SECURITIES TOKENS: A STUDY OF SECURITIES AND EXCHANGE LAW OF THAILAND

BY

MS. CHAYANIT JAMORNMAN

AN INDEPENDENT STUDY PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS (BUSINESS LAW)

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Independent Study Paper Title	:	Securities Tokens: A Study of Securities and Exchange Law of Thailand
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ABSTRACT

This article aim to analysis of the problem of securities token regulation in Thailand based on qualitative research. This independent study paper has been prepared with the purpose to study token as securities according to the Securities and Exchange B.E.2535 (The Act of 1992). It focuses on the legal problem by comparing to the model law in the United States of America, and Singapore in order to find out whether Thailand should amend the definition of securities to cover token or not.

The study finds out the problem of the governing the offering token to the public which is not in the purview of the definition of securities under The Act of 1992. A result is offering token to the public are not governed by this law. Token crowd sale is considerably new in Thailand. To date, the law has not been developed to govern token transaction effectively. Promotor, Token platform, and investors of token crowd sale are not within the scope of governance of the Securities and Exchange Act of 1992; nor are they subject to any other regulations. That is to say; the Securities and Exchange Act only regulates transaction that involves with securities as specifically determined. In other words, obligation and requirements under the Securities and Exchange Law do not apply to the token crowd sale transaction and the involving parties. Lack of government supervision in this part leads to many risks through this transaction, for instance, inadequate information to invest in this transaction, money laundering, and drain fund problem.

In order to govern token crowd sale, there should define an exact definition of the token to be in the definition of securities. No one can give an exact definition for the token, and with the token characteristic that can be in various form, for instance,

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Chapter 1

Introduction

1.1 Historical and Background of the Problems

After the post-financial crisis, almost the capital market entities are struggling to deliver returns on equity from their cost of capital. It causes problem for the start-up in seeking fund from the traditional commercial bank. The new trend for solving this problem is crowdfunding which is a replacement or addition to traditional seed capital sources. There are many definitions of crowdfunding, but there is no generally accepted definition to define the meaning of crowdfunding. Crowdfunding can be simply explained as an open call, primarily through the internet, for the provision of financial resources either in the form of donation or in exchange for some form of reward or voting rights to support initiatives for specific purposes. [1] For raising fund via crowdfunding, it has three roles to fulfill its effort. First, there is the intermediary who serves as a matchmaker between promoters and funders, also known as the crowdfunding platform. Next, there are the fundraisers or entrepreneurs who are raise fund by getting an accession to the market via a crowdfunding platform. Finally, some investors decided to support the project with the expectation of the profit.[2]

Initial coin offering (ICO) or Token crowd sale is one kind of the crowdfunding method to raise a fund via Blockchain through a project or venture by creating and selling its Tokens in exchange for cryptocurrencies or liquid value such as Bitcoin or Ethereum.[3] This revolution is dealing with technology, and it changed the fundamental

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[1] Richard Harrison, Crowdfunding and Entrepreneurial Finance, 1st ed. (United Kingdom: Routledge, 2016), p.56.

[2] Ibid., p.57.

[3] Lawrence Lundy and Jamie Burke and Aron van Ammers, "All You Need to Know About Initial Coin Offerings," Journal of Blockchain, at http://www.the-blockchain.com/docs/Initial_Coin_Offerings_Outlier_Ventures_Research.pdf, (last visited 28 August 2017).

of the traditional financial business, it is a quite beneficial to the start-up to seek fund because this kind of technology has centered on transparency, security, immunity, speed, and potential cost savings.[4]

Token crowd sale can be in various forms. For instance, in the donation model which provide nothing to the contributors even a return on their original investment or it can be in a reward model which offers the contributor a token in return for their funding, or it can be in another form as specified by the fundraiser. As mentioned before the key benefits of this method is to provide a liquidity. So this method was being focused on a new way for a start-up business or escrow agent and their characteristics seem to be a hybrid of the traditional methods of fundraising.

Token crowd sale is looks like the Initial Public Offering (IPO) which is governed by the Securities and Exchange Act B.E.2535 (1992) in the scheme that firstly, during token crowd sale offering, the investors can exchange their tokens or cryptocurrency for shares in a particular scheme; secondly, it refers to a project which is backed by the public for the first time; lastly, it has an authoritative guide which is similarity to prospectuses which called "white paper" which shall be published by the creators for the investors to read all information about their project and make decision to invest in such a project.

As mentioned above this kind of method gives a lot of benefit to the business, so there must be a regulation or a law to govern and monitor it.

In the United States of America, the securities transaction is operating under a two-tier (federal and state) system of securities regulation.[5] Any offering or sale of securities must be governed and complied with both federal law and the laws of each state. The public offering and sale of securities must be registered with the US Securities and Exchange Commission(SEC) under the Securities Act of 1933 (The Act of 1933) and the Securities and Exchange Act of 1934 (The Act of 1934) and must also register under the securities law of each state. The SEC has a responsibility to

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[4] Kullarat Phongsathaporn, "Key Legal Issues to Riding the FinTech Boom," The Next Fintech Trends, Thammasat University (Taphrachan) (15 August 2017): 3.

[5] World Law Group, International Securities Law Handbook, 3rd ed. (Netherlands: Kluwer Law International, 2009), p.661.

monitor only all federal securities law not including state law which has its own department.

Recently, there is an awareness about unregulated token which is arising from Decentralized Autonomous Organization (DAO) case.

DAO is an organization which runs their process by computer code and uses blockchain technology to facilitate the offer and sale of DAO tokens to raise capital, but DAO had run their operation only a few months then it was hacked which means that the system allowed the hacker to drain funds. It caused an effect to the investors who invests in this project.

After DAO case, On 25 July 2017, The Securities and Exchange Commission (SEC) issued a report of the investigation which is based on the Howey test theory. After considered such theory SEC had the opinion that tokens offered and sold by a virtual organization, and having complied with elements provided by the law, then it shall constitute as securities. It should be subjected to the federal securities laws rarely The Act of 1933 and The Act of 1934.[6]

In Singapore, Singapore's central bank, the Monetary Authority of Singapore (MAS) which has a duty to shape Singapore's financial industry by overseeing all financial institution in Singapore, for instance, commercial banks, capital market intermediaries, financial advisor and stock exchange[7] is the regulatory authority of securities law in Singapore.

MAS has a power to issue regulations to govern and monitor the securities market in Singapore which is the Securities and Futures Act (SFA) and also empowered to issue non-statutory rules in the form of codes, guidelines, policy statements, practice notes and no-action letters.[8]

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[6] U.S. Securities and Exchange Commission, Investor Bulletin: Initial coin offerings, at http://www.sec.gov/oiea/ investor-alerts-and-bulletins/ib_coinofferings, (last visited 22 September 2017).

[7] MAS clarifies regulatory position on the offer of digital tokens in Singapore, at http://www.mas.gov.sg/News-and-Publications/Media-Releases/2017/MAS-clarifies-regulatory-position-on-the-offer-of-digital-tokens-in-Singapore.aspx, (last visited 20 September 2017).

[8] World Law Group, op.cit., p.507.

Since 1st August 2017 onward, MAS has released the regulatory position on the Tokens that the issuer of Token in Singapore shall be regulated by MAS if the digital tokens constitute products regulated under SFA. The point that requires clarification of token as securities is that MAS has observed the function of tokens which has evolved beyond just being a virtual currency. For instance, tokens may represent ownership or a security interest over an issuer's assets or property. So if a token represents ownership interests in an issuer's assets or property or a debt obligation of the issuer, it may subject the issuer to the requirements of SFA.

The token which is qualified as securities in Singapore has fallen within the definition of securities in the SFA. The result is that the token issuer shall not only be required to issue a prospectus but also required to comply with all applicable requirements under the SFA.

In Thailand, the regulatory authority on securities law is Securities Exchange Commission (SEC). SEC has the power to monitor and govern the securities market in Thailand and also has the power to issue a notification to specify that which instruments are the security or not.

The Thai Securities and Exchange Act of 1992 (The Act of 1992) section 4 defines a "security" by listing financial instrument which includes equity instrument and debt instrument for instance stock, bonds, debentures, notes, and transferable shares and also includes any other instruments as specified by SEC. This provision indicated that if such instrument is specified as security, the transactions which involved securities are subject to the registration, mandatory disclosure, and intermediaries in securities transactions are subjected to SEC registration, rules, and supervision.

Nowadays, Token is a new trend to raise fund, and it has no legal status in Thailand because the definition of security law in Thailand does not count it as security. It means that it is unregulated and unmonitored by the government so it can lead an effect by having raised fears of a potential bubble to the public who may suffer from damages that occurred from this kind of transactions. This is a big problem for the country because the definition under the Act of 1992 doesn't cover Token as securities, so it means that the SEC does not govern token.

As mentioned that token's characteristic is similar to those of securities, for instance, it has a right to profit made by company or project, right to vote and right to acquire equity. So this research paper shall focus on a strategy whether Thailand

should amend the definition of securities to cover token or not and how does the country regulated token to the existing securities law to seek the appropriate ways to solve this problem raised by this research.

1.2 Hypothesis of the Study

At present token is not categorized as securities or money or asset which is out of the scope governance of the existing of The Securities and Exchange Act 1992 in Thailand. The result of this situation is the SEC, or the other government authorities are not empowered to enforce any provisions of the existing Securities Law. It can be a channel to raise fund illegally. In this scenario, the government have to protect minor investor or retail investor who are involved with token transactions. Therefore, the Thai government should amend The Securities and Exchange Act 1992 to add token as securities to the Act.

1.3 Objectives of the Study

1.3.1 To analyze the status of the Token under the Securities and Exchange Act 1992 of Thailand by analogizing with the Token legal status on The Securities and Exchange Act of 1933, The Securities Exchange Act of 1934 of the United States of America and the Securities and Futures Act of Singapore.

1.3.2 To understand the mechanism of raising fund by Token as it differs from the traditional transaction.

1.3.3 To study problems on using Token to raise fund by analogizing with the DAO case in the United States of America.

1.3.4 To propose the guidelines for the development of the Securities and Exchange Act 1992

1.4 Study of Methodology

This Independent Study is based on qualitative research method through an analysis of documents, obtaining information from both domestic and globalized

databases. All of the research information was from the analysis of many books, article and laws which are used in this research paper are the Thai Securities and Exchange Act 1992, The Securities and Exchange Act of 1933, The Securities Exchange Act of 1934 of United States of America and The Securities and Futures Act of Singapore.

1.5 Scope of the Study

This matter is being taken from 20th August 2017 until 10th March 2018. This research is meant to study only on the law of securities and exchange as mentioned in the title "Securities Tokens: A Study of Securities and Exchange Law of Thailand". In order to analyze the legal status of the Token and to understand this trend of funds raising. It shall also show the comparison between the domestic and foreign law. It shall focus on the issues of the Token to find out the appropriate way to govern it in Thailand.

1.6 Expectation of the Study

1.6.1 To know the legal status of the Token under the law of securities and exchange

1.6.2 To know this hybrid trend of raising fund where the Token is involved.

1.6.3 To know the problems of this kind of fundraising and then adapted the proper way for the solution.

1.6.4 To provide a guideline to ensure effectiveness of law and regulation in Thailand.

Chapter 2

Token and Securities and Exchange Law in Thailand

Token crowd sale is a new kind of financial transaction model which runs its process via distributed ledger or blockchain. This financial model becomes more popular as a new form of both investment opportunity and source of fund because this method can fill gaps and can fix the problems of entrepreneurs who have failed to raise capital through traditional source of fund because of first, most start-ups do not qualified under traditional capital financing since they are too small and also lack potentiality to keep exist and Thirdly, there are too few venture capitalists versus the masses of start-ups who need money.[9]

The prosperity of this transaction makes financial transaction to more complicated than before. And this kind of transaction becomes an issue because the regulatory structure of this transaction has developed without regard on technology, and in contrast, technology continues to develop without regard to the regulatory structure.

In Thailand, a token transaction is difficult to detect at present because the existing laws and regulations are obsoleted and incompatible with a rapidly changing environment. As a result, the existing regulations cannot be enforced effectively. While, in the foreign country, the new legal measures have been established to cover this situation and to reduce this transaction risk.

This chapter is structured into four parts. After a brief review of the token crowd sale market, the second part shall define the concept of token crowd sale, and it also shows how their transaction arrangements. Third part shall focus on the rationale of the legal concept of a token as securities with the purpose to implement token transaction as securities. Last part is a study on securities law in Thailand which governed the securities in Thailand and find out the proper regulation to govern Token crowd sale which is similar to securities sale and then this Chapter shall end by offering certain conclusions.

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[9] Richard Harrison, op.cit., p.54.

2.1 Definition of Token

Token crowd sale or initial coin offering is a new form of digital currency that involve the sale of a cryptocurrency "token" in return for which a purchaser might receive anything ranging from simple access to a future service once it is launched to rights in the profits generated by the venture.

This kind of transaction is a new trend to raise capital fund. To know the framework of this transaction; one have to consider a general overview by starting with the definition of a token. No one can give an exact definition of the token, but one can say that Token or virtual currency is a digital representation of value that can be digitally traded and functions as a medium of exchange, unit of account or store of value. Moreover, in some case, a token can represent other rights and can be securities which may not be lawfully sold without registration with the Securities Exchange Commission.[10]

2.2 Conceptualized Investment Model of Token

The concept of token crowd sale is similar to the one by which investors holds dollar currency in their pockets. Ordinary people may think that this kind of holding is nothing more than a means for paying in exchange for goods and services. But the truth is holding such currency is one kind of investment because it has a value if compared with other foreign currencies and with the goods and services that can be purchased more with the same amount of dollars. The value of a currency is based on the countless factors of the country, for instance, an interest rate levels, government policy, trade deficits with other countries.

Holding Token is also an investment. But instead of investment in the country's economy, it is an investment in the network and technology behind. If the token platform has provided valuable services or valuable product, the investor may increasingly invest to obtain such token in order to join the network. As the result, the

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[10] CCH Incorporated, "Securities/Section20/Broker-dealer," Journal of Banking and Finance 9 (September 2017): 1.

price of token would be expected to rise like monetary currency, and the one who holds token would see their investment gain in value.

Moreover, this kind of transaction is not only similar to an investment in a traditional currency but also more similar with an equity investment in a company. Many of tokens were initially distributed to an investor through crowd sale which is a similar to an initial public offering (IPO). As a result, the token market looks similarity to the market for traditional securities.

An essential element that makes token similar to securities is the initially distributed token to the public. Token crowd sale is a transaction that has introduced the idea of initially distributing tokens to investors who one a token holders. Token holders receives token in exchange for verifying the validity transactions on the network or platform which has an ensured function that no one is double spending their tokens. The purpose of token crowd sale campaign can be in many schemes, but it typically has a goal to raise capital funds, initially distribute tokens fairly amongst the public, and offering a new token at a perceived discount well-below its potential future value. As a result, this crowd sale share is similarities to traditional securities offering where investors purchase stock with expected interest on the future success of the company.

2.3 Characteristic of Token

To determine what is precisely tokens, one shall continue to look at "how the token works" because with the answer on its function may help to accomplish and classify token activity and this question will always be more significant to the regulatory policy than the "what is it" question.[11]

This part shall deal with four characteristics of a token. To start with the description of token characteristic as a commodity and then follow with the description of token which has functioned as an investment instrument. Another part is the description of their character which is composed of three elements like a virtual currency. The last part is about token characteristic which shall have legal status as securities.

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[11]Peter Van Valkenburgh, Framework for Securities Regulation of Cryptocurrencies, at http:// coincenter.org/2016/01/securities-framework/, (last visited 19 November 2017).

2.3.1 Token as a Commodity

In some sense, the root of tokens is scarce items that can be exchanged and may have value despite the facts that it has no institutional issuer or legally-promised redemption. In this sense, tokens are something like valuable commodities, for instance, gold or platinum.

According to Commodity Exchange Act 2015 (CEA), Commodity means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions (as provided by section 13–1 of this title) and motion picture box office receipts (or any index, measure, value, or data related to such receipts), and all services, rights, and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.[12]

From the definition that provided by the law, Commodity defines as any item that accommodates our physical wants and needs, and one of these physical wants is the need for a store of value.[13] By this definition, a token can be a commodity.

The U.S. Commodity Futures Trading Commission (CFTC) already ruled that bitcoin and other cryptocurrencies should be classified as commodities under the CEA. However, the CFTC has not yet issued an official ruling on ICO tokens.

2.3.2 Token as an Investment Instrument

In currently financial services regulatory structure is divided into two broad categories which are traditional banking and securities trading services. And in such trading services, the transaction is involved with the instrument which called "an investment instrument."

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[12] section 7 U.S.C. 1a (4) Commodity Exchange Act (CEA) 2015.

[13] Nicholas Godlove, "Regulatory overview of virtual currency," Journal of Law and Technology 71 (January 2014): 12.

In general, an investment instrument is a document that use with the purpose to acquire equity of capital or to loan capital for instance share certificate, promissory note, and bond. For these purposes, Token can be sold as an investment instrument.

2.3.3 Token as a Virtual Currency

It is important to note that Token's characteristic not only can be commodities and investment instrument but also it can be a virtual currency.

Virtual currency can be defined as a type of unregulated, digital money, which is not issued by the central authority, for instance, central bank but it was issued and usually controlled by its developers, and used and accepted among the members of a specific virtual community. [14] Virtual currency can be defined as a typed of unregulated digital money which is issued by its developer, and it was accepted only among their member in a specific virtual community.

Virtual currency can be defined classified into three types;

1. Closed virtual currency or Virtual currency which is used in an online game
2. Virtual currency schemes which can use to buy only virtual goods and services.
3. Virtual currency which acts like another convertible currency, in this sense, it can use to buy virtual goods and services, but also to purchase real goods and services.

In the history, money was something or an object that has an intrinsic value, or it's called "commodity money" which can be used for exchange with another thing, for instance, gold, silver. Later that, it turned into a piece of paper or "commodity-backed" which is not intrinsically value but can use in exchanged for a fixed quantity of the underlying commodity. In the modern economy, it typically bases on "fiat" currency which similar to a piece of paper but it is different for fiat currency is issued by a central authority and people have widely accepted it in exchange for goods and services because they trust in the central authority.

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[14] European Central Bank, Virtual Currency scheme 2013, p.6, at http://www.ecb.europa.eu, (last visited 2 December 2017).

