

Public Consultation Document

Aor Tor Ngor. 34/2560

Topic: Regulatory approach on Initial Coin Offering (ICO)

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The Securities and Exchange Commission, Thailand (SEC) invites interested parties to provide their views and comments on the regulatory proposal in this document, which can be downloaded at www.sec.or.th

To send your comments and suggestions, please email aunchisa@sec.or.th and archari@sec.or.th

Last day of public hearing 26 November 2017

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The SEC greatly appreciates your participation in this public consultation.

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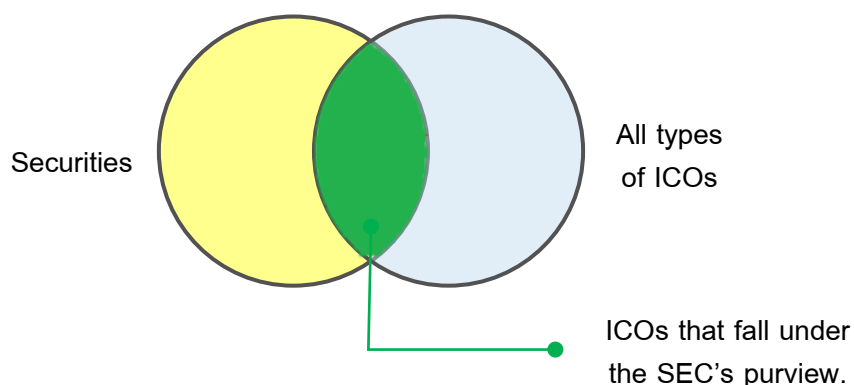
I. Foreword

1.1 The SEC is committed to promoting digital innovation. With rapid development, technology increasingly plays crucial role in delivering innovative products and services, offering the public more choices and democratizing access to financial services. Initial Coin Offering (ICO) is an example of the application of new technology that has exciting potential to support fundraising needs for tech startups and social enterprises.

1.2 ICO refers to a digital way of raising funds from the public. In an ICO process, ICO issuer will offer digital tokens in exchange for cryptocurrency, such as Bitcoin or Ether. Since the digital tokens can diverge widely in design and representation, some may resemble financial returns, rights and obligations in similar ways to securities under the Securities and Exchange Act B.E. 2535 (SEA).

1.3 ICO has gained popularity among tech startups as a timely and cost-effective way to raise funds. In the past few months, ICO has grown exponentially and has surpassed early-stage venture capital funding for blockchain. Many questions have also emerged from the public, whether an ICO can be done legally, particularly whether it falls under the SEC's regulations.

Figure 1: ICOs that fall under the SEC's purview



1.4 In cases where an ICO constitutes offering of securities, the issuer will need to comply with applicable regulatory requirements under the SEC Thailand's purview. The SEC realizes that ICO may not fit neatly with current regulatory framework, and sees an urgency in providing regulatory clarification on ICO to both fundraisers and investors. For fundraisers, a clear policy stance will bring confidence, and help fostering market mechanism and standard practices that they can follow. For investors, appropriate regulation can incentivize market solutions to help investors screen legitimate ICOs from scams.

1.5 ICO can be viewed as a combination of three rising trends: crowdfunding, blockchain technology, and cryptocurrency. While the form of fundraising, means, and technology involved have changed, trust mechanism remains relevant, if not more than ever. A clear regulatory approach can provide guidelines for financial service providers on how they can remain relevant and continue to create values under new technology. For example, financial advisors involved with an ICO will need to understand blockchain technology.

1.6 Considering this new technological context, many aspects of existing rules may need to be reviewed. Therefore, the SEC would like to propose a regulatory approach on ICO and seek public comments to ensure appropriate regulatory responses.

II. Regulatory approach

2.1 Specification of a new type of securities under the SEA to ensure no regulatory gap

- Securities, according to the SEA, are specified on a positive list and may not cover, in some cases, financial instruments that have similar rights and obligations to securities, including digital tokens offered through ICOs.
- Therefore, the SEC would like to propose a definition for “investment participation” as a new type of securities. The definition aims to be a generic description of standardized investment instruments, which by virtue of standardization have the ability to reach a wide group of investors.

“Investment participation” refers to rights, with highly standardized terms and conditions, to participate in pooled benefits from pooled contributions which are collectively managed where investors have no control over day-to-day operation, but does not include the existing types of securities under the Securities and Exchange Act B.E. 2535.

