup> *Id.* at 19.

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.* at 11.

<sup>16</sup> *Id.* at 27.

contributions from a large group of individuals to achieve a common goal.<sup>17</sup> Hence, crowdsourcing is not limited only to the collections of money but other activities which need collaborations from the general public to accomplish the tasks as well.<sup>18</sup> Microfinance or microlending is the practice of lending rather small amount of money to impoverished borrowers who typically lack access to banking services due to the absence of collateral, steady income, credit history or banking transaction costs.<sup>19</sup>

#### **2.4 Benefit of equity crowdfunding**

(1) Benefit to the companies seeking fund: bridging financing gaps for startups and SMEs; lower cost of capital.

(2) Benefits to the investors: providing investment alternative to investors; increasing the chance for investors to invest in start-up stage.

(3) Benefits to the country: channeling savings to the economy; increase competition.

#### **2.5 Risks of equity crowdfunding**

(1) Risk of fraud - can be reduced by many measures such as regulations that requires crowdfunding portals to carry out some sort of due diligence requirement that creates communication channel between investors and issuers provided by funding portals, or the use of escrow agent which crowdfunding portals do not let investors directly transfer money to the issuing companies, rather they will use escrow agent to forward the raised fund to the issuers based on the agreed terms, to name a few.

(2) Risk of crowdfunding portal failure - can be reduced by having in place a regulatory regime for crowdfunding portal which require crowdfunding portals to be approved and complied with the regulations of the Office of the Securities and Exchange Commission.

(3) Investment risks such as illiquidity risk, dilution risk, failure of issuers' business, rarity of dividend; these risks can be mitigated by limiting the offering amount of issuers, categorize different types of investors based on their net worth or financial literacy. Plus, crowdfunding portals should help ensure that investors fully understand the risk of investment prior to invest their money through equity crowdfunding.

### **3. Laws Concerning the Offering of Equity Crowdfunding in Foreign Countries**

#### **3.1 The United States**

The United States' President Obama signed the Jumpstart Our Business Startups Act<sup>20</sup>, or the JOBS Act, on April 5, 2012<sup>21</sup>. The Title III–

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<sup>17</sup> *Id.* at 27.

<sup>18</sup> *Id.* at 27.

<sup>19</sup> Ross S. Weinstein, “*Crowdfunding in the US and Abroad: What to Expect When You’re Expecting*”, **46 CORNELL INT’L L.J.** 427 (2013)

<sup>20</sup> JOBS Act, sec. 1.

<sup>21</sup> Stuart R. Cohn, “*The New Crowdfunding Registration Exemption: Good Idea, Bad Execution*”, **64 Fla. L. Rev.** 1434 (2012).

CROWDFUNDING<sup>22</sup> of the JOBS Act creates exemptions from the Securities Act of 1933 regarding securities registration which allow financial return crowdfunding activities to be legally carried out in the United States without having to comply with the costly process of registration with the United States' Securities and Exchange Commission (hereinafter referred to as "US SEC") according to the 1933 Act. In order to protect the investors and introduce an inexpensive alternative source of funding to business startups, Title III of the JOBS Act applies to the issuers of financial return crowdfunding, intermediaries or funding portal, and crowdfunding investors. The JOBS Act permits business to raise fund from anyone—not only accredited investors—with specific limitations. As specified by the Securities Act of 1933, companies can offer or sell securities to the general public if the securities are registered with the US SEC or are exempted from registration.<sup>23</sup>

The JOBS Act's requirements are as followed;

### **(1) Requirements on the issuers**

Only United States-incorporated corporations which are not already registered with the US SEC are eligible corporations to offer crowdfunding shares. Those corporations must offer for sale of shares through a registered broker or funding portal. The limitation on the offering amount of a single issuer is not more than 1,000,000 USD within the 12-month period.

The JOBS Act exempts some filing and disclosure requirements on the issuers that offer their shares via crowdfunding portals still, the US SEC requires equity crowdfunding issuing companies to disclose the following information: general information about the issuing company,<sup>24</sup> financial information of the issuer which varies according to the target amount of the offering<sup>25</sup> (if the target size of offering is 100,000 USD or less the issuer only has to provide the most recent income tax return and a certified financial statement; if the target size of offering is more than 500,000 USD, the issuer must provide audited financial statements<sup>26</sup>), ownership and capital structure of the issuer,<sup>27</sup> disclosure concerning the offering,<sup>28</sup> annual reporting requirement.<sup>29</sup>

Issuers are prohibited from "advertise the term of the offering" other than to direct investors to brokers or funding portals.<sup>30</sup> Compensation to any person who promotes the offering "through communication channel provided by a broker or

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<sup>22</sup> cited as the "Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012" or the "CROWDFUND Act" JOBS Act title III sec. 301.

