

**The Disclosure Regulation of the Issuer under Equity
Crowdfunding: Comparison of JOBS Act and Thai
Notification of the Capital Market Supervisory Board no. Tor
Jor. 21/2562**

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ABSTRACT

The objective of this article is to analyze the disclosure regulation of the issuer under the equity crowdfunding system in the United States of America and Thailand based on the documentary analysis method. A result of this article found that equity crowdfunding in the United States of America is controlled by the JOBS Act, which clearly stipulates the issuer's disclosure obligations, crowdfunding portal's obligation, submission process, and related format throughout the offering period. From the study of Thailand, it is found that Thailand has the legalization of equity crowdfunding called the notification of the Capital Market Supervisory Board Tor Jor. 21/2562, which does not directly stipulate the issuer's disclosure obligation and only obliged the crowdfunding portal to execute a mutual agreement with the issuer for setting a minimum requirement. Also, this notification does not have any standard for disclosed information, the crowdfunding portal's obligation, the submission process, and related formats. Finally, the writer realized that the existing disclosure regulations in Thailand still have loopholes and not truly protect investors. From my point of view, as the writer, the most effective resolution is to revise the existing notification by using the JOBS Act as a guideline. This article recommends the authority to add additional clauses or appendixes of the existing notification on the point of the obligation on the issuer's disclosure obligation, controlling the obligation of the crowdfunding portal and submission process.

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Introduction

The crowdfunding investment is becoming popular and widespread throughout the world due to financial problems and the world economic crisis.¹ Crowdfunding appears as one of the solutions for solving the lack of cash flow in SMEs. In addition, it is a significant role for financing SMEs at their early stages because they have no track record, reputation, customer base and assets that could be used as collateral to receive credit from the financial institutions.

The Equity crowdfunding is the commercial transaction that the issuer shall offer shares to raise their financial capital from the investors via the crowdfunding portal, and the investors shall receive shares in return.²

Equity crowdfunding is one of the most complex procedures for the investment of SMEs. It shall be risky for the investor, especially the non-accredited who have adverse qualifications as to the experiences and knowledge in financing, including their annual income and ability to handling the risks. Thus, the applicable laws concerning equity crowdfunding provide the various protections such as investment limitation and investment knowledge test. In addition, the issuer's disclosure is one of the most important measures for protecting the non-accredited investors.

In United States of America, has specified regulations for equity crowdfunding called "U.S. Jumpstart Our Business Startups Act (JOBS Act)".³

To issue an offering under these regulations, the issuer as one part of the transaction has an obligation to disclose information by filing the standard form which is called "FORM C". The U.S. SEC expects the issuer to submit comprehensive and delicate disclosure by Form C such as information about the related parties, narrative and structure of business and projects, the share price and calculation, the usage of the proceeds amount from offering, offering target amount and deadline date for available offering

¹ Parthena Maria Malouta, Legal Aspects of Crowdfunding, (Greece: International Hellenic University, 2017), p. 1-3.

² Poonhom Sookasang, Legal Measures to Facilitate the Offering of Equity Crowdfunding, (Bangkok: Thammasat University, 2015), p.16.

³ Thomson Reuters, JOBS Act: Crowdfunding Summary, Practical Law Practice Note 6-518-7396 by Practical Law Corporate & Securities (2013).

period and the issuers' financial condition including any significant events. Moreover, to defer fraud, the issuers must proffer their financial statements and income tax return for the specified period. Under certain circumstances, the investors, especially non-accredited investors who have a lack of investment knowledge, shall be genuinely treated and protected.

Thailand has also adopted the equity crowdfunding scheme called the “Notification of the Capital Market Supervisory Board No. Tor Jor. 21/2562 Re: Regulations on Offer for Sale of Securities through Crowdfunding Portals” which is involved with the operation and function of equity crowdfunding in Thailand. This notification does not directly obligate an issuer to disclose their information. Including it does not specify the standard of the information that needs to be published on the system. The crowdfunding portals are a pivotal position in verifying qualified issuers and controlling information disclosure of the issuer by self-regulation without any guideline from SEC. Thai SEC does not directly supervise the quality and quantity of the disclosed information including the standard of disclosure system.⁴Due to the lack of obligations for the issuer, which does not point out the risk factors under the investment, these obligations do not increase the decision-making ability of the investors.

Therefore, Thailand still has problems with disclosure regulation. The first problem is the control and management system, which does not directly control the issuer by governmental regulation. The current disclosure regulation of the issuer is to be controlled by the self-regulation of the crowdfunding portal, which lacks the ability to thoroughly examine issuers. The second problem is the list of issuer’s disclosed information that does not have any standard or guideline from Thai Securities and Exchange Commission. The last problem is the submission process, which is the lack of the sufficiency tracking system. From the mentioned problems, it shall be assumed that non-accredited investors may not receive complete and accurate information that shall be an adverse effect on their decision-making ability. Furthermore, it shall affect the concealed fraud and the confidence of the international perspective and eventually in the long terms of the Thai economic system. In conclusion, the “Notification of the Capital Market Supervisory Board No. Tor Jor. 21/2562 Re: Regulations on Offer for Sale of Securities through Crowdfunding Portals” is not able to truly protect non-accredited investors.

⁴ Thai Securities and Exchange Commission, at <http://capital.sec.or.th/webedu/upload/file-09062015160156866.pdf>, (last visited 13 April 2020).

This article aims and focuses on examining all the features of the disclosure regulation of the issuer by comparing to the equity crowdfunding laws in Thailand and the USA. There may be some legal aspects that Thailand could adopt from the U.S. regulations for improving existing regulations.

Methods

This methodology of this work relies on the documentary research concerning the disclosure regulation of the issuer under equity crowdfunding in Thailand and the United States of America. The primary sources are the Jumpstart Our Business Startups Act (JOBS ACT) and the Notification of the Capital Market Supervisory Board No. Tor Jor. 21/2562. The secondary sources are textbooks, journals, articles, and electronic information.

Literature Review

The United States of America can be considered a model country for having investment regulations and financial transactions in various forms including equity crowdfunding. The financial transactions are subjected to the Securities Act 1933. Even though equity crowdfunding is exempted from some of the restriction of the issuer's duties under the Securities Act 1933, the issuers are still obliged by the mandatory disclosure to file certain information to U.S. SEC and disclose the required information to the related parties, investors, relevant brokers or crowdfunding portal under Title III of the JOBS Act.⁵⁶

The issuers are obliged to submit important information regarding their offering to potential investors, including the U.S. SEC, 21 days before the sale of the security through the crowdfunding platform. It give the period for the investors for reviewing and beware the potential benefits and risks. It's also allows the U.S. SEC to have time to investigate before proceeding with the public offering.

⁵ Steven C. Bradford, The New Federation Crowdfunding Exemption: Promise Unfulfilled, at <http://web.law.columbia.edu/sites/default/files/microsites/capital-markets/files/Promise%20Unfulfilled.pdf>. (2012).

⁶ Dagmar Pasovs, Equity Crowdfunding-where is the industry today?, (Tilburg University Law school, (2016).

Under the mentioned act, the disclosure is the direct obligation of the issuer. The issuer is responsible for disclosing information and the potential risks of raising funds to investors by electronic form. These regulations also specify a list of information to be published by law. Besides, the U.S. SEC may require additional information that may be relevant, and they can inspect the said information. The mentioned information can be categorized into four types, which are general information, financial information, other relevant information, and reporting company status, in the form of soft information and hard information on the full disclosure principle from beginning to the end of the offering. Moreover, the issuer is obliged to notify the case of the amendment and changes of the company immediately. Also, investors can know the current situation of the company. Therefore, the investor will receive accurate and complete information for their consideration and analysis before investing in all financial aspects by this regulation as well.

The crowdfunding portal has the same condition as a brokerage under the Code of Federation Regulation. Besides, the crowdfunding portal must be following the Anti-Money Laundering (AML) laws. The crowdfunding portal plays a role in monitoring, preventing, and reporting financial transactions that are considered money laundering or other financial violations. Therefore, the crowdfunding portal has the power to examine the issuer's disclosure transaction.

In addition, the issuers that make a crowdfunding offer must submit an electronic offering statement file called Form C through the specific system called EDGAR. The issuer shall give the information in the XML filled text box on the EDGAR system. Also, this system includes a question and answer format to make the information to be complete. Furthermore, other related information that is not requested may submit as an attachment to Form C with flexible form. Hence, this system shall be a convenience for The U.S. SEC in monitoring and storing the data.

On the other hand, Thailand adopted the equity crowdfunding scheme from foreign sources to achieve the same purpose of promoting financial support for SMEs. Thailand's equity crowdfunding has generally been regulated by the Securities and Exchange Commission (Thai SEC). In 2019, the Thai SEC issued the new Notification of the Capital Market Supervisory Board No. Tor Jor. 21/2562: The Offering of Securities for Sale through Crowdfunding Portals.⁷ According to clause 31 (5) and 46 (4) of this notification, the crowdfunding portal is responsible for overseeing the issuer's disclosure

⁷Notification of the Capital Market Supervisory Board No. Tor Jor. 21/2562:

obligation that the issuers have to disclose clear, easy to understand, and non-misleading information with an adequate and reliable disclosing system.⁸⁹

Under the mentioned notification, there is not directly specify the disclosure obligation of the issuer. In addition, it does not specify the details of disclosed information, whether in the form of soft information or hard information. Also, this notification stated that the disclosure of issuer information is a direct obligation of the crowdfunding portal to oversee and control the disclosure system in the form of executing a mutual agreement with minimum standard to the issuer. Moreover, the above duties do not have the published rules, the scope of authority and control, and the timeframe for performing the functions of the relevant parties clearly as it should be.

The crowdfunding portal in Thailand is the responsible person for making the disclosure system to be adequate and reliable. Also, they have to make agreements with the issuer with minimum requirements for carrying out appropriate disclosure. In Thailand, there is no special law authorizing them to control and examine the quality and quantity information delivered from an issuer. Therefore, the current status of the crowdfunding portal is just the intermediary position to connect the financial transaction between the issuer and the investors without any examination power or guideline.

Moreover, there is no precise specification regarding the application, form, format, content, detail, including the system for submitting the information. Disclosure of information is only a mutual commitment that is acknowledged between the issuer and the crowdfunding portal but not published to investors or the public for their consideration. Moreover, due to the unclear submission process and format, it may cause data errors and transparency issues in the control and inspection of the mentioned information as well as not being sufficiently protective for investors. At the moment, there are no clear and complete guidelines on the submission process at this point.

By comparing studies with the U.S. fundraising legal system, which is the prototype law of equity crowdfunding, the writer found the deference of the disclosure system between the United States of America and Thailand as follows:

⁸ The Securities and Exchange Act B.E. 2535, Section 4.

⁹Miss PoonhomSookasang, “Legal Measures to Facilitate the offering of Equity Crowdfunding,” Faculty of Laws, Thammasat University, (2015).

	The United States of America	Thailand
Laws concerning the disclosure system	<ul style="list-style-type: none"> • Title III of the Jumpstart Our Business Startup Act (JOBS Act) 	<ul style="list-style-type: none"> • Notification of the Capital Market Supervisory Board No. Tor Jor. 21/2562
The Issuer's Disclosure Obligation	<ul style="list-style-type: none"> • Having the disclosure obligation of the issuer. • Having standard and detail of disclosed information, whether hard and soft information. 	<ul style="list-style-type: none"> • No specify the disclosure obligation of the issuer • No standard for disclosed information
The Submission Process	<ul style="list-style-type: none"> • Having EDGAR system and specific format called Form C 	<ul style="list-style-type: none"> • No clearly and published system and format.
The Disclosure Controlling Obligation of Crowdfunding Portal	<ul style="list-style-type: none"> • Having the same condition as a brokerage under the Code of Federation Regulation. • Following the Anti-Money Laundering (AML) laws. • Having a duty on checking information, and there are clear procedures for examination and enforcement guidelines. 	<ul style="list-style-type: none"> • A crowdfunding portal is a responsible person for controlling the disclosure in the form of mutual agreement with minimum requirements with the issuer. • No duty on checking information, and there are clear procedures for examination and enforcement guidelines.

Figure 1 Summarize the difference of disclosure system between the United States of America and Thailand.

In conclusion, equity crowdfunding in Thailand is controlled by the disclosure regulation that is run by the self-regulation of the crowdfunding portal instead of a government regulation; it does not have a clear and sufficient standard for protecting the non-accredited investors.

Results

This article found that the legislation, standards, practical guideline, and enforcement of the disclosure regulation of the issuer under the equity crowdfunding system in Thailand are still unclear and not sufficient for genuinely protecting investors. When comparison existing disclosure regulations in Thailand with the disclosure of issuer in the United States of America, the writer found the following problems:

1. Issuer's Disclosure Obligation

Under the Notification of the Capital Market Supervisory Board No. Tor Jor. 21/2562 regarding the issuer's disclosure obligation and the nature of the disclosed information has only specified the issuer's qualifications of being a transparent business or project that has no listed shares in the Stock Exchange of Thailand. However, it does not specify the obligation of the issuer and the nature of the issuer's information that must be disclosed. This notification only determines that the disclosed information must be clear, easy to understand, and not misleading with the adequate and reliable disclosure system that is controlled by the crowdfunding portal.

The problem for this matter is that the issuer may reveal only the basic information of the company such as company structure, director's information which does not cause an increase in the ability to make investment decisions of non-accredited investors. There are no guidelines and clear examination criteria for investors or the public to acknowledge. The crowdfunding portal only has an intermediary status which lacks a clear and transparent audit obligation and may not have the ability to examine and control the quality and quantity of the information.

2. The Disclosure Controlling Obligation of the Crowdfunding Portal

Under the Notification of the Capital Market Supervisory Board No. Tor Jor. 21/2562 regarding the status and disclosure controlling obligation of the crowdfunding portal, which contains information regarding the obligation of information control, states that the crowdfunding portal must control a clear, easy to understand, and non-misleading information on the adequate and reliable disclosure system. The status of the crowdfunding portal, which is the responsible person for the disclosure issue, however, cannot examine and verify the accuracy of the issuer's information. On the other hand, the Thai SEC just controls the overall picture but not providing the details of the

information to be released to all investors. The disclosure regulation is self-regulated overseen by the crowdfunding portal, not by the government control of the Thai SEC.

The problem with this is that there are no specifications of rules and guidelines for checking the data of the issuer. The current status of the crowdfunding portal is like an intermediary for transmitting information only. Also, there are currently no guidelines on the ability, obligation, and procedures for reviewing the crowdfunding portals.

3. The Submission Process

Under the Notification of the Capital Market Supervisory Board No. Tor Jor. 21/2562 regarding the submission process, there is no clear statement regarding the rules, conditions, and timing of disclosure, as well as not having any clear disclosing forms. In addition, the problem regarding this matter is that the pending information does not have practical standards and clear audit procedures from the Thai SEC and may cause deficiencies in the accuracy and completeness of the information submitted. This mention shall result in investors, especially non-accredited investors, not receiving full and complete information. Thailand does not have an effective submission process that contains essential items for disclosure like Form C of the U.S., which can be efficiently checked by the U.S. SE

This article concludes that the issuer's disclosure under the Notification of the Capital Market Supervisory Board No. Tor Jor. 21/2562 is not clear enough and is inconsistent with the economic conditions and the rapidly increasing interest in this type of investment. As well as not having the right protection of non-accredited investors due to the present fundraising laws which are considered as one of the tools that help stimulate the economy and is a great way to raise funds for SMEs.

Therefore, the regulations relating to the disclosure of the issuer's information, which is an important measure to protect investors, should have clear regulatory guidelines covering and supporting the investment of non-accredited investors in equity crowdfunding.

Recommendations

From the study and research about the disclosure of issuer information under the equity crowdfunding system in Thailand under the Notification of the Capital Market Supervisory Board No. Tor Jor. 21/2562, the writer suggests to solve the problems with legal development guidelines as follows;

First, the recommendation for issuer's disclosure obligations, The Notification of the Capital Market Supervisory Board No. Tor Jor. 21/2562 should revise the clause by adding the direct disclosure obligation and condition to the issuer, including the details of the information that must be disclosed throughout the offering period.

The issuer's obligation should be clear, accurate, and setting the document standard, which contains the general company information, financial terms, and condition, anticipated business plan, related matters to the offering, the progress of business and expenditure, or other projection that must be disclosed to investors completely.

The writer proposes a disclosure obligation of the issuer by adding new clause on the existing notification as following:

“The issuer must file the specified information with authority and provide to investors, crowdfunding portal, and potential investors. Include the issuer must provide the operation report and financial statement annually.

Also, the writer proposes the format of issuer's information that must be disclosed by adding a new clause on the existing notification as following:

“(A) the issuer general information and status of the business (B) the director, officer and shareholder who hold more than 20% of total shares (C) the issuer's current and future business plan (D) a discussion of the issuer's financial condition statements (E) purpose and intended use of proceeds of the offering (F) target offering amount, deadline, and updates regarding the progress of issuer in meeting the target amount (G) the price and method for determining the price (H) ownership and capital structure (I) related-party transactions (J) other related matters and (K) annual reports of the result of operations and the financial statement.”

Moreover, the writer proposes that the Thai SEC should also issue clear guidelines or mutual commitment for disclosure of the mentioned information and disclose them to investors and the public, enabling investors to acknowledge and finalize this information for increasing their investment ability.

Second, the recommendation for the crowdfunding portal's obligation, the notification should revise the clause by adding obligation and condition for a crowdfunding portal to carry out some due diligence and to control the quality of the information before posting on a network. The writer proposes a preliminary form for determining the obligations and conditions of a crowdfunding portal as following:

"The registered crowdfunding portal must have an obligation to examine and consider the accuracy and completeness of the information which is released by the issuer within the specified period.”

In addition, the Thai SEC should add and release the timeframe and scope of this duty to the crowdfunding portal as well.

Third, the recommendation for the submission process, the Notification of the Capital Market Supervisory Board No. Tor Jor. 21/2562 should add the specific disclosure form, related documents and submitting system similar concept to submission process of the U.S.A., which shall be a guideline and support for providing complete information during the offering period which are offering statement and amendments, the annual report and termination of reporting. Moreover, this system should be convenience for submitting the information of the issuer, receiving and using the information of investors, including the examination ability of related authority.

The writer proposes that filling requirements and form by issuing an appendix or adding the new clause on the existing notification as following:

“(A) Offering statement and amendments: The issuer offering the securities through the crowdfunding system must file with the authority and provide to the investors and relevant crowdfunding portal an offering statement, an amendment to offering statement on the specified period.” And

“(B) Annual report and termination of reporting: The issuer offering the securities through the crowdfunding system must file with the authority and provide to the investors and relevant crowdfunding portal an annual report, amendment to an annual report, and termination of reporting on a specified period.”

Other related matters, such as the format of the submission form or related form(s), should be released by an appendix of the exiting notification for saving time in the rapid economic system.

Also, the authority must have established rules, timelines, including procedures for conducting disclosure reviews. Hence, the issuer's information disclosure is useful, reliable, and sufficient for investors' decisions.

Lastly, the recommendation for the equity crowdfunding system, the Thai SEC should public the practical guidelines to be used all through the offering process, which shall affect all related parties in the transaction. Therefore, it should be taken into consideration to amend and revise some provisions by these proposed recommendations. Finally, it will be an essential tool for promoting the equity crowdfunding system in Thailand more effectively as well as being dependable for long-term investor protection.

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