“ส่วนแบ่งร่วมลงทุน” หมายถึง
“สิทธิซึ่งมีข้อตกลงและเงื่อนไขที่เป็นมาตรฐานเดียวกันหรือใกล้เคียงกัน
ในการได้รับส่วนแบ่งในผลประโยชน์ซึ่งเกิดจากการร่วมลงทุนในการดำเนินการใดหรือ
ทรัพย์สินใดโดยไม่มีส่วนในการบริหารจัดการการดำเนินการ
(day-to-day operation)
แต่ไม่รวมถึงหลักทรัพย์ที่มีการประกาศกำหนดไว้แล้วภายใต้พระราชบัญญัติหลักทรัพย์
และตลาดหลักทรัพย์ พ.ศ. 2535”

- Because the structure of an ICO can diverge greatly, whether the ICO constitutes securities offering under the SEA shall be determined on a case-by-case basis.

2.2 ICO process

- Technically, ICO process can apply to any types of securities. However, at this stage, the SEC proposes to create an ICO regime only for the newly defined

“investment participation” as an initial experimentation. Using ICO process with other types of securities will require some adaptations of traditional regime to accommodate digital process. Until then, offerings of any other types of securities such as equity shares or debentures will need to comply with the existing regime.

“Initial Coin Offering” is the offering process of digital tokens, where rights of digital token holders are specified in a digital form with automatic enforcement of contract, and the registration of token holders is done digitally.

"กระบวนการไอซีโอ" หมายถึง
การออกและเสนอขายหลักทรัพย์ที่ใช้วิธีการทางดิจิทัลกำหนดสิทธิของผู้ถือหลักทรัพย์
จัดเก็บทะเบียนผู้ถือหลักทรัพย์
และบังคับข้อตกลงระหว่างผู้ออกหลักทรัพย์และผู้ถือหลักทรัพย์โดยอัตโนมัติ

2.3 The proposed ICO regulatory approach

- Thailand's regulatory regime generally covers both a traditional track for public offerings as well as an exemption or light-touch track for offers made to sophisticated investors or private placements. However, the SEC proposes that ICO for “investment participation” be initially allowed for institutional investors (II), venture capital funds (VC), private equity funds (PE), ultra high net worth investors (UHNW)¹, as well as retail investors with some investment limit.
- Retail investors should be allowed to participate in ICOs, since they can play an important role in contributing to the development of the white paper and help increase the likelihood of project's success. However, each retail investor

¹ According to Notification of Securities and Exchange Commission Kor Jor. 4/2560 on Determination of Definitions of Institutional Investors, Ultra High Net Worth Investors, and High Net Worth Investors, an ultra high net worth investor refers to:

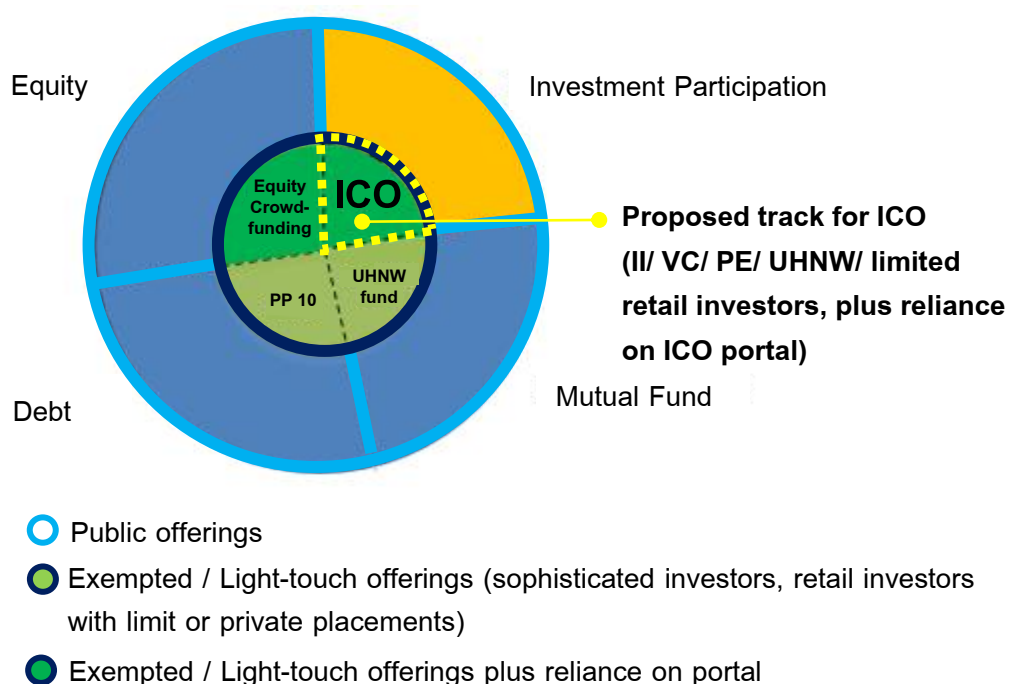
- (1) a juristic person having any of the following characteristics
 - (a) shareholders' equity as stated in the latest audited annual financial statements of at least 200 million baht; or
 - (b) direct investment in securities or derivatives as stated in the latest audited annual financial statements of at least 40 million baht or at least 80 million baht if including bank deposits
- (2) an individual, when combining with spouse, having any of the following characteristics
 - (a) net asset of at least 70 million baht, excluding the value of primary residence
 - (b) annual income of at least 10 million baht or at least 7 million baht if excluding spouse's
 - (c) direct investment in securities or derivatives of at least 25 million baht or at least 50 million baht if including bank deposits