As mentioned above, Money has three elements; Firstly, it is a medium of exchange, and it is used as an intermediary in a trading transaction to avoid inconveniences between the two parties. Secondly, it is a standard unit for the measurement of value or costs of goods and services. Lastly, it can be saved and stored value in the future. Moreover, in the fiat money system, it shall be composed of trust which is the crucial element for people in this system.

Nowadays, the number of people who access and use the internet has grown dramatically. The impact has been significant not only to the change of social behavior but also effected the virtual community. With the essence that virtual currency is composed with the functions as a medium of exchange, unit of account and store of value and it was being reliable and safe then a virtual currency is being accepted as money.

After concluded all, Token's characteristic is composed of three functions which are: First, the investor can purchase a token for accession to the platform to acquire some product or services which provided by the promoter and to expect the profit because such token can be traded in the secondary market. Second, it can be a unit of account, but at present, it has no legal status. Last, a token can be something that stores a value in the future, but it depends on each project that created by the promoter. In this sense, a token can be a virtual currency.

2.3.4 Token as Securities

The token transaction is effected to the pattern of the traditional financial transaction, and this kind of transaction is more complicated than before because the regulatory structure of this transaction has developed without any regard to technology, and in contrast, technology is continuing to develop without giving any regard to the regulatory structure. With this kind of fanning out, it needs to structure the token's characteristic to give it a legal status.

With the process of token crowd sale transaction which is similar to an initial public offering (IPO), in the sense that both are in the process that companies raise capital, while an ICO is an investment that gives the investor a virtual currency or commodity which known as a token in return for an investment. Although the characteristic of ICOs and IPOs has certain similarities, it has some differences as follows:

Table 1: The difference between IPOs and ICOs[15]

Feature	IPOs	ICOs
1. Ownership	Ownership of the company based on the number of shares.	Only a right to participate in each project.
2. Decision making Authority	CEO and Board of director	Decentralized
3. An outline for the investor	Prospectus	White paper
4. Fund raising	One time sale with multiple investor	Multiple rounds of fund raising
5. Legal status	Regulated by securities law	Non-regulation

In the United States of America, Token crowd sale is a new kind of transaction, and it becomes popular for the start-up business to raise capital fund, but the problem arises due to the third party who are not involved in this transaction (or hacker), can has access the Token platform to drain fund. Where this problem arises, because Token has no legal status, the result of having no legal protection for this kind of transaction, so it effected the investor who invests in this transaction.

The Securities and Exchange Commission (SEC) issued a report of the investigation which is bases on the Howey test theory. After considered with such theory SEC saying that tokens offered and sold by a virtual organization were securities and it is subject to the federal securities laws which are The Act of 1933 and The Act of 1934.

2.4 Token Market

The aim is to study the token market. After a brief review of the Token market then description shall be given about how the blockchain technology works and follow with how token market work.

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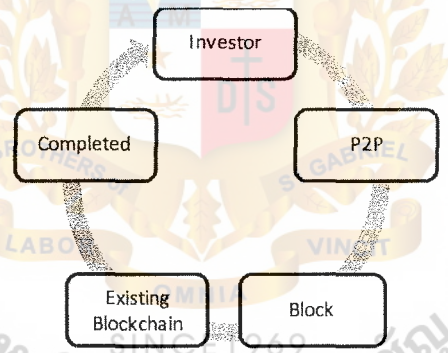
[15] Bob Mason, what is an ICOs and how does it work?, at https://www.fxempire.com/education/article/ico-initial-coin-offering-work-418446#what%20is%20ico., (last visited 19 December 2017).

The token market has been described as a new business construct that allows an organization is launching a business based on a distributed ledger or blockchain technology to raise funds without the regulatory constraints and requirement. This market is uniquely enabled by the combination of the internet and token, and it is a new way to raise money that looks like a normal company issues and sell their stock to raise capital, but in this market, there is no central controlling company.

Token crowd sale is to run their process through the technology which is blockchain. A blockchain technology is an electronically distributed ledger which similar to a stock ledger by maintains various participants in a network of computers.[16] For their process, it uses cryptography to process and verify transaction on the ledger which can call that Token's network software is an open source that can be duplicated and modified without seeking a license from the copyright holder.

Figure 1: How Blockchain works[17]



From above picture, blockchain process is started by

1. The investor requests their transaction then their request is broadcast to P2P network which is consisting of "nodes." The nodes shall validate the

[16] Gregory J. Nowak and Joseph C., Blockchain and Initial Coin Offerings: SEC provides First U.S. Securities Law Guidance, at https://corpgov.law.harvard.edu/2017/08/09/blockchain-and-initial-coin-offerings-sec-provides-first-u-s-securities-law-guidance/, (last visited 19 November 2017).

[17] Ameer Rosic, What is Blockchain Technology? A step by step guide for beginners, at https://blockgeeks.com/guides/what-is-blockchain-technology/, (last visited 10 December 2017).

transaction and in this process, the investor's status using known algorithms. A verified transaction can involve with token, cryptocurrency, contracts, records or even other information.

2. Once verified, such transaction shall combine with other transaction by creating a new block of such data for the ledger. A block contained in the header references to the previous block and a group of transactions. Each link in the blockchain creates a secure and independent chain.

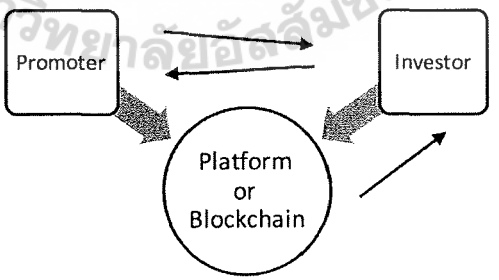
3. The new block then added to the existing blockchain, in a way permanently and unalterable.

4. The transaction in a blockchain is the completed.

From the above mentioned process, Token' characteristic looks like a medium of exchange which created and stored electronically in the blockchain by using encryption techniques to control the creation of units and to verify the transaction. And In this process, the token has no intrinsic value and has no physical form which means it exists only in the network.

Moreover, with this specialized characteristic of the blockchain, it is a kind of technology that has centers on transparency, security, immunity, speed, and potential cost savings.

Figure 2: How Token Market Works



The transaction in the token market shall start by

1. The promoter who is the one who sells token in the market, the promoter shall tell the second participant who is the investor that

- The capital raised from the sales will be used to fund development in the digital platform by using software or other projects or

- Purchasing their tokens is one kind of investment with the investor can invest with the expectation of a return of such investment or
- To participate in a share of the profits which provided by the project.

2. The investor who purchased such token may use such token to accede the platform, use the software, or otherwise participate in the project.

In the process to acquire Tokens, the purchaser shall sign a transaction message which references to past transactions that shall fund the new operation. To explain this, sending input transactions, must be larger or in total than the desired output transaction, and any excess is specified to be returned to the same user as change. As a result, the full transaction message shall reference for all past deals that used as inputs, all output address and amounts sent to each output. With this working process, it means that both the address is signed with the sender's private key which can prove that he or she was the recipient of referenced input transactions. Then, this signed message shall be broadcasted to the network, and if the signatures are valid, then all operations shall add to the blockchain.

2.4.1 The Intermediaries in Token Transaction

The token transaction has to use distributed ledger or blockchain technology which is processing by the promoters who are selling tokens to the purchaser by telling that capital which raised from this sale will be used to develop platform, software or invest in other projects. And the purchaser can use fiat currency or virtual currency to purchase such token to use such token to access the platform, use the software or other investment projects.

Moreover, the promoter can lead the purchaser to buy such token to expect a return on their investment because token can be resold to others in a secondary market or to participate in the project by holding token.

Token crowd sale is one kind of fundraising transaction, and it can be defined as an open call through the internet with the provision of financial resources either in the form of donation or exchange for some reward or even can be exchanged for the voting right to support a project that provided by the promoter.

For fulfilling this kind of transaction, there are always has three roles in a token effort.

First, there is the intermediaries or internet platform (blockchain) which can be in the form of digital marketplace or website which has a duty as a matchmaker between the promoters and investors.

Second, there is a promoter or a virtual organization or other capital raising entity which is an organization embodied in computer code and executed on a distributed ledger or blockchain and they use "code" to serve a function in their organization automatically.[18]

Finally, the last participation in this transaction is the investors or purchasers who had to decide to support the project by purchase token in an exchange with their voting right or their expectation of some profit.

2.4.2 The Regulation on Public Offering

In token crowd sale, there is no regulation on public offering because the law does not regulate token crowd sale. A result is there is no law to require promoter to provide and disclose information adequately, so investor has no protection in this transaction.

The token transaction revolves around "white paper" which is a document that lays out facts about the distributed application which must to describe how the tokens shall work[19] and provide some information about their process for investors to make decision.

The white paper is similar to "prospectus" in the securities transaction, but it differs in the scheme that there is no law to regulate it, so the promotors in token crowd sale can put in any information without the regulation of the law. Most token crowd sale shall put this information in their white paper which are a problem,

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[18] CCH Incorporated, op.cit., p.2.

[19] Rob May, scrap the white paper: How to evaluate tokens and blockchain, at https://www.coindesk.com/scrap-white-paper-evaluate-tokens-blockchains/, (last visited 19 February 2018).

solution and product, token implementation (how token works with the product), and token development and plan.[20]

Regarding with unregulated transaction, there is no public regulation for the promotor to comply with the public offering. The result is white paper is often similar to marketing document which stands for luring investors to invest in project unlike prospectus that stands for protecting investors.

2.5 Legal Concept of Token as Securities

As mentioned above, token is something that can be in various form which is up to the transaction, for instance, valuable commodities or virtual currency or digital money in the scheme that it can use as a medium of exchange.

In general, a token is an instrument which can be a share in some cases because their character has a differentiate. A token can serve as a medium of content or even transferable on a blockchain, whereas a share has a legally specific purpose, content, and features. To be specific what is exactly token, it is up to the creator to define what is the content of token.

A Token can divide into two groups[21]:

1. value and utility, in this group value tokens are used to represent a financial value and can be easily transferable, but in this sense, tokens are not links to a specific product or services

2. Utility tokens, in this group, it can be used in connection with a particular product or services via blockchain. In this group, one could not directly have far access to the user by using a value token, but a compatible utility token is required.

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[20] Andrew J. Chapin, what to look for in an ICO white paper, at https://hackernoon.com/what-to-look-for-in-an-ico-white-paper-successful-token-54eba3787139, (last visited 20 February 2018).

[21] Nejc Novak, A call for legal, ethical and sustainable token offering, at https://medium.comb/@nejcnovaklaw/a-call-for-legal-ethical-and-sustainable-token-offerings-4d7cd16c64ac, (last visited 10 December 2017).

Taking into account that, A token can represent many things, but in this part, certain jurisdictions, for instance, United States of America and Singapore consider token as securities.

Start with a legal concept of a token as securities which is to ensure that the securities market will operate efficiently, the legal principles on securities is base on the two primary goals which are first, to protect the consumer or an ordinary user of the services to be safe and sound. And another goal is to protect the securities market by creating a market where the participants had equal access to the same information and subjected to the same rules.

The securities market differs from another kind of investment because the securities have no intrinsic value in themselves, it only has a value that depends on how much other people are willing to pay for it. Because of this kind of distinctive features of securities, there must be a peculiar regulation on such instrument which is deemed as securities.

Get legal protection under securities law; one must consider that which transaction is involved with security. The boundaries of securities law are defined by the word "securities" which means that any trade that included with securities are subjected to registration, disclosure, and also fall within both civil and criminal liability.

And it also specifies the intermediaries in securities transaction shall be subject to the securities law.

As in the United States of America is the country that have given the broadest definition to securities, and the securities transaction is subjected to both federal law and each state of law. To know that which transaction is subjected to the securities law, it had to know what is constitutes as security by making study on the legal principles on securities as shall be stated below.

2.5.1 The Definition of Securities

In the United States of America, the definition of securities exists in the two mains federal laws which are The Securities Act of 1933 (the Act of 1933), The Securities and Exchange Act of 1934 (the Act of 1934), and not also in state securities law (blue sky law). Moreover, it exists in the supreme court precedent. The provisions of the federal securities laws shall apply only to the transaction of "securities."

The term securities means any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a ''security'', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.[22]

In general, the definition of securities involves with three different types of instruments.

First, it is an instrument that issued for non-investment which is a denominate stock or notes. In this type, a share of stock always is deemed as security. In contrast with the stock, some kinds of notes should not be deemed as securities, for instance, a note secured by a mortgage on the immovable property, notes that secured by account receivable and notes which is an evidence of loan given by the traditional commercial bank.

Second, it is particular types of instrument which issued by financial institutions which are called financial instruments, for instance, life insurance policies, certification of deposit in commercial bank and loan association. In this type of instruments, although they are issued by financial institutions, they are exempted from the registration provisions of the federal securities law.[23]

Last, it is an instrument evidencing investment in profit-seeking undertakings which are not in the form of notes or stock or other traditional securities which called investment contract. This type is the hardest one to determine whether this investment scheme is a type of securities or not. The supreme court has used an investment contract to interpret this type of instrument.

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[22] Section 2(1)(a) The Securities Act of1933 (December 4 2015).

[23] Section 3(a)(2),(5),(8) The Securities Exchange Act of 1933 (August 10 2012).

2.5.2 Testing for "securities"

The federal securities law already defined what constitutes as security by listing financial instruments for instance stock, bond, debentures, note and transferable shares. And it also included generic catch-all terms, for instance, investment contract, certificates of interests in profit-sharing agreement and evidence of indebtedness.[24]

In deciding what instruments have been held to be securities within the definition of federal or state securities statutes. The statutory language is expansive and has been interpreted widely causing to the courts to provide predictable guidelines.

To find a solution for this struggling for an appropriate definition of what is constitutes security, the courts have used various test for determining whether such instrument is a security or not. To determine what is constituted as securities, there are some statute which are developed from the interpretation of the phrase "investment contract" which are as follows:

1. Investment Contract (Howey Test)

In the historical background which has a problem about the struggling with an appropriate definition of securities, the supreme court, federal and state courts have realized of the fact that whether the particularity investment or instrument involved is the one that needs the investor protection of the federal securities laws.

The court has interpreted the definition with the statutory phrase of "investment contract" which comes from the development of judicial interpretation. An Investment contract is a test that is uses for determining which instrument should be qualified as securities and this test focuses on the investor's reliance on the promoter's efforts. This test is came from the supreme court judgement in the case of "Securities and Exchange Commission v. W.J. Howey Co.," The test which is now known as "Howey test."

Moreover, the phrase of investment also appears in section 2(a) (1) of the Act of 1933 and on section 3 (a) (10) of the Act of 1934 both include an "investment contract" in the list of instruments which are considered as securities.

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[24] Section 3(a) (10) The Securities Exchange Act of 1934 (August 10 2012).

The investment contract is a legal term without commercial significance[25] and it is an important term that uses for determining the general applicability of instrument that which one should consider as securities under federal securities law.

For the fact of the Howey case, it is about the promotion of small lots of fruit trees where the offeror offered a management contract by affiliating the issuer to pick and market the fruit with the profit inuring to the investor.

The legal issue, in this case, is when does an instrument fall within the definition of securities. The supreme court did not present any single determining factor in defining what securities are but look in the whole package of the investment which included the way that the investment is marked to the investor. It is the crucial significant decision which leads to the conclusion that what is being offered may not be as important as how it is being presented.

According to this case, the supreme court of justice had revealed the judge-made boundaries of the definition of securities by focusing on the question that when does an instrument fall within the principle of investment contract (Howey test). The Howey test had analysis forth broad guidelines that when securities are found to exist, so there are four guidelines to be considered.

First, it is an investment which means the investment that can be in cash or non-cash. In this factor, the supreme court has decided for the term of "investor" which means the one who invests his money, so the subsequence of the Howey case has taken the position that not only the investment in services but also in the property as opposed to money is sufficient.

Second, it is common enterprise; this factor requirement is focused on the question of the extent to which the success of the investor's interest rises and falls with others involved in the enterprises. From this factor, there are two concepts which are firstly, the concept that use to describe the interest among the investor which called "horizontal commonality" and secondly, it is the concept that use to describe the relationship not among the various investors but instead on the connection between the investor and the promoter who shares a risk with their investor which

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[25] Alan R. Palmiter, Securities Regulation, 4th ed. (New York: Aspen Publishers, 2008), p.43.

called "vertically commonality". Under these two concepts, it surely that horizontal commonality is satisfied with the common enterprise under the Howey test, but the court interpreted that whether vertically commonality will be satisfied.

Third, it is the expectation of the return on their investment, and this performance whether fixed or non-fixed must be an essential motivation for the investment.

Fourth, it is efforts to other which mean the profit which must be derived from the efforts of others[26] which mean that the efforts of the others investor must be significant to the success. Under this factor, if the effort of the others is de minimis in assuring the success of the investment, then the Howey test will not be satisfied.

2. Risk Capital Test

Risk capital test was found in the Corporate Securities Law of 1968 by the California Supreme Court of the United States of America. The Corporate Securities Law regulates all offers and sales of securities in California. All securities offered or sold must be either qualified with the Commissioner of Corporations or exempted from registration by a specific Rule of the Commissioner or specific law. The court is using risk capital test when their state's blue sky laws apply to unorthodox transactions.[27]

Although the risk capital test is in different terminology with the Howey test, their aims are quite the same. The different is under the risk capital analysis, the second factor of the Howey test which is "common enterprise" is not necessary to find out. The risk capital test focuses on the extent that the dependency upon others for the success of an enterprise.

Under this test, the court formulated a new test which is considered by first, fundraising is being for business. Second, the transaction is offered indiscriminately to the public. Third, it is about the investor which their power has no substantial effect on the success of their business, but their money has because it is inadequately secured.

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[26] Thomas L. Hazen, The Law of Securities Regulation, 6th ed. (U.S.A.: West Publishing Co., 2006), p.41.

[27] Alan R. Palmiter, op.cit., p.45.

This theory has arises from the landmark case which is "Silver Hills Country Club v. Sobieski." The legal issue, in this case, is whether a country club membership is securities or not?

