

PROBLEMS ON PROTECTION OF SHAREHOLDER'S RIGHTS FROM INVESTING IN EQUITY

CROWDFUNDING: STUDY ON

LIMITED COMPANY*

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ABSTRACT

Crowdfunding Platform allows SMEs with limited resources to jump from the old-fashioned funding schemes to new forms of relief via the internet. In other words, SMEs use online funding as a channel to get funding sources. Furthermore, Crowdfunding Platform has been developed to serve commercial purposes in which the investors expect the returns from their investment.

Equity Crowdfunding, as recently adopted by the Securities and Exchange Commission (SEC), generally relies on the concept of capital increase and offering for the sale of shares in the limited company under the umbrella of the Civil and Commercial Code (CCC) and Securities and Exchange Act B.E. 2535. However, unlike that of the typical provisions, the new SEC's rules grant the exemption to the limited company to offer the shares for sale publicly subject to the conditions imposed. In other words, it aims to unblock the restrictions of existing provisions in order to facilitate Equity Crowdfunding whereby the limited company is entitled to offer its shares for sale to other investors in addition to the original shareholders who have a shortage of funds at the early stage of the start-up and may not be able to inject more capital to continue the business. More importantly, the Crowdfunding exemption under the

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SEC's Notifications allows the private limited company to raise funds by offering the shares for sale to the public or public offering which is a similar concept to that of a public limited company except this public offering by a private limited company must be done online.

Thai law, which is SEC's Notifications as aforementioned by virtue of Securities and Exchange Act B.E. 2535 comparing the US law and the UK law, does provide proactive measures to protect prospective investors. However, it is doubtful whether those involved in the sale afterwards continue to receive protection without a certain exit for the shareholders and whether there is an appropriate fiduciary duty for the controlling shareholders, including the controlling authority. Unlike the typical limited company whose shares belong to a close group of shareholders, Equity Crowdfunding limited companies offer its shares for sale to the public.

Therefore, a comparative study of these foreign laws and Thai laws concerning the protection of shareholders' rights in a limited company relying on Equity Crowdfunding should help in implementing effective rules to balance fundraising promotion with investors' rights after the funds have been injected. In this regard, the laws of the United Kingdom and the United States are subject matters to study as both nations have concrete statutory laws and case laws governing Equity Crowdfunding and protection of minority shareholders for this high value industry. The significant amount of investment and the number of concerning parties that have entered into this fundraising scheme with the express purpose of promoting startups and SMEs has been taken into account as well. In addition, it is worth noting that Equity Crowdfunding is the way to consume financial product where the fruits of this product are expected rather than the product itself.

Keywords: Equity Crowdfunding, Limited Company, Shareholders, Issuer, Funding Portal, Crowd Investor, Shareholders Protection

บทคัดย่อ

การระดมทุนจากประชาชนหมู่มากโดยวิธีการที่เรียกว่า Crowdfunding ช่วยให้วิสาหกิจขนาดกลางและขนาดย่อม (Small and Medium Enterprises – SMEs) ซึ่งแต่เดิมมีข้อจำกัดในการเข้าถึงแหล่งเงินทุนสามารถเข้าถึงแหล่งเงินทุนได้ง่ายขึ้นผ่านช่องทางออนไลน์หรืออินเทอร์เน็ต โดยการระดมทุนจากประชาชนหมู่มากนี้เป็นวิธีการระดมทุนโดยการเสนอขายหุ้นของบริษัทให้แก่ประชาชนเป็นการทั่วไป การระดมทุนโดยวิธีดังกล่าวนี้ถูกพัฒนาขึ้นมาเพื่อวัตถุประสงค์เชิงพาณิชย์ซึ่งนักลงทุนต่างก็คาดหวังผลตอบแทนจากการลงทุน

สำนักงานคณะกรรมการกำกับหลักทรัพย์และตลาดหลักทรัพย์ (ก.ล.ด.) ได้ออกประกาศที่เกี่ยวข้องขึ้นเพื่อเปิดให้มีการระดมทุนจากประชาชนหมู่มากตามหลักการเพิ่มทุนและการเสนอขายหุ้นตามประมวลกฎหมายแพ่งและพาณิชย์ และพระราชบัญญัติหลักทรัพย์และตลาดหลักทรัพย์ พ.ศ. 2535 โดยมีวัตถุประสงค์ในการยกเว้นบทบัญญัติที่มีอยู่เพื่อให้บริษัทจำกัดสามารถเสนอขายหุ้นให้แก่ประชาชนเป็นการทั่วไปได้ตามเงื่อนไขที่กำหนด กล่าวคือ เป็นการยกเว้นข้อจำกัดในการเสนอขายหุ้นของบริษัทจำกัดเพื่อให้บริษัทจำกัดสามารถขายหุ้นให้แก่บุคคลอื่นโดยตรงเป็นการทั่วไปนอกจากผู้ถือหุ้นเดิมของบริษัทจำกัด เนื่องจากผู้ถือหุ้นเดิมซึ่งอยู่ในช่วงเริ่มต้นธุรกิจอาจไม่มีเงินทุนเพียงพอในการเข้าซื้อหุ้น เพื่อให้บริษัทนำเงินจากการขายหุ้นมาดำเนินกิจการต่อไปได้ อนึ่ง ข้อยกเว้นตามประกาศ ก.ล.ด. ที่ให้บริษัทจำกัดสามารถระดมทุนจากประชาชนหมู่มากได้นั้น มีความคล้ายคลึงกับการระดมทุนโดยการนำหุ้นออกขายให้แก่ประชาชนเป็นการทั่วไปของบริษัทมหาชน เพียงแต่การระดมทุนโดยวิธีการนี้จะต้องเป็นการระดมทุนผ่านช่องทางออนไลน์

แม้ว่าประกาศ ก.ล.ด. ที่เกี่ยวข้องซึ่งออกตามความในพระราชบัญญัติหลักทรัพย์และตลาดหลักทรัพย์ พ.ศ. 2535 เมื่อเปรียบเทียบกับกฎหมายของสหรัฐอเมริกาและสหราชอาณาจักร จะได้กำหนดมาตรการทางกฎหมายเพื่อคุ้มครองนักลงทุนซึ่งเป็นประชาชนหมู่มากไว้แล้ว แต่กลับไม่ปรากฏว่ามีมาตรการทางกฎหมายที่แน่นอนและชัดเจนในการคุ้มครองนักลงทุนในฐานะผู้ถือหุ้นภายหลังจากการระดมทุนประสบความสำเร็จ อีกทั้งยังไม่ปรากฏว่ามีบทบัญญัติที่เกี่ยวข้องโดยตรงกับหน้าที่ในฐานะผู้ที่ได้รับความไว้วางใจของผู้ถือหุ้นข้างมาก (Fiduciary Duty) เหมือนดังกฎหมายของสหรัฐอเมริกาและสหราชอาณาจักร ตลอดจนไม่ปรากฏว่ามีหน่วยงานที่เกี่ยวข้องซึ่งมีอำนาจหน้าที่ในการกำกับดูแลที่เพียงพอ ทั้งๆ ที่บริษัทจำกัดซึ่งระดมทุนโดยการเสนอขายหุ้นให้แก่ประชาชนหมู่มากย่อมมีผู้มีส่วนได้เสียมากขึ้นตามไปด้วย ซึ่งต่างจากบริษัทจำกัดทั่วไปซึ่งมีเพียงผู้ถือหุ้นในวงจำกัดเท่านั้น และการลงทุนด้วยวิธีนี้ยังเปรียบเสมือนการบริโภคผลิตภัณฑ์ทางการเงินประเภทหนึ่ง (Financial Product) ซึ่งนักลงทุนเป็นผู้บริโภคผลิตภัณฑ์ทางการเงินย่อมความหวังในผลตอบแทนที่จะได้จากผลิตภัณฑ์ทางการเงินด้วย

เพราะฉะนั้น การศึกษาเปรียบเทียบระหว่างกฎหมายของสหรัฐอเมริกาและสหราชอาณาจักรกับกฎหมายไทยที่เกี่ยวข้องกับการคุ้มครองสิทธิของผู้ถือหุ้นในบริษัทจำกัดที่ระดมทุนโดยการเสนอขายหุ้นให้แก่ประชาชนหมู่่มาก ก็น่าจะก่อให้เกิดการนำมาตราการทางกฎหมายที่มีประสิทธิภาพมาบังคับใช้เพื่อสร้างความสมดุลระหว่างการส่งเสริมการลงทุนและสิทธิของนักลงทุน ทั้งนี้ เนื่องจากกฎหมายของทั้งสองประเทศที่ได้หยิบยกมาศึกษาเปรียบเทียบนั้น มีกฎหมายสารบัญญัติและแนวทางคำพิพากษาซึ่งเกี่ยวข้องกับการระดมทุนจากประชาชนหมู่่มากและการคุ้มครองผู้ถือหุ้นข้างน้อยที่มีประสิทธิภาพ อีกทั้ง ภาพรวมการระดมทุนจากประชาชนหมู่่มากของทั้งสองประเทศยังมีมูลค่าสูงมากเมื่อพิจารณาจากจำนวนเงินลงทุนและจำนวนผู้มีส่วนเกี่ยวข้องทุกฝ่าย โดยมีวัตถุประสงค์หลักเช่นเดียวกันในการส่งเสริมกิจการเกิดใหม่ (Startups) ตลอดจนวิสาหกิจขนาดกลางและขนาดย่อม

คำสำคัญ: การระดมทุนโดยการเสนอขายหุ้นให้แก่ประชาชนหมู่่มาก, บริษัทจำกัด, ผู้ถือหุ้น, ผู้ระดมทุน, ตัวกลางระดมทุน, นักลงทุนซึ่งเป็นประชาชนหมู่่มาก, การคุ้มครองผู้ถือหุ้น

Introduction

Generally, Crowdfunding can be classified in two main categories; namely Non-commercial Crowdfunding or Community Crowdfunding and Commercial Crowdfunding or Investment Crowdfunding.¹ The clear cut between these categories as brought up above is the expectation of profit in return of the money given. That is to say that people who contribute to the non-commercial campaigns do not financially benefit from their contribution, whilst people that invest in the latter do so in hopes of a return in their investment as the term straightforwardly prescribes. There are four sub-categories of Crowdfunding: (i) Donation Crowdfunding, (ii) Reward Crowdfunding, (iii) Lending Crowdfunding, and (iv) Equity Crowdfunding. Donation and Reward Crowdfunding can be collectively referred to as Non-commercial Crowdfunding. On the other hand, Lending and Equity Crowdfunding fall under the umbrella of Commercial or Investment Crowdfunding.²

¹ Andrew C Fink, “Protecting the Crowd and Raising Capital Through Crowdfunding Act”. **90 U. Det. Mercy L. Rev.** 1, 4 (2012).

² IOSCO. “*IOSCO crowdfunding an infant industry growing fast.*” (2015)

The big difference between Crowdfunding and other typical fundraising mechanisms is that it is done online via the intermediary or the online portal. The online portal is a platform whose function is to arrange and operate the beginning of Crowdfunding process until the end. In other words, it is simply a website that the fund seekers post their campaigns which are available to anyone who is interested to fund their campaigns regardless of how they are called in accordance with each type of Crowdfunding. The online portal as the operator other than being an online venue for the fundraisers to present their campaigns through various forms of media, will also apply the procedure for fundraising in which the fundraisers have to follow. This fundraising procedure is a combination of the target amount of funds required and time limits to achieve said target. That is to say that the campaigns must be able to collect the full amount of money requested from the crowd within a certain period of time. Otherwise, the campaigns will be deemed a failure and the funds will be returned to the individual investors. Thus, online portals can be considered an underwriter and at the same time, an escrow agent, if the fund is pledged with it. Alternatively, the funds could be remitted from the crowd once the collective amount eventually hits the target within a stipulated period.

Overview of Equity Crowdfunding

Equity Crowdfunding mainly involves four connecting parties: (i) issuers or the companies seeking fund, (ii) funding portals, (iii) escrow agents, and (vi) crowd investors.³

(i) Issuers

The issuer in Equity Crowdfunding refers to the startups that need funds to grow their business but are limited to other funding resources due to their lack of credit and collateral, such as, banks,

<http://www.iosco.org/research/pdf/swp/Crow-funding-An-Infant-Industry-Growing-Fast.pdf> (accessed on 14 November 2015).

³ Zachary Robock, "The Risk of Money Laundering Through Crowdfunding : A Funding Portal's Guide to Compliance and Crime Fighting", **4 Mich. Bus. & Entrepreneurial L. Rev.** 113 (2014).

financial institutions, or even venture capital, etc. Since the equity or share of the issuer is given to the investors in exchange for financial support, by offering shares for sale, the issuer by its nature must be a legal entity in the form of either a publicly-held or closely-held corporation.⁴ In other words, the issuer must have already been established as a limited company which can be either a private limited company or a public limited company where the share capital is the key element available for such legal entity to raise in exchange for issuing the ownership to the investor in form of shares.⁵ Given that the issuers are startups with limited resources even if they have high business potential, it is reasonable that most of them are incorporated as a limited company. The issuer's main responsibility is to disclose the up-to-date and correct information to the crowd investors in the early stage of the campaign launch and thereafter, which is the duty of disclosure.⁶ This duty of disclosure is vital and linked to the fraud protection as soliciting the investors with false information is deemed violating the investors' right and a criminal offense.⁷

(ii) Funding Portals

The Funding Portal as an online intermediary is a website where a campaign is launched to the public and advertises to crowd investors to buy the shares being offered for sale by the startups. In other words, its role is similar to that of the underwriter in the stock market, but with the less complications and less regulated functions since they are not allowed to give or provide any advice to the investors.⁸ The Funding Portal's main role is to provide a forum for the issuers and the crowd investors whereby it is responsible in verifying and categorizing the background and knowledge of the

⁴ Notification of the Capital Market Supervisory Board No.TorChor.7/2558, Clause 5

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

⁶ Sharon Yamen, Yoel Godfeder. *"Equity Crowdfunding – A Wolf in Sheep's Clothing : The Implications of Crowdfunding Legislation under the JOBS Act"*. **11 BYU Int'l L. & Mgmt. R.** 41 (2015).

⁷ *Supra* note 3.

⁸ *Id.*

investors and determining whether or not they are sophisticated enough to invest through Equity Crowdfunding.

In this regards, the Funding Portal is basically regulated and licensed by the Securities and Exchange Commission and obligated to verify the identity of the issuers as per the disclosure compliance and professional courtesy including to make the agreement with the issuers in order to ensure that they shall proceed responsibly throughout the fundraising and thereafter if the campaign becomes successful. Such agreement shall include the subscription procedures with a cooling-off period, updates on the significant changes of the issuers' details which may affect the investors' rights, updates on the use of funds having been raised, verification of investment limit for individual investors, etc.⁹ In addition, the Funding Portal shall announce the risk warning for investing in Equity Crowdfunding given the illiquid condition of this kind of securities.¹⁰ More importantly, the Funding Portal is not allowed to hold the fund even if it is the funding intermediary.¹¹ The Funding Portal is required to arrange the escrow agent to manage the fund transfer which is pledged by the investors during the fundraising to the issuers if the campaign is achieved within a stipulated period on the basis of "All or Nothing".¹²

(iii) Escrow Agents

The escrow agent in crowdfunding plays the same role as it does in the ordinary course of business. Which is to mean it is the intermediary who supervises the contract compliance of both parties including holding and releasing the money pledged by one party to the other party when the condition of contract is fulfilled.¹³ Given

⁹ *Id.*

¹⁰ *Id.*

¹¹ Notification of the Capital Market Supervisory Board No.TorChor.7/2558, Clause 23

¹² Douglas J. Cumming, Gael Leboeuf, Armin Schwienbacher, "*Crowdfunding Models : Keep-It-All vs. All-Or-Nothing*" (2015), <http://leeds-faculty.colorado.edu/bhagat/CrowdfundingModels-KeppItAll-AllorNothing.pdf> (accessed on 26 November 2015).

¹³ *Id.*

the concept of “All or Nothing”¹⁴, the escrow agent will oversee when the fund hits the target which is the issuers’ expected and sufficient amount to achieve the campaign and run the business. Once the target is met or, in other words, when the offer meets with the acceptance under the condition that the accumulated amount of funds promised by the crowd investors to invest in the campaign reaches the total amount as stipulated by the issuers, the escrow agent will arrange the transfer of funds pledged by the crowd investors to the issuers.¹⁵

(iv) Crowd Investors

The main target investors of Equity Crowdfunding is the mass individual investors consisted of those who have a variety of experiences and knowledge in investments and those who do not, but are eager to invest in the business when they find the campaign interesting and worth the risk after taking into account of the potential return of investment.¹⁶ In other words, they are the middle class whose annual net worth relies on limited sources of incomes and their financial status is hardly considered wealthy.¹⁷ These crowd investors are categorized into two types namely the sophisticated or accredited investor and non-accredited or unsophisticated investor.¹⁸

The level of sophistication to determine whether the investor is qualified to invest through Equity Crowdfunding as the accredited or sophisticated investor depends on the variety of criteria under the different jurisdictions, but they share the same concept that the sophisticated or accredited investors shall possess the financial and business knowledge that allows them to appreciate the risks of the investment and are able to fend for themselves if they are provided with the appropriate type and amount of information or the access to

¹⁴ *Id.*

¹⁵ Notification of the Capital Market Supervisory Board No. TorChor. 7/2558, Clause 27

¹⁶ Jorge Pesok, “Crowdfunding : A New Form of Investing Requires A New Form of Investor Protection”, 12 Dartmouth L.J. 146 (2014)

¹⁷ *Supra* note 3.

¹⁸ *Supra* note 16.

this information.¹⁹ The sophistication is also based on the wealth of the investors as their ability to take risks in regards to the investment through Equity Crowdfunding depends on how much money they have available and also their ability to recover such loss by other means or if such loss creates only slightly decreases their wealth. It should be fair to say that the more sophisticated or wealthier investors are presumed to be able to analyze the investment opportunity for themselves or bear the financial risks.²⁰

On the contrary, the non-accredited or unsophisticated investor has the adverse qualifications as to the experiences and knowledge in investment including their annual income and/or net worth. In other words, they have limitations in analyzing the risks of investment as well as in bearing such risks due to the financial constraints and their ability to recovery the loss by other means. However, most of the crowd investors which the issuers, through the Equity Crowdfunding scheme, aims to raise the money from, are the non-accredited investors. Thus, the laws concerning equity crowdfunding provide the limit of investment or investment cap for each individual investor. The Funding Portal is also required to evaluate the sophistication of the crowd investors by arranging a quiz that tests basic knowledge in regards to investing in this platform before allowing them to participate in the campaign.²¹

Analysis of Problems on Protection of Crowd Investors and Minority Shareholders according to the Comparative Study of Foreign Laws (the United States of America and the United Kingdom) and Thai Laws

¹⁹ Joan MacLeod Heminway, Shelden Ryan Hoffman, “*Proceed at Your Peril : Crowdfunding and Securities Act of 1933*”, **Tennessee Law Review**, Vol. 78, p. 879, 2011, University of Tennessee Legal Studies Research Paper No. 154 , page 32

²⁰ Douglas S. Ellenoff, “Making Crowdfunding Credible”, **66 VAND. L. REV. EN BANC** 19 (2013), Page 20

²¹ Notification of the Capital Market Supervisory Board No.TorChor.7/2558, Clause 23

1. Consumer Protection Perspective

Although Equity Crowdfunding is the investment platform, the investors in Equity Crowdfunding are treated as consumers under the UK and US laws, especially, the retail or unaccredited investors who are the main target source of funds, whilst the Thai SEC tends to treat them with the same standard as applied to sophisticated investors whom are assumed to be aware of the associated risks before investing in companies seeking funds via Equity Crowdfunding. Above all, Thailand does not have any direct responsible authority who actively monitors and takes action in case there is any issue that arises from Equity Crowdfunding other than the SEC's Notifications imposed on the Funding portal for the procedures and requirements regarding the primary stage of fundraising which mostly ends when the campaign succeeds. Their responsibility is to make the updated information of the issuers available after the sale of shares. To retain no effective sanction, save for the revocation of certificate and restriction, allows the campaign to resume operating should the Funding Portal fail to do so.

The duty to disclose the correct information of the business and company details by the issuers is also loosely implemented as the SEC assumes no responsibility for any misleading information or any misfiling. The sale of shares in a limited company and public limited company, regardless whether are listed or non-listed by virtue of SEC's exemption on Equity Crowdfunding, is not subject to the available sanction concerning filings under the umbrella of Securities and Exchange Act. In addition, the SEC does not scrutinize the information provided by the issuers since the disclosure is carried out on a basis of self-declaration under the supervision of Funding Portal. In case investors suffer any damages caused by such misconduct of the issuers, the investors may have to pursue a civil remedy against the issuers on their own under the contract and tort laws set forth in the CCC. Unlike other similar cases including but not limited to directors' misconduct, fraud, embezzlement, etc., the SEC is entitled to take action when the investors are defined as Client according to

the provisions concerning sale and offering for sale of shares under the Securities and Exchange Act.²²

According to the UK Financial Conduct Authority (FCA), Investment-based Crowdfunding or Commercial Crowdfunding, to be precise, Equity Crowdfunding is regulated under the scope of FCA consumer protections since they are allowed by this new type of investment platform to invest in new or established businesses by buying shares which is termed by the FCA as “non-readily realizable securities” where they are not listed on regulated stock markets and carry significant risks and specifically when they are sold over the internet.²³ The FCA also plays a very active role in supervising the Equity Crowdfunding by engaging with the Funding Portal and the issuer’s management. They monitor their websites and review monthly management information. This is to ensure that the consumers are properly protected with regards to allowing only the appropriate type of investors to invest according to the criteria of COBS. The financial promotions are clear, fair and not misleading in term of the nature and performance of the assets invested in and the exit opportunities available for the investors.²⁴ By virtue of Financial Services and Markets Act 2000 (FSMA), in addition to the FCA’s active role in supervising the Equity Crowdfunding, the UK has another two authorities. These are the Financial Services Compensation Scheme (FSCS) and the Financial Ombudsman Service (FOS) which have been established to protect the retail or self-certified sophisticated individual investor from the unwanted consequences of investing through Equity Crowdfunding due to misleading investment advice, negligence management of

²² Busara Jatejumnongjit. *"The Protection for Minority Shareholders in a Limited Company"*. Thesis for Master of Law (Business Law). Faculty of Law. Chulalongkorn University. (2000). Page 122.

²³ Financial Conduct Authority, Policy Statement re: *"The FCA’s regulatory approach to crowdfunding over the internet, and the promotion of non-readily realizable securities by other media – Feedback to CP13/13 and final rules"* (2015), <https://www.fca.org.uk/news/ps14-04-crowdfunding> (accessed on 7 December 2015).

²⁴ *Id.*

investments, misrepresentation, or fraud caused by the Funding Portal or issuers.

Similar to that of the UK, the US Federal Trade Commission (FTC) and its Bureau of Consumer Protection has recently taken an active role in investor protection in Crowdfunding as they took legal action against Erik Chevalier in *FTC v. Chevalier* in the District Court of Oregon²⁵. Although the case was filed for fraudulent crowdfunding caused by the misuse of money raised under the regime of Reward-based Crowdfunding, it is worth noting that the FTC also recognizes Crowdfunding in view of consumer protection under its scope of responsibility and function of its dual mission to protect consumers as well as promote competition²⁶. It can be seen that whilst the US's SEC regulates the safe harbor or exemption for Equity Crowdfunding and supervises the process from the early stage of fundraising until the campaign is achieved as the FCA does in the UK, the FTC is proactively taking actions in implementing the same investor protection as the FSCS and FOS do.

Although Thailand has the Office of the Consumer Protection Board (OCPB), its power is still questionable as OCPB may not be capable to extend its protection to Equity Crowdfunding as there is no clear decision as to whether or not the investors should be treated as if they were consumers or if they do not deserve the associated risks that ordinarily arise out of investing. Therefore, adopting the concept of Equity Crowdfunding without concrete and specific authority like those of the UK and the US to look after the issuer may cause problems down the road that will need to be solved.

2 Shareholders Protection Perspective

According to the law a limited company is managed by the Board of Directors (BOD), and subsequently, the BOD is controlled

²⁵ Jeffrey Becker. "*FTC ruling sheds some light on investor protection in crowdfunding.*" **Chicago Diary Law Bulletin**. Volume 161, No. 126, June 29, 2015, http://www.smbtrial.com/RC1ACS162/assets/files/Documents/18273_LB_reprint_Swanson_Jun29-2015.pdf (accessed on 17 December 2015).

²⁶ Federal Trade Commission. "*What We Do.*" <https://www.ftc.gov/about-ftc/what-we-do> (accessed on 17 December 2015).

by a meeting of the shareholders. This means that the meeting of shareholders may pass a resolution to elect or dismiss a board member. The meeting of shareholders can also pass any resolution to ratify the directors' action or approve the transactions in relation to the business. When the meeting of shareholders considers and resolves the agendas, the majority voting is a standard criteria applied to conclude the decision of the meeting. The vote can be counted according to the number of shareholders physically attending the meeting with voting rights or the amount of shares being held by each shareholder in case a poll is requested by at least two shareholders under the CCC.²⁷ In other words, it is simply a rule of one share - one vote, which may also be agreed upon in the Articles of Association (AOA).

Thus, this majority rule applied in favor of majority shareholders significantly prejudices the voting rights of minority shareholders since the majority always overcomes the minority and may pass any unfair or unfavorable resolution over the minority. More importantly, the retail investors who have become the shareholders by purchasing the shares according to the limited amount as specified by SEC through Equity Crowdfunding, will then automatically fall into the status of minority shareholder and the AOA initiated by the issuers who are the original majority shareholders despite having no chance to otherwise agree to nor modify the terms earlier.²⁸

2.1 Election of Directors

It is of course the wish of every shareholder to have influence over the company's direction since they have signed up as the investors by purchasing company shares. Given that the law does not prevent shareholders from taking a position in the board, they can play a proactive role in leading the business by becoming the directors or by nominating any other natural person to preside on

²⁷ Civil and Commercial Code, Sec. 1190

²⁸ Civil and Commercial Code, Sec. 1108

their behalf.²⁹ As the directors must be elected or dismissed by the resolution of the meeting of shareholders, the majority rule shall apply to the voting.³⁰

In case the poll is requested by at least two shareholders or as specified by AOA to implement the one share - one vote rule by counting the amount of shares acquired by the shareholders attending the meeting to conclude a resolution, the majority of shareholders who are the same persons as the original group of issuers will definitely win the vote because of the larger amount of shares on hand compared to the very few held by the retail investors.³¹ Thus, this does not guarantee that the right and interest of minority shareholders will be prudently considered by the directors whom are nominated by the different group of majority shareholders. More importantly, the majority shareholders may take advantage of such criteria to promote only themselves onto the board or their relatives and overlook those nominated by the minority shareholders in order to take absolute control over the company. As a result, it is very unlikely that the minority shareholders will be treated fairly, since they do not have any meaningful influence over the company.

2.2 Dividends

The distribution of dividends also requires the majority votes of the meeting of the shareholders, it all depends on the majority shareholders whether they want to retain cash flow generated from the business growth or return them in the form of dividends to the investors in accordance with the portion of shares acquired. This condition also applies to the distribution of interim dividends by the BOD except that the BOD's resolution shall be passed by counting the major number of directors who agree with the agenda since each director has one vote. If the directors are also nominated by the same group of majority shareholders, it is difficult to expect a resolution to the conflict on the same matter from the meeting of the BOD when

²⁹ Civil and Commercial Code, Sec. 1150

³⁰ Civil and Commercial Code, Sec. 1151

³¹ Civil and Commercial Code, Sec. 1182

the meeting of the shareholders says no when they all are on the same side.

There is no statue allowing shareholders to claim the distribution of dividends under the CCC even when the company has become profitable and has cash positive growth. The expectation on the return of investment that the retail investors had when backing the campaign by buying the shares offered can be failed by the issuers. This can happen when the issuers are the majority shareholders as well as the directors and have absolute control over the company. That is to say that the issuers are in a position to easily take advantage of the investors via Equity Crowdfunding as the return on investment is subject to the issuers' discretion, especially if they did not promise nor guarantee the fruitful investment in the first place. Above all, withholding the distribution of dividends does not fall under the breach of directors' duty causing damage to the company as the money is still listed as a company's assets. More importantly, the CCC neither provides any remedy nor any available legal actions to be taken by the minority shareholders against the majority shareholders in the case of failing to pay dividends other than the revocation of illegitimate meeting in regards to the quorum, the process of holding a meeting, and voting.³²

2.3 Class of Shares

There are mainly two classes of shares in a limited company: ordinary shares and preference shares in accordance with the CCC. The distinction between these classes of shares is the right attached to them. The ordinary share contains ordinary rights pertaining to the voting and receiving of dividends where the shareholders holding this class of share is entitled to one vote per ordinary share and annual dividends if the company is profitable subject to the resolution of the shareholders' meeting. The right attached to preference share may vary on the terms of AOA with the different rights from that of ordinary share.³³ As it is termed 'preference', the right attached may

³² Civil and Commercial Code, Sec. 1195

³³ Civil and Commercial Code, Sec. 1108

be greater or less than that of the ordinary share. Whilst the preference share may provide holders the guaranteed amount of dividends for example, 10 percent of the profit generated at the end of each fiscal year, the voting right can be less such as five preference shares per one vote or even none.

It is crucial for the investors to understand their right that they may enjoy before subscribing to differently classed shares being offered by the issuers in Equity Crowdfunding as there exists no regulation regarding which class of shares shall be offered by the issuers and to what extent the rights are attached to the preference share, if issued and offered for sale, shall be specified. Especially, in case they did not have a chance to agree with the contents of the AOA and the right attached to preference shares once specified cannot be altered thereafter under the CCC.³⁴ As a result, the issuers may arbitrarily impose whatever conditions they want on the preference shares and sell them to the investors in order to weaken the influence of minority shareholders over the control of company by limiting their voting rights. Although this may be arguable to some extent as the investors do not wish to take a key role in running the business, it does not logically make sense for people to give away their money without any recourse.

2.4 Dilution of Shares

The dilution of shares is also a major concern since it directly impacts the voting rights of minority shareholders who are the retail investors with limited economic capability. The dilution of shares is a result of capital increase under the CCC whereby the new shares are issued for sale to raise more capital. In order to enable capital increases, a special resolution must be passed by the meeting of shareholders requiring three-fourths of the total share capital to be presented at the meeting. In other words, it requires 75 percent of the majority vote, which is higher than the majority votes required to pass a normal resolution at over 50 percent of the total share capital present at the meeting. Nevertheless, the majority of the shareholders

³⁴ Civil and Commercial Code, Sec. 1142

who are the issuers in the crowdfunding company can still push forward the scheme.

Although the CCC provided the pre-emption right or the right of first refusal for the original shareholders including minority shareholders to buy the newly issued shares in order to secure the same portion of shares and voting rights, the retail investors are unlikely to spend more money in doubling the acquired shares especially if the company is not profitable and there is no guarantee on the distribution of dividends. Even if they wish to do so, the SEC's Notification still limits the maximum amount of 50,000 Baht for a purchase of shares in each crowdfunding company.³⁵ Hence, if they have fully invested in accordance with the limit, they are not entitled to buy more newly issued shares in response to the capital increase. Given the above scenario, the portion of shares and voting rights of minority shareholders will gradually be diluted every time the capital is increased.³⁶ Eventually, the minority shareholders power and influence will fade from the company even though they are still holding the same amount of shares.

2.5 Conflict of Interest and Related Party Transactions

A related-party transaction is a business deal or arrangement between two parties who are joined by a special relationship prior to the deal, say, a business transaction between a major shareholder and the corporation such as a contract for the shareholder's company to perform renovations to the corporation's offices, would be deemed a related-party transaction. The original shareholders are also the majority shareholders and the directors of the limited company raising funds via Equity Crowdfunding. The crowd investors who then become the minority shareholders in such a company by purchasing the shares could easily be taken advantage of as they are not eligible to control nor manage the business operation. This conflict of interest, if conducted by the directors, could be subject to a

³⁵ Notification of the Capital Market Supervisory Board No. KorChor. 3/2558, Clause 2

³⁶ Civil and Commercial Code, Sec. 1222

lawsuit brought on by the stakeholders which could be any of the shareholders against such directors.³⁷ However, it is merely a civil remedy and time consuming litigation with additional cost that the shareholder must bear in advance without any guarantee that it can finally be recovered as the result depends on the court's discretion.

2.6 Liquidity and Secondary Market

The SEC's exemption altered the concept of a limited company by enabling the sale of shares issued by a limited company to the public similar to the public offering in public limited company. However, such an exemption does not provide an exit for the shareholders to resell their acquired shares in the open market unlike those bought in the stock exchange. Thus, the transfer of shares in a limited company still falls under the typical regime of the CCC where the transfer of shares entered into a name certificate shall be effective by executing the share transfer instrument and subsequently being registered on the share registration book of the company book.³⁸ In addition, the advertisement for both the first sale by the issuers and the resale by the investors are prohibited.³⁹

According to the SEC's Notifications, the shareholders may resell their acquired shares of a limited company by virtue of this financial promotion specifically to less than or equal to 50 accredited or sophisticated investors within a period of twelve months, or to institutional investors, such as commercial banks, venture capital, private equity, or to original shareholders of the company i.e. the founders and other investors who have joined the campaign and have become shareholders for the project after it was launched on the website.⁴⁰

³⁷ Civil and Commercial Code, Sec. 1169

³⁸ Civil and Commercial Code, Sec. 1129

³⁹ Civil and Commercial Code, Sec. 1102

⁴⁰ Notification of the Capital Market Supervisory Board No. TorChor. 8/2558, Clause 2

As a result, there is not really a proper exit available by virtue of the CCC for the shareholders or retail investors. When the business does not perform well or is being financially taken advantage of or jeopardized under direction of the majority shareholders who are the founders and business owners and who play a key management role on the board. On the other hand, if the company is so profitable, it is worth noting that the CCC does not allow the company to buy back shares from the shareholders as a limited company is prohibited from holding its own issued shares, even if this could possibly be the simplest exit because the founders do not have to spend their personal funds to buy back shares from the retail investors.⁴¹

Conclusion and Recommendations

The Equity Crowdfunding exemption has totally changed the principle of limited company since it turns a closely-held corporation into a publicly-held corporation, even if its legal status remains unchanged as a limited company and the laws concerning limited company are still fully and effectively applied to the corporate entity and legally outline the relationship and liability among all parties involved. It is undeniable that the associated risks on the crowd investors who are the main target source of funds in Equity Crowdfunding prevent this financial promotion from achieving success as the mechanism to provide SMES with the more flexible sources of fund will eventually turn to affect the issuers because nobody would want to take such risks. Therefore, the measures to protect the crowd investors and the minority shareholders need to be appropriately implemented in addition to the existing protections under the SEC's Notifications and the CCC in response to the success of this fundraising scheme.

In light of the above problems on the protection of shareholders' rights, in other words, the crowd investors' rights in the post-stage Equity Crowdfunding after they have backed the campaign

⁴¹ Civil and Commercial Code, Sec. 1143

by buying the shares and become the shareholders in a limited company, the recommendations in view of the comparative study of the UK and US laws that Thailand should adopt and implement are as follows:

(1) Direct Controlling Authority having the same roles and responsibilities in term of consumer protection for financial products as that of the UK's FCA, FOS, FSCS and the US's FTC;

(2) Mandatory Provisions of AOA for a limited company relying on Equity Crowdfunding in favor of the crowd investor who later become the minority shareholders, such as, fixing dividends for preferential shares issued to the group of crowd investors, grouping the shareholders separately into the original shareholders' group and the crowd investors' group where the shareholders' meeting requires the participant and vote of the crowd investors' group, and tag-along right for the mutual exit if the original shareholders want to sell their shares;

(3) Minimum Shares Offered to the crowd investors so that the group of crowd investors will have minimum shares with voting rights to summons the shareholders' meeting;

(4) Share Repurchase allowing the company to buy back the shares from the crowd investors as the alternative exit by using the company's profits instead of the original shareholders' pocket to retrieve the shares;

(5) Shareholders' Fiduciary Duties owed by the majority shareholders to the minority shareholders in order to prevent the original shareholders from taking advantage of the crowd investors by utilizing the majority votes on hand; and

(6) Court Claim against Majority Shareholders by the minority shareholders for relevant injunctions or orders under the specific provisions of Act in addition to the claim based on the tort law and contractual laws.

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