should be subject to an investment limit of 300,000 baht per project to limit potential losses.

- In addition, the SEC believes there is a need for market players that can help bring quality, transparency, and confidence to the ICO market. This could be accomplished by requiring ICO to be conducted through an ICO portal recognized by the SEC. The conditions for portal recognition may include how the ICO portal can:
 - (1) perform due diligence, screen legitimate ICOs from scams, screen deals for viability and digital token distribution structure;
 - (2) verify source code / smart contract against white paper;
 - (3) ensure Know-Your-Client (KYC) arrangements;
 - (4) ensure applicable investment limits are observed;
 - (5) keep track of token subscriptions and transactions; and
 - (6) cooperate with the SEC on the ongoing supervision.

Conclusively, ICO portal will perform similar functions to investment bankers and registrar. Nevertheless, ICO portal does not guarantee business success of the startups, which generally have high failure rate.

Figure 2: Proposed regulatory approach for ICO, comparing to other regimes



- Since the proposed regime for ICO is for sophisticated investors and retail investors with an investment limit, and relies on recognized ICO portal performing the above functions, the role of the regulator will concentrate on working with the ICO portal to ensure that our regulatory objectives are met, rather than directly screening each ICO project. The SEC shall not spell out specific approaches that ICO portal may use, as long as the ICO portal can perform required functions and meet the regulatory objectives. The ICO portal shall be incorporated in Thailand with a minimum registered capital of 5 million baht, which is in line with requirements on equity crowdfunding portals.
- From a legal standpoint, there are two regulatory approaches for the ICO framework: a) using an exemption regime, and b) using an automatic approval regime.
 - a) The exemption regime option: ICOs conducted through a recognized portal are exempt from the approval process and the disclosure requirements, e.g. filing the registration statement, the draft prospectus, audited financial statement, and other documents related to ICO with the SEC. Therefore, when fraud or disclosure of false information occurs, the case will not be subject to the SEA, but will be prosecuted through anti-fraud provisions under the Criminal Code.
 - b) The automatic approval option: ICOs conducted through a recognized portal are automatically approved. As a condition for approval, the issuer must submit required reports and documents to the ICO portal and the SEC at and after the offering. In case of fraud or disclosure of false information, the case will be subject to the SEA, in addition to anti-fraud provisions under the Criminal Code.
- The SEC thinks that b) will give the SEC more tools for investor protection purposes.
- Where the digital tokens involved in an ICO fall under the definition of securities, parties engaging in activities other than issuance and offering (e.g. brokerage, dealing, giving investment advice, and operating an exchange or trading platform) will be required to seek a license, registration, or exemption from the SEC.

III. Other issues

3.1 When ICO portal also invests in its curated deals

- An ICO portal may invest in its curated ICOs. While this could enhance the confidence of the investors, there is a concern that the ICO portal may have superior information and have a potential to front-run other investors. If an ICO portal is investing in its curated ICOs, it should have a mechanism to prevent potential conflict of interests and disclose material information in a timely manner to investors.

3.2 Risk related to holding an investment denominated in a cryptocurrency

Since ICOs are traded in cryptocurrency (such as Bitcoin or Ether), there is a concern that token holders may be exposed to the fluctuation in the value of the cryptocurrency of denomination. However, some have argued that the quoted value in cryptocurrency will adjust itself, as would be the case with fiat currency. Investors can also switch between fiat currency and cryptocurrency to minimize this risk.