In this case, the promoters of the Silver Hills Country Club had a plan to run their business, so they established a plan by selling "charter memberships" to finance the club. The price of such membership is to increase as additional facilities which are added to the country club. Moreover, apart from the cost of a membership, a member had to pay monthly dues which are in the amount of fixed at the time he or she purchases for membership. The purchase of a membership in a country club acquires a contractual right to use club facilities which cannot revoke except for his misbehavior or his failure to pay dues. With the buying of this member club, the members have no right in the income, assets of the club, sharing in the profits or even didn't get ownership of the club, they only get the right to use the club facilities. The membership of the club is transferable but only to the one approved by the board of director of the country club, so the membership of the country club is defined as an irrevocable right which is qualified as a beneficial interest which is in the definition of securities in section 25008 California Corporations Code 1947.[28]

In other states, the sale of membership in which member has no interest in the asset or profits, it will not be defined as securities. But in section 25008, the law describes it as securities broadly to protect the public.

As mentioned above, considering the definition of securities under the Howey test which is the federal definition, this membership would not be defined as securities because the member of the club only gets the benefit of membership not included a financial return.

But under the capital risk test, the court considered by looking through the substance to protect the public, so the court found that the investor or the

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[28] Section 25008 California Corporation Code 1947, "Security" includes all of the following:

"(a) Any stock, including treasury stock; any certificate of interest or participation; any certificate of interest in a profit-sharing agreement; any certificate of interest in an oil, gas, or mining title or lease; any transferable share, investment contract, or beneficial interest in title to property, profits, or earnings.

member of this club were risking their capital because they are expecting in receiving the benefit of club membership which is controlled by the issuer of the membership. With this kind of the court consideration, the definition of securities is emphasized by different components of the test.

However, there is some case that The court uses risk capital test to consider and the court decides that it was not in the scope of securities under section 25019, California Corporations Code 1947. [29]

In the case of "Hamilton Jewelers v. Department of Corporations". Hamilton operates a retail jewelry business and advertising their business by the newspaper. Which stated that Hamilton offered the public to invest in their business by purchasing diamonds at $500, and if anytime within three year periods, the one who buys such diamond elect to return, Hamilton still return the full purchase price plus 5% interest which calculated daily from the date of purchasing.

The definition of "securities" in section 25019 of the California Corporations Code is from various sources, for instance, section 2 of the Act of 1933 and section 25008 of the State Corporation Code. They all include the terms "evidence of indebtedness and investment contract" within the definition of securities? The Department of Corporations of the state of California had contended that Hamilton's public offering which is in the newspaper advertisement has constituting the offering of securities in the form of an "evidence of indebtedness."

The term "evidence of indebtedness" under the Act of 1933 is not limited only to a promissory note or other simple acknowledgment of debt but it included all contractual obligations to pay in the future for consideration presently received, so it might seem that this term applies to the newspaper advertisement.

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[29] Section 25019 California Corporation Code 1947, Security means any note; stock; treasury stock; membership in an incorporated or unincorporated association; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; viatical settlement contract or a fractionalized or pooled interest therein; life settlement contract or a fractionalized or pooled interest therein; voting trust certificate; …

But this case, the supreme court denied that it was not in the definition of securities. Because even though Hamilton offers to pay interest on investment would fall within the meaning of securities, but in this case, the investor's capital was not at risk because the investor had a diamond worth at least $500, so the customer is secure which is no "risk capital." And, therefore, this transaction would not come within the regulatory purpose of the Corporate Securities Law even though 5 percent interest might ultimately pay to the customer.

After comparison of these two cases, the risk capital test has a broad formulation and has provided more flexibility because of the elements of the risk capital test can be satisfied even though the investment does not be involved with a common enterprise. Moreover, there are two significant advantages. First, this test didn't define a benefit as narrowly as the Howey test. Second, the benefit in this test need not be a material benefit.[30]

3. Securities in Varying Contexts

Not all of the transaction are constituted as offering of securities, only offering instrument which is fall within the definition of securities are constitutes as securities offering. Many instruments fall clearly within the definition that provided by the law, for instance, stock, bonds, and debenture. But there are some that are not within such definition. The purchaser can ask the court ("shifting the definitional burden onto the courts)."[31] to find that such interest is an investment contract or not. For instance, real estate interest, partnership interest, notes that given in commercial transaction even though their objective of doing business is to produce a return on investment.

The definition of securities often turn on the meaning of an investment contract, so the transaction which is discussed below in the subsections is treating as securities.

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[30] Sustainable Economics Law Center, The risk Capital Test-List of States, at http://www.theselc.org/which_states_apply_the_risk_capital_test_when_deciding_what_is_a_security, (last visited 2 November 2017).

[31] Mark A. Sargent, "Are Limited Liability Company interest Securities?" Pepperdine Law Review 19 (15 April 1992): 1081.

1) Condominium and Real Estate development as Securities

The Securities and Exchange Commission noted that offer and sale of a condominium might involve the offering of securities in the form of an investment contract within the meaning of the Act of 1933 and the Act of 1934.[32] With the uncertainty of this regulation, the SEC has issued the release no.5347[33] With the uncertainty of this regulation, the SEC has issued the release no.5347 with the purpose to alert the person who engaged in the business of building and selling the condominium and other similar types of business. To has responsibilities under the Act of 1933, the Act of 1934 and to provide the guideline for a determination of when an offering of a condominium or other units may review as offering securities.

In general, the interests in real estate themselves shall not be deemed as securities. Even the purchaser has purchased the real estate with the purpose of investment; it will not be deemed as securities. For instance, the commercial real estate is sold real estate to the tenant; it will not be security because the owner of the real estate didn't get the profit by relying on the promotor's effort.

As such, it is clear that the purchasing of real estate for investment will be deemed as securities only when the profit potential is dependent upon the management of the real estate by the promoter of real estate program. If it is deemed as securities, then the full weight of securities law shall apply, but if it is not securities, it shall not under the federal securities law.

2.6 Thai Securities and Exchange Law

The history of the securities and exchange law has started in 1961, Thailand implemented its first-five-year National Economic and Social Development Plan to promote economic growth and stability as well as to develop standard of living of

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[32] John C. Coffee, JR. and Hillary A. Sale, Securities Regulation, 11th ed. (United States: Foundation press, 2009), p.290.

[33] Securities and Exchange Commission, Guideline as to the applicability of the federal securities laws to offer and sale of condominiums or units in a real estate development, at https://www.sec.gov/rules/interp/1973/33-5347.pdf, (last visited 25 November 2017).

people. Later that, The Second National Economic and Social Development Plan (1967-197)[34] did not only propose the establishment of Thailand's first securities market to play the role of mobilizing capital to support the nation's economic and industrial development but also provided the appropriate measurement and tools to facilitates securities trading.

In 1972, the Thai government took a further step in creating a capital market by amending the "Announcement of the Executive Council No. 58 on the Control of Commercial Undertakings Affecting Public Safety and Welfare."[35] The changes extended government control and regulation to the operations of finance and securities companies, which until then had operated relatively and freely.

In May 1974, the legislation established the Securities Exchange of Thailand (SET) was enacted to provide for securities trading to promote savings and mobilize domestic capital. The enactment was followed by revisions to the Revenue Code at the end of the year, encouraging the investment in the capital market.

On 30th April 1975, the primary legislative framework was in place, and the Securities Exchange of Thailand officially started trading. Later that on 1st January 1991, the name was formally changed to the Stock Exchange of Thailand (SET).[36]

2.6.1 Regulation of the Securities in Thailand

Nowadays, there is an International Organization of Securities Commissions (IOSCO) which is an international body that brings together the world's securities regulators, and it is recognized as the standard setter for the securities sector. As Thailand is an ordinary member of IOSCO, the regulation under the Securities and Exchange Act B.E.2535 (1992) (SEA) shall be pursuant with IOSCO.

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[34] Office of the National Economic and Social Development Board office of the Prime Minister, National Economic and Social development plan, at http://coop.eco.ku.ac. th/learning1/five19.html, (last visited 25 November 2017).

[35] Revolutionary Council Order 58, at http://www.thaifert.com/upfiles/download/files_491.pdf, (last visited 20 November 2017).

[36] Securities and Exchange of Thailand, Historical of the SET, at https://www.set.or.th/th/about/overview/ history _p1.html, (last visited 15 November 2017).

In Thailand, The SEA is the applicable law that recognizes the regulatory structure of the Thai capital markets and introduced several concepts concerning securities regulation. This law is focused on the market that allocated capital, moving such capital from savers through financial intermediaries for instance underwriters, dealers, and other financial firms to the user. The primary focus of this law is not only the process of intermediation between the saver and user of capital but also other function as well.

2.6.2 Objectives of the Regulation of the Market

IOSCO's objectives and the principle of securities regulation sets out 38 principles of securities regulation which are based upon three objectives which are first, protecting investor; secondly, ensuring that markets are fair, efficient and transparent; lastly, reducing systemic risk

As Thailand is a country member of IOSCO, then the objective of the SEA which is the domestic law in Thailand that governs securities market is according to the principle of IOSCO.

To get protection under the SEA, SEC defined "securities company" means any company, or financial institution licensed to undertake securities business under this Act.[37] Securities business can be conducted only by the formation of either a limited company or a public limited company, or by a financial institution established by other laws, and after having obtained a license from the Minister upon the recommendation of the SEC. [38]

Securities companies are prohibited from carrying on any business which is not involved with "securities." This prohibition is based on the concept that securities companies are a type of financial institution that can only engage in business activities which are approved by the relevant authority. For instance, securities companies are prohibited from trading derivatives because they are not "securities" within the meaning of the SEA, but ordinary companies can trade in derivatives because no law restricts them from doing so.[39]

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[37] Section 4 The Securities and Exchange B.E.2535.

[38] Section 90.

[39] Pises Sethsathira, "Securities Regulation in Thailand: law and policies," Pacific Rim Law & Policy Journal, Journal of securities law (July 1995): 797.

The SEA is the law that under the international standard which is widely accepted. Although every investment has a risk, this law has not regulated every product. Only the product that constitutes as securities under the definition that provides by the SEA shall be in the scope of the law.

For the provision that protects investors, the SEA has set out in the anti-fraud provisions which is as follows:

1 Antifraud Provisions

In chapter 8 of the SEA, entitled the antifraud provision which is "Prevention of Unfair Securities Trading Practices." These provisions can be grouped into three main categories as follows:

1) False or Misleading Information

This antifraud provision provides "No securities company or any person responsible for the operation of a securities company or company which issues securities or any person having an interest in the securities shall impart any false statement or any other statement with the intention to mislead any person concerning the facts relating to the financial condition, the business operation or the trading prices of securities of a company or juristic person whose securities are listed in the Securities Exchange or are traded in an over-the-counter center."[40]

This provision prohibits people and companies from imparting any false statement or any other statement with the intention of misleading any person concerning facts relating to the financial conditions.

2) Insider Trading

Insider trading defines as the purchase or sale of securities which are listed on the Securities Exchange by the person who takes advantage of other persons who are using information material to changes in the prices of securities which has not yet been disclosed to the public. and to which information he has access by virtues of his office or position.[41]

The term of "person" as mentioned above has been defined as

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[40] Section 238 The Securities and Exchange B.E.2535.

[41] Section 241.

(1) director, manager, the person responsible for the operation or auditor of a company whose securities are listed in the Securities Exchange or traded in an over-the-counter center.

(2) Securities holder of a company whose securities are listed on the Securities Exchange, who holds securities the par value of which exceeds five percent of the registered capital. To calculate the value of the securities that owned by such person, the securities held by his spouse and minor children shall be counted as his securities.

(3) state agency personnel, or director, manager, or officer of the Securities Exchange or of an over-the-counter center who is in an office or position with access to information which is material to changes in the price of securities.

(4) any person involved in securities and the trading of securities in the Securities Exchange or an over-the-counter center.

3) Market Manipulation

The provision that prevents market manipulation is the section 243 which states that in the purchase or sale of securities which are listed on the Securities Exchange or traded in an over-the-counter center are prohibited from the following action:

"(1) The one who is colluding or agreeing with another person to purchase or sell securities in concealment to mislead the general public to believe that such securities are purchased or sold in high volume, or the price of such securities has changed or not changed during any period which is not consistent with normal market conditions;

(2) The one, either by himself or jointly with another person, who continuously trade securities which the results from the purchase or sale of such securities is not consistent with the normal market conditions. Such trading is made to lure the general public to purchase or sell such securities unless such trading is made in good faith to protect his rightful benefit".[42]

This provision concerning the prevention of market manipulation which can be divided into two categories:

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[42] Section 243 The Securities and Exchange B.E.2535.

The first category is section 243 (1), it covers the collusion or agreement between two or more persons in the purchase or sale of listed securities in concealment. Such concealment is aimed to mislead the public to believe that such securities are purchased or sold in general volume, or the price of such securities has changed or not changed at any time or during a period in a manner which is not consistent with the normal market conditions.

By section 243 (1), the following case shall be deemed as the concealment to mislead the general public:

(1) the purchase or sale of securities where the persons who finally receives benefit from such purchase or sale is the same person;

(2) the order to purchase securities with the knowledge that he or jointly with any other person has ordered the sale or is going to order the sale provided that the order shall be in a proximate amount, price and time;

(3) the order to sell securities with the knowledge that he or jointly with any other person has ordered the purchase or is going to order the purchase provided that the order shall be in a proximate amount, price and time.[43]

The second category is on section 243 (2), it concerns the continuous trading of listed securities by any person, either independently or jointly with any other person which results in the purchase or sale of such securities which is not consistent with the normal market conditions. Such trading is made with the intent to lure the general public to purchase or sell such securities unless such trading is made in good faith to protect his rightful benefit, then the trader shall not be held liable for breaching this provision.

2.6.3 The Function of the Law

The critical fundamental principle of the SEA is to protect investors to have adequate information and reduce the risk which may come from securities transaction.

This type of regulation has various functions. Firstly, it is regulated the company which displays some identical that has good stability and good quantity to issue securities to investors to the public which is known as "merit-based" securities

[43] Section 244 The Securities and Exchange B.E.2535.

regulation. Secondly, with the objective that to protect the investor, this law had a function to drive financial market effectively which is "disclosure-based" system of securities regulation. Lastly, this law also has a higher function which affects the financial market in Thailand to have a higher standard which is the "anti-fraud" provision.

2.6.4 The Basic Structure of the Law

Before the enactment of the SEA, Thai law that regulated capital market was under several statutes. These different statutes and authorities caused some problems in Thai capital markets. To remedy the issues that created by such inconsistencies, a new policy to integrate the laws and authorities concerning the capital market was introduced in the 5th National Economic and Social Development Plan, by promulgating of the SEA.[44] The SEA has given a significant in the development of Thai securities law and having the following considerable regulation to protect investors:

1. The Regulation of Public Offerings

With the key principle of the law that aims to protect investors, SEA has established three requirements which are pursuant with the IOSCO principle for the public offering of shares which are: the approval requirement, the disclosure requirement, and the distribution requirement.

1) The approval requirement

This requirement is in section 33 which states

"No company shall offer for sale newly issued securities in the category of shares, debentures, bills, certificates representing the rights to purchase shares, certificates representing the rights to purchase debentures, and other securities as specified by the SEC unless such offering:

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[44] Office of the Natioanl Economic and Social Development Board Office of the Prime Minister, The fifth National economic and social development plan, at http://www.nesdb.go.th/nesdb_en/ewt_w3c/ewt_dl_link.php?filename=develop_issue&nid=3780, (last visited 22 January 2018).

(1) falls under Section 63;

(2) has obtained approval from the SEC Office and complied with Section 65 or

(3) is an offer for sale of newly issued securities by a public company limited and is made entirely to its shareholders in proportion to their existing shareholding and consideration of full payment for the value offered".

On account of this section, issuer company cannot issue new shares to public offering without obtaining approval from SEC.

2) The disclosure requirement

During the drafting of the SEA, not only the approval requirement that used to protect the public from fraud but also the disclosure requirement is still necessary.

Apart from the approval requirement, section 65 states that

"The offer for sale of securities to the public or any person may be made only when the registration statement and the draft prospectus which have been filed with the SEC Office by the promoters of a public limited company, a company or owner of securities have become effective."[45]

So public offering of shares can be made only after a registration statement and prospectus become effective by default forty-five days after the receipt of such registration statement and prospectus by the SEC.[46]

After the date of the registration statement and prospectus become effective, SEC has the following powers with regards to disclosure.[47] First, the SEC has the power to order the suspension of the effectiveness of the registration statement and draft prospectus, if the SEC finds that such statements are false or fail to disclose material facts. Second, the SEC has the power to order the temporary suspension of the effectiveness of the registration statement and prospectus, if the SEC finds that the statement or prospectus contains the incorrect material fact which may affect the investment-making decisions of the purchasers of securities. Last, the SEC

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[45] Section 65 The Securities and Exchange B.E.2535.

[46] Section 67.

[47] Section 76.

has the power to order the person who files documents to make corrections if it finds that the statement or the prospectus is incorrect.

3) The distribution requirement

SEC also requires that the distribution of shares in all initial public offerings (IPOs) must satisfy the following conditions [48]: First, at least thirty percent of the total amount of the shares offered must be allotted to the small investors. Second, the amount to be allotted to persons recommended by the major shareholders or the management of the company may not exceed ten percent of total amount of the shares offered.

This requirement was imposed by SEC in response to complaints from the public that they were unable to subscribe to shares in the IPOs.

2. The Regulatory Authority

In Thailand, The Securities and Exchange Commission (SEC) is the only government agency that is empowered to supervise the capital markets. The responsibilities of the SEC are specified in the SEA and the Derivatives Act of 2003 (DA). Sections 14, 15 of the SEA provide the SEC Board has the authority to issue orders, rules, regulations, notifications, and directions under the SEA.

Due to the changing of the innovator, the social surrounding has changed dramatically. For this reason, the law and regulations are out-of-date, cannot be enforced effectively and cannot cove with new kind of investment which has technology-based. The gap in the law causes an impact on the whole economy of the country.

Although the SEC is the only government agency that is empowered to supervise capital market, the SEA provided two critical measures to balance their power. The first measure is about the power to issue regulations.[49] SEA provided that when applicable rules or directives are issued, the SEC must submit such matter to sub-committee for consideration, and recommendation of sub-committee shall propose

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[48] Pises Sethsathira, op.cit., p.791.

[49] Ibid., p.787.

to SEC. The second measure is the right to file an appeal against adjudication or order of the SEC.[50]

For the enforcement, SEC actions are pursuant to the 1st principle of IOSCO.[51]SEC shall consider all applicable laws and notifications, and all SEC final actions are public by published notices of proposed new rules or amendments to regulations and all final rules on its website. Public comment is permitted, and occasionally a public hearing shall be held. Before publication, the relevant industry subcommittee reviews the proposal.

Moreover, SEC is the full power authority to investigate possible violations of the securities law by any person or entity. Its authority to demand documents or compel testimony is not limited to registered person or entities. However, it may impose administrative sanctions only against any entity or person registered with SEC. These sanctions include a reprimand, suspension, license revocation or imposition of a limitation on business activities.

Any action taken by the SEC may challenge in the Administrative Court. The court may reverse an SEC action only if it finds that it exceeded the authority of the SEC or if it finds that the SEC failed to adhere to procedural requirements.

In conclusion, although SEC is the only one authority that has a full power to govern any transaction in the securities market, it cannot use their power abusively because any action with abusive power may lead to the administrative procedure.

3. Civil and Criminal Liability for Securities Law Breaches

The Securities and Exchange Act of 1992 has civil and criminal liability for securities law breach which are as follows:

1) The criminal liability

SEC as a regulator will assume its primary responsibility in investigating possible offenses of this law. If the SEC deems a criminal violation has

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[50] Appellate Committee's Rule of Practice on Procedure for Consideration and Adjudication of Appeal B.E. 2542.

[51] Principle 1 The responsibilities of the regulator should be clearly and objective stated.

occurred, it will pursue the matter by filing a criminal complaint with the Royal Thai Police for further investigation according to the Thai Criminal Procedure Code. [52]

However, under Section 317 of the Securities and Exchange Act 1992, certain offenses can be criminally fined by the Criminal Fining Committee appointed by the Minister of Finance. In this connection, if the fine is fully received within the period specified by the Committee, the matter is considered settled.

On the contrary, to criminally pursue offenses not specified by the Sections 317, the SEC has no power to prosecute in its name. Such criminal complaint shall file with the inquiry officer of the Economic Crime Division (ECD) of the Royal Thai Police or the special investigator of the Department of Special Investigation (DSI), Ministry of Justice. Should a contravention is believed to have occurred, the matter shall be forwarded by the ECD or the DSI to the Office of the Attorney General (OAG) for criminal prosecution.

2) Civil liability for False Statements or Omissions

In the case where the registration statement and prospectus contains a false statement, or fail to disclose material facts. Any person who (1) purchases securities from the promoters of a public limited company; (2) a company or owner of securities; and (3) such person is still the owner of such securitics are suffers damage from such purchase, shall have the right to claim compensation from the company or the owner of the securities.

To claim such compensation, the investor who purchases the share must purchase the shares before the fact of false statement or omissions become apparent, and within one year from the effective date of the registration statement and the prospectus.[53]

The right to claim for such compensation is limited by a time period of one year from the date on which the fact that the registration statement and prospectus contained false information became known or should have been known,

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[52] Securities and Exchange Commission, Criminal Sanction, at http://www.sec.or.th/EN/Enforcement/Pages/ CriminalSanction.aspx, (last visited 15 January 2018).

[53] Section 82 The Securities and Exchange B.E.2535.

but not exceeding two years from the effective date of the registration statement and prospectus.[54]

2.6.5 The Definition of Securities

The Security and Exchange Act which is the law that governed securities transaction provides the definition of "securities"[55] in section 4 which is "securities" means

(1) treasury bills;

(2) bonds;

(3) bills;

(4) shares;

(5) debentures;

(6) investment units which are instruments or evidence representing the rights to the property of a mutual fund;

(7) certificates representing the rights to purchase shares;

(8) certificates representing the rights to purchase debentures;

(9) certificates representing the rights to purchase investment units;

(10) any other instruments as specified by the SEC.

From the definition of securities that provided above, the purpose of section 4(10) is to include within the definition the many types of instruments that in the commercial world shall fall within the definition of securities, but at present, no such instrument that specified by the SEC.

Section 2 1) -(10) "an instrument that constituted as securities", so it means that any transaction that involved with (1) - (10) shall remain under SEA regulation and shall register with SET unless it was exempt by the law.

From the definition that mentioned above, it can be categorized by it characteristic into three types which are;

1. Equity Instrument

In Thailand, the investor who invests in equity instrument can trade equities on both the Stock Exchange of Thailand (SET) and the Market for Alternative

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[54] Section 86 The Securities and Exchange B.E.2535.

[55] Section 4.

Investment (MAI). Which is depends on the company is listed and traded on SET or MAI.

Equity Instrument is the instrument that issued by a company to raise capital for the enterprise.

There are many types of an equity instrument.[56]

1. Common Stock which is securities that represents ownership in a public company. Shareholders of common stock can vote in proportion to their holdings for the board of directors and on company policy. Shareholders are also entitled to dividends, if any, as well as capital gains, and possibly subscription rights to purchase additional shares at a discounted price.

2. Preferred Stock, it is an equity instrument which is similar to common stock by which shareholders participate in ownership of a public company. But, preferred stockholders have a greater claim on a company's assets and earnings than common shareholders. In case of a company's insolvency, the preferred stock shareholders shall be entitled to be paid off from company funds before any payment is made to common stock shareholders. Preferred stock shareholders are also first in line for dividend payments, which are sometimes guaranteed.

3. Warrants which are an equity instruments that give the holder the right to purchase an underlying asset at an exercise price, in a certain quantity depending on a set ratio, and by a predetermined future date. Companies will often include warrants as part of a new-issue offering to entice investors into buying the new security.

4. Unit Trust, it is the security issued by an investment management company to raise capital through a mutual fund by allocating money in the fund to invest in financial markets in accordance with the fund's prospectus. Unit holders participate in fund ownership and are entitled to receive dividends from accrued profits.

5. Non-Voting Depositary Receipt which is an equity instrument issued by Thai NVDR Co., Ltd. to represent a Thai company's publicly traded securities. NVDR's allow foreign investors to invest in Thai securities when foreign ownership restrictions under Thai law might prevent them from otherwise doing so.

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[56] Jiradth Sangkaew, Financial markets mechanism in Thailand economy system, 3rd ed. (Bangkok: Amarin printing & publishing Co., Ltd.), p. 330.

By investing in NVDRs, investors are entitled to the same benefits such as dividends as those who invest in a company's common stock. However, NVDR shareholders have no voting rights within a company.

6. Depositary Receipt or A DR is an equity instrument issued by Siam DR Co., Ltd. Underlying assets for DR's may be common stock, debentures, or convertible debentures. Investors holding a DR are entitled to the same benefits as a listed company's shareholders in all respects.

One, it can say that the one who holds an equity instrument or shareholder shall have the right as follow:

1. Holding equity instrument will represent an ownership interest in the venture, for instance, holding stock.

2. The right to claim on the part of the corporation's assets and earnings.

3. Holding certain types of equity instruments entitle the shareholder to vote and participate in significant decisions at shareholder meetings.

4. Shareholders also had the opportunity to receive dividends which are subjected to the company's profitability and any terms agreed upon.

2. Debt Instrument

A debt instrument is the result of a contract between the issuer of debt and the debt holder (also called "investor"). It must have specifically defined maturity dates, interest rates, and other benefits. Also, interest payment dates and redemption dates/principal payment dates must be specified at the time the debt instrument is issued in addition to the maturity period. This instrument is transferable, and it can be traded.

Issues a debt instrument is the one who borrows from the debt instrument purchaser, so the issuer is the "debtor" while the buyer is the "lender" or "creditor." Being debt instrument is unlike equities or common stock, where investors buy shares which represent ownership in a company.

3. Other Instruments as Specified by SEC

In this type of securities, it is a full power of the ministry of finance to issue a notification to define other instruments as securities, and the result is what is specified by the notification shall be under the SEA.

At present, there is no notification specified by the ministry of finance that specified another instrument as securities.

2.7 Conclusion

Nowadays, a token is mostly undefined which in turn effects on the legal status of a token. With this reason, this chapter shows about the process of ICOs, Token market and what is exactly token's characteristic by looking at the history of securities and their legal concept to specify what is exactly token.

The result is token can be sold in the scheme of securities and then the regulation of securities shall apply to this transaction and investors shall get protection under this law.

Chapter 3
Token under the Regulation of Securities Law in Foreign Countries

Token is a digital token which created on a blockchain as a part of the decentralized software. There are many different types of tokens, each with varying characteristics and uses, for instance, some tokens have functioned as digital currency, or it can represent a right to tangible assets like gold.

In this chapter, shall focus on a token that has functioned as securities depend on their features that token holder shall have their voting right or suffered from any loss or damages that may occur from a token transaction.

The framework in this chapter shall focus on US federal securities law and The Securities and Exchange Law in Singapore. Both countries regulated token securities which constitute as securities under securities law. This would mean, among other things that it is illegal to offer token for sale to the public except comply with the rule and regulation of securities law.

3.1 Securities and Exchange Law in the United States of America

The securities market in the United States of America is large, well-developed and has complexed regulations. These provide benefits not only to the U.S. economy but globally.

USA is a country member of the International Organization of Securities Commissions (IOSCO) which is the international organization that provides good practice and standard for securities regulation. A country member of IOSCO has to implement IOSCO regulation in their domestic law to make sure that their domestic law is qualified to an international standard which is widely accepted. USA is one country that implemented IOSCO principles. The result is it can guarantee that their regulatory framework is qualified as international standard and foreign investors can invest in securities markets under same conditions as domestic investors [57]

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[57] International Monetary Fund, IOSCO objective and principles of securities regulation, at https://www.imf.org/en/Publications/CR/Issues/2016/12/31/United-States-

The securities market is operating under a two-tier (federal and state) system of securities regulation in the United States of America. Any offering or sale of securities must be analyzed to ensure that it is in compliance with both federal law and the law of each state in which the securities are sold or offered for sale.

The public offering of securities in the United States must register with the US Securities and Exchange Commission (SEC) under the Securities Act of 1933, and unless the exception is available, it must also register under the securities law of each state.

3.1.1 Regulation of the Securities in United States of America

In USA securities market, there are two scales of the transaction. The first transaction is the issuer transaction which means the sale of securities to investors by issuers who are seeking to raise capital for their business. The second transaction is a trading transaction which is the transaction that interacts with investors who buy and sell the already-issued securities in the secondary market.

With these two types of transactions, there are two applicable laws on the transactions. The first transaction, newly issuing securities, is regulated by The Securities and Exchange Act of 1933 (The Act of 1933), this law applies to the sale of securities interstate, and the law requires the issuer to file a registration statement and to disclose their information accurately. The second transaction is the sale and exchange of existing securities in the secondary market is under The Securities Exchange Act of 1934 (The Act of 1934.[58]

The Act of 1933 which can refer as the "truth in securities law."[59] is based on the idea that companies offering securities should provide investors with sufficient information about both the issuer and the securities to make an informed

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Financial-Sector-Assessment-Program-Detailed-Assessment-of-Implementation-on-42827, (last visited 12 February 2018).

[58] Kevin C. Taylor, Fintech Law: A Guide to Technology Law in the Financial Services Industry,1st ed. (Texas: Bloomberg, 2014), pp.2-8.

[59] U.S. Securities and Exchange Commission, The law that govern securities industry, at https://www.sec.gov/answers/ about-lawsshtml.html, (last visited 16 January 2018).

investment decision. This act required that securities offered or sold to the public in the USA must register by filling a registration with the Securities and Exchange Commission (SEC). The purpose of this law is the disclosure of important financial information through the registration of securities. Such information is for investors to decide whether to purchase a company's securities. If investors who purchase such securities are suffering from losses, they have the rights to recover the loss, if they can prove that there was incomplete or inaccurate disclosure of important information.

The Act of 1934 empowers the Securities and Exchange Commission (SEC) to monitor the securities transaction and the operation of the brokerage firms. This act also gives the SEC broad power to police the sale of securities in the USA. Powers held by SEC include the authority to register, regulate, and oversee brokerage firms, organizations which included the New York Exchange and the American Stock Exchange.[60]

1. Objectives of the Regulation of the Primary Market

Offers and sales of securities are subject to the registration requirements of the Act of 1933. These provisions mandate comprehensive disclosure regarding the offering, the issuer, and related matters. Encourage the accuracy and completeness of disclosure; this act imposes strict obligations and liabilities upon parties of the transaction which is an issuer. The definition of "issuer"[61] is broadly defined to include "every person who issues or proposed to issue any securities" and "person"[62] includes any unincorporated organization.

The registration provisions of the Act of 1933 contemplates that the offer or sale of securities by issuers must be registered with the SEC and comply with the securities law. But, in some situations, this obligation is unnecessary to impose the expensive and time-consuming requirements of the statutory scheme. These situations are "exempt transactions" for instance intrastate,[63]private offerings[64] and small offerings[65].

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[60] U.S. Securities and Exchange Commission, Ibid.

[61] Section 2(4) Securities and Exchange Act of 1933.

[62] Section 2(2).

[63] Section 3(a)(11).

[64] Section 4(a)(2).

The objective of this law is to protect investors in securities transaction by providing not only information adequately but also provide the antifraud provisions to prevent fraud in the sale of securities as follows:

1) Antifraud provision

The Act of 1933 and the Act of 1934 serve the dual purposes of ensuring that issuers selling securities to the public disclose material information to investors, and any securities transactions are not based on fraudulent information or practices.

The antifraud provisions contained in these Act particularly as follows:

(1) The Act of 1933

In general, the terms of "securities market" is the broad term that used to refer to both the distribution market whereby issuers raise capital by selling securities to investors and the secondary market which provides liquidity for these investors by providing an organized marketplace for the continuous trading of securities previously issued and outstanding.[66] The secondary markets also are often referred to as the trading markets or post-distribution markets.

The Act of 1933 concerns exclusively with the distribution markets. There are fraud actions that occur in the distribution market which are as follows:

a. Fraudulent trading in markets

The Act of 1933 regulates the distribution of securities and seeks to protect the investing public against securities fraud. To enforce these objectives, section 12(2) prohibits fraud and misrepresentation in the offer or sale of securities which is arising in connection with prospectus and communications requirement.

The elements of an express cause of action under this section has entitled the purchaser to rescission from her seller (or in the event that the purchaser no longer owns the security, to receive damages equivalent to rescission) if

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[65] Section 4(a)(5) Securities and Exchange Act of 1933.

[66] Therese H. Maynard, "Liability under Section 12(2) of the securities Act of 1933 for Fraudulent Trading in Postdistribution Markets," William &Mary Law Review 32 (February 1991): 848.

the purchaser can establish that the seller used interstate commerce or emails to offer to sell or to sell a security to the purchaser by means of a prospectus or oral communications that missrepresented or omitted a material fact of which the purchaser did not have knowledge, unless the seller sustains the burden of proving that she did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.[67]

From the above elements, the seller who shall liable under this section must have engaged in fraudulent conduct using prospectus or oral communications. By including the term "prospectus," it shows that this section has taken aim at any writing used to misrepresent or mislead.

To examine the definition of prospectus, it includes any notice, circular, advertisement, letter or communication, written or by radio or television, which offers any securities for sale or confirms the sale of securities[68]. The term of the prospectus can define broadly which means that almost any written communication that can be said to offer securities for sale, no matter what form it may take.[69]

To recover under this section, the purchaser (plaintiff) shall have the burden of proof on the fact that the seller misrepresented or omitted a "material fact." It means something which is a substantial likelihood that investors would consider it important in deciding whether to purchase the securities. But the plaintiff needs to prove only one material that misrepresented, and need not to prove all of the misrepresentations.

Moreover, this section also provides an affirmative defense for the seller to prove not only that one did not know about the untruth or omissions, but also that one could not have learned the truth by the exercise of reasonable care.

(2) The Act of 1934

To provide transparency in the secondary market, the Act of 1934 created SEC, and section 10(b) of the Act of 1934 empowered SEC to enact 10b

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[67] Section 12(2) Securities and Exchange Act of 1933.

[68] Section 2(10).

[69] Therese H. Maynard, op.cit., p.858.

rules against "manipulative and deceptive practices."[70] in securities trading which is as follows:

a. Manipulative and deceptive practices

Section 10(b) of the Act of 1934 makes it "unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange... to use or employ, in connection with the purchase or sale of any securities... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."[71]

It is clear that nothing is already prohibited by section 10(b). Instead, section 10(b) makes unlawful or prohibits, certain conduct only if it contravenes on SEC rule.[72] In other words absent a rule, section 10(b) does not prohibit anything. Rule 10b is adopted under authority granted the commission under section 10(b). To discuss the prohibition of any act or omission resulting in fraud or deceit in connection with the purchase or sale of any security, it needs to discuss Rule 10b. There are lists in subsections of rule 10b which are as follows:

a) Rule 10b-1

In general, securities transaction that is exempt from the registration (exempt transaction) are not under the disclosure requirement.

However, under this rule, it makes clear that SEC rules against fraud apply to a transaction of securities that are exempt from registration.

b) Rule 10b-3

This rule prohibits securities brokers and dealers from directly or indirectly engaging in securities fraud. This rule is an important tool that SEC use along with 10b-5 to against fraud.

c) Rule 10b-5

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[70] Find law, Securities and Exchange Act Rule 10b, at http://consumer.findlaw.com/securities-law/securities-and-exchange-act-rule-10b.html, (last visited 3 February 2018).

[71] Section 10(b) Securities Exchange Act of 1934.

[72] Steve Thel, "Taking section 10(b) seriously: Criminal Enforcement of SEC Rules," The Fordham Law Archive Scholarship and History 1 (March 2014): 4

The anti-fraud provision that the SEC created is listed in subsections of rule 10b which is broad and complex. Rule 10b-5 is the most important federal controls concerning insider trading. It is a catch-all provision that is the most important and widely used anti-fraud securities rule. With the complexity of this rule, the SEC enact new regulations known as Rule 10b-5(1) and Rule 10b-5(2) to clarify the scope of Rule 10b-5.

(a) Rule10b5-1

This rule is about trading securities by material non-public information in insider trading. It prohibits the following actions which are

first, the purchase or sale of securities that base on the basis of material non-public information about the securities.

Second, an issuer who in breach of a duty of trust that is owed directly, indirectly or derivatively to the issuer of that security.

Last, the shareholders of that issuer, or to any other person who is the source of the material non-public information.

If there is anyone who was accused that trading security by non-public information.[73] for instance, if such person can demonstrate that before becoming aware of the information, the person had adopted a written plan for trading securities.

(b) Rule10b5-2

This rule shall apply to any violation of section 10 (b) of the Act of 1934 that is based on the purchase or sale of securities by material non-public information that misappropriated in breach of a duty of trust or confidence. This rule also provides a non-exclusive definition of circumstances in which a person has a duty of trust or confidence[74] for "misappropriation."

b. Fraud and misrepresentation

This anti-provision is on section15(c) which is a general fraud provision that is similar to rule 10b-5, but this provision specifically applicable to transaction involving with broker-dealers.

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[73] Rule 10b5-1(c)(1)(ii).

[74] Rule 10b5-2(b).

Under section 15(c), the SEC has adopted the rules that prohibited certain manipulative and deceptive practice in securities trading which is Rule15c1-2. This rule defines the term of "manipulative, deceptive, or other fraudulent device or contrivance" to include any untrue statement of a material fact and any omission in order to make statements made.

c. Market Manipulation

At present, manipulation accomplishes through the methods that are complicated and it is hard to detect. This activity created an artificial price that gives investors false information about the stock, and it can effect investors decision in their trade.

To put all traders on a fair basis, the Act of 1934 which primarily regulates transaction of securities in the secondary market[75] it has specific provision to prohibit market manipulation which is in section 9.[76] This section can divide into two groups: the first group is in section9 (a)(1) and (2) which deal with manipulative trading practices; the second group is in section 9(a)(3)- (5) which deal with information-based manipulative schemes.

Investors who suffered from any loss or damages that arise from market manipulation shall have an explicit right of action against the buyers or sellers who trade the stock which registered on a stock exchange.

However, the claim under this section is difficult to prove, since investors must show that the price is effected by the manipulation and that the defendant acted willfully. Proving damages also involves proving the actual value, since successful claimants may recover the difference between the actual value and the price they paid.

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[75] Cornell Law School, Securities Exchange Act of 1934, at https://www.law.cornell.edu/wex/securities_exchange_act_of_1934, (last visited 20 January 2018).

[76] Section 9 Securities Exchange Act of 1934.

2. Function of the Act of 1933

The goal of securities law focuses on the protection of investors to equal access to the same information that required for the investment to make decisions. By this goal, it shows that securities transaction created the information age since the law required the issuer must disclose important information for their investors but if they lack information, it will be effected to investors to feel unsafe for their decision in investment then the securities markets dry up.

3. Basic Structure of the Act of 1933

The objective of the securities law is to protect the investor by establishing some conditions for the party who are involved in the securities market. In this part the aim to study the process that required by the law to guarantee that investors shall receive adequate information to make their decision.

1) The Regulation of public offerings

In the USA, in pursuant with the IOSCO principle[77], the Securities Act 1933 has established only the disclosure requirement for a public offering.[78]

(1) The disclosure requirement

The registration under the Act of 1933 often referred as "the truth in securities" law which has two fundamental objectives: firstly, to require that the investors receive financial and other significant information concerning securities are offering for public sale; and secondly, to prohibit deceit, misrepresentations, and other fraud in the sale of securities.[79]

a. The registration process

In general, any transaction involving selling securities to the public must govern by the Act of 1933. This law states that selling securities in the USA must be registered with the registration forms and prospectus which provided

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[77] Principle 16 There should be full, accurate and timely disclosure of financial results, risk and other information that is material to investors decision.

[78] Pises Sethsathira, op.cit., p.788.

[79] U.S.Securities and Exchang Commission, Registration Under the securities Act of 1933, at https://www.sec.gov/fast-answers/answersregis33htm.html#.WmgP3zEoyC4.facebook, (last visited 10 January 2018).

some information.[80] For instance, a description of the company's properties and business, a description of the security to be offered for sale, and information about the management of the company.

Section 6 of the Act of 1933, says that the registration entails two parts: first, the issuer must submit information that will form the basis of the prospectus, to be provided prospectively to investors. Second, the issuer must submit additional information that does not go into the prospectus but is accessible to the public.

After having received prospectives and document from issuers, the SEC is an authority to determine what information issuers must submit[81] but it is information about the issuer and the terms of the offering securities that would help investors to decide on the investment. The registration statement and the prospectus that the companies filed is subjected to examination for compliance with the disclosure requirement, and after that, it shall become effective within 20 days after filing with SEC.[82]

In conclusion, this registration process is the way to protect investors. Issuers cannot offer to sell securities without disclosing information about the company and developing and delivering a prospectus that the SEC has reviewed. Moreover, issuers are liable for any material misstatements or omissions in the prospectus or registration statement, providing a way to enforce truth in disclosure.

b. Exempt transaction

Not all offerings of securities must register with the SEC. There are many securities which are exempt from ,neither the registration requirement ,nor a prospectus, for instance, private offerings to a limited number of persons or institutions, offerings of limited size, intrastate offerings, and securities of municipal, state, and federal governments.[83]

There are several reasons why securities may be exempt from registration requirements: first, the securities are considered safe because it is issued by government authority, for instance, government bonds. Second, the sale

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[80] Section 5 Securities Exchange Act of 1934.

[81] Section 7 Securities and Exchange Act of 1933.

[82] Section 8.

[83] U.S.Securities and Exchang Commission, The law that govern securities industry, at https://www.sec.gov/answers/ about-lawsshtml.html, (last visited 16 January 2018).

of securities is restricted to a specific geographic area, usually within the state (intrastate). Third, the securities are sold to accredited investors who are considered to have the expertise to manage their money and to avoid fraudulent schemes.[84]

4. The Regulatory Authority

The securities market is operating under a two-tier system which is federal and state system. The Securities and Exchange Commission (SEC) is the main authority that is responsible for administering all federal securities laws.[85] Each state has its own separated securities department which regulates the offer and sale of securities in each state by its own securities law which is known as "blue sky law."

As a result, any securities transaction in the USA must comply with both federal law and blue sky law, for instance, if there is any action that complies with the element of anti-fraud provisions, it is commonly enforced not only by SEC but also by the states to bring such action pursuant to state law.[86]

5. Civil Liability for False Statement or Omissions.

The objective of the securities and exchange law is to protect investors, and with this objective any transaction that is involving with something that the law defined it as securities, such transaction must be subjected to the Act of 1933 and the Act of 1934 to protect investors. Anyone who was considered as a participant in the securities market must comply with the securities and exchange law, and if he breached the law, he may face civil and criminal liability.

In this part, it can divide into two parts. To start with the breaches of the Act of 1933 and then follow with the breach of the Act of 1934.

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[84] Securities exempt from registration under the securities Act of 1933, at https://thismatter.com/money/stocks/exempt-securities.htm, (last visited 4 February 2018).

[85] World Law Group, op.cit., p.661.

[86] Mark J. Astarita, Introduction to State Securities (Blue Sky) Laws, at http://www.seclaw.com/introduction-to-state-securities-laws/, (last visited 4 February 2018).

1) Breaches of the Act of 1933

The Act of 1933 intends to do is to require the "truth about securities."[87] At the time of issue and to impose a penalty for failure to tell the truth. Once it is told, the matter is left to investors.

There are some provisions that impose civil liability for an action that not comply with this law which is as follows:

a. Section 11 of the Act of 1933

Section 11 stated that any purchaser in case "any part of the registration statement, when such part become effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statement therein not misleading."

This section 11 applies to all registrations. It gives civil rights to all purchasers (from whomever they purchase) against those liable on the registration statement. In this case, the purchaser is not required to prove that an untrue statement or omission was material at the time of his purchase.

b. Section 12 of the Act of 1933

As refer to section 5 and section 10 of the Act of 1933 which stated that in transactions not exempted by section 4, involving securities not exempted under section 3 a person may not deliver securities for or after the sale unless a prospectus meets the requirement of section 10. With these two provisions of the law, the prospectus included every written communication or advertisement offering a security for sale. Only when the security that is newly registered and prospectus meet the requirement of section 10 are available.

The circumstance that comes along with this two sections is the prospectus that complies with the law can lead to liability under section 12.

Moreover, if a security is sold in violation of section 5, the purchaser may sue the seller in recission or damages. To maintain such right, the purchaser needs to show only the violation of section5.

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[87] William O. Douglas, "The Federal Securities Act of 1933," Yale Law Journal 2 (December 1933): 171.

(1) Breach of the Act of 1934

The Act of 1934 provides the provisions of manipulative and deceptive practices to protect investors.

In an attempt to cope with these practices, the SEC has adopted the rule10b-5, under section 10(b) of the Act of 1934.

Violations of this rule, the Act of 1934 provides an implied civil liability[88] which are first, the statutory of tort theory that a person injured by violation of a statute enacted for the benefit of persons in his position is entitled to recover his damages; second, the theory that since 29(b) of the Act of 1934 makes all contracts that violated this act or rules promulgated under it voidable, any transaction violating rule 10b-5 must be voidable by the injured party in civil action.

3.1.2 The Definition of Securities

The securities market in the USA is governed by the Act of 1933 and the Act of 1934. The distinction between this law is the Act of 1933 primarily deals with the registration of new securities issues. It is concerned with the principle of disclosure regarding the new issue for the benefit of the investing public. The Act of 1934 concerns the rules that govern the securities exchanges, as well as the rules that govern the registration and regulation of broker and dealers.

Although the power over the market is different, these two laws have provided security in the same manner. A result is anything that constituted as security under the definition that provided by these two applications of law, the transaction that involved with it must comply with these laws.

The Act of 1933 has provides the definition of securities in section 2(a)(1)[89] , and the Act of 1934 provides such definition in section 3 (a) (10).[90]

One had to take into accounts that the above provision defines the securities, it defines "securities" in both specific and more general terms. The list of specific instruments included any note, stock, bond, and debenture. And then, there

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[88] Alan H. Bromberg, "securities law-fraud-SEC Rule 10b-5," Duke Law Journal 417 (January 1968): 419.

[89] Section 2(a)(1) The Securities and Exchange Act of 1933.

[90] Section 3 (a)(10) The Securities Exchange Act of 1934.

follow with the list of the general catch-all term, for instance, any evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, investment contract and any instrument commonly known as a security[91].

One kind of security under these two federal laws is an "investment contract." The investment contract is the best fit for analyzing token under the federal securities law.

3.1.3 Current Regulation on Token in The United States of America

At present, token crowd sale is taking in many different forms. There are two categories of tokens in different circumstances. The first kind of token is meant to serve simply as a highly-liquid for traditional security which is called "securities-tokens."[92] Another kind is utility tokens which are a category of blockchain tokens that contains assets which are not related to financial services products.

This part aims to discuss only the first kind of token which is "securities-tokens." This kind of tokens represents the right to share in a cash-flow. Although white paper provides sufficient information to indicate securities-token has been issued. Regulators around the world have started to qualify those tokens as securities.

In the U.S.A. The Securities and Exchange Commission (SEC) issued an investigative report from DAO's case that any transaction that conducted by an organization that using distributed ledger or blockchain technology which can be referred as "initial coin offering" or "token crowd sales." This transaction involved with the technology, with this kind of automation, it does not remove conduct from the purview of the U.S. federal securities laws then tokens is subjected to the requirements of the federal securities laws.[93]

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[91] John c.coffee, JR. and Hillary A. Sale, Securities regulation cases and material, 11th ed. (Foundation press Co., 2015), p.254.

[92] Juan Batiz-Benet, The SAFT project: Toward a compliant token sale framework, at https://saftproject.com/static/SAFT-Project-Whitepaper.pdf, (last visited 5 February 2018).

[93] SEC issues investigative Report Concluding Dao Tokens, A digital asset were securities, at https://www.sec.gov/news/press-release/2017-131, (last visited 16 January 2018).

Discuss the current regulation on tokens in the USA, it shall start with the report of investigation under the Howey test which is a fundamental principle of securities laws that apply "investment contract" to virtual organizations or capital raising entities making use of distributed ledger technology which is as follows:

1. Under section 2(a)(1) of the Act of 1933, securities include "an investment contract." An investment contract is an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.[94] This principle is flexible because many types of instruments can fall within the ordinary concept of a security.

The consideration to determine whether a token is securities under this principle can be expressed in three elements:

1) The investment that can be cash or non-cash

In determining whether an investment contract exists, cash is not the only form of an investment that shall create an investment contract. Token crowd sale uses blockchain technology to make their investment. Such investment is the type of contribution of value that can create an investment contract.

2) With a reasonable expectation of profits

An expectation of profit means expected capital appreciation resulting from the development of the initial investment or expected participation in earnings resulting from the use of investors funds.[95]

In this element, investors purchased token were investing in a common enterprise and reasonably expected to earn profits through a token platform.

3) Derived from the managerial efforts of others

In this element, investors' profit was to be derived from the efforts of others. Depending on the terms of each particular contract that created by the promoter. Investors in a token transaction have relied on the managerial and entrepreneurial efforts of promotor to put the project proposal and generate profits for investors.

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[94] Section 2(a)(1) Securities and Exchange Act 1933.

[95] Juan Batiz-Benet, op.cit.

After having concidered all elements, token satisfy with the elements of Howey test under U.S. securities law then it can be constituted as security. A result is, a registration and prospectus requirements apply to the issuer of token which gives various conditions to comply with the law which are as follows:

1. Issuers must register offers and sales of securities unless a valid exemption applies.[96] If there is the one who participates in an unregistered offer and sale of securities which is not subject to a valid exemption shall liable for violating the law.

2. A system that meets the definition of "an exchange"[97] must register as a national securities exchange.

In the USA, one can raise money through crowdfunding only by using the unique fundraising websites or brokers. Both acquire the right to provide such services only after being registered with the SEC. There are restrictions concerning the amount of funding a company may get. Also, issuers are required to disclose financial records and other information to investors and the SEC.

As mention that the objective of the registration provisions of the federal securities laws is to ensure that investor who is involved with this transaction shall have all proper disclosure and shall subject to regulatory scrutiny for investors' protection. Moreover, this report also confirms and ensures that issuers of blockchain which is technology-based securities must register offers and sales of such securities unless a valid exemption applies.

Once the token is qualified as securities, a result is a registration and prospectus requirement applies to the issuer or the promoter in a token transaction which can ensure a minimum of investor protection.

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[96] Section 5 Securities and Exchange Act of 1933.

[97] Section 3(a)(1) of Securities and Exchange act Af 1934; defines as any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood… ."

3.1.4 Conclusion

Token crowd sale is an innovative technology and has beneficial ways to raise capital. Such an innovative technology behind this virtual transaction does not exempt securities offerings and trading platforms from the regulatory framework which was designed to protect the investors in the securities market.

If token transaction involves the offer and sale of token that constitutes securities which depends on the facts and circumstances. The one who offers and sells securities in the United States must comply with the federal securities laws, including the requirement to register with the SEC unless qualifying with an exemption from the registration requirements of the federal securities law. Such registration provision is designed to provide investors with procedural protections and material information necessary to inform investors decisions. These requirements apply to whether the traditional company or a decentralized autonomous organization regardless whether securities that purchased is using U.S. dollars or virtual currencies.

3.2 Securities and Exchange Law in Singapore

The securities market in Singapore is trading on the Singapore Exchange Limited (SGX) which is demutualizing from the merger of the Stock Exchange of Singapore (SES) and the Singapore International Monetary Exchange Ltd. (SIMEX).

Nowadays, The SGX is the only stock exchange in Singapore.[98] Securities trading is operated by a wholly owned subsidiary of the SGX which is the Singapore Exchange Securities Trading Limited (SGX-ST). SGX-ST maintains two listing board which are the main board and catalist.

For the Mainboard, Singapore operates securities market with the disclosure-based regime. SGX's listing rules provide the disclosure-based regime with high-quality administrative standards and continuing requirements for issuers. This requirement is to require listed issuers to make timely disclosure of all material

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[98] Navin Sregantan, Market infrastructure- Singapore, at http://www.luxcsd.com/luxcsd-en/products-and-services/market-coverage/asia-pacific/singapore/market-infrastructure---singapore/7608, (last visited 5 February 2018).

information to the market to ensure that issuers meet the minimum requirement that prescribed by the rule.

Unlike issuers listed on SGX's main board, Catalist companies are directly supervised by their sponsors which is qualified with professional companies experienced in corporate finance and compliance advisory work. They are authorized and regulated by SGX through strict admission criteria and continuing obligations. However, SGX continues to regulate issuers through its rules for admission and continuing obligation. It also retains the power to discipline them when there is a rule breach

There are some keys differences between a mainboard and a catalyst listing.

Table 2: A listing on the Singapore Stock Exchange: Mainboard vs Catalist[99]

The condition of the law	Main board	Catalist
1. Quantitative requirement	Needs to satisfy at least one quantitative requirements.	-
2. IPO Approval	Approval by SGX-ST and MAS	Approval by its appointed sponsor
3. Shareholders' approvals for acquisitions and disposals	If an acquisition or disposal does not exceed that 20% no need to ask for approvals.[100]	An approval only required where an acquisition exceeds 75%[101]

Moreover, Singapore is an ordinary member of International Organization of Securities Commissions (IOSCO) which is the international body that brings together the world's securities regulators and is recognized as the global standard setter for the securities sector. There are various of the objective of IOSCO which is as follows: firstly, to cooperate in developing, implementing and promoting adherence to internationally recognized and consistent standards of regulation. Secondly, to enhance investor

[99] A listing on the Singapore Stock Exchange: Mainboard vs Catalist, at http://www.legalbusinessonline.com/news/sponsored-listing-singapore-stock-exchange-main board-vs-catalist-part-2/72106, (last visited 9 February 2018).

[100] Rule 1006 of Main Board Rule.

[101] Rule 1006 of Catalist Rule.

protection and promote investor confidence in the integrity of securities market. Lastly, to exchange information at both global and regional levels to assist the development of markets.[102] With these objectives, IOSCO has established two multilateral memorandums of understanding which are as follows:

First, IOSCO established Enhanced Multilateral Memorandum of Understanding (EMMoU), this stands for serving and supporting its objectives of protecting investors and ensuring that securities markets are fair, efficient, and transparent. On 17th November 2005, Singapore has signed EMMoU.

Second, IOSCO has established Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU), this memorandum sets an international benchmark for cross-border co-operation. It has provided securities regulators with the tools for combating cross-border fraud and misconduct which can weaken global markets and undermine investors confidence, for instance insider trading, market manipulation and misrepresentation of material information. On 17th November 2005, Singapore has signed MMoU.[103]

As a result that Singapore is a country member of IOSCO and Singapore is already signed these two memoranda then these two memoranda shall remain in effect as long as, and until, Singapore continues to wish to use it. So the regulation of securities law in Singapore is qualified with the international standard.

3.2.1 Regulation of the Securities in Singapore

The Securities and Future Act, Chapter 289 of Singapore (SFA) was enacted in 2001 to be the main statute for the legal and regulatory framework for securities which including the offer securities in Singapore.[104] The SFA does not distinguish between an offering of securities by a public or private entity or whether the entity is incorporated in Singapore or elsewhere. Entities that are listed in

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[102] IOSCO, International Organization of Securities Commissions, at https://www.iosco.org/about/?subsection=about_iosco, (last visited 9 November 2018).

[103] IOSCO, Signatories to Appendix A and Appendix B List, at https://www.iosco.org/about/?subSection=mmou&subSection1=signatories, (last visited 9 February 2018).

[104] Wong Partnership LLP, Securities World, 4th ed. (United Kingdom: Thomson Reuters UK Limited Trading as Sweet & Maxwell, 2014), p.417.

Singapore would either be listed on the Main Board of the SGX-ST or on the Catalist, both of which are operated by the SGX-ST.

In general, there is no requirement in Singapore for a foreign issuer to be registered in Singapore for it to make an offer of securities in Singapore. However, if the offer of securities does not fall within one of the exemptions from the prospectus requirements that are set out in the SFA. The issuer would need to prepare a prospectus to be issued in connection with the offer, and the prospectus would need to be registered with the Monetary Authority of Singapore (MAS).

1. Objectives of the Regulation of the Market

As mentioned that MAS is the authority that has full power to govern securities market in Singapore. The objective of supervision in regulating the markets is set out in section 5 of the SFA which is in pursuant with the public policy objectives that set out by international standard-setting bodies for instance, the International Organization of Securities Commissions (IOSCO)"

MAS' objectives in regulating securities markets are as follows:

1) To promote fair, orderly and transparent markets

This objective is stood for to provide investors with greater confidence in the financial system which means that the market should run with the non-discriminatory basis, provide reliable procedures which can minimize risk of market failure, and provide public information on trading which based on a real-time basis.

2) To facilitate efficient markets for the allocation of capital and the transfers of risks

An efficient market stands for a reliable process and unhindered. By using the relevant information to reflect in the price discovery process, an efficient market allows allocation of scarce capital to its most efficient use.

3) To reduce systemic risk

The objective of reducing systemic risk by regulating markets essential because systemically-important markets may potentially undermine stability or public confidence in the financial system.

From the above objectives, the SFA providing an effective framework to enable sharing of information between MAS and investors, and there is

no restriction on foreign firms that are operating in Singapore because they may conduct and be regulated under the same requirements as local intermediaries. So there is a reasonable protection level of protection of investors in Singapore which can say that its standards and their application match global best practice.

To achieve these objective, SFA provides the following provision to make market efficiency which are as follows:

1) Antifraud provision

The applicable law that is governing the trading of securities on the SGX-ST included Securities and Futures Act, 2001 (SFA). The SFA has three objectives which are first, to promote fair, orderly and transparent markets; secondly, to facilitate efficient markets for the allocation of capital and the transfer of risks; lastly, to reduce systemic risks.[105] With this objective, there are the antifraud provisions to facilitate efficient securities market as follow:

(1) Misleading Statement or Omission

The process of securities is largely influenced by investor confidence, making it possible to affect those prices by disseminating favorable or unfavorable information.

This antifraud provision is in section 199 of the SFA which prohibits a person from making a false statement or disseminating information which is false or misleading in a material particular which is likely to have the effect of:

(a) Inducing other persons to subscribe for securities;

(b) Inducing the sale or purchase of securities by other persons; or

(c) Increasing, reducing, maintaining or stabilizing the market price of securities;

if when making that statement or disseminating that information, the person does not care whether the statement or information is true or false, or knows that the statement or information is false or misleading in a material particular.[106]

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[105] Section 5 Securities and Future Act (cap.289).

[106] Section 199.

A false and misleading statement in this section includes written or verbal commentary by a person who does not have reasonable grounds for making those statements. In the context of securities, the prohibition against making false and misleading statements focus on the likelihood of such statements inducing a person to deal in the securities or on affecting on their prices.

(2) Insider trading

Insider trading is a process whereby a person who is connected with a corporation uses information that is not available to the public when dealing with securities.[107] The insider is in a position to gain by selling or buying securities before information that might be affected the price of the corporation's securities is made to the public.

The most important of the provisions regulating insider trading are contained in Division 3, part XII of the SFA. This regulation prohibited two kinds of action.[108] The insider is in a position to gain by selling or buying securities before information that might be affected the price of the corporation's securities is made to the public.

The most important of the provisions regulating insider trading is contains in Division 3, part XII of the SFA. This regulation prohibited two kinds of action. Which is as follows: firstly, the possession of information concerning securities that are not available and materially price sensitive. Secondly, the subscribing, purchasing or selling those securities or procuring another person to subscribe, purchase or sell those securities or communicating the information where the securities are listed in an exchange and the insider knows that the tippee would be likely to subscribe, purchase or sell the securities or procure another person to do so.

(3) Market manipulation

Market manipulation is the conduct of market activities to interfere with the actual supply and demand in the market. Manipulation in the securities market can be done in a variety manners. Section 196 of the SFA is the provision that targets the person who manipulates the securities market.

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[107] Walter Woon, "Regulation of the securities industry in Singapore," PacificRimLaw & Policy Journal 4 (July 1995): 743.

[108] Section 218 Securities and Future Act (cap.289).

Section 198 of the SFA prohibits stock market manipulation which is an act where a person carries out transactions in the securities of a corporation which have the effect of raising, decreasing or maintaining the price of securities with the intention to induce other persons to subscribe, purchase or sell such securities.

Moreover, the SFA also provides catch-all provision[109] to prohibit any form of stock market manipulation which has not deal with the specific section to protect investors, for instance, employing any device, scheme or artifice to defraud.

2. The Function of Law

The rationale of SFA is to implement this act as a "single rulebook," and to protect the investor to be able to make informed decisions; it has two primary reasons behind which are;

First, due to the increase of technology in the capital markets, cross-selling and financial innovations required the local regulators to create a flexible and transparent legal framework which adequately balanced prudential concerns with financial market development.

Second, Since Asian financial crisis 1997, MAS's approach had changed from a merit-based regulation to a more flexible and disclosure-based regime where companies are mandated under section 203 of SFA to continuously disclose material information.

The SFA is aimed to provide an effective framework to enable the sharing of information and cooperation between MAS and foreign regulators on supervisory and enforcement matters. This law can be described as "relating to the regulation of activities and institutions in the securities and futures industry, including leveraged foreign exchange trading, and of clearing facilities, and for matters connected in addition to that."[110]

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[109] Section 201 Securities and Future Act (cap.289).

[110] Law Teacher, Securities and Future Act, at https://www.lawteacher.net/free-law-essays/security-law/securities-and-futures-act.php, (last visited 16 January 2018).

3. The Basic Structure of the Law

In this part shall study the requirement of the SFA which is a securities law in Singapore to give protection to the investor in the securities market.

1) The regulation of public offerings

In general, there is no requirement for a foreign issuer to register in Singapore to make an offer of securities in Singapore.[111] However, if the offer of securities does not fall within one of the exemptions from the prospectus requirements which is in the SFA, then the issuer need to prepare a prospectus to be issued in connection with the offer, and the prospectus shall need to be registered with MAS.

Under the SFA, any offer of securities must be accompanied by a prospectus which prepared by the requirements of the SFA[112] and its accompanying regulations, and registered by the MAS. Failure to comply with this requirement shall have an offense punishable by a fine or imprisonment or both.

(1) The approval requirement

Under this requirement, a company seeking a listing its shares on the SGX mainboard and SGX Catalist will need to meet the conditions which set out in rule 210 of the mainboard rules of the SGX or rule 406 of the Catalist Rules of the SGX.

a. Criteria for Mainboard Listing

The Mainboard in the securities market in Singapore is operating with the disclosure-based regime with high-quality administrative standards for issuers. This requirement stands to ensure that issuers shall meet the minimum requirements to protect investors.

The company that wants to be listed on the mainboard of the SGX must comply with one of the following quantitative and qualitative criteria:[113]

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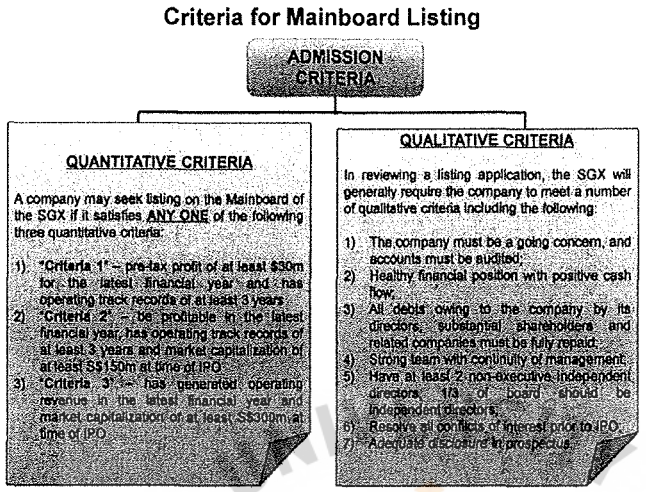
[111] Wong Partnership LLP, op.cit., p.418.

[112] section 243(1); A prospectus for an offer of securities shall contain (a) all the information that investors and their professional advisers would reasonably require to make an informed assessment of the matters specified in subsection (3); and (b) the matter prescribed by the authority.

[113] Rule 210 of the Main Board Rule.

Figure 3: Criteria for Mainboard Listing[114]



(a) Minimum consolidated pre-tax profit (based on full-year consolidated audited accounts) of at least S$30 million for the latest financial year and has an operating track record of at least three years.

(b) Profitable in the latest financial year (pre-tax profit based on the latest full-year consolidated audited accounts), has an operating track record of at least three years and has a market capitalization of not less than S$150 million based on the issue price and post-invitation issued share capital.

(c) Operating revenue (actual or pro forma) in the latest completed financial year and a market capitalization of not less than S$300 million based on the issue price and post-invitation issued share capital. Real Estate Investment Trusts and Business Trusts who have met the S$300 million market capitalization test but do not have historical financial information may apply under this rule if they can demonstrate that they will generate operating revenue immediately upon listing.

Furthermore, in respect of (a) and (b) above:

(a) The company must have been engaged in substantially the same business and have been under substantially the same management throughout the period for which three years operating track record applies.

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[114] Wee Woon Hong, Singapore Initial Public Offerings 2017, at https://www.globallegalinsights.com/practice-areas/initial-public-offerings/global-legal-insights---initial-public-offering-2017-1st-ed./singapore, (last visited 9 February 2018).

(b) If the group made low profits or losses in the two years before the application due to specific factors which were of a temporary nature and such adverse factors have either ceased or are expected to be rectified upon the company's listing, the application might still be considered.

(c) In determining the profits, exceptional or non-recurrent income and extraordinary items must be excluded.

(d) The SGX will normally not consider an application for listing from a company which has changed or proposes to change its financial year end if the SGX is of the opinion that the purpose of the change is to take advantage of exceptional or seasonal profits to show a better profit record.

b) Criteria for Catalist

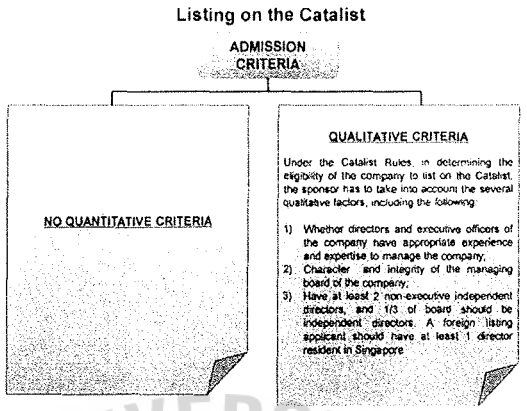
The criteria for listing in Catalist is different from listing in Mainboard because issuers who want to list in Ctalist are directly supervised by their sponsors which is qualified with professional companies who have experience in corporate finance and compliance advisory work. So issuers who want to list in Catalist is does not need the requirement from SGX.[115]

The listing company that want to list in Catalist must comply with rule 406 of the Catalist rules of the SGX which stated that it shall comply only with the qualitative rules which are as follows[116]:

[115] Nicole Tan, Open Catalist market in Singapore, at https://positioningmag.com/38269, (last visited 25 February 2018).

[116] Rule 406 of the Catalist Rules of the SGX.

Figure 4: Criteria for Catalist[117]



(a) The group must be in a healthy financial position, having regard to whether the group has positive cash flow from operating activities.

(b) Before listing, all debts owing to the group by its directors, substantial shareholders, and companies controlled by the directors and substantial shareholders must be settled. (This rule does not apply to intra-group debts.)

(c) While the surplus arising from the revaluation of plant and equipment can be shown in the books of the company, such surplus should not be capitalized or used for calculating its net tangible assets per share.

It is important that the directors and management of the company must be of good integrity. The specified requirements of the SGX are as follows:

(a) The directors and executive officers should have appropriate experience and expertise to manage the group's business.

(b) The character and integrity of the directors, management and controlling shareholders of the company will be a relevant factor for consideration.

(c) The company's board must have at least two non-executive directors who are independent and free of any material business or financial connection with the company.

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[117] Wee Woon Hong, op.cit.

(1) The disclosure requirement

Singapore is a country member of International Organization of Securities Commission (IOSCO). Singapore has to improve its domestic law standard by implement the principle of securities regulation that provided by IOSCO.

Principle 16 of IOSCO which is the principle for issuers, it states that there should be full, accurate and timely disclosure of financial results, risk and other information which is material to investor's decisions.

From this principle, there is no legal prohibition on unlisted public companies raising fund from the public. However, unlisted public companies intending to raise funds from the public must comply with all applicable requirements under the SFA. There are requirements under SFA which are as follows:

a. Prospectus register with MAS

Section 240 (1) of the SFA requires all offers of securities to be made in or accompanied by a prospectus registered with MAS unless the offer falls within the available exemption which is in section 272- section 280 of the SFA, for instance, an offer of securities to employees of the issuer.[118]

Singapore operates securities market with the disclosure-based regime for capital markets. SGX's listing rule is increasing the disclosure-based regime to provide high baseline admission standards and continuing requirements for issuers. An issuer making an offer of securities must lodge and register a prospectus with MAS. The prospectus must contain all information that investors and their professional advisers would reasonably require to make an informed assessment of the securities.

b. Disclosure an information

Section 243 of the SFA requires issuers to disclose all information that investors and their professional advisers would reasonably require making an informed assessment of, among other matters, the rights and liabilities attached to the securities, the assets and liabilities, profits and losses, financial position and performance, and prospectus of the issuer.

Whose shares are already listed and traded on the SGX-ST, and its substantial information is in the public domain (with the continuous public regime) can offer of shares or debentures for cash.

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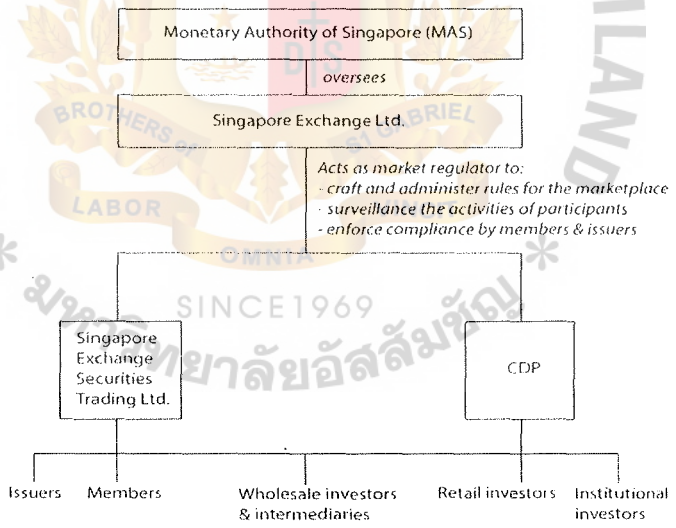
[118] Section 273 (1)(f) Securities and Future Act (cap.289).

In conclusion, an issuer who intends to make an offer of securities must lodge a prospectus with MAS. Once it is lodged, it will be available on MAS' OPERA website[119] for public comments. It is an online database which hosts information and document on public offers of securities. This allowed the public to view and download all document lodged with MAS, and provide comments on prospectus during the exposure period (before the registration). It shall be noted that disclosure on OPERA website that the lodged prospectus has not been registered with MAS, in this sense, investors should not apply for the shares by lodged prospectus. Prospectus lodged with MAS are subject to reviews by MAS before they are registered. MAS may register such prospectus within the prescribed period[120]

4. The Regulatory Authority

Figure 5: Regulatory Framework[121]



There are many regulators in the securities market in Singapore which are as follows:

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[119] OPERA refers to the offers and prospectus Electronic Repository and Access.

[120] Section 240 (8) Securities and Future Act (cap.289).

[121] Wee Woon Hong, op.cit.

(1) The Monetary Authority of Singapore (MAS)

Under the SFA, the highest tier of regulation is the Monetary Authority of Singapore (MAS), which is the authority that has a duty to oversight the securities regulation in Singapore. The regulatory and supervisory of MAS are stated in section 4 of the Monetary Authority of Singapore Act (Cap.186) (MAS Act). Section 4(2)(b), and section 23(8) of the MAS act states that MAS is responsible for conducting integrated supervision of financial services which including the Securities and Future Act (Cap.289) (SFA) and the Financial Advisers Act (Cap.110) (FAA). With these two provisions, MAS is an authority that has power over the capital market activities that are set out in detail in SFA and FAA. Moreover, section 321 of the SFA [122] is a statutory that empower MAS to issue where it deems appropriate regulations, notices, guidelines, codes, policy statements and practice notes to provide guidelines on the operation of the provisions of statute, the regulatory objectives, and in regulation to any matter relating to the functions of MAS.

Moreover, the MAS act also provides for the establishment of MAS as a body corporate and therefore it is a separate legal person which is legally independent of the executive and legislative branches of the Singapore government. A result is MAS' responsibilities for capital market regulatory policies does not need an approval requirement from the government or other government agencies. So the final decisions on capital markets regulatory policies rest with MAS. With this kind of full power of MAS, section 22 of the MAS act provides the legal protection with a full indemnity for any director, officer or employee of MAS who has done anything including any statement made, or omitted which done with good faith,[123] and this protection continues after an employee leaves MAS.

(2) Singapore Exchange Limited (SGX)

Section 6 of the SFA states that market operators may comprise approved exchanges or recognized market operators unless exempted.

From this provision, the only entity that approved by MAS to perform as self-regulatory organizations (SROs) in Singapore, is the Singapore Exchange Limited (SGX). The function of SGX is to establish new rules on trading,

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[122] Section 321 Securities and Future Act (cap.289),

[123] Section 22.

business conduct, and qualification and administer compensation arrangements for investors who suffer loss due to the defalcation or insolvency of members.

SGX is responsible for approving new listing, but MAS must review and register any prospectus (offer of securities) which relating to the new issue of securities. An issuer who wants to issue an initial public offering (IPO) and seeking a listing on the Singapore Exchange Securities Trading Ltd. (SGX-ST) must submit a listing application which including prospectus to SGX-ST for review, and lodge the prospectus with MAS for registration.

In this scenario, SGX-ST will consider whether the listing applicant is satisfied the listing requirements and will decide whether to approve or reject the listing.

Application. MAS shall review and recheck that such prospectus complies with the statutory disclosure requirement. So SGX is the primary regulator which is under the supervision of the MAS about the listing of companies in Singapore. A company in Singapore that wants to list in the market shall obtain an approval from SGX before listing in the market. After listing, SGX still has the power to ensure that the company complies with the regulation.

In conclusion, MAS and SGX are of the view to facilitate the fair, orderly and transparent trading in the SGX-ST. This conclusion is in line with the assessment under the International Monetary Fund (IMF). IMF found that Singapore securities market is in the high level of compliance with international standards.

3) Civil Liability for false statement or omissions

As mentioned that the regulations that govern securities transaction in Singapore are SFA. If there was some action that breaches of the SFA, it might result in one or more of the following consequences;

First, it is shown in Part XII of the SFA which prohibits certain conducts in relation to securities;

(a) False trading and marketing rigging transactions[124];

(b) Securities market manipulation[125];

(c) Making or disseminating false or misleading statements[126];

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[124] Section 197 Securities and Future Act (cap.289).

[125] Section 198.

(d) Fraudulently inducing persons to deal in securities[127];

(e) Employing manipulative and deceptive devices[128];

(f) Circulating or disseminating information about illegal transactions[129];

Any person who commits any of the above acts is guilty of an offence with the result in a fine and/ or imprisonment.[130]

Second, SFA has civil penalties which means that contravention of the SFA provisions can have a result in the imposition of a civil penalty. Where the person in contravention of the SFA has gained profits or avoided a loss, the court may order he or she to pay a civil penalty.

Lastly, SFA has civil liability which means that a person who has gained a profit or avoided a loss as a result of his or her contravention of the SFA may also be liable to pay compensation to a person who has suffered a loss because of the contravention. This liability arises irrespective of any conviction or civil penalty imposed on the contravening person under SFA.

3.2.2 The Definition of Securities

The SFA underpins MAS' capital markets regulatory framework. The SFA provides the regulation of securities through rules on the securities which are offered to investors and information that must be provided with such offers. This law is set out the regulatory framework to facilitate disclosure-based regime, which seeks to empower investors to make informed investment decisions.

Section 2 of the SFA provides the definition of security which included almost all of the capital markets products for instance share, debenture, or units in collective investment.[131]

In recent years, MAS has observed some non-conventional products being offered to investors an alternative investment. Some of these products have

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[126] Section 199 Securities and Future Act (cap.289).

[127] Section 200.

[128] Section 201.

[129] Section 202.

[130] Section 204.

[131] Section 2.

essentially the same characteristics as regulated capital markets products, but it structured in a way that is outside the framework of SFA regulatory. However, MAS does not seek to govern all product that is offered, but MAS is of the view that where products are being offered to investors as investments, sufficient information should be provided to investors on how to protect themselves.

A result is products that display similar characteristics as securities should accordingly be subject to the requirement of the SFA, then investors enjoy the regulatory safeguards when being offered such products.

This part shall study the elements of Collective Investment Scheme (CIS)[132] which is securities under the SFA to find the similarity characteristics with other kinds of alternative investment.

MAS' capital markets regulatory framework also seeks to safeguard the interests of investors in CIS. As defined in section 2 of the SFA which stated that CIS are arrangements in respect of any property, whether securities or futures, commodities or real estate.

Apart from the statutory definition of a CIS, MAS has set out general principles of how each element should apply in the context of CIS [133]:

1. Participants have no day-to-day control over the management of the property ("lack of day-to-day control")

This element draws an important distinction about the nature of investment that each investor is undertaking. It means that in the scheme of investment, the management of such investment is in the investor's control or investing to get rights under a scheme that provides for someone else to manage such investment.

A result is if investors retain control over how their property is managed (have day-to-day control), they would be in a better position to protect their interests without the need for regulatory intervention.

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[132] Section 2 (e) Securities and Future Act (cap.289).

[133] MAS, Consultation Paper on proposals to Enhance Regulatory Safeguards for Investors in the Capital Markets, pp.12-13, at http://www.mas.gov.sg/news-and-publications/consultation-paper/2014/consultation-on-proposals-to-enhance-regulatory-safeguards-for-investors-in-the-capital-markets.aspx, (last visited 13 January 2018).

2. Managed as a whole and pooled profits

These two elements establish the collective nature of the arrangement which means that the investment must be effective as a "pooled" to generate profits which would otherwise not be available to participants if such investment managed on an individual basis. For instance, if there is someone who takes full ownership of the block of the apartment, where such block is managed on the basis that the only profit that he obtains is what arises from the management of his property, there is no management as a whole. In this case, this block of the apartment is not to be a CIS.

3. Purpose or effect of the arrangement is to enable participants to participate in profits arising from the scheme property ("rights to participate in pooled profits")

In determining whether an arrangement is "for profit," MAS didn't regard on the consumption-based basis, but regard to whether the arrangement purports or has the effect of giving participants rights to participate in pooled profits of the scheme.

From the above of the elements that use for interpretation of what constitutes as a CIS

As mentioned above, it should be note that where each element was committed, it would already fall within MAS' capital market regulatory framework.

3.2.3 Current Regulation on Token in Singapore

A digital token is a cryptographically-secured representation of a token-holder's rights to receive a benefit or to perform specified functions. A virtual currency is one particularity type of digital token, which typically functions as a medium of exchange, a unit of account or a store of value.[134]

The nature of the token transaction which can raise large sums of monies in a short period, it becomes popular, and it was attractive for the investor who raise

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[134] MAS, MAS clarifies regulatory position on the offer of digital tokens in Singapore, at http://www.mas.gov.sg/News-and-Publications/Media-Releases/2017/ MAS-clarifies-regulatory-position-on-the-offer-of-digital-tokens-in-Singapore.aspx, (last visited 13 January 2018).

capital to invest in this kind of transaction. But token crowd sale is a kind of transaction that vulnerable to money laundering and terrorist financing risks. The decision by MAS is to follow the US to clarify the position towards digital tokens and regulate them as securities which are a step towards an international oversight of this transaction.

on 1st August 2017, MAS clarified that token crowd sale transaction in Singapore would be regulated by MAS if the digital tokens constitute products which regulated under the Securities and Future Act (Cap.289) (SFA).[135]

The consideration for a token that constitutes a product under the securities law which administered by MAS are as follows:

Under section 2 (1) of the SFA[136], offers or issues of digital tokens may be regulated by MAS if the digital tokens are capital markets products under SFA. Capital markets products include any securities, futures contracts and contracts or arrangement for leveraged foreign exchange trading.[137]

To determine whether token is a type of capital markets products is considered on the structure and characteristic of a token. For instance[138], a digital token may constitute: a share[139], where it confers or represent ownership interest in a corporation, represent liability of the token holder in the corporation or a digital token

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[135] Saheli Ray Chaudhury, Governments want to control cryptocurrencies- but there is a danger to too many rules, at https://www.cnbc.com/2017/09/12/regulators-are-turning-their-attention- to -cryptocurrencies.html, (last visited 14 January 2018).

[136] Section 2(1) of SFA stated that "Capital market products" means any securities, futures contracts, contracts or arrangements for the purposes of foreign exchange trading, contracts or arrangements for the purposes of leveraged foreign exchange trading, and such other products as MAS may prescribe as capital markets products."

[137] Section 2 of the SFA Securities and Future Act (cap.289).

[138] "A Guide to Digital Token Offerings" by MAS, page 3.

[139] Section 2(1) of the SFA, share means a share in the share capital of corporation and includes stock except where a distinction between stock and share is expressed or implied.

may constitute as a unit[140] in a collective investment scheme (CIS), where it represents a right or interest in a CIS, or an option to acquire a right or interest in a CIS.

If tokens are constituted as securities or units in a CIS, it is subjected to the same regulatory with offers securities under part XIII of the SFA which is about offers of investments. A result is, an issuer(offer) of such tokens may only make an offer digital tokens, if the offer complies with the requirements under section 240 and 296 of part XIII of SFA. These includes the requirements that the offer must be made in or accompanied by a prospectus that is prepared in accordance with SFA and already comply with prospectus requirement with MAS.

Where digital tokens fall within the definition of securities in the SFA, the result is, the issuers of such tokens would be required to lodge and register a prospectus with MAS prior to the offer of such tokens, unless exempted.

The intermediaries who facilitate offers or issues of digital tokens have to apply for a capital market services license which are the guidelines on criteria for the Grant of a Capital Markets Services License[141] and the Guidelines on License Applications, Representative Notification and Payment of Fees.[142]

3.2.4 Conclusion

In Singapore, MAS already issues a guide as general guidance on the application of the securities law for an issuer that wants to offer or issues a digital token that he or she must comply with the securities law before issuing such token.

Moreover, if the token doesn't constitute as security under securities law, MAS also intend to establish a new payment services framework ("New Payments Framework") that will include rules to address such token under the provision of money laundering and terrorism financing risks.

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[140] Section 2(1) of the SFA, a unit, in relation to collective investment scheme, means a right or interest (however described) in a collective investment scheme (whether or not constituted as an entity), and includes an option to acquire any such right or interest in the collective investment scheme.

[141] Guideline No. SFA 04-G01.

[142] Guideline No. CMG-G01.

3.3 The Comparison on Token Regulation between U.S.A. and Singapore

In USA and Singapore, these two countries are country members of IOSCO. This guarantee that their domestic law is qualified by the international standard to protect both local investors and foreign investors.

Almost all the country has an awareness of the problem of token crowd sale, and there has no specific regulation on this kind of transaction. With these kinds of issues, USA and Singapore are the countries that try to solve such problems by trying to specify token characteristic to be in the purview of securities law in order to protect investors and prevent any loss or damages that shall occurs from token transaction.

There are differences on token regulation between these two models which are in the figure as follows:

Table 3: The Comparison on Token Regulation between USA and Singapore.

Protection of the Law on token crowd sale	**U.S.A.**	**Singapore**
1. IOSCO	□	□
2. Types of token	Securities	Collective product
3. Applicable Law	-Securities and Exchange Act of 1933 and -Securities and Exchange Act of 1934	Securities and Future Act (Cap.289)
4. The requirement of the law	Disclosure requirement	-Disclosure requirement -Registration requirement
5. Antifraud provisions	□	□
6. Government Authority	Securities and Exchange Commission (SEC)	The Monetary Authority of Singapore (MAS)
7. Civil liabilities	□	□

In conclusion, token crowd sale in these two countries is protected by the law of securities if their characteristics are involved with elements that provided by their securities laws. A result is any transaction involved the law shall govern public offering in any manners, the party in such transaction.

Chapter 4
Analysis of Legal Problems on Token as Securities under Thai Law

The improvement of technology brings the countries around the world including Thailand to the digital economy. This kind of innovation not only gives a lot of benefit to the people by providing convenience but also has some bad effect on the traditional pattern to be more complicated than before. Token crowd sale has played more role than before and causes an impact not only at the international level but also in Thailand. People begin to recognize and invest in this kind of investment and holding token as a tool like money or credit.

The method of token crowd sale causes a higher risk to the investor. For instance, money laundering when token can be used instead of the fiat currency, or drain fund when the hacker can have access the platform illegally. These problems have occurred because there is no specific provision to govern and provide legal status for the token. However, the government, related institutions, and other authorities are well aware and warn about token crowd sale and try to manage or control this kind of investment.

At present, Thai government does not accept token as securities which can be used to trade in the securities market. However, it is not illegal or forbidden. Nevertheless, the Bank of Thailand (BOT) which is the central organization that supervises the financial sectors of the country, has issued comments about the information of Bitcoin which is included other kinds of electronic information in order to give awareness to the one who wants to invest in this kind of transaction. But there is still no law that covered token transaction.

In this chapter, it is about the analysis of the legal problem that occurs form unregulated token crowd sale as securities and the analysis of the guideline for developing securities law to treat token as securities.

4.1 Token as Securities

With the characteristic of digital innovation which increasingly play a role in the offering public the more choices to access to financial services. Token crowd sale is an example of the application of new technology that has existing potential to support fundraising needs for startups. Token crowd sale refers to a digital way of raising funds from the public.

In the token transaction, an issuer will offer digital tokens in exchange for the cryptocurrency. Since the digital token can diverge widely in form and representation, some may resemble financial returns, rights, and obligations which is a similarity to securities under the SEA. In this sense, the securities and exchange act can be used to adapt the provision to solve the issue of an unregulated token transaction.

The legal status of token crowd sale in Thailand is still unclear unlike in USA and Singapore. The definition of securities under the SEA does not cover token. This means that token crowd sale which is an investment that promoters use to raise fund from the public is unregulated by SEA. The SEC which is an authority that governs securities markets is trying to understand this type of financial innovation by public hearing about this issue.[143]

4.1.1 The Problem of Unregulated Token Crowd Sale

Lacking legislation can cause the problem to the investor in token transaction as following:

1. There is no Effective Law to Regulate the Digital Platform as Funding Portals

Token crowd sale takes a marketplace on a digital platform which comprised of many different platforms where the investor can convert the token unit into another or real currency. Many platforms are not subject to the securities and exchange regulations. Even if they play as dealer or broker in the traditional capital market.

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[143] Public consultation Aor Tor Ngor.34/2560 with topic regulatory approach on Initial Coin Offering (ICO).

2. No Investor Protection

This issue is firstly discuss, carefully research the platform and pay close attention to the free structure and systems safeguards because at present, there is no law to enforce token platform to be registered, and with the unregistered platform, it may not be able to protect against market abuses by other traders adequately.

3. The Potential for Fraud in Money Laundering

Token crowd sale has become a primary means of fundraising for projects built on blockchain technology. Every transaction of a blockchain-based token is permanently recorded on a public viewable digital ledger.[144] Although the parties in such transaction associated with each other by secret identification, it is possible for investigators or the hacker to track down.

Due to the nature of the token transaction which can raise sums of monies in a short time, it is vulnerable to money laundering and terrorist financing.[145] With this innovation in technology, money laundering has embraced a universal character. The problem of money laundering is not only associated with drug trafficking or tax avoidance offenses but also increases the risk of each customer and business transaction.

Battle with money laundering and protect the investor from fraud token crowd sale needs some form of the regulation. At the worldwide level, the nations need to adopt an appropriate methodology, and the government in domestic level need to improve domestic legal structure; the regulation should also focus on the token crowd sale.

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[144] Saheli Roy Choudhury, It's a very good time to be a money launder, and you can thank cryptocurrencies, at https://www.cnbc.com/2017/08/04/icos-may-be-seen-as-securities-by-u-s-and-singapore-regulators.html, (last visited 17 January 2018).

[145] MAS, op.cit.

4. Inadequate documentation

In the case that investors want to invest in the token transaction, as mentioned that, in Thailand, it has no regulation that regulates the promoter to give adequate information to the investors. But, it has "white paper" which is an authoritative report or guide which informs readers a complex issue and lay out facts about the blockchain or distributed application which describe how tokens wor.[146] The white paper is the similarity to the prospectus [147] which is disclosure document that the issuer used to finalize sale until the registration statement has been efficiently declared by the SEC.[148]

Although token transaction has a white paper as a disclosure document for the individual investors to decide to invest in its transaction, it has no regulation to specify that which information the promoter should disclose to the investor, so sometimes it can be a kind of marketing. The investor of token crowd sale should educate themselves about the risk of lacking the information before getting involved and giving any money or personal information to a token platform. For the prospectus which are used for Initial Public Offerings (IPOs) required by the securities regulations to disclose both of hard and soft information. However, white papers are not regulated in the same line.

In addition to these issues, another concern especially cautioned by the BOT[149] is on capital movements by the used of Token which may cause the impact to the society. This situation has led to the more attention to a status of token in the aspect of law in Thailand.

After analyzed various applicable law to find the proper legal measurement. The result is token transaction should be a security under the SEA because token characteristic is like securities which can raise capital fund in capital market, so the appropriate regulation for raising capital through token crowd sale must

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[146] Rob May, Scrap the white paper : how to evaluate tokens and blockchain, at https://www.coindesk.com/scrap-white-paper-evaluate-tokens-blockchains/, (last visited 15 January 2018).

[147] Section 4 Securities and Exchange Act B.E. 2535.

[148] Section 72.

[149] Notification of Bank of Thailand 8/2557.

take appropriate steps to comply with securities law.[150] And having this appropriate rule in place can guarantee that investors shall have adequate documentation and token transaction shall be under the antifraud provision which is the protection of the securities law.

4.1.2 The Advantage and Disadvantage of Adopting Token as Securities

In this regard, the relevant authorities' position against token is positive as they also take into accounts that this innovation contains both advantages and disadvantages to the people in the country.

1. The Advantage of Adopting Token as Securities.

Token transaction has run their process in the distributed ledger or blockchain platform which the promoter of such platform can create such platform for the investor to access to purchase a product or get services or even can be a platform for investment.

With this elastic platform, it has many advantages in the scheme of investment, for instance, no international transaction fees, transaction speeding, borderless currency and the value of the token is insulated from the governments.[151] And token characteristic which is a representation of contractual rights in the form of an easily transferable medium, so token can be a variety of things and even can be rights to exchange the token for another asset to receive future payment or to share in a profit of a venture which is a similar to securities.

The advantageous of a token as securities are investors in this transaction shall get protection under the SEA. In this sense, this does not mean the law guarantee a profit from the investment, but guarantee that the investor shall get

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[150] Saheli Roy Choudhury, It's a very good time for money launder and you can thank cryptocurrencies, at https://www.cnbc.com/2017/08/04/icos-may-be-seen-as-securities-by-u-s-and-singapore-regulators.html, (last visited 12 January 2018).

[151] Bitcoin Exchange Gvide, AML Bitcoin-ATENC Anti-money laundering KYC Cryptocurrency?, at https://bitcoinexchangeguide.com/aml-bitcoin/, (last visited 12 January 2018).

adequacy information to decide to invest in such transaction, and if he or she gets a loss, the law may provide the measure to prevent that loss and seek redeem for damages.

2. The Disadvantage of Token as Securities.

SEA has the objective to protecting the investor, so the law has a high standard which has a complicated procedure to qualified. After the SEA is implemented to include token as securities, it shall cause the following problem which are:

1) Time-consuming

The SEA requires the procedure which may cause the difficult to the investor, and to comply with the law it may take a period. For instance, the promoter can raise fund after the document and prospectus become effective.

2) Capital outflow

Capital outflow is an economic term that used to describe the movement of the assets flows out of the country.[152] This movement occurs when foreign and domestic investors sell off their holdings in particular country because of perceived weakness in the nation's economy, and they believe that better opportunities exist abroad.

If Thailand implements the SEA to cover token as securities, the investors shall face with strict regulation. A result is a Thai business would launch token crowd sale in other countries, this may cause a problem to Thailand to face with capital outflow.

In conclusion, although governing token as securities is made their process to be complicated. For instance, it takes a period because the issuer (the promoter) in the token transaction have to wait until their document and prospectus become effective, then they can raise fund through token crowd sale, or it must comply with many regulations of the SEA which is costly. But with the objective of the SEA which is stand for protection investor, so it provides much regulation for an issuer to comply. The token should be under the governing of the SEA to make investors have confidence.

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[152] Investopedia, capital outflow, at https://www.investopedia.com/terms/c/capital-outflow.asp, (last visited 8 March 2018).

4.1.3 Analysis of the Guideline for Developing of Securities Law to Treat Token as Securities

Regulation is one of the most important questions regarding with token transaction. Token may fulfill functions of virtual currency, commodity, an investment instrument, company share and many others. The result is token quite difficult to define.

At present, the token is treated as security, but not all of the token are securities. There are two types of token which are security token and utility token.[153] Security-tokens are designed to be the company's share, while utility tokens represent access to company's product or services. Although token are securities. However, they are exempted from the regulation of securities law.

Many countries try to develop their securities law to cover security-tokens by inclusion of token in the definition of securities to grant the protection to investors in token crowd sale.

The legal concept of the token as securities is to ensure that securities market will operate efficiently. The legal principle is based on the two primary goals which are first, to protect the consumer or an ordinary user of the securities to be safe and sound; secondly, to protect securities market by creating a market where the participants have equal access to the same information and subjected to the same rules.

1. United State of America

In deciding what instruments have been held to be securities within the definition of federal or state securities statutes. The statutory language is expansive and has been interpreted widely by the legal principle which is:

1) Howey test

In the United State of America, to determine whether token is a security-token or utility-token, SEC performs Howey test principle which is the legal principle that the court uses to interpret what is constituted as securities in the scheme of "an investment contract." There are four elements to consider which are:

(1) Investment can be in cash or non-cash.

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[153] Bonpay, Security Tokens Vs. Utility Tokens, at https://medium.com/@bonpay/security-tokens-vs-utility-tokens-1aa7531aabe8, (last visited 3 April 2018).

(2) A common enterprise which is the element which focuses on the success of investor interest rise and falls with other involved in the enterprise.

(3) The expectation of the return on their investment.

(4) The profit from such investment must derive from the effort of other investors.

From the above elements, this principle has made the securities law in the USA flexible and modernity. With this characteristic of the USA law, if a token is concluded with all elements of Howey test, then token crowd sale is under the purview of the law. This gives a lot of benefits to investors who invest in this kind of investment in the sense that they can get the protection under the securities law.

2. Singapore

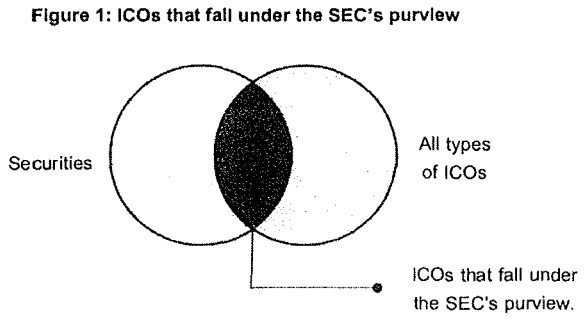
In Singapore, MAS already issued a regulatory framework to seek the safeguard for investors by setting out the general principle in the context of collective investment scheme (CIS) which is a kind of securities. A result is if a token is concluding with all elements of CIS, then it shall constitute as securities and shall subject to the provision of securities law.

3. Thailand

According to the definition of the securities, a token is not in the definition of securities under section 4 of the SEA which can be used to trade in the securities market. To determine whether token is security, there is no legal principle as in the United States of America which the court can use to interpret token as securities.

Token characteristic is a similarity to securities in the scheme that it can raise fund from the public by offering a token, but not all of the digital tokens can constitute as securities only some of them can constitute as securities which are shown in the following figure:

Figure 6: Token that Fall under the SEC's Purview[154]



From above figure, not all tokens are securities. Only securities-token are in the purview of securities and exchange law. Other types of token which are utility-token are not in the SEC's purview.

In cases where token constitutes as securities, their issuer is required to comply with the applicable regulations under SEC Thailand's purview. To analyze whether the token is securities or not, one shall consider from the definition of securities on section 4 the SEA states that "securities" means

(1) treasury bills;

(2) bonds;

(3) bills;

(4) shares;

(5) debentures;

(6) investment units which are instruments or evidence representing the rights to the property of a mutual fund;

(7) certificates representing the rights to purchase shares;

(8) certificates representing the rights to purchase debentures;

(9) certificates representing the rights to purchase investment units;

(10) any other instruments as specified by the SEC.[155]

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[154] Public Consultation Document Aor Tor Ngor.34/2560, at https://www.iosco.org/library/ico-statements/Thailand%20-%20SEC%20-%20Public%20Consultation%20Document%20on%20ICOs.pdf, (last visited 12 February 2018).

[155] Section 4 Securities and Exchange Act B.E.2535.

According to the definition of the securities that provided by SEA, a token can be apply to any types of securities, for instance, it can be a share which represents ownership of the corporation, or it can be debenture which is instruments representing indebtedness.

As mentioned afore, Thai securities law and the courts have not established the guidelines for interpreting whether the term securities covering tokens consequently the interpretation shall follow section 4 (10) which is the provision that empowers SEC to issue a notification for another instrument to be in the definition of securities. This provision that is flexible, so the SEC should propose token as a new type of instrument which can constitute as securities and the SEC should create token regime only for the newly defined instrument with the virtue to reach a broad group of investors.

4.2 Regulation on Token Transaction

The key fundamental principle of securities law is to protect investors from having information adequately and reducing risk which may come from securities transaction. Although every investment has the risk, the securities law does not regulated every instrument. To get protection under the securities law, only the transaction that involved with the instrument that constitutes as securities shall be in the scope of the law.

The promotor who issue token that constitutes as securities to public offering shall comply with the securities law and their transaction shall be fall under the purview of the securities law which is as follows:

4.2.1 The Disclosure Requirement on White Paper

In the securities law, there has disclosure requirement on prospectus which is the standard for the issuing company to comply with the public offering. This requirement is the most important provision for investors to have adequate information before deciding on their investment.

In addition to issue, it involves with the document which called "white paper." The white paper is defined as an authoritative report or guide that informs readers concisely about a complex issue and presents the issuing body's philosophy on

the matter. It is meant to help readers understand an issue, solve the problem or make decision.[156]

Although in token crowd sale, it has a white paper which is a simple description of the project, it has no law to govern it, so it is silent on important information. A result is many of token crowd sale are offered with inadequate disclosure of information. This can cause many problems as follows:

Firstly, investors in the token transaction could not identify the issuing entity's or promotor's origin when analyze token's white paper to make a decision.

Secondly, lack of necessary information as to who stands behind the token crowd sale, the impact of right to claims for compensation under the law is severely limited, and if the parties to a transaction cannot be established with certainty, the law's arms are tied.

Thirdly, a whitepaper which is provided by promotor being incomplete, misleading, unaudited. It can lead to the high risk of fraud.

Lastly, the decision to invest in token crowd sale is lack of financial information, it can lead to problems of investors' decision to fund in such token crowd sale that it cannot be based on a rational of calculus.

According to the above problems, if a token is in the purview of securities law then the promotor shall comply with the disclosure requirement before public offering then investors in the token transaction shall have adequate information.

4.2.2 Antifraud Preventive Provision

Fraud is a broad concept that refers to any intentional act committed to secure an unfair or unlawful gain.[157]

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[156] Dirk A. Zetzsche, Ross P. Buckley, Douglas W. Arner and Linus Fohr, "The ICO gold rush: it's scam, it's a bubble, it's a super challenge for regulators," Law Working Paper Series 011 (November 2017): 10.

[157] Black's Law Dictionary defines fraud as, "An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by

In the scheme of securities law, there is an anti-provision to guarantee and protect the investing public against securities fraud and misrepresentation in the offer or sale of securities which shall arise in connection with prospectus and communications requirement.

A token which constitutes as securities shall be fall under the purview of securities law, so the antifraud provision shall govern this kind of transaction. A result is if there is illegal and prohibited action under the anti-fraud provision, the promotor in the token transaction shall be liable.

4.2.3 Civil Liability

These measures are the essential procedures to control and monitor transactions to reduce the risk of investment. As a result, the promotor shall comply with the disclosure provision, provide adequate information as specified by the law on the whitepaper and shall not involve with the actions prohibited by the law which can lead to the civil liability.

4.3 Governing Platform

Token crowd sale is one kind of the crowdfunding method to raise fund via Blockchain through a project or venture by creating and selling its tokens in exchange for cryptocurrencies. A blockchain technology is an electronically distributed ledger which similar to a stock ledger by maintaining various participant in a network of computers. The token crowd sale itself is expressly intended to serve as electronic raising fund through blockchain platform and to operate on the internet trade basis. The network enables users to transfer token directly to each other and settling those exchanges simultaneously without the involvement of any third party.

Token crowd sale does not have any central administrating authority, and it is not subject to control or supervision of any governmental bodies. Blockchain technology is used not only for token crowd sale but also transactions related to

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concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury."

another kind of virtual currencies.[158] The issue about the decentralized system causes the effect to the economic system in a way that makes it difficult to determine and oversight the token crowd sale transaction.

4.4 Conclusion

Token crowd sale is the technology-based investment which has an advantage for a startup to raise funds from the public, but it is lack of legal protection. It can cause many problems for investors, for instance, lack of information to allow proper investment decision or lack of right to be compensated for any damage that shall occur from token crowd sale. These problems be lead to an awareness in many countries around the world; they try to find the solution not only by adapting the existing securities law to govern this kind of transaction but also try to enact new regulations which related to technology-based investment. All of these solutions are meant to protect investors.

In the United State of America, the SEC tries to solve a drain-fund problem which is occurred by token crowd sale and try to find a proper measure to prevent money laundering that may occur from this transaction. SEC already issued a report of the investigation which says that not all of tokens are securities, but only tokens that comply with the principle of Howey test are considered as securities. Therefore an issuer in the transaction that involved with a token (securities) must comply with the securities law before they issue such token.

In Singapore, the decision to clarify the position of a token by MAS has followed the model of the USA. MAS explained that not all token shall be constituted as a collective product. Only the product that composes with collective investment's elements shall constitute as a collective product under the definition of securities of the SFA act.

In Thailand, SEC has already issued a public consultation document to public hearing. This movement is not only for protecting investors but also promoting digital innovation. The public consultation document did not specify what is precisely token, so the token regime in Thailand is not quite clear. After concluded token characteristic, it must be governed by the SEA.

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[158] Prarya Apaiyanukorn, "Anti-money laundering against virtual currency in case of using Bitcoin," (Master degree, Faculty of Law, Thammasat University, 2015), p.28.

Chapter 5
Conclusion and Recommendations

At present, token crowd sale is a new kind of investment that has been interested in investors because it gives an opportunity to a start-up (an entrepreneur at the early stage with minimal investment) to seek capital funds. Moreover, Token crowd sale is a kind of internet-based investment which provides various ways for the start-ups to invest in their project, for instance, stock trading or investing in company's shares. With this characteristic, it does not matter where investors meant to takes place and where the project in which investors want to invest is located. Furthermore, token crowd sale is not under the present applicable law, and the government does not control it. Although it is good for investors in the sense that investors do not have to pay any commission fee or any taxes that may be include in such transaction, but it can cause many risks to investors.

The problem of unregulated token crowd sale has created a barrier to the necessary regulation for preventing online crime or enforcing regulations. Token crowd sale in many countries are still under development especially in USA and Singapore which are the law-model countries

5.1 Conclusion

A token is a kind of internet-based investment; it is the free movement of information which creates an issue in regulating the contents and its users. This characteristic may stick to the same problems as another kind of internet-based investment, for instance, fraud, money laundering, record keeping and hacker. Moreover, it could be stick with the issue of lacking an enforcement in the sense that involving with tokens; it cannot enforce and supervise adequately.

However, there are a number of difficult legal questions surrounding token crowd sale, for instance, some tokens, depending on their features, may be subjected to securities law or another applicable law. The law is inconsistent among jurisdictions both in terms of definition and supervision which are as follows:

5.1.1 Token as Securities

To determine that token is within the purview of the regulation of securities law or not, one should analyze the definition of securities in the securities law. From the study, in the United States of America and Singapore which have laws that one may use as a model law, these two countries have covered token in the definition of securities which are as follows:

In the United States of America, the SEC which is an authority that governed securities market already issued the report of investigation that some token that involved with "an investment contract" constitutes as security under section 2 (a)(1) of the Securities and Exchange Act,1934.

In Singapore, the MAS has issued "A guide to digital token offerings" to clarify some token that constitutes a capital market product is a security, and it must be regulated under the Securities and Futures Act (cap.289).

However, in Thailand, the definition of securities under the SEA which is the law that governs securities transaction in the securities market have not covered token as securities, so token transactions are not in the purview of securities law. This can cause the risk of money laundering for the absence of the supervision form the administration by issuing any regulation.

5.1.2 The Regulation of Token Crowd Sale

Public securities-tokens are under the securities and exchange law. To prevent investors from fraud, there are the following measurements which are as follows:

1. The Regulation on Public Offering

Offer and sales of securities are subject to the registration requirement of the SEA. This provision mandates comprehensive disclosure regarding the offering, the issuer, and related matters. To encourage accuracy and completeness of disclosure requirement, the SEA imposes strict obligations and liabilities upon parties of the transaction that evolve around securities-token.

2. Antifraud Provision

The objective of the SEA is to protect investors in securities transaction by providing not only the requirement for the issuer to provide information adequately but also provide the antifraud provisions to prevent fraud in the sale of securities.

In case of there is a breach of the law, for instance, participation in unregistered offerings or there is fraud or disclosure of false of information, the case shall be subjected to the SEA, and the intermediaries who involved in such transaction shall have liabilities under the SEA.

5.2 Recommendations

Every kind of investment has a risk that shall occur from it an ordinary transaction. Token crowd sale is one kind of investment which runs their process on the internet platform.

This part aims to recommend the solution to reduce some risk in token crowd sale which does not occur in an ordinary transaction, but it occurs from lack of law to govern which can lead to many risks encountered by investors.

5.2.1 Amendment of the Definition of Securities in the SEA to Cover Token

The SEA should be the primary law to supervise and regulate the token to manage the risk of investment through a token transaction in the future. The other regulations have to be amended to be consistent with this act.

According to the SEA, the list in the definition of securities under section 4 may not cover token. To follow the regulation of USA and Singapore, the SEC which is an authority that has the power to monitor and govern token transaction should propose that token is a new type of instrument which can constitute as securities under section 4(10) then token transaction shall fall under the regulation of securities law.

Moreover, the SEC should create a new regime for the token transaction, for instance, the SEC had to explore the punishment for the criminal based activities which caused the draining of fund or money laundering offense to restrict the illegal use of a token. The existing laws do not have the prohibition of the user of a token in the commission of a crime. If the regulators can inquire this supplement option to control and enforce on this subject matter, so the investors, companies, and platform operators shall be subjected to regulations and could be subjected to a penalty the same as another offense.

As for recommendation, the author suggests amendment to the Securities and Exchange Act (SEA) section 4(10) to add the definition of securities to cover "token" to affirm legal status of token under the securities law.

5.2.2 Governing Token Platform

Not all of the tokens can constitute as securities. There are two types of token which are security-token and utility-token. There are two approaches for such token; they are as follows:

1. Using an Exempt Regime Option

This approach stands for the utility-token which is not governed by securities law.

With a token process that is operated on the internet which is an open network, it is easily accessible by anyone through a digital process at fewer fees compared with traditional investment. This is a kind of innovative investment so that it can relate to various kinds of crimes.

The approach is as this scheme conduct through the internet; if the promoter of such platform already registered their platform, then it is a recognized platform. This recognized platform is easy to investigate, so there are exempt from the approval process and the disclosure requirements.

In this approach, if there is any fraud or false information that occurs, the case will not be subjected to the SEA but it is restricted by any other laws including Anti-money laundering law and Emergency Decree on Fraudulent Loan B.E. 2527.

2. The Automatic Approval

This approach stands for security-token. In this case, their transaction shall comply with the SEA. The SEC should amend the approval conditions in the SEA to cover the registered platform, so the registered platform shall be applied. As a condition for approval, the issuer of such platform must submit a required report and other documents related to token crowd sale to SEC at and after the offering.

In case of fraud or disclosure of false of information, the case shall be subjected to the SEA in addition to anti-fraud provisions.

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