<sup>23</sup> Shekhar Darke, "To Be or Not to Be a Funding Portal: Why Crowdfunding Platforms Will Become Broker-Dealers", **10 HSTBLJ 183** (2014)

<sup>24</sup> Securities Act of 1933 § 4A(b)(1)(A), (B), (C), JOBS Act, sec. 302(a).

<sup>25</sup> Steven C. Bradford, "The New Federation Crowdfunding Exemption: Promise Unfulfilled". <<http://web.law.columbia.edu/sites/default/files/microsites/capital-markets/files/Promise%20Unfulfilled.pdf>> (2012) 10.

<sup>26</sup> Securities Act of 1933 § 4A(b)(1)(D)(iii), JOBS Act, sec. 302(a).

<sup>27</sup> Securities Act of 1933 § 4A(b)(1)(H), JOBS Act, sec. 302(a).

<sup>28</sup> Securities Act of 1933 § 4A(b)(1)(E), (F), (G), JOBS Act, sec. 302(a).

<sup>29</sup> Securities Act of 1933 § 4A(b)(4), JOBS Act, sec. 302(a).

<sup>30</sup> Securities Act of 1933 § 4A(b)(2), JOBS Act, sec. 302(a).

funding portal” is also restricted, unless complying with the US SEC rules of compensation disclosure.<sup>31</sup>

## **(2) Requirements on the investors**

The JOBS Act imposes limitation on crowdfunding investment depending on net worth or annual income of each investor.<sup>32</sup> For example, if both net worth and annual income is less than 100,000 USD; the limit is the greatest of either 2,000 USD, 5% of annual income, or 5% of net worth.<sup>33</sup>

The crowdfunding portals must review investor education information, make sure that the investors answer question concerning the understanding of relevant investment risks, and affirm their understanding of the risk to lose all money and they can bear such loss.<sup>34</sup>

## **(3) Requirements on the intermediaries (brokers or funding portals)**

Crowdfunding intermediaries, either brokers or funding portals, must be registered with the US SEC.<sup>35</sup> Funding portal is a new category of intermediary created by the JOBS Act being defined as “any person acting as an intermediary in a transaction involving the offer or sale of securities for the account of others, solely pursuant to section 4(6) of the Securities Act of 1933.”<sup>36</sup> Funding portals cannot offer investment advice; solicit purchases, sales or offers to buy securities displayed on their portals; compensate other persons for the solicitations or based on the sale of securities offered on their portals; hold, manage, possess or handle investors fund or securities; engage in other activity the SEC deems inappropriate.<sup>37</sup>

Crowdfunding intermediaries must provide disclosures such as the ones related to risk and other investor education materials as the SEC determine appropriate.<sup>38</sup> Moreover, intermediaries must ensure that each investor reviews investor education information, affirms that the investor understand the risk of losing the entire investment, and answer questions concerning the risk of the investment.<sup>39</sup>

Furthermore, crowdfunding intermediaries must take measures to reduce the risk of fraud which includes obtaining a background check on each officer or any person who holds more than 20% of the issuer’s outstanding equity,<sup>40</sup> and ensure that the issuers receive the offering proceeds when the raised capital is more than a target offering amount. They must not compensate promoters, finder, or lead generators for providing the information that identifies any potential investor.<sup>41</sup>

## **Implementation rules**

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<sup>31</sup> Securities Act of 1933 § 4A(b)(3), JOBS Act, sec. 302(a).

<sup>32</sup> Securities Act of 1933 § 4A(h), JOBS Act, sec. 302(b).

<sup>33</sup> *Id.*

<sup>34</sup> Securities Act of 1933 §4A(a)(4)(C)(B), JOBS Act, sec. 302(b).

<sup>35</sup> Securities Act of 1933 § 4A(a)(1), JOBS Act, sec. 302(a).

<sup>36</sup> Securities Exchange Act of 1934 § 3(a)(80).

<sup>37</sup> Securities Exchange Act of 1934 § 3(a)(80)(A)(B)(C)(D)(E).

<sup>38</sup> Securities Act of 1933 § 4A(a)(3), JOBS Act, sec. 302(b).

<sup>39</sup> Securities Act of 1933 §4A(a)(4), JOBS Act, sec. 302(b).

<sup>40</sup> Securities Act of 1933 §4A(a)(5), JOBS Act, sec. 302(b).

<sup>41</sup> Securities Act of 1933 § 4A(a)(10), JOBS Act, sec. 302(b).

When the JOBS Act was signed into law in April 2012, it is required to issue the implementation rules within 270 days after enactment of the Act.<sup>42</sup> Until the commission adopts the final rules, the use of crowdfunding exemptions under the JOBS Act is still unlawful under the federal securities laws.<sup>43</sup> However, as of May 2015 the US SEC has not yet issued the finalized rules.

Because of the uncertainty encompassing when the US SEC will finalize their implementation rules; numerous states have enacted (or are currently enacting) their own crowdfunding exemption law for intrastate offerings. As of May 2015, more than twenty states have either authorized separate intrastate crowdfunding exemptions or have enacted amendments to their current blue sky laws to allow some sort of intrastate Crowdfunding.<sup>44</sup>

### **3.2 The United Kingdom**

The Financial Conduct Authority (hereinafter referred to as “the FCA”) is the United Kingdom’s capital market regulator. The FCA has issued Policy Statement called “The FCA’s regulatory approach to crowdfunding over the internet, and the promotion of non-readily realizable securities by other media (PS14/4)” which aims to outline the new regulatory regime that regulates firms operating investment-based crowdfunding portals.<sup>45</sup>

#### **(1) Requirements on the issuers**

The PS14/4 does not specify about the issuers of equity crowdfunding. The Financial Services and Markets Act 2000 require the publication of prospectus when transferable securities are offered to the public. In practice, a majority of crowdfunding offers would fall within one of the exemptions provided in Section 86 of the Financial Services and Markets Act if the offers are “made to or directed at qualified investors only” or “the total consideration for the transferable securities being offered cannot exceed 100,000 Euro.”<sup>46</sup> Hence, issuers may use this exemption, if they are eligible, to not publish a prospectus. Moreover, the Companies Act 2006 also prohibits the offer of shares in a private limited company to the public.<sup>47</sup>

#### **(2) Requirements on the investors**

Firms promoting unlisted securities via crowdfunding portals are only allow to directly communicating with the certain types of investors. Namely: professional clients; retail client who are venture capital or corporate finance contacts; retail clients who are certified as sophisticated or high net worth investors; retail clients who certify

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<sup>42</sup> JOBS Act Title III, section 302 (c).

<sup>43</sup> “Information Regarding the Use of the Crowdfunding Exemption in the JOBS Act” (US SEC) <<http://www.sec.gov/spotlight/jobsact/crowdfundingexemption.htm>>

<sup>44</sup> “State of The States – List of Current Active And Proposed Intrastate Crowdfunding Exemptions (Updated)” (Crowdfunding Legal Hub) <<http://crowdfundinglegalhub.com/2015/01/16/state-of-the-states-list-of-current-active-and-proposed-intrastate-exemptions>>

<sup>45</sup> “PS14/4 - The FCA’s regulatory approach to crowdfunding over the internet, and the promotion of non-readily realisable securities by other media - Feedback to CP13/13 and final rules” (FCA) <[http://www.fca.org.uk/your-fca/documents/policy-statements/ps14-04\\_PS\\_14/4\\_chapter\\_1](http://www.fca.org.uk/your-fca/documents/policy-statements/ps14-04_PS_14/4_chapter_1)>

<sup>46</sup> The Financial Services and Markets Act 2000, sec. 86.

<sup>47</sup> The Company Act, sec 775.

that they “will not invest more than 10% of their net investible financial assets in unlisted securities.”<sup>48</sup> If retail investors do not receive any advice, the appropriateness test shall be applied to those investors to ensure that investors understand the involved risks.<sup>49</sup>

The FCA does not impose investment limit on sophisticate<sup>50</sup> and high net worth<sup>51</sup> investors, whereas the investment limits for non-high net worth, non-sophisticate investors are capped at not more than 10% of the net investible assets.

<sup>52</sup>

### **(3) Requirements on the crowdfunding intermediaries**

The offer of shares will generally constitute a financial promotion which cannot be made to retail investors unless the promotion is communicated or approved by a firm authorized by the FCA or it benefits from an exemption from the financial promotion regime. Thus, either the crowdfunding portals will need to be FCA-authorized or they will need to ensure that an FCA-authorized firm approves the financial promotion.<sup>53</sup> Conducting a regulated activity without having authorization is a criminal offence. Hence, it is common for crowdfunding portals to engage an FCA-authorized firm to approve initial investor communications and secure that the promotion of investment opportunities fall within these exemptions either; (i) existing shareholders-crowdfunding portals will create a shareholder relationship with all funding subscribers and a parent/subsidiary relationship with fund-seeking subscribers; and/or (ii) sophisticated, high net worth and professional investors-crowdfunding portals will assess the subscribers’ investment sophistication or require the subscriber to certify their own net worth or investment experience.<sup>54</sup>

## **4. Implication of Equity Crowdfunding under Thai Laws**

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<sup>48</sup> *Supra* note 45, at 36.

<sup>49</sup> *Id.* at 7.

<sup>50</sup> Sophisticate investors are the following investors;

(i) an investor who received a certification by a qualified firm that has assessed the investor to be “sufficiently knowledgeable to understand the risks associated with engaging in investment activity in...non-readily realizable investments”;

(ii) an investor who self-certified by providing the intermediary a signed “Self-Certified Sophisticated Investor” statement which required the investor to affirm that he or she is a member of (a) a business angel network; (b) has invested in an unlisted company in the previous two years; (c) has worked in the business finance sector over the previous 2 years or; (d) served as a director of a company with revenues of at least 1 million GBP (1.68 million USD).

<sup>51</sup> High net worth investors are defined by the FCA as someone with annual income of at least 100,000 GBP (168,000 USD) or net assets of at least 250,000 GBP (419,000 USD).

<sup>52</sup> Robert Steinhoff, “*The Next British Invasion is Securities Crowdfunding: How Issuing Non-Registered Securities Through the Crowd Can Succeed in The United States*”, **86 U.Colo.L.Rev.** 661 2015.

<sup>53</sup> “*Review of Crowdfunding Regulation*” (European Crowdfunding Network) at 224 <<http://www.eurocrowd.org/files/2014/12/ECN-Review-of-Crowdfunding-Regulation-2014.pdf>>

<sup>54</sup> *Id.*, at 225.

There are 4 Notifications issued relating to the facilitation of equity crowdfunding in Thailand, namely;

(i) Notification of the Capital Market Supervisory Board No. TorChor. 7/2558 Re: Regulations on Offer for Sale of Securities through Electronic System or Network

(ii) Notification of the Capital Market Supervisory Board No. TorChor. 8/2558 Re: Rules, Conditions and Procedures for Offering for Sale of Shares by Shareholders of Limited Companies

(iii) Notification of the Office of the Securities and Exchange Commission No. SorMor. 11/2558 Re: Determination of Fees for Filing of Registration Statement, Registration and Other Applications (No. 36)

(iv) Notification of the Securities and Exchange Commission No. KorChor. 3/2558 Re: Exemption from Filing of Registration Statement for Securities Offered through Provider of Electronic System or Network

### **(1) Requirements on the issuers**

Limited companies or public limited companies that are (i) being incorporated under Thai law; (ii) and having clear business operation or project and having intention to operate such business or project with the proceeds raised from an offer for sale of securities through crowdfunding portals. Holding company which operates its business by holding shares in limited company or public limited company in the amount not less than fifty percent of the total voting right in the invested company and does not have any other significant businesses, can offer their shares through crowdfunding portal as well, if the invested companies possess the characteristic as aforementioned in (i) and (ii).<sup>55</sup>

There are two portions of offering amount based on characteristics of investors. Issuing companies must clearly separate the offering amount for each portion.<sup>56</sup> Offer for sale of shares to retail investors with the value not exceeding 20 million Baht during the period of 12 months as from the first offer and not exceeding 40 million Baht as from the first offer, providing that offer for sale to each retail investor shall not exceed fifty thousand Baht in each company. Offer solely to institutional investor, private equity trust, venture capital business and qualified investor. There is no offering limit for this portion of investors.

Transaction must be conducted through an approved crowdfunding portal. Within 15 days from the closing date, issuing companies must report the sale of securities. Plus, the issuing companies have not, in the past 2 years, making false disclosure or incomplete disclosure in materiality; failing to facilitate the crowdfunding portal in disclosing information on the portal concerning use of proceeds raised from offer for sale of securities through the crowdfunding portal; failing to disclose sufficient information on the crowdfunding portal continuously after the offer for sale of securities.

### **(2) Requirements on the investors**

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<sup>55</sup> Notification of the Capital Market Supervisory Board No. TorChor. 7/2558, Clause 5.

<sup>56</sup> Notification of the Capital Market Supervisory Board No. TorChor. 7/2558, Clause 7.

There are investment limits for retail investors. Any retail investor may invest in any company via funding portals not exceeding 50,000 Baht during 12-month period and in total a retail investor can invest not more than 500,000 Baht in equity crowdfunding shares. It is arguable if this fixed amount truly reflects the capability of each and every retail investor. As in the UK, the investment limits are set at percentage of the investors' investible assets; and the US also divide investors based on their net worth and annual income.

Furthermore, retail investors must pass an investment knowledge test. Because equity crowdfunding is rather new, and there are risks of losing all the invested money, before subscription, a crowdfunding portal must ensure that the investors tested their investment knowledge, and providing that the investors have chosen all correct answers.<sup>57</sup>

### **(3) Requirements on the crowdfunding intermediaries**

The requirements for becoming crowdfunding platform under Thai law provided in chapter 3 clause 12 and 13 of the notification no. TorChor. 7/2558 that filing an application with the SEC Office in accordance with Form 35-FP together with the documents specified in the application being incorporated under Thai law having paid up registered capital not less than five million Baht (around 0.15 million USD) not having a reasonable ground to believe that the applicant has financial condition problems or has any deficiency and/or not appropriate for being crowdfunding platform the person who are the directors, managers should not be prohibited by the rule regarding personnel in the capital market business having the place for operating crowdfunding platform business in cases that the applicant is a company having operated other businesses, other businesses shall not have conflict of interest with the crowdfunding portal platform.

## **5. Conclusion and recommendations**

### **5.1 Conclusion**

Comparing to the US law, the UK law is less stringent and regulating equity crowdfunding is seemingly more relaxed. However, securities crowdfunding, both equity and debt-instrument, is very successful in the UK as the FCA opt for market approach that let the players operate their business with sufficient oversight from the regulator. There are a number of British crowdfunding portals that are operating and raising money for startups now, such as the prominent Seedr.com. While the US still wait for the US SEC implementation rules to come out, a number of states have already enacted their own crowdfunding exemption laws for intrastate offering of equity crowdfunding.

In Thailand, as it is a public offering of shares, without specific laws and regulations, the offer for sale of shares through crowdfunding portal would have to comply with burdensome securities laws and regulations. Hence, the Securities and Exchange Commission of Thailand has issued a set of notifications to specifically deal with equity crowdfunding which focuses on the operation and duties of crowdfunding portals

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<sup>57</sup> Notification of the Capital Market Supervisory Board No. TorChor. 7/2558, Clause 38.

## 5.2 Recommendations

The investment limit for retail investors is capped at the aggregate of 500,000 Baht, with the single-issuer investment limit of 50,000 Baht during the 12-month period. The number is insufficient to fill SMEs' financing demand. Because Thai SMEs need approximately 4 trillion Baht per year while the TCG can only guarantee 30,000-50,000 million Baht per year.<sup>58</sup> That leaves the huge amount of 3.5 trillion Baht that SMEs need for funding annually.

Because crowdfunding portals are not yet operating in Thailand (as of July 2015) but from the experience of the current donation-based crowdfunding platform in Thailand, Taejai.com, which only has 9,300 members and only 2,319 members have contributed to the donation projects on the website, together with the amount of trading accounts on the SET which is 1,098,731 accounts as of December 2014.<sup>59</sup> Even if the expected number of equity crowdfunding investors is as high as those of the SET and every investor invests their maximum limits of 500,000 Baht per 12-month period, the money raised through crowdfunding portals would still be insufficient to fill the financing gaps of SMEs as the demand for funding is still higher than the expected money raised through equity crowdfunding portals.

Hence, it should be taken into consideration to amend the investment limit for retail investors to be able to actually provide the SMEs the much needed capital and at the same time protect investors from exposing to too many risks by limiting the investment limit proportionately to the risk profiles of each investor.

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<sup>58</sup> Bank of Thailand. “บทบาทของ บพท. กับการช่วยเหลือสเมสเอ็มอี”

[<https://www.bot.or.th/Thai/Phrasiam/Documents/Phrasiam\\_4\\_2557/No.10.pdf>](https://www.bot.or.th/Thai/Phrasiam/Documents/Phrasiam_4_2557/No.10.pdf)

<sup>59</sup> The Stock Exchange of Thailand. “Market Statistics”

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