Consultation Response Form

Topic: Regulatory approach on Initial Coin Offering (ICO)

General Information

Name _____ Title _____

Company/ Organization _____

Tel _____ Fax _____

Email _____

Your status (check all applicable boxes)

- Entity with interest to become an ICO portal
- Potential issuer
- Retail investor
- Ultra high net worth investor
- Institutional investor / venture capital fund/ private equity fund
- Securities company / financial advisor / underwriter
- Other (please specify) _____

Please send your comments to FinTech Department, SEC Thailand

333/3 Vibhavadi Rangsit Road, Chom Phon, Chatuchak, Bangkok 10900

Tel/Fax: 0-2033-9936 หรือ email: aunchisa@sec.or.th

*** The SEC greatly appreciate your participation in this public consultation. ***

Comments

1. Do you agree with the definition of “investment participation” to ensure no regulatory gap?

| Regulatory proposal | Agree | Disagree |
|--|--------------------------|--------------------------|
| “Investment participation” refers to rights, with highly standardized terms and conditions, to participate in pooled benefits from pooled contributions which are collectively managed where investors have no control over day-to-day operation, but does not include the existing types of securities under the Securities and Exchange Act B.E. 2535 | <input type="checkbox"/> | <input type="checkbox"/> |
| Comments: <hr/> <hr/> <hr/> <hr/> <hr/> | | |

2. Do you agree with the proposed ICO definition?

| Regulatory proposal | Agree | Disagree |
|--|--------------------------|--------------------------|
| “ICO” is the offering process of digital tokens, where rights of digital token holders are specified in a digital form with automatic enforcement of contract, and the registration of token holders is done digitally. | <input type="checkbox"/> | <input type="checkbox"/> |
| Comments: <hr/> <hr/> <hr/> <hr/> <hr/> | | |

3. Do you agree that in the initial stage, an ICO regime should only cover ICOs that fall under the newly defined “investment participation”?

| Regulatory proposal | Agree | Disagree |
|---|--------------------------|--------------------------|
| Creating and ICO regime only for the newly defined “investment participation” as an initial experimentation. | <input type="checkbox"/> | <input type="checkbox"/> |
| Comments: _____ _____ _____ _____ | | |

4. Do you agree with initially restricting ICOs to some groups of investors and not allowing public offerings?

| Regulatory proposal | Agree | Disagree |
|--|--------------------------|--------------------------|
| Not allowing public offerings, only institutional investors, venture capital funds, private equity funds, ultra high net worth investors, and retail investors with an investment limit can invest in ICOs. | <input type="checkbox"/> | <input type="checkbox"/> |
| Comments: _____ _____ _____ _____ | | |

5. Do you agree with allowing each retail investor to participate in ICOs with an investment limit of 300,000 baht per project?

| Regulatory proposal | Agree | Disagree |
|---|--------------------------|--------------------------|
| Each retail investor should be allowed to participate in ICOs with an investment limit of 300,000 baht per project. | <input type="checkbox"/> | <input type="checkbox"/> |
| Comments: <hr/> <hr/> <hr/> <hr/> | | |

6. Do you agree with the requirement that an ICO should be conducted through an ICO portal recognized by the SEC?

| Regulatory proposal | Agree | Disagree |
|--|--------------------------|--------------------------|
| Requiring ICO to be conducted through an ICO portal recognized by the SEC. | <input type="checkbox"/> | <input type="checkbox"/> |
| Comments: <hr/> <hr/> <hr/> <hr/> | | |

7. Do you agree with the conditions for the recognition of the ICO portal?

| Regulatory proposal | Agree | Disagree |
|---|--------------------------|--------------------------|
| <p>The conditions for portal recognition:</p> <p>(1) perform due diligence, screen legitimate ICOs from scams, screen deals for viability and digital token distribution structure;</p> <p>(2) verify source code / smart contract against white paper;</p> <p>(3) ensure Know-Your-Client (KYC) arrangements;</p> <p>(4) ensure applicable investment limits are observed;</p> <p>(5) keep track of token subscriptions and transactions; and</p> <p>(6) cooperate with the SEC on the ongoing supervision.</p> <p>The ICO portal shall be incorporated in Thailand with a minimum registered capital of 5 million baht.</p> | <input type="checkbox"/> | <input type="checkbox"/> |
| <p>Comments:</p> <hr/> <hr/> <hr/> <hr/> | | |

8. Do you agree with option b) using automatic approval approach, which requires submission of reports and documents by issuers?

| Regulatory proposal | Agree | Disagree |
|---|--------------------------|--------------------------|
| <p>Using automatic approval approach, which requires submission of reports and documents by issuers.</p> | <input type="checkbox"/> | <input type="checkbox"/> |
| <p>Comments:</p> <hr/> <hr/> | | |

9. Do you agree that if an ICO portal invests in its curated deals, it shall have a mechanism to prevent potential conflict of interests and disclose material information in a timely manner to investors?

| Regulatory proposal | Agree | Disagree |
|--|--------------------------|--------------------------|
| <p>If an ICO portal invests in its curated deals, it shall have a mechanism to prevent potential conflict of interests and disclose material information in a timely manner to investors.</p> | <input type="checkbox"/> | <input type="checkbox"/> |
| <p>Comments:</p> <hr/> <hr/> <hr/> <hr/> | | |

Other comments:
