
LEGAL TRANSPLANTATION OR LEGAL INNOVATION? EQUITY-CROWDFUNDING REGULATION IN TAIWAN AFTER TITLE III OF THE U.S. JOBS ACT

Chang-hsien Tsai*

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* Associate Professor, Institute of Law for Science and Technology, National Tsing Hua University, Taiwan; LL.B., LL.M., National Taiwan University; LL.M. in Corporate Law, New York University School of Law; J.S.D., University of Illinois College of Law. Member, Taiwan and New York Bars. For comments on prior drafts, I thank Andrew Verstein, Todd J. Zywicki, Max Stearns, Wei Shen, Duoqi Xu, Ruoying Chen, Tao Huang, M. Todd Henderson, Saul Levmore, Anup Malani and those participants in the University of Chicago–Shanghai Jiao Tong University Securities Law Forum “The Future of Securities Regulation in the US and China” as well as those in Colloquium during the University of Chicago Law School Summer Institute in Law and Economics. I am grateful to the Ministry of Science and Technology of Taiwan for financial support (Grant No. MOST 103-2410-H-007-019). For research assistance, thanks are due to Kuan-Jun Peng, and for excellent editorial assistance, to BUILJ. The standard disclaimers apply.

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ABSTRACT

Crowdfunding has caused a worldwide revolution in early-stage startup financing during recent years. In the United States, the expansion of for-profit crowdfunding platforms to fund small businesses and startups prompted Congress to pass the game-changing law on equity crowdfunding, Title III of the JOBS Act in 2012 (“CROWDFUND Act”). While its specific rules and regulations as adopted by the SEC take effect this year, the substance of the JOBS Act as a whole is geared more towards the goal of capital formation,

over the historically promoted goal of investor protection. The use of equity crowdfunding has extended over to Taiwan as well. In 2014, the Taiwanese government created the Go Incubation Board for Startup and Acceleration (“GISA Board”), a government-sanctioned public equity crowdfunding platform run by the GreTai Securities Market (“GTSM”), a government-controlled foundation. It first promulgated the GISA Regulations and soon thereafter the Private Portal Regulations to govern the public and private platforms, respectively. Though transplanted from the CROWDFUND Act, Taiwan’s legal adaption or innovation reflects its path dependence on a high level of investor protection underlying local securities regulation, placing much more emphasis on investor protection than on capital formation, in theory. From a public choice perspective, the resultant features of Taiwan’s legal transplantation could be attributed to lobbying and influence by incumbent securities firms, as well as the GTSM’s own political incentives. This Article argues that a comparative and qualitative study of Taiwan’s equity crowdfunding regulatory patterns reveals that the transplantation of the U.S. model tends to be more of form than of substance, that is, of copying the text rather than pursuing the goal of capital formation in practice.

INTRODUCTION

Crowdfunding has recently become a powerful mechanism for entrepreneurs and startups to raise early-stage capital.¹ Crowdfunding is essentially a tool to attract a new pool of people — not the traditional banks and wealthy investors — via the Internet or social media networks to contribute to a funding target or project of the entrepreneur or startup.² Historically, in the United States, small businesses have struggled to raise seed capital.³ Most of the traditional funding channels, namely banks, private equity investors, angel investors, and venture capitalists, have been unwilling “to touch [for instance] a consumer products company until it surpassed \$10 million in sales.”⁴ Moreover, according to the

¹ Gary Dushnitsky & Dan Marom, *Crowd Monogamy*, 4 BUS. STRATEGY REV. 24, 24 (2013).

² See Tanya Prive, *Inside the JOBS Act: Equity Crowdfunding*, FORBES (Nov. 6, 2012), <http://www.forbes.com/sites/tanyaprive/2012/11/06/inside-the-jobs-act-equity-crowdfunding-2>. See also Kevin Harrington, *Will JOBS Act Equity Crowdfunding Ever Happen?*, FORBES (Feb. 3, 2015), <http://www.forbes.com/sites/kevinharrington/2015/02/03/will-jobs-act-equity-crowdfunding-ever-happen/#2715e4857a0b7cd52fbc44> ed.

³ See Prive, *supra* note 2.

⁴ Amy Cortese, *The Crowdfunding Crowd is Anxious*, N.Y. TIMES (Jan. 5, 2013), <http://www.nytimes.com/2013/01/06/business/crowdfunding-for-small-business-is-still-an-unclear-path.html> (summarizing thoughts of a director at a private equity firm in New York on equity crowdfunding).

Small Business Administration, “U.S. banks . . . held \$607 billion in outstanding small business loans of \$1 million or less during 2011.”⁵ But as small businesses, startups, and non-profits have begun to embrace crowdfunding, and as governments around the world have started to recognize this enthusiasm and spearhead reforms in this area, crowdfunding has become increasingly competitive with the traditional funding channels.⁶

In April 2012, the U.S. Congress passed a “game-changing” law: the Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act (“CROWDFUND Act”) — the short title of Title III of the Jumpstart Our Business Startups Act (“JOBS Act”).⁷ This new law created a revolutionary avenue of capital formation for small and new businesses: equity crowdfunding.⁸ With the aim of reducing compliance costs for small businesses, the JOBS Act focused more on forming capital than on protecting investors,⁹ and it tasked the U.S. Securities and Exchange Commission (“SEC”) with publishing regulations and rules to address these two, often mutually exclusive, goals in order for the CROWDFUND Act to be implemented.¹⁰

⁵ Prive, *supra* note 2 (internal citation omitted).

⁶ Dushnitsky & Marom, *supra* note 1, at 24.

⁷ Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (301-02) (2012) [hereinafter the JOBS Act] (codified as amended in various sections of the U.S. Code).

⁸ There are five models of Internet crowdfunding, which are differentiated by what funders receive as consideration for their money: (1) peer-to-peer lending; (2) pre-purchase funding; (3) donations; (4) rewards; and (5) equity. Title III of the JOBS Act is concerned with only the fifth model, equity, which is the focus of this Article. For a brief overview of the other four models, see John S. Wroldsen, *The Social Network and the Crowdfund Act: Zuckerberg, Saverin, and Venture Capitalists’ Dilution of the Crowd*, 15 VAND. J. ENT. & TECH. L. 583, 588-89 (2013). See also Harrington, *supra* note 2.

⁹ J. Robert Brown, Jr., *JOBS Act Issue: Introduction* 1 (Univ. of Denver Sturm College of Law Legal Research Paper Series, Working Paper No. 13-1626, 2013), <http://ssrn.com/abstract=2257894>. For remarks by SEC Commissioners, see generally SEC, SEC GOVERNMENT-BUSINESS FORUM ON SMALL BUSINESS CAPITAL FORMATION FINAL REPORT 14, 19, 21 (Apr. 2013), <http://www.sec.gov/info/smallbus/gbfor31.pdf> (“[T]he Jumpstart Our Business Startups Act has changed the landscape of the dialogue on helping small businesses raise capital. . . . The JOBS Act — given its goal of spurring economic growth and job creation by making it easier for businesses to find funding — is a significant step in the right direction. . . . [I]t’s imperative that we not only use this Forum, but the mandates in the JOBS Act, to focus our attention and time on small business issues to facilitate capital formation . . .”).

¹⁰ Stacy Cowley, *S.E.C. Gives Small Investors Access to Equity Crowdfunding*, N.Y. TIMES (Oct. 30, 2015), <http://www.nytimes.com/2015/10/31/business/dealbook/sec-gives-small-investors-access-to-equity-crowdfunding.html>. See also Crowdfunding, 78 Fed. Reg. 66,428 (Nov. 5, 2013) (to be codified at 17 C.F.R. pts. 200, 227, 232,

Historically, U.S. federal securities laws have tended to swing towards the goal of investor protection. The Sarbanes-Oxley Act of 2002 (“SOX”)¹¹ placed heavy burdens on both large and small companies; specifically, SOX not only strengthened mandated disclosures but also interfered with internal corporate governance.¹² Although its goal was to protect investors, it neglected the importance of promoting capital formation either through offering legal flexibility or avoiding excessive burdens.¹³ Similarly, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”)¹⁴ exempted small issuers from Section 404(b) of SOX,¹⁵ however, it further tightened protective measures for investors.

The CROWDFUND Act — which created a groundbreaking exemption for equity crowdfunding (in effect “overturning eighty-year old securities laws and decades of legal precedent”¹⁶) — now tends to swing towards the other side of the balance, of promoting capital formation by small businesses.¹⁷ Even within the scope of the SEC’s various drafts and promulgations since 2012, the trend is noticeably more favorable towards capital formation.¹⁸ As recently adopted by the SEC in October 2015,¹⁹ while certain protective measures will likely emerge, the JOBS Act will now expand to include non-accredited investor participations and allow startups and small businesses to raise up to \$1 million within a year and

239, 240, and 249) (SEC’s proposal on Crowdfunding, which was originally published online to the public).

¹¹ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 [hereinafter SOX].

¹² See *id.* See also Chang-hsien Tsai, *International Jurisdictional Competition under Globalization: From the U.S. Regulation of Foreign Private Issuers to Taiwan’s Restrictions on Outward Investment in Mainland China*, 2 *ASIAN J. L. & ECON.* 1, 12 (2011), http://econpapers.repec.org/article/bpjajlecn/v_3a2_3ay_3a2011_3ai_3a1_3an_3a5.htm.

¹³ See Chang-hsien Tsai, *Demand and Supply Forces in the Market for Law Interplaying through Jurisdictional Competition: Basic Theories and Cases*, 1 *EAST ASIAN L.J.* 1, 17-18, 21 (2010), <http://ssrn.com/abstract=2662986>.

¹⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

¹⁵ Section 404(b) of SOX requires public companies to have an independent auditor attest to and report on how its management assesses its internal controls. See SOX, § 404(b). See also Stephen M. Bainbridge, *The Corporate Governance Provisions of Dodd-Frank* 12-13 (UCLA Sch. of Law, Law-Econ. Research Paper No. 10-14, 2010), <http://ssrn.com/abstract=1698898>.

¹⁶ Harrington, *supra* note 2.

¹⁷ See Brown, *supra* note 9, at 1.

¹⁸ See Cowley, *supra* note 10.

¹⁹ Press Release, SEC, SEC Adopts Rules to Permit Crowdfunding: Proposes Amendments to Existing Rules to Facilitate Intrastate and Regional Securities Offerings (Oct. 30, 2015), <https://www.sec.gov/news/pressrelease/2015-249.html> [hereinafter SEC Press Release].

make offers via Broker-Dealer or Portal Intermediary.²⁰ Thus, effective 2016 in the U.S., entrepreneurs will have a wide variety of options for how they want to go about capital formation.²¹

But before the 2012 version of the Act could feasibly be implemented in the U.S., the idea of using equity crowdfunding extended over to Taiwan as well. In January 2014, the Taiwanese government established its first equity crowdfunding platform, the Go Incubation Board for Startup and Acceleration (“GISA Board”)²² — one similar to those that will now be authorized under the CROWDFUND Act, such as IndieGogo and SeedInvest.²³ The main difference between the GISA Board and those equity crowdfunding platforms now legalized by the CROWDFUND Act is that the Taiwanese platform is public, run by GreTai Securities Market (“GTSM”), a quasi-governmental organization — not by a private for-profit entity.²⁴ The different regulatory features may be attributed to the surrounding circumstances; as comparative law scholars argue, “[d]ifferent jurisdictions have different preferences and beliefs regarding the enforcement of securities law.”²⁵

However, the ostensible purpose for the creation of the GISA Board was to provide a platform to support small-sized innovative companies that have not gone public,²⁶ similar to those targeted by the CROWDFUND Act. Although some legal rules, such as protective caps on the total amount investors can invest under the CROWDFUND Act,

²⁰ Chance Barnett, *SEC Approves Title III of JOBS Act, Equity Crowdfunding with Non-Accrediteds*, FORBES (Oct. 30, 2015), <http://www.forbes.com/sites/chancebarnett/2015/10/30/sec-approves-title-iii-of-jobs-act-equity-crowdfunding-with-non-accredited/3/#6b807e6b69ef2f1a987669ef>.

²¹ See Cowley, *supra* note 10.

²² Chen Hung-Yi, *The New Crowdfunding Market in Asia: Taiwan*, CROWDFUND INSIDER (May 8, 2015), <http://www.crowdfundinsider.com/2015/05/67502-the-new-crowdfunding-market-in-asia-taiwan/>. See also Jean-Luc Soulier & Marcus Best, *Description of the Securities Law in Taiwan* in INT’L SEC. L. HANDBOOK 9335424 (C.C.H.), 2015 WL 9335424 (Dec. 2014).

²³ Cowley, *supra* note 10.

²⁴ The GTSM (also known as the Taipei Exchange, or TPEx) operates Taiwan’s over-the-counter or emerging markets. In addition to the over-the-counter exchange main board, the GTSM created the GISA Board in January 2014 with the support of the Financial Supervisory Commission, Taiwan’s equivalent of the U.S. SEC. See *Establishment Purpose of Go Incubations Board for Startup and Acceleration Firms (GISA)*, TAIPEI EXCHANGE (GRETAI SECURITIES MARKET), http://www.tpex.org.tw/web/regular_emerging/Creative_emerging/Creative_emerging.php?l=en-us (last visited Mar. 1, 2015).

²⁵ Wallace Wen-Yeu Wang & Chen Jian-Lin, *Reforming China’s Securities Civil Actions: Lessons from PSLRA Reform in the U.S. and Government-Sanctioned Non-Profit Organization in Taiwan*, 21 COLUM. J. ASIAN L. 115, 117 (2008).

²⁶ *New Fundraising Platform for Small, Innovative Enterprises to Open Next Month*, FORMOSA NEWS (Dec. 25, 2013), <http://englishnews.ftv.com.tw/read.aspx?sno=CDA60A6BD4286D2BF08D91488B8A939D> (last visited Mar. 10, 2015).

were transplanted into the Regulations Governing the Go Incubation Board for Startup and Acceleration Firms (“GISA Regulations”),²⁷ the GISA Regulations are more concerned with protecting investors both in theory and in practice, than the CROWDFUND Act, as initially passed in 2012, is in theory. A year later, in April 2015, the Taiwanese government also passed the Private Portal Regulations, which authorized the use of private portals to run equity crowdfunding.²⁸

The enactment of both the GISA Regulations and the Private Portal Regulations might have occurred due to local market trends as well as the practice of concomitant adaptation. However, from a public choice perspective, the legal innovation of Taiwan’s regulations in practice was likely due to bureaucratic incentives to run equity crowdfunding by a government-controlled organization, such as the GTSM, and not due to mere lobbying by interest groups, such as existing securities firms. What is perplexing is that the GTSM is the very regulator enacting and enforcing the Private Portal Regulations, even as it competes with other regulated private funding portals. Therefore, as this Article argues, the aforementioned Regulations tend to favor investor protection much more than the CROWDFUND Act, the transplanted or patterned-after law; this, in turn, may saddle startups in Taiwan with unbearable compliance costs in practice and ultimately compromise the goal of small business capital formation.

This Article is organized as follows: Part I provides an overview of the analytical framework of scholars Ajay Agrawal, Christian Catalini, and Avi Goldfarb (“Agrawal et al.”)²⁹ and summarizes the theoretical regula-

²⁷ CAI TUAN FA REN ZHONG HUA MIN GUO ZHENG QUAN GUI TAI MAI MAI ZHONG XIN CHUANG GUI BAN GUAN LI BAN FA (2015 XIU GAI) [REGULATIONS GOVERNING THE GO INCUBATION BOARD FOR STARTUPS AND ACCELERATION FIRMS (2015 Revisions) (Taiwan)], art. 4, ¶ 12 (2015) [hereinafter GISA REGULATIONS]. For English translations, see *Regulations Governing the Go Incubation Board for Startups and Acceleration Firms*, RELATED SEC. & FUTURES INST., <http://eng.selaw.com.tw/LawArticle.aspx?LawID=FL072102&ModifyDate=1050310&Hit=1>

²⁸ CAI TUAN FA REN ZHONG HUA MIN GUO ZHENG QUAN GUI TAI MAI MAI ZHONG XIN ZHENG QUAN SHANG JING YING GU QUAN XING ZHI QUN ZHONG MU ZI GUAN LI BAN FA (2016 XIU GAI) [TAIPEI EXCHANGE REGULATIONS GOVERNING RUNNING THE CONDUCT OF EQUITY CROWDFUNDING BY SECURITIES FIRMS (2016 Revisions) (Taiwan)], art. 1 (2016) [hereinafter PRIVATE PORTAL REGULATIONS].

²⁹ The theoretical framework of this paper is primarily based on a 2013 study by Ajay K. Agrawal et al. They examined the incentives and disincentives for actors in crowdfunding, finding that there are three types of market failures: adverse selection, moral hazard, and collective actions. They concluded that some market designs may solve these market failures: reputation signaling, rules and regulations, crowd due diligence, and the use of a provision point mechanism. See generally Ajay K. Agrawal, Christian Catalini, & Avi Goldfarb, *Some Simple Economics of Crowdfunding* (NBER Working Paper Series No. 19133, 2013), http://www.nber.org/papers/w19133.pdf?new_window=1.

tory regime of equity crowdfunding in the United States. Part II discusses the development of crowdfunding in Taiwan and delves into the GISA Regulations from a doctrinal perspective. Then, employing a qualitative approach to the legal issues related to the GISA Regulations, through interviews with participants in Taiwan's crowdfunding market, Part III provides a critique of the creation of the GISA Board and the Private Portal Regulations from a public choice perspective. This Article concludes by arguing that Taiwan's legal transplant of the U.S. equity crowdfunding law is turning out to be of more of form, of copying the texts, than of substance, of pursuing capital formation in practice.

I. EQUITY CROWDFUNDING IN THE UNITED STATES

As discussed above, crowdfunding is an evolving method of raising money, in which ordinary people can make investments using their online or social media networks.³⁰ This idea of investments online originated from the idea of "crowdsourcing," which is "a type of participative online activity in which an individual, an institution, a nonprofit organization, or company proposes to a group of individuals . . . via a flexible open call, the voluntary undertaking of a task."³¹

Among the various types of crowdfunding, equity crowdfunding will now allow people to purchase equity or ownership interests in the business projects in which they invest.³² Equity crowdfunding could not be tapped, however, before the adoption of the *final* "Regulation Crowdfunding" of the JOBS Act. Such offering and sale of securities otherwise triggered the application of the federal securities laws, which would require such securities to be registered with the SEC, unless an exemption applied.³³

³⁰ See Wroldsen, *supra* note 8, at 602-03; see also SEC Press Release, *supra* note 19.

³¹ Enrique Estellés-Arolas & Fernando González-Ladrón-de Guevara, *Towards An Integrated Crowdsourcing Definition*, 38 J. OF INFO. & SCI. 189, 197 (2012). See also Thomas Lee Hazen, *Crowdfunding or Fraudfunding? Social Networks and the Securities Laws—Why the Specially Tailored Exemption Must be Conditioned on Meaningful Disclosure*, 90 N.C. L. REV. 1735, 1736 (2012) ("Crowdfunding is the fundraising analog to crowdsourcing, which refers to mass collaboration efforts through large numbers of people, generally using social media or the Internet.") (footnote omitted). See also Andrew A. Schwartz, *Keep It Light, Chairman White: SEC Rulemaking under the CROWDFUND Act*, 66 VAND. L. REV. EN BANC 43, 47 (2013) ("Wikipedia and Yelp are among the better-known crowdsourced projects to date.") (footnote omitted).

³² See Paul Belleflamme, Thomas Lambert, & Armin Schwiendbacher, *Crowdfunding: Tapping the Right Crowd* 4 (CORE Discussion Paper No. 2011/32, July 9, 2013), <http://ssrn.com/abstract=1578175>. See also Wroldsen, *supra* note 8, at 589.

³³ Wroldsen, *supra* note 8, at 589 n.19. ("In brief, Internet platforms that facilitate crowdfunding investment would likely need to register with the Commission as broker-dealers, and crowdfunded securities would either need to be registered with

While the practical effects of the SEC's regulations and rules are still unknown since the law will take effect this year,³⁴ it is clear that the JOBS Act of 2012 in theory provides an exemption to permit securities-based crowdfunding and allows for the use of a funding portal, in which Internet-based platforms or intermediaries would be used to facilitate the offer and sale of securities without having to register with the SEC as brokers.³⁵ As of October 2015, Regulation Crowdfunding now specifically "enable[s] individuals to purchase securities in crowdfunding offerings subject to certain limits, require[s] companies to disclose certain information about their business and securities offering, and create[s] a regulatory framework for the intermediaries facilitating crowdfunding transactions."³⁶

Since the exact scope of the SEC final rules for the CROWDFUND Act remains unknown in practice, the initial texts of the JOBS Act from 2012, as well as the early research on non-equity crowdfunding could, to an extent, help illustrate the characteristics of equity crowdfunding.³⁷ As demonstrated below, under the framework of Agrawal et al., the economic principles governing *non-equity* crowdfunding likely apply to equity crowdfunding as well, with a few nuances noted.

A. *An Economic Analysis of Equity-Crowdfunding Regulation*

Agrawal et al.'s framework analyzes the incentives and disincentives of three primary participants in the crowdfunding market: platforms, creators, and funders.³⁸ Focusing on disincentives, Agrawal et al. illustrate several kinds of potential sources of market failures and then propose market design features and strategies to reduce disincentives as well as the possibility of market failure.³⁹ This Article largely follows this framework, identifying the major participants in the crowdfunding market to examine their motivations, to map such incentives onto the newly developing equity crowdfunding market, and to address related legal and regulatory issues. However, it is important to note that this Article also adds the government as the fourth major participant in equity crowdfunding, discussed in detail below.

the Commission or fall within an exemption from registration."'). See also SEC Press Release, *supra* note 19.

³⁴ See SEC Press Release, *supra* note 19.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Agrawal et al., *supra* note 29, at 4-6.

³⁸ See *id.*

³⁹ *Id.* at 7.

1. Platform Motivations

Crowdfunding platforms, or alternatively “funding portals,” are predominantly for-profit businesses in the U.S.⁴⁰ According to Agrawal et al., “[m]ost platforms employ a revenue model based on a transaction fee for successful projects, typically 4-5% of the total funding amount.”⁴¹ Examples of crowdfunding platforms in the U.S. include Kickstarter, a broader creative-projects-based platform founded in 2009,⁴² IndieGogo, and SeedInvest.⁴³ As such, their incentive for engaging in crowdfunding is to “maximize the number and size of successful projects” by “attracting a large community of funders and creators as well as [by] designing the market to attract high-quality projects, reduce fraud, and facilitate efficient matching between ideas and capital.”⁴⁴ Similarly, in Taiwan, non-equity crowdfunding platforms are for-profit businesses too. For example, the largest non-equity crowdfunding platform in Taiwan, flyingV, has a revenue model based on a transaction fee (equivalent to 8 percent of the total funding amount) for successful projects.⁴⁵

However, depending on the nature of the platform, the incentive sometimes may be not-for-profit in principle. As will be discussed below about the government’s role and incentive, the public platform may not be as focused on innovation or creativity in a capital-raising project, as on the implementation of prevailing government policies.⁴⁶ Nevertheless, the same incentives, whether the platform is public or private, likely govern equity crowdfunding since the only difference is the nature of the exchanged properties, rather than the inherent mechanisms or structure of the exchange via the platform.

⁴⁰ *Id.* at 15.

⁴¹ *Id.*

⁴² *Id.* at 3.

⁴³ Cowley, *supra* note 10.

⁴⁴ Agrawal et al., *supra* note 29, at 15.

⁴⁵ FLYINGV GRP. MEMBERS & REPORTERS OF ECON. DAILY NEWS AGENCY, FLYINGV WO TING, NI ZUO DE DAO — QUN ZHONG MU ZI: 30 GE CHENG GONG GE AN DE 15 GE GUAN JIAN MI JUE [SPONSORING PROJECTS ON FLYINGV-CROWDFUNDING: 30 SUCCESSFUL CASES WITH 15 KEY SECRET TIPS] 43 (2014) (Taiwan) [hereinafter SPONSORING PROJECTS ON FLYINGV] [on file with author]. “FlyingV” is currently the largest non-equity crowdfunding platform in Taiwan. See FLYINGV, <https://www.flyingv.cc/> (last visited Jan. 11, 2015).

⁴⁶ As in the case of the Investor Protection Center (“IPC”) established in Taiwan to serve the function of the U.S. lawyer-driven class actions, because of the dominant government presence in the IPC, the potential arbitrariness of IPC’s decisions are likely subject to possible undue influence by other government interests. See Wang & Lin, *supra* note 25, at 150-51.

2. Creator Motivations

Creators of small businesses and startups, or alternatively “issuers” in the equity context, may choose crowdfunding to raise capital because it lowers costs and provides greater access to information, among many other reasons.⁴⁷ Under the non-equity crowdfunding system, creators have no geographical limitations and can match with those individuals who are the most willing to invest in the creator’s business, perhaps in exchange for “early access to products, recognition for discovering innovations, participating in a new venture’s community of supporters, and other non-pecuniary rewards.”⁴⁸

Moreover, to the extent that crowdfunding online usually generates more information than other traditional avenues — particularly information about the other investors’ interests, the current ideas of product modifications, and the extensions from potential uses — such information may increase funders’ willingness to pay and thereby lower the cost of capital.⁴⁹ Through the increase in information and engagement with users, creators also benefit from user-driven innovation since their feedback may help creators develop products that better match the need of future users.⁵⁰

These incentives apply to investors in both the U.S. and Taiwan. Creators may face some disincentives in crowdfunding, the greatest of which is that they must disclose their innovations to the public, and such disclosure may attract imitation.⁵¹ The same phenomena would seem to apply to equity crowdfunding, where the *quid pro quo* would now be equity in the small business or startup.

3. Funder Motivations

Investors engaging in crowdfunding generally have five incentives: (1) increased access to investment opportunities; (2) early access to new products; (3) increased participation in social activities or online communities; (4) demonstrated support for the ideas or innovations of the projects they fund in a philanthropic way; and (5) formalization of otherwise informal financial contracts.⁵²

To be sure, investors also face several risks or disincentives in crowdfunding, including: (1) possible failure to deliver products, to generate equity value, or to meet the milestones of projects; (2) fraud; and (3) increased likelihood of failure of these early-stage projects.⁵³ These three risks arise due to the information asymmetry between project creators

⁴⁷ See Agrawal et al., *supra* note 29, at 10-13.

⁴⁸ *Id.* at 10-11.

⁴⁹ *Id.* at 11.

⁵⁰ *Id.* at 13.

⁵¹ *Id.* at 16.

⁵² *Id.* at 14-15.

⁵³ *Id.* at 18-20.

and crowdfunders, and while such risks likely apply to equity crowdfunding, the nature of the property, that is, stocks, may exacerbate this asymmetry.⁵⁴ But by and large, these incentives and risks similarly seem to apply to the equity crowdfunding setting.

4. Government Motivations

This Article regards the government as the fourth participant in the crowdfunding market, for both private and public platforms. Overall, the government plays an important role in facilitating equity crowdfunding, because equity crowdfunding can only be undertaken if the government provides exemptions from securities law registration requirements.⁵⁵

With respect to private portals, as the SEC Chair Mary Jo White observed, “[t]here is a great deal of enthusiasm in the marketplace for crowdfunding, and these rules and proposed amendments provide smaller companies with innovative ways to raise capital and give investors the protections they need.”⁵⁶ In this respect, the incentive of the government may be to adapt to the current economic conditions and growing popularity and trends, as well as to encourage economic growth.

As provided in the initial text of the CROWDFUND Act, the SEC follows the approach of soft or libertarian paternalism to implement the CROWDFUND Act with more flexible rules,⁵⁷ in order to promote small business capital formation. In Taiwan, even though the GTSM clearly indicates that the GISA Regulations are patterned after the CROWDFUND Act,⁵⁸ their practical or actual goal may differ from that of capital formation mainly voiced under the U.S. model, due to the Taiwanese government’s preferences for a higher level of investor protection. In Part III, we will take a closer look at the GISA Regulations based on interviews with major actors in Taiwan’s crowdfunding market to uncover the scope of the Government’s motivations.

B. *A New Crowdfunding Exemption: Title III of the JOBS Act of 2012*

When Congress passed the JOBS Act in 2012, it legalized a revolution-ary avenue of capital funding, by including an exemption to permit secur-

⁵⁴ *Id.* at 7, 20.

⁵⁵ See SEC Press Release, *supra* note 19.

⁵⁶ *Id.*

⁵⁷ Using this approach, the SEC attempts “. . . to shape and contain investor preferences rather than effecting preformed investor choice.” Abraham J.B. Cable, *Mad Money: Rethinking Private Placements*, 71 WASH. & LEE L. REV. 2253, 2270 (2014). For a brief definition of soft or libertarian paternalism, see Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1162 (2003) (“Libertarian paternalism is a relatively weak and nonintrusive type of paternalism, because choices are not blocked or fenced off.”).

⁵⁸ See GISA REGULATIONS, *supra* note 27.

ities-based crowdfunding and by creating a “funding portal” to “allow Internet-based platforms or intermediaries to facilitate the offer and sale of securities without having to register with the SEC as brokers.”⁵⁹ The Act also tasked the SEC with adopting the rules and regulations to balance the two goals of investor protection and capital formation, by the fall of 2012.⁶⁰

The SEC initially released a set of draft rules in October 2013, which were criticized for being “too costly and complex.”⁶¹ Then, in October 2015, two years later, the SEC adopted the final rules, “Regulation Crowdfunding,” to permit new and small companies to use equity crowdfunding, and the JOBS Act will finally take effect this year.⁶² The final rules address many of the earlier concerns and provide a regulatory framework for facilitating equity crowdfunding transactions.⁶³ In essence, the final rules expand the portals into the nonaccredited markets, set particular investment limits, and require companies to disclose certain information about the company.⁶⁴

However, for the purposes of this comparative analysis, the initial text of the JOBS Act from 2012, as referred to by the Taiwanese government when promulgating the GISA Regulations in January 2014 and the Private Portal Regulations in April 2015, constitutes the U.S. model here. Thus, the primary areas governing registration requirements, investments caps, resale restrictions, and funding portal requirements are based on the initial 2012 text of the JOBS Act, each of which will be summarized below.

1. An Exemption from Registration Requirements

Section 4(a)(6) of the JOBS Act, an amendment to the Securities Act of 1933, allows startup entrepreneurs to try to raise equity capital through crowdfunding.⁶⁵ If securities offerings are exempt transactions, entrepreneurs cannot resell those securities unless they are registered with the SEC or unless other exemptions are available, while the anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 are applied in principle.⁶⁶ According to the CROWDFUND Act, the sale of securities by non-reporting companies through crowdfunding, totaling up to \$1,000,000 in a twelve-month period, is exempt from the

⁵⁹ See SEC Press Release, *supra* note 19.

⁶⁰ Harrington, *supra* note 2.

⁶¹ Cowley, *supra* note 10.

⁶² See SEC Press Release, *supra* note 19.

⁶³ Cowley, *supra* note 10.

⁶⁴ See SEC Press Release, *supra* note 19.

⁶⁵ JAMES D. COX ET AL., *SECURITIES REGULATION: CASES AND MATERIALS* 249, 311-12 (7th ed. 2013).

⁶⁶ *Id.* at 249.

SEC registration.⁶⁷ The CROWDFUND Act not only requires non-reporting firms to make non-trivial disclosures,⁶⁸ but also adopts a funding threshold to prevent issuers from taking funds from investors under some circumstances.⁶⁹

2. Investment Caps for Investors

The CROWDFUND Act introduced a new regulatory technique: investment caps.⁷⁰ For investors whose annual income or net worth is less than \$100,000, the annual investment cap is the greater of either \$2,000 or five percent of their annual income or net worth.⁷¹ If investors have an annual income or net worth of more than \$100,000, they can invest ten percent of this amount in crowdfunded shares, subject to a “maximum aggregate amount sold of \$100,000.”⁷²

3. The Resale of Crowdfunded Securities

Under the Act, investors cannot transfer or resell the crowdfunded securities within one year subsequent to the date of purchase, unless they resell to the issuer, to an accredited investor, or to a family member of the purchaser, or if the resale or transfer is part of an offering registered with the SEC.⁷³

⁶⁷ See JOHN C. COFFEE JR. & HILLARY A. SALE, *SECURITIES REGULATION: CASES AND MATERIALS* 385 (12th ed. 2012); WILLIAM MICHAEL CUNNINGHAM, *THE JOBS ACT: CROWDFUNDING FOR SMALL BUSINESS AND STARTUPS* 5 (2012); Lina Jasinskaite, *The JOBS Act: Does the Income Cap Really Protect Investors?*, 90 *DENV. U. L. REV. ONLINE* 81, 83 (2013).

⁶⁸ COX ET AL., *supra* note 65, at 312.

⁶⁹ Agrawal et al., *supra* note 29, at 27. From an economic perspective, this threshold is a provision point mechanism to address the market failure of coordination among investors because of the free-rider problem. As briefly defined, “the creator only receives the funds if a funding threshold level is reached or surpassed within a certain period of time.” *Id.* at 31. The CROWDFUND Act specifies the likelihood of this mechanism to be mandated, as crowdfunding intermediaries would have to “ensure that all offering proceeds are only provided to the issuer when the aggregate capital raised from all investors is equal to or greater than a target offering amount, and allow all investors to cancel their commitments to invest, as the Commission shall, by rule, determine appropriate.” See *Jumpstart Our Business Startups Act*, Pub. L. No. 112-106, §§301-02, 126 Stat. 306 (2012) (adding Section 4A(a)(7) to the Securities Act of 1933); Agrawal et al., *supra* note 29, at 31.

⁷⁰ See SEC Press Release, *supra* note 19.

⁷¹ See *Jumpstart Our Business Startups Act*, § 302(a). See also COFFEE & SALE, *supra* note 67, at 385; COX ET AL., *supra* note 65, at 312; Agrawal et al., *supra* note 29, at 26-27.

⁷² CUNNINGHAM, *supra* note 67, at 11-12.

⁷³ Schwartz, *supra* note 31, at 49-50; COFFEE & SALE, *supra* note 67, at 385; COX ET AL., *supra* note 65, at 313.

4. Requirements for Funding Portals

Because the transaction must be made through a government-certified crowdfunding platform, platforms must register as a funding portal or as a broker with the SEC and with self-regulatory organizations, such as the Financial Industry Regulatory Authority, Inc. (“FINRA”).⁷⁴ Furthermore, besides disclosing crowdfunded security risks, funding portals must educate investors and make sure that investors affirm that they understand the level of risk in startups and small issuers and the risk of illiquidity.⁷⁵ Portals must also make sure that investors do not invest more than the aggregate amounts that they may statutorily purchase across all platforms.⁷⁶

Although these elements were tweaked in the October 2015 final rules, these aforementioned elements were the ones that influenced and were selectively translated into the Taiwanese system in early 2015.

II. THE LEGAL INNOVATION OF EQUITY-CROWDFUNDING REGULATION IN TAIWAN: A FOCUS ON THE GISA BOARD

Non-equity crowdfunding platforms began to emerge in Taiwan in 2012. When it comes to the consideration that funders receive, crowdfunding projects have relied on the pre-purchase, reward, and donation models.⁷⁷ In terms of the equity model, however, although the founder of flyingV once attempted to design a private equity crowdfunding platform, flyingVC,⁷⁸ in a private-placement form similar to the business model adopted by AngelList⁷⁹ in the United States, this plan was suspended, possibly due to the absence of clear authorization of private crowdfunding platforms from Taiwan’s government prior to 2015.⁸⁰ In addition to introducing the first legitimate equity crowdfunding platform

⁷⁴ CUNNINGHAM, *supra* note 67, at 10-11.

⁷⁵ *Id.* at 11.

⁷⁶ COX ET AL., *supra* note 65, at 312.

⁷⁷ SPONSORING PROJECTS ON FLYINGV, *supra* note 45, at 26. For examples of non-equity crowdfunding platforms in Taiwan, see, e.g., HEREO, <http://hereo.cc/> (last visited Mar. 4, 2015); FLYINGV, <https://www.flyingv.cc/> (last visited Mar. 4, 2015); FUUDAI, <http://www.fuudai.com/> (last visited Mar. 4, 2015); LIMITSTYLE, <http://www.limitstyle.com/> (last visited Mar. 4, 2015); VDEMOCRACY, <https://www.vdemocracy.tw/> (last visited Mar. 4, 2015); WEREPORT, <http://we-report.org/> (last visited Mar. 4, 2015); ZECZEC, <https://www.zeczec.com/> (last visited Mar. 4, 2015).

⁷⁸ Hong-Quan Lin, *Xin Chuang Gong Si De Mu Zi Kun Jing (San): Tu Po Chuan Tong Mu Zi Mo Shi—FLYING.VC [Startups’ plight of capital raising (III): Channels breaking the traditional fund-raising mode—FLYING.VC]*, INSIDE (2013), <http://www.inside.com.tw/2013/11/21/the-dilemma-of-start-up-fund-raising-c> (last visited Mar. 4, 2015).

⁷⁹ ANGELLIST, <https://angel.co/help/general> (last visited July 29, 2014).

⁸⁰ See *infra* Part III.E.4.

in Taiwan, the GISA Board has several major components regulated under the GISA Regulations, which will be discussed below.

A. *The Beginning of Equity Crowdfunding in Taiwan*

Before the authorization of private crowdfunding platforms at the end of April 2015, the only exception to the prohibition on running an equity crowdfunding platform was the GISA Board, a Financial Supervisory Commission (“FSC”) supported funding portal created by a quasi-governmental foundation, the GTSM.⁸¹ The rules and legal issues regarding the GISA Board are worth studying because it began operations in January 2014 in Taiwan, and so it is unique in its public capacity, as compared to all of the other current crowdfunding portals in the world. In 2013, one of the FSC’s main annual responsibilities was to prepare for the creation of the GISA Board. According to the GISA Board’s website, its second official goal is to support small innovative companies and to help these potential startups raise the capital they need.⁸²

Interestingly, though the equity crowdfunding law passed in the United States first, Taiwan has been able to develop its laws and regulations in more detail, and as such, I will now turn to the major components in Taiwan’s system.

B. *Examining Components of the GISA Regulations*

On its face, many of the GISA Regulations share similar characteristics and rules with the CROWDFUND Act of 2012 in the U.S. This Section highlights a number of the legal issues raised regarding the types of issuers permitted, the investment caps, the disclosure requirements, the scope of the exemption, and the resale restrictions for equity crowdfunding in Taiwan.

1. Types of Issuers

According to the GISA Regulations, startups must meet the following requirements to apply to the GISA Board: (1) the applicants must be companies limited by shares, that is, limited companies, or preparatory offices for the incorporation of a company by public offering under Taiwan’s Company Act;⁸³ (2) in principle, the total paid-in capital or the total paid-in capital planned for incorporation by public offering must be NT\$50 million or less (this requirement illustrates that the GISA Board

⁸¹ See FIN. SUPERVISORY COMMISSION, JIN-GUAN-ZHENG-FA-ZI No. 1020050231, http://www.sfb.gov.tw/ch/home.jsp?id=88&parentpath=0,3&mcustomize=lawnews_view.jsp&dataserno=201312130001&toolsflag=Y (passed on Dec. 13, 2013) (Taiwan) [hereinafter Order of Exempt Securities]. The FSC is essentially Taiwan’s equivalent of the SEC.

⁸² GISA REGULATIONS, *supra* note 27, art. 4, ¶ 1

⁸³ *Id.*

targets small companies);⁸⁴ and (3) companies need to have innovative or creative concepts and future development potential.⁸⁵ The total par value of capital stock offered for subscription by investors through the GISA Board may not exceed NT\$15 million.⁸⁶ As in the case of the CROWDFUND Act, there is also a funding cap on the capital to be raised in the case of GISA shares in Taiwan. Moreover, those allowed to register on the GISA Board are limited to non-publicly traded companies.⁸⁷

2. Investment Caps

Investments made by a non-professional investor through the GISA Board during the preceding year may not exceed NT\$150,000.⁸⁸ This investment cap does not apply to the original shareholders of the issuer or a professional investor.⁸⁹

“Professional investors” encompass four categories: (1) foreign or domestic banks, insurance companies, securities firms, pension funds, mutual funds, unit trusts, and any other institutions approved by the competent authority; (2) juristic persons or funds whose total assets, as stated in a CPA-audited or -reviewed financial report for the most recent period, exceed NT\$50 million; (3) natural persons who provide proof of financial capacity showing assets of NT\$30 million or more, and who also possess ample professional knowledge of financial products or have ample trading experience; and (4) trust enterprises in a trust agreement with a trustor who falls within the preceding second and third categories.⁹⁰

Table 1 below summarizes these regulations.⁹¹ The significance of these specific categories lies in the fact that the categorization of professional and non-professional investors here are basically patterned after the differentiation of accredited and non-accredited investors under the CROWDFUND Act.⁹²

⁸⁴ *Id.* art. 4, ¶ 2.

⁸⁵ *Id.* art. 4, ¶ 13.

⁸⁶ *Id.* art. 15, ¶ 1.

⁸⁷ For instance, Brinno, a high-tech camera maker, used to be a non-publicly traded company registered on the GISA Board, and it thereafter applied to list its shares on the Emerging Stock Board also operated by the GTSM. Therefore, its shares are publicly traded, and this is the first case where a GISA company successfully makes its transition from the GISA Board to tap the public capital market. See Wei-Se Jian & Huan-Min Wang, *Chuang Gui Ban Jin Nian Chou Zi Jin Liang Yi* [Near Two Hundred Million New Taiwan Dollars Are Raised on the GISA Board This Year], JING JI RI BAO [ECON. DAILY] (Taiwan), Dec. 18, 2014, at C2.

⁸⁸ GISA REGULATIONS, *supra* note 27, art. 16, ¶ 2.

⁸⁹ *Id.*

⁹⁰ *Id.* art. 16, ¶ 3.

⁹¹ See *supra* Part III.A.2.

⁹² See Cowley, *supra* note 10; see also *infra* Part III.C.1.

TABLE 1: THE GISA REGULATIONS ON INVESTORS AND INVESTMENT CAPS

Investors	Definition		Investment Caps
Professional Investors	Juristic Person	Professional institutional investors	No limitation
		A juristic person or fund whose total assets exceed NT\$50 million	
	A trust enterprise that has entered into a trust agreement with a trustor		
	Natural Person	A sophisticated natural person who provides proof of financial capacity showing assets of NT\$30 million or more	
Non-Professional Investors	Investors who are not professional investors		NT\$150,000 per year

3. Disclosure Requirements

Once a startup registers on the GISA Board to raise capital, it must disclose information about the startup.⁹³ However, because the GISA Board is still regarded as a relatively small business, it is not suitable for a privately traded startup to comply with disclosure requirements as demanding as those applied to public companies.

The GISA Regulations impose requirements for the eight types of basic information a startup must disclose on the GTSM website,⁹⁴ and it provides the twelve specific circumstances under which the startup must disclose such material information.⁹⁵

Specifically, the eight types of basic information include: (1) basic company information; (2) information on company insider shareholdings; (3) dates of regular and special shareholders meetings and related issues; (4) financial reports; (5) dividend distribution for the current year; (6) “shareholders” meetings minutes; (7) date of record for the company’s decision to distribute dividends, bonuses, or other benefits and related issues; and (8) information on a cash capital increase.⁹⁶ The significance of these kinds of disclosure requirements will be discussed in more detail below.⁹⁷

⁹³ GISA REGULATIONS, *supra* note 27, art. 22, ¶ 1.

⁹⁴ *Id.*

⁹⁵ *Id.* art. 23, ¶ 1.

⁹⁶ *Id.* art. 22, ¶ 1.

⁹⁷ *See infra* Part III.B.1; *see also infra* Part III.B.3.

Furthermore, the GISA Regulations provide an exhaustive list of twelve circumstances, wherein the company on the GISA Board must disclose the following material information:

- (1) a loss of creditworthiness;
- (2) any major litigious or non-litigious matter, or similar legal disputes with a material effect on its finances or business;
- (3) a major change in its operation with a material impact on company business;
- (4) a sale of a substantial part of its business or assets;
- (5) a change in its chairman or general manager;
- (6) a plan for business cooperation or an important contract, or any change in such a plan or contract with a material effect on its finances or business;
- (7) a resolution by the board of directors for a capital increase through a new share issue or the record date of a cash capital increase, or a material change in the preceding;
- (8) a resolution by the board of directors to file with the competent authority following supplementary procedures to register with the competent authority and to be classified as a public company;
- (9) a resolution by a board of directors or shareholders' meeting to apply for termination of GISA registration;
- (10) a suspension of the company's qualification to raise capital through the GISA, followed by explanations of the extraordinary circumstances leading to the suspension, of how to resolve the problems, and of subsequent improvement;
- (11) a suspension of the company's qualification to raise capital through the GISA; and
- (12) any other circumstances with a material effect on shareholder equity.⁹⁸

The implications of this exhaustive list will be drawn below.

4. The Public Integrative Counseling Mechanism

After receiving a company's application to register on the GISA Board, the GTSM will examine the company's innovation(s) as part of the first-stage examination.⁹⁹ If the company passes this first-stage examination, the GTSM's public integrative counseling mechanism ("PICM") will provide comprehensive counseling services, including accounting, internal control, marketing, and regulatory counseling services, to help private and small startups set up internal control, accounting, and corporate governance systems.¹⁰⁰ This counseling period should not exceed

⁹⁸ *Id.* art. 23, ¶ 1.

⁹⁹ *See id.* art. 3.

¹⁰⁰ *See id.* arts. 8-12.

two years.¹⁰¹ Although the PICM may help a startup enhance its corporate governance, the obvious goal of this mechanism is to ensure a high level of investor protection, to the point that it might impose excessive burdens on startups, albeit with the GTSM's help. I expand below on the significance of this counseling mechanism and the uniqueness of the government's role in Taiwan's equity crowdfunding market.¹⁰²

5. The Scope of the GISA Security Exemption

Curiously, the FSC's order¹⁰³ characterizes the GISA Board securities as "exempt securities," so that they need not fulfill the registration requirement under Paragraph 1 of Article 22 of the Securities and Exchange Act (the "SE Act").¹⁰⁴ This gap leaves unanswered the question of what law a court should apply in the event of securities antifraud litigation involving a GISA company: the SE Act or the GISA Regulations. This gap also helps illustrate the scope and limitations of the GISA Board securities exemption.

Even though some provisions of the GISA Regulations acknowledge this issue, these rules do not provide a clear legal answer.¹⁰⁵ The SE Act should govern only public companies, but leading Taiwanese scholars assert that the anti-fraud provision (Paragraph 1 of Article 20 of the SE

¹⁰¹ *Registering on GISA and Counseling Procedures*, TAIPEI EXCHANGE (GRETAI SEC. MKT.) SEC. MKT. http://www.tpex.org.tw/web/regular_emerging/Creative_emerging/creative_emerging_04.php?l=en-us (last visited Oct. 25, 2015). *See also* GISA REGULATIONS, *supra* note 27, arts. 8-12.

¹⁰² *See infra* Part III.B.2.

¹⁰³ Order of Exempt Securities, *supra* note 81.

¹⁰⁴ ZHENG QUAN JIAO YI FA [SECURITIES AND EXCHANGE ACT] (Fin. Supervisory Committee), art. 22-1 (Taiwan), <http://law.moj.gov.tw/LawClass/LawContent.aspx?PCODE=G0400001> [hereinafter SE ACT]. Therefore, as discussed in Part II.B.1, the FSC's approach to exempting GISA securities is not by way of "transaction exemptions," as is done under the JOBS Act. *Cf.* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, §§301-02, 126 Stat. 306 (2012).

¹⁰⁵ Paragraph 2, Article 22 of the GISA Regulations enacts that "no misrepresentation, concealment, or information sufficient to mislead others may be contained within the" eight types of basic reported information, as introduced in Part II.B.3. GISA REGULATIONS, *supra* note 27, art. 22, ¶ 2. Meanwhile, Paragraph 3, Article 23 of the GISA Regulations states that no material information required to be reported under the twelve circumstances as mentioned in Part II.B.3 "may contain any descriptions of an exaggerated nature or resemble advertising or promotional language, nor may they involve misrepresentation, concealment, or misleading statements." *Id.* art. 23, ¶ 3. Also, Paragraph 2, Article 24 of the GISA Regulations provides that "when information reported by a GISA company contains misrepresentations, it will be handled pursuant to the relevant provisions of the GISA Regulations and the GISA company will solely bear the related legal liability." *Id.* art. 24, ¶ 2.

Act) still applies, despite the classification of GISA securities as “exempt securities” that are not publicly traded.¹⁰⁶

In short, the conundrum rests on that securities antifraud liabilities cannot be placed under the GISA Regulations since these Regulations are promulgated by the GTSM, which is merely a government-controlled foundation, free and independent from the legislature or an executive agency authorized by a statute to impose such liabilities.

6. The Resale of GISA Securities

In addition to the question of the scope of the GISA securities exemption, the resale rule for GISA securities is not clear. In theory, because GISA securities are neither publicly traded nor registered with the FSC, the FSC should regulate more strictly their transfer to protect investors. Currently, however, I opine that there is a loophole in the laws because neither statutory provisions nor the GISA Regulations govern the transfer of GISA securities, which frustrates the main goal of the GISA Regulations by jeopardizing investor protection.

In U.S. securities regulation, both private offerings and equity crowdfunding are now “exempt transactions.”¹⁰⁷ This contrasts with the requirements for private offerings in Taiwan, where the government has imposed some restrictions on the transfer of securities placed in private offering or private placement securities.¹⁰⁸ For example, investors may not resell privately placed securities until three full years have elapsed since the delivery date and the privately offering company has since registered previously unregistered securities with the competent authority.¹⁰⁹ Similarly, there should be some restrictions on the transfer of GISA securities, such as the aforementioned lock-up period for transferring privately placed securities in Taiwan.

However, while the text of the CROWDFUND Act and its various promulgations indicate support for the goal of capital formation, the practical reality of the equity crowdfunding exemption is still unclear, and it depends on the development of case law in the U.S. As such, an examination of the on-the-ground effects of equity crowdfunding in Taiwan may provide some insight.

¹⁰⁶ LEN-YU LIU, XIN ZHENG QUAN JIAO YI FA SHI LI YAN XI [MODERN SECURITIES LAW: CASES AND EXPLANATIONS] 346 (12th ed. 2014) (Taiwan); Chih-Cheng Wang, *Chuang Gui Ban Yu Gong Zhong Chou Zi Fa Zhi Zhi Jian Gou* (Shang) [*The GISA Board and the Establishment of the Regime for Crowdfunding, Part I*], 148 YUE DAN FA XUE JIAO SHI [TAIWAN L. REV.] 33, 40-41 (2015).

¹⁰⁷ COX ET AL., *supra* note 65, at 262.

¹⁰⁸ SE ACT, *supra* note 104, art. 43-8, ¶ 1.

¹⁰⁹ *Id.*

III. THE LEGAL TRANSPLANTATION OF EQUITY-CROWDFUNDING REGULATION IN TAIWAN: A QUALITATIVE ANALYSIS

Although the U.S. was the first to pass the equity crowdfunding laws in 2012, Taiwan has had a head start on knowing the practical effects of such laws as the GISA Regulations that were promulgated in January 2014 — since the U.S. only recently finalized the JOBS Act, to take effect this year. Part III will dissect a number of legal issues concerning equity crowdfunding (especially with the GISA Board), first from the perspectives of primary participants in the crowdfunding market in Taiwan, and second from a comparative, public choice perspective, looking also to the U.S. regulatory regime.

A. *Data and Methods*

This Article examines legal issues from the perspectives of major participants in the crowdfunding market by conducting and evaluating in-depth in-person interviews. Questions for these in-depth interviews are “semi-structured.”¹¹⁰ This Article employs “purposive sampling” as the sampling strategy,¹¹¹ which turns on the thesis of the study and chooses the most relevant samples.¹¹²

The data comes from the following interviewees in Taiwan: (1) an investor: a lawyer specializing in the market for crowdfunding; (2) an issuer: a CEO of a startup with experience in raising capital on the GISA Board; (3) a government representative: an FSC official in charge of the equity crowdfunding market; (4) a private equity crowdfunding platform: a founder of a major non-equity crowdfunding platform who once considered creating a private equity crowdfunding portal; and (5) a public equity crowdfunding platform: a manager in charge of an equity

¹¹⁰ Semi-structured questions are a set of questions predetermined by the author that are related to the identified specific issues; the questions may be extended, depending on the answers of the interviewees. See Andrea Fontana & James Frey, *Interviewing: The Art of Science*, in HANDBOOK OF QUALITATIVE RESEARCH 361, 373 (Norman K. Denzin & Yvonna S. Lincoln eds., 1994).

¹¹¹ Methodologically speaking, “qualitative research tends to focus on a smaller number of ‘observations’ or ‘data sources’ There are various sampling techniques that may be employed. . . . [T]he researcher may seek out key people or events that are likely to provide rich sources of information or data.” This sampling technique is called purposeful or purposive sampling. *Id.* See also Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 926, 934, 942 (Peter Cane & Herbert M. Kritzer eds., 2012).

¹¹² ROBERT K. YIN, *QUALITATIVE RESEARCH: FROM START TO FINISH* 88 (2011). Other commonly used sampling methods include: convenience sampling, snowball sampling, and random sampling. Convenience sampling is to do the sampling conveniently from all the samples currently available; snowball sampling uses current samples to obtain others; and random sampling is to sample statistically from a population. *Id.* at 88–89.

crowdfunding business within the GTSM. Table 2 summarizes the data and method mentioned above.¹¹³

TABLE 2: THE DATA AND METHOD

Market Actors	Samples	Interviewee	Date of Interview	Symbol
Portals	A private crowdfunding portal whose founder used to consider creating another private equity crowdfunding portal	A founder of the non-equity crowdfunding platform	Sept. 26, 2014	A
	A major non-equity crowdfunding platform			
	The GTSM, a government-controlled foundation operating emerging securities markets	A manager handling the equity crowdfunding business in this foundation	Oct. 9, 2014	B
Issuers	A startup with experience in raising capital on the GISA Board	A CEO of this startup	Oct. 23, 2014	C
Investors	A lawyer specializing in crowdfunding in Taiwan	A lawyer	Sept. 2, 2014	D
Government	An official of the FSC, the government agency regulating securities markets	An official in charge of the equity crowdfunding market	Nov. 6, 2014	E

As shown in the table above, each corresponding interviewee represents a different major participant in the Taiwanese crowdfunding market. As

¹¹³ Interview with Lawyer with Taiwanese crowdfunding specialization, in Taiwan (Sept. 2, 2014) [hereinafter D]; Interview with Founder of non-equity crowdfunding platform, in Taiwan (Sept. 26, 2014) [hereinafter A]; Interview with Manager handling equity crowdfunding business within the GTSM, in Taiwan (Oct. 9, 2014) [hereinafter B]; Interview with CEO of startup with GISA capital raising experience, in Taiwan (Oct. 23, 2014) [hereinafter C]; Interview with FSC official in charge of equity crowdfunding market, in Taiwan (Nov. 6, 2014) [hereinafter E] [on file with author]. Given that these interviews occurred before the Private Portals Regulations went into effect in April 2015, the interviewees' answers are observations or predictions in the context of the Private Portals Regulations. The transcribed notes from the interviews are on file with author.

the data gathered are confidential, this author preserves each interviewee's anonymity by using letters A through E to correspond with each of the interviewees.¹¹⁴ In addition, the interview codes are in the form of "Xy," in which "X" is the capitalized symbol from A to E representing respective interviewees, and "y" is the interview question number and their answers for those questions.

B. *Creator Issues*

This Section explores the legal issues that raise the most concerns for project creators or issuers on the GISA Board — that is, the disclosure requirements and the PICM. This Section also recommends that after reflecting on the short experience of the GISA Board, the GTSM-promulgated regulations governing equity crowdfunding be simplified to strike a balance between investor protection and capital formation.

1. Disclosure Requirements for the GISA Board

While GISA companies publicly offer their shares in the same manner as public companies, one would assume that the disclosure requirements should be simpler or less burdensome for GISA companies, given the fact that GISA companies are small startups and are less able to assume high regulatory burdens (E7, A1).¹¹⁵

In practice, however, disclosure requirements under the GISA Regulations are far from simple. The disclosure requirements for GISA companies include the eight basic categories of information on the GTSM website mentioned above, as well as material information under the twelve circumstances listed under the GISA Regulations.¹¹⁶

On the one hand, the eight requirements for GISA companies¹¹⁷ and the requirements listed on the GTSM website are simplified and appear less complicated as compared to those for public companies (B39).¹¹⁸

¹¹⁴ The interview notes were transcribed in Mandarin, and some of the relevant portions have been translated to English by author.

¹¹⁵ See Interview with E, *supra* note 113, at 7; see also A, *supra* note 113, at 1.

¹¹⁶ See *supra* notes 94, 95.

¹¹⁷ Article 8–33 of the "Regulations Governing Information to be Published in Public Offering and Issuance Prospectuses" identifies all the information a prospectus prepared by a public company must include. See GONG SI MU JI FA XING YOU JIA ZHENG QUAN GONG KAI SHUO MING SHU YING XING JI ZAI SHI XIANG [REGULATIONS GOVERNING INFORMATION TO BE PUBLISHED IN PUBLIC OFFERING AND ISSUANCE PROSPECTUSES] art. 8–33 (Taiwan).

¹¹⁸ See Interview with B, *supra* note 113, at 39. Regarding the information reporting website for GISA companies, see *Chuang Gui Ban Zi Xun Gong Kai Xi Tong* [GreTai Securities Market Observation Post System for GISA Companies], TAIPEI EXCHANGE SEC. MKT., http://mops.twse.com.tw/server-java/gotc/gotc_index (last visited Oct. 29, 2015). For public companies, see *Market Observation Post System*, TAIWAN STOCK EXCHANGE, http://emops.twse.com.tw/emops_all.htm (last visited Oct. 19, 2015).

Additionally, the manager handling the GTSM's equity crowdfunding business observed that on the surface, the material information GISA companies need to disclose under the twelve circumstances (material information disclosure) also appears simplified (B45).¹¹⁹

However, startups registering on the GISA Board still encounter excessive burdens in abiding by these disclosure rules (C2, C10).¹²⁰ For example, Interviewee C, the CEO of the startup with experience in raising capital on the GISA Board, described his interactions with the GTSM: he asked whether his startup needed to disclose information regarding his company's contract with a major company, possibly as material information under the exhaustive list of twelve circumstances, but the GTSM Board could or did not give clear answers as even they were unsure about the scope of how to properly regulate GISA companies or about the extent of differentiation from public companies; apparently, most of the time, even the staff of the GTSM expressed that GISA companies should be regulated just as much as public ones.¹²¹ Thus, as this Article argues, the simplification of these rules is actually not sufficient for GISA companies as compared to the requirements for public companies.¹²²

Although the disclosure requirements for GISA companies are a liberalized version of the traditional mandated full-disclosure requirements, they must be simpler if the goal is to achieve regulatory humility.¹²³ In other words, humble regulation or light-touch regulations would be a more effective way to help people make better choices.¹²⁴ Furthermore,

¹¹⁹ See Interview with B, *supra* note 113, at 45.

¹²⁰ See Interview with C, *supra* note 113, at 2, 10.

¹²¹ *Id.* at 2.

¹²² See ZHENG QUAN JIAO YI FA SHI XING XI ZE [SECURITIES AND EXCHANGE ACT ENFORCEMENT RULES] art. 7 (Taiwan). The GTSM also acknowledged that the requirement for material information disclosure was designed with reference to Article 7 of the Securities and Exchange Act Enforcement Rules, which apply to publicly traded companies. See *Obligations for Companies Applying for GISA Registering*, TAIPEI EXCHANGE (GRETAI SEC. MKT.) SEC. MKT., http://www.tpex.org.tw/web/regular_emerging/Creative_emerging/creative_emerging_05.php?l=en-us (last visited Oct. 19, 2015).

¹²³ Specifically, humble regulation embraces lessening unnecessary regulations, lowering transaction costs, and shifting the regulatory focus from *ex ante* restrictions to *ex post* remedies. See Larry E. Ribstein, *Sarbox: The Road to Nirvana*, 2004 MICH. ST. L. REV. 279, 296-97 (2004); see also Chang-hsien Tsai, *Cong Fa Yu Jing Zheng Guan Dian Lun Zui Di Zi Ben Zhi Zhi Bian Qian: Jian Lun Wo Guo Mian E Zhi Zhi Ke Neng Gai Ge* [A Jurisdictional Competition Perspective on Changes of Minimum Capital Requirements: With a Look at Taiwan's Probable Reforms on Par Value Rules], 42 TAI DA FA XUE LUN CONG [NAT'L TAIWAN UNIV. L.J.] 553, 610 (2013).

¹²⁴ See Oskari Juurikkala, *The Behavioral Paradox: Why Investor Irrationality Calls for Lighter and Simpler Financial Regulation*, 18 FORDHAM J. CORP. & FIN. L. 33, 51 (2012) (“[I]t is not a foregone conclusion that heavy intervention is the optimal

in the sense of humble regulation, the government should act as a “nudger,”¹²⁵ and simpler disclosure would be a good way to nudge.¹²⁶

2. The Public Integrative Counseling Mechanism in the GISA Board

After surpassing the first-stage examination of the innovation of a company applying for GISA registration, then comes the PICM. Under this mechanism, the GTSM undertakes a comprehensive examination of the financial and business conditions of the applicant company in coordination with an accounting firm or other external professional firms.¹²⁷

In theory, the goal of this mechanism is to provide advisory counseling on accounting, internal control, marketing, and legal affairs based on what the actual needs of the applicant company are deemed to be.¹²⁸ This mechanism is a major characteristic of the GISA Board, and differentiates the GISA Board from other private equity crowdfunding platforms elsewhere in the world (B3, B13).¹²⁹ As exemplified below by the experience of Interviewee C, the CEO of the startup, the GISA Board focuses primarily on this mechanism, treating capital formation as a secondary goal (B40).¹³⁰ That is, the most important goal of this mechanism is to assure investor protection (B14).¹³¹

The manager handling the equity crowdfunding business for the GTSM added that because GISA companies are startups, the requirements for this mechanism are simplified (B43).¹³² Nevertheless, the CEO of the startup with experience in raising capital on the GISA Board complained that, although the GTSM and KPMG, one of the top accounting firms in Taiwan, tried to counsel the startup on establishing accounting and financial systems similar to those of public companies, the GISA Board placed unnecessary and excessive regulatory burdens on the startup. In particular, this CEO added that for almost a whole year during the pre-registration counseling process of the GISA Board, a significant amount of time was spent towards meeting one of the requirements under the PICM: more standardized financial reports. For a small startup like his, he

policy. It may be that simple ‘light-touch’ regulations more effectively help market participants improve their choices.”).

¹²⁵ CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 9 (2013) (“Nudges consist of approaches that do not force anyone to do anything and that maintain freedom of choice, but that have the potential to make people healthier, wealthier, and happier.”).

¹²⁶ *Id.* at 93 (“[D]isclosure should be concrete, straightforward, simple, meaningful, timely, and salient.”).

¹²⁷ GISA REGULATIONS, *supra* note 27, art. 10, ¶ 1.

¹²⁸ *Id.* art. 9, ¶ 1.

¹²⁹ See Interview with B, *supra* note 113, at 3, 13.

¹³⁰ See *id.* at 40.

¹³¹ See *id.* at 14.

¹³² See *id.* at 43.

added that resources should be invested to increase the operational workforce before being used to hire more financial or accounting staff (C2, C7).¹³³

Why does the PICM end up as an intrusive mechanism of investor protection? The GISA Board is operated by the GTSM, whose motivation to facilitate equity crowdfunding is influenced by the FSC — that is, compelling the GTSM to focus more on investor protection than on capital formation.¹³⁴ In contrast, helping startups raise capital would be a priority for a private equity crowdfunding platform with the goal of maximizing the number and size of successful projects.¹³⁵

3. Regulating Equity Crowdfunding in the Future: Simplifying Information Disclosure

As of April 2015, the FSC permits private equity crowdfunding platforms.¹³⁶ As a result, there are now two kinds of equity crowdfunding platforms in Taiwan: the government-operated GISA Board and Private Portals. The Section below argues that, on the one hand, private portals have stronger incentives to facilitate equity crowdfunding than those of the GTSM.¹³⁷ On the other hand, not only do the GISA Regulations need to be simplified in the short run, but GTSM-enacted regulations governing equity crowdfunding through the Private Portal Regulations must also be simplified to “nudge” people in the long run.

The traditional methods of mandatory disclosure are too complicated for startups and are ineffective at protecting investors; retail investors tend to ignore tediously complex information (D4).¹³⁸ To be more specific, disclosure requirements could adopt simplified language, presentations, and scoring systems.¹³⁹ For example, the disclosure requirements for financial products in Singapore, Hong Kong, Canada, Australia, and New Zealand emphasize the usage of simple words.¹⁴⁰ Rules in Singapore, Hong Kong, and Canada further emphasize that the words should

¹³³ See Interview with C, *supra* note 113, at 2, 7.

¹³⁴ See *infra* Part III.E.

¹³⁵ See *supra* Part II.A.1.

¹³⁶ See *infra* Part III.E.4.

¹³⁷ See *infra* Part III.E.3.

¹³⁸ See Interview with D, *supra* note 113, at 4.

¹³⁹ See OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 126, 129, 131 (2014). See also Sunstein, *supra* note 125, at 2, 10-11; *The Debt to Pleasure*, ECONOMIST, Apr. 27, 2013, at 64; *Fixing the Republic*, ECONOMIST (Apr. 20, 2013), <http://www.economist.com/news/business/21576359-two-democrats-how-manage-government-better-fixing-republic>.

¹⁴⁰ See Andrew Godwin & Ian Ramsay, *Financial Products and Short-Form Disclosure Documents—Challenges and Trends* 10-11 (Ctr. for Int’l Fin. & Reg., WorkingCIFR Paper No. 032, 2014), <http://ssrn.com/abstract=2510189>.

be easy for investors to understand.¹⁴¹ In the future, regulations governing equity crowdfunding could take this simple-disclosure approach (such as standardized short forms) toward investor protection (D5).¹⁴²

C. *Investor Issues*

This Section sheds light on the legal issues that affect investors in the market: the types of investors, the investment caps, and the resale restrictions for equity crowdfunding in Taiwan.

1. Who Are the Investors?

Commentators have asserted that because crowdfunding provides the opportunity of investing in startups to retail investors, it “democratizes” access to investment.¹⁴³ Because crowdfunding also provides startups that lack access to wealthy investors with other opportunities to obtain sufficient funding from the investing public, it “democratizes” entrepreneurship.¹⁴⁴ Theoretically, equity crowdfunding investors can be ordinary and non-professional people.

However, the lawyer, a sophisticated investor, speculated that in the initial stage of the equity crowdfunding market, investors would not be mom-and-pop investors (D21).¹⁴⁵ The founder of the non-equity crowdfunding platform, based on his observations on the market trends of business models adopted in China and the U.S., predicted that as the equity crowdfunding market develops, professional investors would not dominate all the market, and more non-professional investors would enter this market; thus, to him, at least two types of equity crowdfunding markets would unfold: one for the investing crowd, and the other for angel investors (A5, A15).¹⁴⁶

In practice, the majority of GISA investors have been natural, non-professionals (E3, C22, C23).¹⁴⁷ According to the FSC official, the official statistics in his office, as of November 2014, provided that approximately 75 percent of GISA investors are natural and non-professional investors,¹⁴⁸ and the official concluded that the high percentage of retail

¹⁴¹ See *id.* at 11.

¹⁴² See Interview with D, *supra* note 113, at 5.

¹⁴³ Schwartz, *supra* note 31, at 44, 46.

¹⁴⁴ Dushnitsky & Marom, *supra* note 1, at 24, 26; Schwartz, *supra* note 31, at 48 n.16 (quoting Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. ON REG. 313, 359 (2011)).

¹⁴⁵ See Interview with D, *supra* note 113, at 21.

¹⁴⁶ See Interview with A, *supra* note 113, at 5, 21.

¹⁴⁷ See Interview with E, *supra* note 113, at 3; Interview with C, *supra* note 113, at 22, 23.

¹⁴⁸ The reference to these official statistics came from my interview with the FSC official, who said that the specific numbers were not made public, but are on file with author.

investors in the marketplace might be one of the reasons why the GISA regulatory scheme is primarily concerned with investor protection (E4).¹⁴⁹ This official's comment may support the assertion that although the birth of the GISA Board is a legal transplant of the CROWDFUND Act, Taiwan's legal adaption or innovation reflects the preference for investor protection underlying local securities regulation.¹⁵⁰ In other words, the goal of the GISA Regulations is mainly to protect investors, and not to form capital, the primary focus of the CROWDFUND Act as it was adopted in 2012.¹⁵¹

2. Investment Caps

Because the GTSM places greater emphasis on investor protection, investment caps in the GISA Regulations are worth studying. Investments made by a non-professional investor through the GISA Board during the preceding year may not exceed NT\$150,000, but the investment cap does not apply to the original shareholders of the issuer or professional investors.¹⁵² For a natural person to qualify as a professional investor, the natural person must provide proof of financial capacity, showing assets of NT\$30 million or more and possess ample professional knowledge of financial products or ample trading experience.¹⁵³

Compared to the rules on private placements in Taiwan, the threshold for a natural person to be a "professional investor" under the GISA Regulations is higher, and therefore more restrictive.¹⁵⁴ Given that GISA securities are publicly offered but have just been declared exempt from registration, GISA investors clearly require more investor protection than investors in the context of private placement. Hence, under the GISA Regulations, rules for professional investors are appropriate in this regard.

In the case of the investment cap for non-professional investors in the GISA Regulations, the appropriateness of the regulatory design merits rethinking. In fact, the original (much lower) investment cap for a non-

¹⁴⁹ See Interview with E, *supra* note 113, at 4.

¹⁵⁰ See *infra* Part III.F.

¹⁵¹ 158 CONG. REC. S2231 (daily ed. Mar. 29, 2012) (statement of Sen. Bennet).

¹⁵² GISA REGULATIONS, *supra* note 27, art. 16, ¶ 2.

¹⁵³ *Id.* art. 16, ¶ 3.

¹⁵⁴ In the context of private placements, if a domestic or foreign natural person with ample knowledge of the privately offering company wants to qualify as a professional investor, he or she needs to meet one of the following requirements when subscribing for or receiving the unregistered securities. First, the natural person must own assets exceeding NT\$10 million, or the net assets the natural person and his/her domestic partner jointly own exceed NT\$15 million. Or second, within the last two years, the average annual income of the natural person must exceed NT\$ 1.5 million, or the joint average annual income of the natural person and his/her domestic partner exceeds NT\$ 2 million. See Order of the Securities and Futures Commission, Ministry of Finance, Tai Cai Zheng Yi Zi No. 0910003455 (June 13, 2002) (Taiwan).

professional natural person, NT\$60,000, was increased to the current cap of NT\$150,000 by the GTSM on May 25, 2015.¹⁵⁵ The initial NT\$60,000 cap was imposed in early 2014, based on the \$2,000 annual investment cap for investors whose annual income or net worth is less than \$100,000 in the CROWDFUND Act of 2012,¹⁵⁶ the initial cap of NT\$60,000, close to US\$2,000, was determined based on local economic conditions in Taiwan (B27).¹⁵⁷ The investment caps for non-professional investors are stratified and comparably flexible in the CROWDFUND Act, but the cap for non-professional investors in Taiwan is the one-size-fits-all NT\$60,000 (B28, D32) until May 25, 2015.¹⁵⁸

Even though the current cap was raised to NT\$150,000 when Paragraph 2 of Article 16 of the GISA Regulations was amended in May 2015, the one-size-fits-all regulatory pattern remains.¹⁵⁹ In terms of the NT\$60,000 initial cap, the FSC official explained that because investor protection is the primary concern of the GISA Regulations, the investment caps for both professional and non-professional investors are thus more stringent (E10).¹⁶⁰

This echoes the preference for investor protection over capital formation in the GISA Regulations, which could be a different case compared with the enactment of the JOBS Act. However, the interviewed official acknowledged that because many have complained that the one-size-fits-all cap of NT\$60,000 is too low, in order to meet demands from the capital market, the investment cap in the GISA Regulations (at least in the case of non-professional investors) could be reviewed for future modification (E12).¹⁶¹ This might explain why the current cap was raised to NT\$150,000 in May 2015.¹⁶²

¹⁵⁵ *Id.*

¹⁵⁶ Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 315, 126 Stat. 306 (2012).

¹⁵⁷ See Interview with B, *supra* note 113, at 27.

¹⁵⁸ See *supra* Part II.B.2; B, *supra* note 113, at 2; Interview with D, *supra* note 113, at 32.

¹⁵⁹ GISA REGULATIONS, *supra* note 27, art. 16, ¶ 2.

¹⁶⁰ See Interview with E, *supra* note 113, at 10.

¹⁶¹ *Id.* at 12.

¹⁶² GISA REGULATIONS, *supra* note 27, art. 16, ¶ 2. The GTSM raised the annual investment cap to NT\$150,000 in light of the international regulatory trends of the U.S., Japan and Malaysia. This increase is aimed at channeling capital in the private sector to help startups develop and at making fundraising by startups more flexible. See Order of the GTSM, Zheng-Gui-Xin-Zi No. 10411001202 (passed on May 25, 2015) (Taiwan); Order of the GTSM, Zheng-Gui-Xin-Zi No. 10411001571 (passed on June 17, 2015) (Taiwan).

3. The Resale of GISA Securities

According to the GISA Regulations, there is no ban on the resale of GISA securities, and so they can be freely transferred (B1, B8, E18).¹⁶³ Nevertheless, the CEO of a GISA company added that the resale rules are not clear (C28).¹⁶⁴ Though the GISA Regulations are modeled after the CROWDFUND Act, which in principle, forbids investors from transferring or reselling crowdfunded securities within one year (although there are some exceptions),¹⁶⁵ there is a major difference between the kinds of securities. GISA securities are inherently “publicly offered” but have just been exempted from registration so that GISA investors need more investor protection than those in the context of private placement.¹⁶⁶

Accordingly, there should be some restrictions on the transfer of GISA securities, such as the aforementioned lock-up period for transferring privately placed securities.¹⁶⁷ For the sake of regulatory congruency and because Taiwan’s government prioritizes investor protection in regulating the equity crowdfunding market, this legal imperfection should be fixed by statutorily imposing a lock-up period, such as that used for privately placed securities, although the period could be shorter — perhaps, limited to one year.

D. *Government Issues*

This Section highlights the legal issues with regard to the scope of the exemption and the regulatory attitude towards equity crowdfunding in Taiwan, which serves as a prelude to my core theoretical arguments about government participants below.

1. To What Extent Are GISA Securities Exempted?

While GISA securities are “exempt securities” — that is, not subject to the registration requirement in Paragraph 1 of Article 22 of the SE Act in Taiwan — the question remains about the practical scope of this exemption. Specifically, the question of which law to apply in a GISA securities

¹⁶³ See Interview with B, *supra* note 113, at 1, 8; Interview with E, *supra* note 113, at 18.

¹⁶⁴ See Interview with C, *supra* note 113, at 28.

¹⁶⁵ See *supra* Part I.B.3.

¹⁶⁶ In theory, because GISA securities are not registered with the FSC, transferring them should be regulated more strictly to protect investors. Even though under U.S. securities regulations, both private offerings and equity crowdfunding under the CROWDFUND Act are exempt transactions (since non-accredited investors are allowed to invest merely in the context of equity crowdfunding rather than of private offerings), non-professional investors on the GISA Board, like those non-accredited counterparts in the U.S., may need more investor protection than professional or accredited investors in the context of private placement.

¹⁶⁷ See *supra* Part II.B.6.

fraud case has not yet been answered (B4, B7),¹⁶⁸ in Taiwan, let alone in the U.S. The government official asserted that the SE Act should not be the governing law in such a case, because even though GISA companies publicly offer their shares on the GISA Board, they are exempt from registering these shares with the FSC and thus are not public companies (E8, E9).¹⁶⁹

Therefore, only laws governing private companies, such as the Business Entity Accounting Act, should be applied when a lawsuit is filed (E8, E9).¹⁷⁰ This Article asserts that the anti-fraud provision (Paragraph 1 of Article 20 of the SE Act) should apply.¹⁷¹

2. A New Regulatory Philosophy of Equity Crowdfunding: Humble Regulation through “Nudges”

The newness of equity crowdfunding as a way to raise capital in Taiwan has prompted the question of how we should regulate it. The regulatory model under the CROWDFUND Act resulted in the gradual blurring of the boundary between private placements and public offerings (E31).¹⁷² Therefore, a new regulatory philosophy should be proposed to regulate equity crowdfunding. Even if the GTSM has at its core the goal of investor protection, and not that of capital formation, due to its status as a quasi-government foundation, it should adopt a new regulatory philosophy that allows the balance of the two regulatory goals to swing further towards capital formation. Because the GISA Regulations are imported mostly from the CROWDFUND Act of 2012 (B4, B49), the GTSM should not just borrow the form or the statutory text of the Act but must also derive its function or substance, i.e., how it primarily focuses on capital formation, from the Act.¹⁷³

As such, the GISA Regulations should take a more flexible regulatory philosophy — “humble” regulation or “light-touch” regulations — by employing such regulatory techniques as simplifications to “nudge” protected investors and to remove unnecessary red tape for startups seeking early stage funding.¹⁷⁴ The government official also recognized that future rules and regulations governing equity crowdfunding should keep

¹⁶⁸ See Interview with B, *supra* note 113, at 4, 7.

¹⁶⁹ See Interview with E, *supra* note 113, at 8, 9.

¹⁷⁰ *Id.*

¹⁷¹ See *supra* Part II.B.5.

¹⁷² See Joan Macleod Hemingway, *Crowdfunding and the Public/Private Divide in U.S. Securities Regulation*, 83 U. CIN. L. REV. 477, 501 (2014) (“[T]he JOBS Act, including the CROWDFUND Act . . . markedly blurred the boundaries between public and private offerings and public and private companies.”). See also Interview with E, *supra* note 113, at 31.

¹⁷³ See Interview with B, *supra* note 113, at 4, 49.

¹⁷⁴ See *supra* Part III.B.1.

pace with the times, so a new regulatory philosophy must eventually be adopted (E30).¹⁷⁵

E. *Crowdfunding Platform Issues*

This Article puts the government in the limelight as the fourth participant in the equity crowdfunding market. In Taiwan, although the GTSM ostensibly reveals that the GISA Regulations and its sibling, the Private Portal Regulations, are patterned after the CROWDFUND Act, their practical or actual goal may differ from that of the U.S. model, due to the Taiwanese government's preferences for a higher level of investor protection.

From a public choice and comparative perspective, I further examine the current institutional framework of public plus private crowdfunding platforms, demonstrating that Taiwan's equity crowdfunding regulatory patterns reflect a transplantation of the U.S. model that tends to be more of form than of substance, that is, of copying the text rather than pursuing the goal of capital formation in reality.

1. The GISA Regulations from a Public Choice Perspective

The unique feature of equity crowdfunding in Taiwan is the role of the GTSM in operating the GISA Board. As explained above, the main goal of the GISA Regulations is to protect investors: the fact that a quasi-governmental organization runs the GISA Board may help achieve this goal, but it also generates some problems.¹⁷⁶

From the "public choice" perspective, the political process is a competition among interest groups to secure rents with "public-spirited justifications used to disguise interest group rent seeking."¹⁷⁷ That is, interest groups will become involved in the political process to advocate for the common interests of their members.¹⁷⁸ One interest group rent-seeking activity is private law making, or working for their own interests by influencing the design or content of regulations.¹⁷⁹ However, interest groups lobby the government to enact laws that serve them or indirectly interfere

¹⁷⁵ See Interview with E, *supra* note 113, at 30.

¹⁷⁶ See *supra* Part III.D.

¹⁷⁷ See Marcel Kahan & Edward Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997, 2027 (2014). See also BARAK ORBACH, *REGULATION: WHY AND HOW THE STATE REGULATES* 199 (2013) (footnote omitted) ("The term 'rent seeking' is often used to describe the pursuit of private interest through regulation. Rent-seeking activities are all actions that interest groups may take to promote their goals, and their costs are added to the burden interest groups impose on society.") [hereinafter ORBACH, *REGULATION*]. See also generally Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967).

¹⁷⁸ DENNIS C. MUELLER, *PUBLIC CHOICE* III 475 (2003).

¹⁷⁹ Barak Orbach, *Invisible Lawmaking*, 79 U. CHI. L. REV. 1, 1 (2012).

with the process of law making, in effect “captur[ing]” lawmakers or regulatory agencies.¹⁸⁰

In accordance with the public choice perspective, this Article posits first that, in deciding whether to authorize private crowdfunding portals in the equity crowdfunding market, some interest groups might have influenced regulators to create the GISA Board in January 2014 as the only legal equity crowdfunding platform in Taiwan. Doing so thus created a barrier to enter the equity crowdfunding market for private portals, at least until private funding portals would be legalized.¹⁸¹

Second, because the GTSM created and operates the GISA Board, its incentive to promote small business capital formation and to facilitate equity crowdfunding might differ from that of a private funding portal.¹⁸²

2. The Power of Interest Groups

Before the recent authorization of private funding portals at the end of April 2015, the GTSM monopolized equity crowdfunding in Taiwan; the question of whether to lift the ban and to legalize equity crowdfunding run by private funding portals was open to debate (D35).¹⁸³ However, in the early stage of deliberating whether to lift the ban within Taiwan’s government, interest groups might have lobbied regulators in deciding how to legalize equity crowdfunding in Taiwan, by ostensibly arguing for investor protection; specifically, some interest groups, namely securities firms, might have objected to the permission of internet enterprisers like Alibaba in China to provide financial services online, in order to entrench themselves in the traditional financial industry (D36).¹⁸⁴ This view was confirmed in an interview with a founder of a non-equity crowdfunding platform, who added that the plan to set up an equity crowdfunding portal was abandoned partly because of concerns and fears of groups of vested interests (A32).¹⁸⁵

¹⁸⁰ *Id.* at 15; Barak Orbach, *What Is Regulation?*, 30 YALE J. REG. ONLINE 1, 5-6 (2012). See also ORBACH, REGULATION, *supra* note 177, at 199 (“Capture” theories or regulatory capture indicates that “regulators are captured by the regulatees; that is, they serve those they intend to regulate rather than the public.”); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 5 (1971) (“[A]s a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.”). For the application of the regulatory “capture” theory to explain the political economy of takeover regulation in China, see Chao Xi, *The Political Economy of Takeover Regulation: What Does the Mandatory Bid Rule In China Tells Us?*, 2015 J. BUS. L. 142, 153-54 (2015).

¹⁸¹ See *infra* Part III.E.2.

¹⁸² See *infra* Part III.E.3.

¹⁸³ See Interview with D, *supra* note 113, at 35.

¹⁸⁴ *Id.* at 36.

¹⁸⁵ See Interview with A, *supra* note 113, at 32.

The government agency official did not think this was the case;¹⁸⁶ in its defense, the official said that the business interests of securities firms would not overlap with those of private funding portals because each group targets different customers or markets (E24, E25).¹⁸⁷ However, because the public choice explanation predicts that a gap may exist “between rhetoric (public-spirited [justifications]) and reality (rent-seeking),”¹⁸⁸ in the case of the creation of the GISA Board, we can infer that the government allowed the GISA Board to be run as the only equity crowdfunding platform in Taiwan due to investor protection, based on a public-spirited justification.

We can also infer that in reality this equity crowdfunding regulation resulted from interest groups (such as incumbent organized securities firms) securing barriers to the entry of private portals by urging the government to establish the GISA Board as a regulatory monopoly in the equity crowdfunding market. Additionally, we may infer that such interest groups might thus acquire rents at the expense of startups and retail investors, thereby weakening the democratization of access to capital and investments.¹⁸⁹

In other words, Taiwan may have created its crowdfunding program in a way that was designed to limit its potential to compete with existing securities firms at least until private funding portals were authorized at the end of April 2015.

3. Bureaucratic Incentives for Running the GISA Board

The main incentive private funding portals have to facilitate equity crowdfunding is that it maximizes transaction volume by helping startups raise capital while presumably providing a certain level of investor protection.¹⁹⁰ In the process of fundraising, private funding portals do not promise that every project is sure to succeed, and instead conveys the possibility that projects on the funding portals may fail (A7, A9).¹⁹¹ In contrast, in examining a startup applying to register on the GISA Board, the GTSM may consider whether the startup is very likely to succeed or not — that is, the government cannot take the risk that a GISA company could fail (A8).¹⁹²

¹⁸⁶ See Interview with E, *supra* note 113, at 24, 25.

¹⁸⁷ *Id.*

¹⁸⁸ Kahan & Rock, *supra* note 177, at 2027.

¹⁸⁹ See ORBACH, *supra* note 177, at 199 (“Industries and firms sometimes strategically support regulation, among other reasons because they realize that restrictive regulation will be adopted. The support may enable the industry (or industry members) to influence the design for its (or their) benefit.”).

¹⁹⁰ See *supra* Part II.A.1.

¹⁹¹ See Interview with A, *supra* note 113, at 7, 9.

¹⁹² See *id.* at 8. This might be because government agencies such as the FSC tend to be averse to risk, “defensive, threat-avoiding, scandal-minimizing,” and “reluctant

Based on the responses from the interviews, if a GISA company were to fail or commit fraud, the FSC and the GTSM would risk severe public criticism. To avoid risking public criticism, the GTSM pays the closest attention to the success rate and also places the greatest emphasis on investor protection by all means, including the PICM.¹⁹³ This mindset might lead it to compromise the promotion of capital promotion to an extent (B14, B49, D13, D34).¹⁹⁴

Additionally, the government (represented by the president of the GTSM) indicated that there is an effect of government certification or endorsement derived from registering on the GISA Board to raise capital,¹⁹⁵ so the GTSM would carefully examine the integrity of startups applying for GISA registration (E3, B23, E1).¹⁹⁶ All in all, these measures are taken to ensure a very high level of investor protection, which demonstrates that the GTSM's incentive to operate an equity crowdfunding portal differs from those of private funding portals.¹⁹⁷

Political influence over the GTSM may further account for its distinct incentive to facilitate equity crowdfunding in Taiwan. The Investor Protection Center ("IPC") in Taiwan serves the same function as U.S. lawyer-driven class actions; because of the dominant government presence in the IPC, it is very likely that the potential arbitrariness of the IPC's decisions are subject to possible undue influence by other government interests.¹⁹⁸

to take on activities that embrace seemingly intractable problems and that are fraught with the danger of unintended consequences including regulatory failure and criticism." MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 348 (2009) (footnotes omitted).

¹⁹³ See *supra* Part III.B.2.

¹⁹⁴ See Interview with B, *supra* note 113, at 14, 49; Interview with D, *supra* note 113, at 13, 34. The FSC's and the GTSM's over-emphasis of investor protection illustrates a potential problem for bureaucrats — "a tendency toward 'tunnel vision,' meaning too narrow a focus on their particular regulatory agenda at the expense of alternative policy goals." STEARNS & ZYWICKI, *supra* note 192, at 363 (footnote omitted). This could explain why the FSC's bureaucratic tunnel vision might compromise the promotion of small business capital formation while seeking to protect investors by all means.

¹⁹⁵ Wei-Se Jian, *Chuang Gui Ban Zuo Da Ni Zeng Xiao F Gu [With the Rise of the GISA Board GTSM Considers Attracting Registration by Foreign Startups]*, JING JI RI BAO [ECON. DAILY] (Apr. 13, 2015) (Taiwan), <http://udn.com/news/story/7254/832724>.

¹⁹⁶ See Interview with B, *supra* note 113, at 23; Interview with E, *supra* note 113, at 1, 3.

¹⁹⁷ See STEARNS & ZYWICKI, *supra* note 192, at 358 ("Economists have predicted that the incentive structure faced by bureaucrats will lead to unduly risk-averse decision-making, producing an inefficiently high level of regulation.") (emphasis added).

¹⁹⁸ See Wang & Lin, *supra* note 25, at 150-51.

Just as in the case of the IPC, the creation of the GISA Board in January 2014 demonstrated the Taiwanese government's preference for public rather than private enforcement in protecting investors.¹⁹⁹ The GTSM's control over the GISA Board, a nonprofit foundation controlled by the FSC,²⁰⁰ may be the reason that the statute emphasizes investor protection over capital formation.²⁰¹ Put simply, the monopoly on the equity crowdfunding market that the GISA Board held until April 2015, illustrates that the government prefers the quasi-regulatory body, the GTSM, over private portals for enforcing investor protection.

4. Regulating Equity Crowdfunding in a Changing Landscape: Licensing Private Portals under the Public Plus Private Double-Track System

Even if there are some imperfections in the GISA Board as it is run by the GTSM, the GTSM played an interim role in setting an example of running an equity crowdfunding platform in Taiwan legitimately, but the excessive level of investor protection should be reconsidered (D34).²⁰² The spirit of crowdfunding lies in "democratizing" access to investment as well as to capital.²⁰³ To achieve this goal, the lawyer asserted that the equity crowdfunding market could form new capital in a more effective

¹⁹⁹ See Ching-Ping Shao, *Representative Litigation in Corporate and Securities Laws by Government-Sanctioned Nonprofit Organizations: Lessons from Taiwan*, 15 *ASIAN-PAC. L. & POL'Y J.* 58, 74 (2013) ("[T]he IPC's position may be moved along the public/private spectrum back toward the public end if we take into account its monopoly status in initiating the legal actions."). In terms of the nature of the enforcement body, there are two types of law enforcement: public and private. The former means that regulatory authorities or quasi-regulatory bodies can initiate enforcement proceedings, while the latter usually indicates that a private party has filed a civil lawsuit. Chao Xi & Yugang Chen, *Does Cumulative Voting Matter? The Case of China: An Empirical Assessment*, 15 *EUROPEAN BUS. ORG L. REV.* 585, 605-06 (2014); see also John Armour et al., *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 *J. EMPIRICAL L. STUD.* 687, 688-96 (2009).

²⁰⁰ Chwen-Wen Chen, *Cai Jing Guan Zhi Fa Zhi De Xian Fa Si Kao*, [Constitutional Thinking about the Financial and Economic Regulatory Regime], 148 *XIAN ZHENG SHI DAI* [CONST. REV.] 3, 16-17 (2014) (Taiwan).

²⁰¹ Professor Kuo-Chuan Lin, a former FSC Commissioner, said that because the FSC thinks that maintaining order in the financial market is much more important than financial innovation, Taiwan's government is more passive when it comes to authorizing new financial business or services such as equity crowdfunding. Spenser Y. Ho et al., *Wang Lu Shi Dai De Jin Rong Xiao Fei Zhe Bao Hu* [The Financial Consumer Protection in the Age of the Internet], 238 *YUE DAN FA XUE ZA ZHI* [TAIWAN L. REV.] 37, 48-49 (2015). The preferences of bureaucrats operating within the FSC may thus focus too much on investor protection at the expense of pursuing small business capital formation.

²⁰² See Interview with D, *supra* note 113, at 34.

²⁰³ See *supra* Part III.C.1.

way, upon liberalizing and opening the market to private funding portals (D11).²⁰⁴

A breakthrough in Taiwan's crowdfunding regulatory pattern, which took place at the end of April 2015, has been that the FSC authorized private portals to administer equity crowdfunding, apart from the GISA Board. On April 30, 2015, the FSC mandated the GTSM to act as the regulator and to promulgate Private Portal Regulations as a governing law for crowdfunding issues on private platforms.²⁰⁵ Taiwan's Cabinet (the Executive Yuan) developed this public plus private double-track system (the Double-Track system) as early as the end of 2014.²⁰⁶

Substantively speaking, the CROWDFUND Act established funding portals as private gatekeepers to ensure the integrity and thoroughness of the crowdfunded securities offered.²⁰⁷ Techniques to regulate funding portals include a requirement to educate investors to ensure that investors affirm that they understand the level of risk in startups and small issuers as well as the risk of illiquidity, and to ensure that investors do not invest more than the aggregate amounts that they are allowed to purchase across all platforms.²⁰⁸

More importantly, equity crowdfunding portals need to act as private gatekeepers with the ability to conduct due diligence on behalf of retail investors to disclose crowdfunded security risks. Therefore, the licensure of private portals in Taiwan is predicated on the fact that they are supposed to possess the ability to perform due diligence on the basic competence of crowdfunding issuers.²⁰⁹ In other words, the ability to help enforce a certain level of investor protection as a private gatekeeper is a

²⁰⁴ See Interview with D, *supra* note 113, at 11.

²⁰⁵ PRIVATE PORTAL REGULATIONS, *supra* note 28, art. 1.

²⁰⁶ *Xu Ni Shi Jie Fa Zhan Fa Gui Tiao Shi Gui Hua Fang An* [A Proposal to Adapt the Current Legal Regime to a Rising Online World], EXECUTIVE YUAN (Dec. 30, 2014) (Taiwan), http://www.ey.gov.tw/News_Content.aspx?n=3D06E532B0D8316C&sms=4ACFA38B877F185F&s=A1747AEA93F0BF62.

²⁰⁷ Lars Hornuf & Armin Schwienbacher, *Which Securities Regulation Promotes Crowdfunding?* 917 (unpublished manuscript) (2014), <http://ssrn.com/abstract=2412124>. A gatekeeper plays two roles in preventing wrongdoing: first, in order to prevent wrongdoing, the gatekeeper denies a corporate issuer access to the capital market by withholding its consent or necessary collaboration; second, the gatekeeper acts as a "reputational intermediary" to enable investors to rely on the disclosures or assurances made by the issuer. JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 2 (2006).

²⁰⁸ See *supra* Part I.B.4.

²⁰⁹ The ability to perform due diligence is an important way to overcome information asymmetries between issuers and investors and enables equity crowdfunding platforms to thrive in that these platforms act as third-party quality certification agencies, and that their reputations can be leveraged if they are trustworthy intermediaries. See Agrawal et al., *supra* note 29, at 18, 20, 22, 24-25, 28, 30.

precondition for obtaining a license to operate a private funding portal (A7, A13, A30).²¹⁰

There are some emerging concerns regarding Taiwan's Double-Track system. First, the GTSM appears to play the part of referee or regulator for private portals while doubling as a player in the equity crowdfunding marketplace. Even if the equity crowdfunding market were liberalized and open to private funding portals, the GISA Board would still be the strongest competitor against or even come to dominate over private portals, although the former is no longer a regulatory monopoly in a formal sense. Specifically, the FSC gave the GTSM a mandate to regulate anyone wishing to be a player in the equity crowdfunding market.²¹¹ The conflict of interest may be disconcerting — that the GTSM, running the GISA Board, is both a player and the referee.

Because of this infrastructure, it is doubted whether the GTSM might set the game rules and enforce them righteously. On the one hand, even if the Private Portal Regulations were somewhat relaxed in January 2016,²¹² with the GTSM as the direct regulator of private portals, the GTSM might have stringently crafted the Private Portal Regulations to suit the incumbent player, the GISA Board. In concrete terms, compared to the Private Portal Regulations, the GISA Regulations could provide advantages for the GISA Board in running a more successful crowdfunding business.²¹³

²¹⁰ See Interview with A, *supra* note 113, at 7, 13, 30. Private Portal Regulations require that before disclosing capital-raising information of crowdfunding issuers on websites, private portals not only assure the quality of issuers' internal controls, accounting, and management integrity, but also conduct due diligence checks on their offering circulars to ensure that no material deficiencies or abnormalities exist. PRIVATE PORTAL REGULATIONS, *supra* note 28, arts. 20, 24 ¶ 1.

²¹¹ See *supra* Parts III.E.2-3.

²¹² According to the GTSM, after referring to foreign legislative developments and domestic business demands, under the principle of risk management, this partial relaxation is aimed at making the operation of private crowdfunding platforms more flexible and facilitates the fundraising of small startups. Order of the GTSM, Zheng-Gui-Xin-Zi No. 10500006361 (passed on Jan. 8, 2016) (Taiwan).

²¹³ For example, as mentioned in Part II.B.1, the total paid-in capital for the GISA company must not exceed NT\$50 million, whereas the cap for the total paid-in capital of crowdfunding issuers listed on private portals is NT\$30 million, according to Article 19 of the Private Portal Regulations. Although both public and private platforms target small companies, the higher registration cap on the GISA Board gives itself an advantage over private portals in attracting issuers. Furthermore, the GISA Board is more successful in competing for crowdfunding issuers in that the investment cap for non-professional investors on the GISA Board is higher than on other private portals. Specifically, as discussed in Part II.B.2, the annual investment cap for a non-professional investor through the GISA Board is NT\$150,000, whereas Article 26 of Private Portal Regulations provides that investment made by a non-professional investor through each private portal during the preceding year may not exceed NT\$100,000. A non-professional investor can thus invest more on the GISA

From a public choice perspective, the GISA Board enjoys regulatory advantages that may be government-conferred rents, created by erecting barriers to entry, similar to restrictive licensing or permit regimes. Consequently, even if private portals had been allowed to list crowd-funded securities since the end of April 2015, the Double-Track regulatory scheme *de facto* has created anticompetitive effects in favor of the GTSM's potentially monopolistic activity.²¹⁴ For example, the GTSM had run the GISA Board since January 2014, and there have already been 62 startups registered on the GISA Board with near NT\$200 million raised at least as of December 2014.²¹⁵

On the contrary, as discussed just below, after the authorization of private portals in April 2015, two securities firms, MasterLink Securities Corporation and First Securities, were licensed to operate equity crowdfunding transactions. But possibly due to the strict restrictions on platforms and investors under the Private Portal Regulations, at least until December 11, 2015, there has not been any startup registered on these two private platforms.²¹⁶ This comparison might illustrate that the GISA Board enjoys advantages over other private platforms in running the crowdfunding business either legally or institutionally.

On the other hand, it was not until December 2015 when the first pure equity crowdfunding registered portal, "Startup Shares," started its operation.²¹⁷ As pure private portals take time and money to form, all of the earliest private equity crowdfunding platforms surely took place through existing securities firms. Two securities firms, MasterLink Securities Corporation and First Securities, were licensed to administer equity crowdfunding transactions as early as June 2015.²¹⁸ The reason for this may be that at the end of April 2015, the FSC ordered that any existing broker or private entity wanting to operate an equity crowdfunding business be licensed as a special broker for equity crowdfunding business

Board than on other private portals, which might also encourage more issuers to seek to register on the GISA Board. *See generally supra* Part II.B.

²¹⁴ *See* STEARNS & ZYWICKI, *supra* note 192, at 49.

²¹⁵ *See* Jian & Wang, *supra* note 87.

²¹⁶ *See* Shu-ting Weng, *Jiong Fa Qui Xian Zhi Hao Yan Ge Er Da Gu Quan Qun Mu Zheng Quan Shang Yi Ge Tuan Dui Dou Mei You [Embarrassing! The Regulations Are Too Strict that No Startups Are Registered on Two Major Equity-Crowdfunding Platforms]*, SHU WEI SHI DAI [BUS. NEXT] (Dec. 11, 2015), <http://www.bnxt.com.tw/article/view/id/38196> (last visited Feb. 2, 2016).

²¹⁷ Bing-nong Zhuang, *Chuang Meng Shi Ji Gu Quan Qun Mu Zheng Quan Kai Ye [Startup Shares Equity Crowdfunding Portal Starts Operation]*, ZHONG SHI DIAN ZI BAO [CHINA TIMES] (Dec. 30, 2015) (Taiwan), <http://www.chinatimes.com/realtimenews/20151230004118-260410>.

²¹⁸ Bi-fen Chen, *Gu Quag Qun Mu Ping Tai Shi Ri Qi Dong [Private Equity Crowdfunding Platforms Will Get Started on July 10, 2015]*, GONG SHANG SHI BAO [CHINA TIMES] (July 5, 2015) (Taiwan), <http://www.chinatimes.com/newspapers/20150705000061-260202>.

only. The issue was that the establishment cost for a pure private portal to acquire this license was at least NT\$50 million higher than that for an existing broker.²¹⁹

At least in terms of the pace to start operations, pure equity crowdfunding registered portals may be at a major disadvantage compared to existing brokers due to higher licensure costs so that pure portals are surely slow movers in entering the equity crowdfunding market.²²⁰ Taken together, Taiwan's government may yoke pure private equity crowdfunding portals by creating entry barriers, hence vesting dominance of the marketplace in the hands of the GTSM and existing brokers.

Furthermore, since the GTSM promulgated the Private Portal Regulations, which were sure to be approved by the FSC thereafter, the current regulations on private platforms still appear to be as much pro-investor protection as the GISA Regulations. For instance, during the examination of a company applying for GISA registration, the GTSM will undertake the PICM to assure the quality of startups' accounting, internal control, and corporate governance, while seriously examining the integrity of startups' management.²²¹ Similarly, according to Article 20 of the Private Portal Regulations, prior to disclosing the capital-raising information of crowdfunding issuers on websites, private portals are required to warrant the quality of issuers' internal controls, accounting, and management integrity.²²² These mechanisms are designed to ensure a high level of investor protection.

Because the GTSM operates the GISA Board, the GISA Regulations require more emphasis to be placed on investor protection than on capital formation.²²³ As the Private Portal Regulations were enacted by the GTSM and mostly patterned after the GISA Regulations, Taiwan's gov-

²¹⁹ Order of the Fin. Supervisory Commission, Jin-Guan-Zheng-Quan-Zi No. 10400140146 (Apr. 30, 2015) (Taiwan) (on file with author). According to the Standards Governing the Establishment of Securities Firms and Regulations Governing Securities Firms (both amended on April 20, 2015 to legalize private equity crowdfunding platforms), the establishment cost for an existing broker to run equity crowdfunding in addition is NT\$10 million for the operation bond, whereas that for a potential private portal can run as high as NT\$60 million (NT\$10 million for the operation bond plus NT\$50 million for the minimum paid-in capital). ZHENG QUAN SHANG SHE ZHI BIAO ZHUN [STANDARDS GOVERNING THE ESTABLISHMENT OF SECURITIES FIRMS], arts. 3, 7, 40 (Taiwan); ZHENG QUAN SHANG GUAN LI GUI ZE [REGULATIONS GOVERNING SECURITIES FIRMS], art. 9, ¶ 1 (Taiwan).

²²⁰ See Shuo-qi Gao, *Gu Quag Qun Mu Ping Tai Shi Ri Qi Dong* [Private Equity Crowdfunding Platforms Are Started Up], GONG SHANG SHI BAO [CHINA TIMES] (July 13, 2015) (Taiwan), <http://www.chinatimes.com/newspapers/20150713000239-260206>.

²²¹ See *supra* Parts II.B.2, B.4, E.3.

²²² PRIVATE PORTAL REGULATIONS, *supra* note 28, art. 20.

²²³ See *supra* Part III.E.3.

ernment simply dressed the regulatory pattern of the GISA Board in “new clothes” as the Private Portal Regulations.

As just mentioned above, even though the Private Portal Regulations were partially loosened in January 2016, this small-scale relaxation was achieved with a view to meeting business demands for legal flexibility in, as Ming-chung Tseng (the former FSC chairman) admitted, that there was not a startup registered on the two private portals formed by existing securities firms at all and that the FSC hence decided to liberalize the Private Portal Regulations after reviewing their strictness.²²⁴ The remark of the former FSC Chairman just demonstrated how the initial version of the Private Portal Regulations was more pro-investor protections. Therefore, both the aforementioned regulations of Taiwan’s equity crowdfunding market are essentially still primarily focused on investor protection.²²⁵

Even though the equity crowdfunding market has been open to private portals since the end of April 2015, with the GTSM dominating the marketplace by acting as both a player and regulator simultaneously, the changing landscape of equity-crowdfunding regulation is proving to be a change in name only. Moreover, Taiwanese regulators have tried to maintain a fair-and-even playing field to ensure the orderly functioning of Taiwanese equity crowdfunding markets, but the framework and enforcement structure for private portals may be so restrictive that even existing brokers as forerunners — with an advantage over pure online platforms — failed to attract any listing as of December 2015. Clearly, Taiwanese regulators failed to strike such a balance as Mary L. Schapiro, the former SEC Chairman, asserted in implementing the CROWDFUND Act — between optimizing investor protection and not hindering the creative impetus of the burgeoning capital formation.²²⁶

²²⁴ See Zhi-rong Guo, *Chuang Meng Shi Ji Gu Quan Qun Mu Ping Tai Kai Pao Tou Liang Jia Mu Zi Ye Zhe Yi Yue Ren Gou* [Startup Shares Equity-Crowdfunding Platform Get Started; Investors Can Subscribe for Shares of Two Fundraisers], SHU WEI SHI DAI [BUS. NEXT] (Dec. 30, 2015), <http://www.bnnext.com.tw/article/view/id/38365> (last visited Feb. 2, 2016).

²²⁵ As mentioned in footnote 201, in terms of bureaucratic motivations, because the FSC prefers financial market stability to financial innovation, this kind of institutional incentive for Taiwan’s government would affect their institutional design in deciding how to legalize new financial business or services such as equity crowdfunding. See STEARNS & ZYWICKI, *supra* note 192, at 325-26, 358. We can therefore estimate that the FSC’s unduly risk-averse decision-making contributes to a considerably high level of investor protection, while compromising the initial pursuit of capital formation.

²²⁶ See Mary L. Schapiro, Opening Remarks of SEC Chairman at the Thirty-First Annual SEC Government-Business Forum on Small Business Capital Formation (Nov. 15, 2012), in FINAL REPORT OF THE 2012 FORUM 13 (April 2013) (“Our goal in implementing the JOBS Act has always been to take a practical approach writing rules and issuing guidance . . . that carefully balances investor protection and capital formation.”) (emphasis added).

F. *A Convergence of More Form but Less Substance towards the U.S. Model*

From a comparative corporate law perspective,²²⁷ it appears that there is an ongoing convergence towards U.S. corporate rules in Taiwan. The birth of the GISA Board can be attributed to Taiwanese regulators' decision to transplant the U.S. CROWDFUND Act into the Taiwanese legal regime. However, we have found that the regulatory techniques introduced in Taiwan are similar only in form; the domestic political economy has already changed their substance or function, which is probably an example of "path dependence."²²⁸ As Bechuk and Roe observed:

Legal rules are often the product of political processes, which combine public-regarding features with interest group politics. To the extent that interest groups play a role, each interest group will push for rules that favor it. Thus, the corporate rules that actually will be chosen and maintained might depend on the relative strength of the relevant interest groups.²²⁹

The political dynamics of private and public groups may account for why the Taiwanese transplant of the CROWDFUND Act has created an excessive level of investor protection but places little emphasis on small business capital formation.

As for private groups in Taiwan's socioeconomic context, interest groups, such as incumbent securities firms, might influence regulators to

²²⁷ In the analysis of comparative corporate law, corporate rules mean "all the rules that govern the relations between the corporation and all of its investors, stakeholders, and managers, as well as among these players," so the corporate rules system includes not only the conventionally defined corporate law but "securities law" as well. Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, in CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 69, 95 (Jeffery N. Gordon & Mark J. Roe eds., 2004).

²²⁸ According to the original convergence theory proposed by Hansmann and Kraakman, corporate rules around the world will eventually reach a high level of uniformity. See generally Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, in CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 33-68 (Jeffery N. Gordon & Mark J. Roe eds., 2004). However, according to the path dependence approach proposed by Bebchuk and Roe, the corporate rules in practice depend on distinct local social and economic contexts. See Bebchuk & Roe, *supra* note 227, at 72-73; see also David Cabrelli & Mathias Siems, *A Case-Based Approach to Comparative Company Law*, in COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH 1, 5 (Mathias Siems & David Cabrelli eds., 2013) (footnote omitted) ("Proponents of [the] 'path-dependence' theory argue that the structure of a jurisdiction's corporate governance system and the shape of its company laws are conditioned by its cultural, social, economic, and political past.").

²²⁹ Bebchuk & Roe, *supra* note 227, at 97. Because the users of corporate rules — companies, local legal communities, and interest groups — have already invested in and benefited from the past socio-economic environment, they may strongly resist any change to the law. *Id.* at 98.

make the GISA Board a monopolistic equity crowdfunding platform in Taiwan and thus make it become an entry barrier to emerging private funding portals in the first place.²³⁰ Even after the authorization of fully private portals, the two earliest crowdfunding platforms were formed by existing securities firms. At least in terms of the pace to start operations, existing brokers had major advantages over the new pure private portals thanks to lower licensing costs.

When it comes to public groups, Anthony Ogus observed:

We can then recognise [sic] that interventionist law is a heterogeneous product: preferences may vary between countries, regions and localities as to the different combinations of the levels of legal intervention and of the price which must be paid for them. If this is the case, there is no necessary expectation that competition between national legal systems will lead to convergence, since much will depend on national preferences regarding the level of protection.²³¹

The GISA Regulations count as part of securities regulation, which is also a type of interventionist law. Given that the official representing the competent authority stated that 75 percent of GISA investors are natural, non-professional people, and so investor protection is therefore extremely important, Taiwan's local preference for supplying higher investor protection is clearly illustrated. The problem that arises from this preference is the increase in compliance costs that startups incur.²³²

Moreover, the incentive of the GTSM might thus differ from that of a private funding portal due to the dominant presence of the competent authority, the FSC. Furthermore, even though private portals have been permitted to list crowd-funded securities since the end of April 2015, the Double-Track regulatory scheme is favorable to the GTSM's substantively monopolistic activity in simultaneously acting as a player and regulator in the marketplace.

Whether in the context of facilitative law (e.g., contract and property) or interventionist law (e.g., tort and regulation),²³³ a comparative law scholar has argued that “[w]hile constitutional law and company law seem to be very different, convergence in these two areas of law shows a number of parallels,” that “[f]irst, in both areas of law, it has been found that countries have converged in a number of dominant legal policies,” and that “[s]econd, researchers have also shown that the precise texts of written constitutions have converged.”²³⁴

²³⁰ See *supra* Part III.E.2.

²³¹ Anthony Ogus, *Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, 48 INT'L & COMP. L.Q. 405, 413-14 (1999) (footnote omitted).

²³² See *supra* Part III.E.3.

²³³ MATHIAS SIEMS, *COMPARATIVE LAW* 229 (2014).

²³⁴ *Id.* at 234-35.

In the case of equity crowdfunding regulations in Taiwan, both the GISA Regulations and the Private Portal Regulations reflect a regulatory convergence of more form or rhetoric (i.e. the textual details of the law) and of less function or substance (i.e. the main regulatory policy — small business capital promotion). The excessive level of investor protection embedded in these two regulations might place heavy compliance burdens on small startups. In other words, from a path-dependence perspective, even though Taiwan's government transplanted formal regulatory techniques from the CROWDFUND Act into both the regulations, the local contextual dissimilarity may result in the substantive core or the legislative purpose of the JOBS Act — a primary focus on capital formation — neglected in the importation.

CONCLUSION

After the CROWDFUND Act was passed in the U.S. in 2012, the idea of equity crowdfunding has gained incredible momentum in helping startups obtain early seed capital elsewhere around the world, particularly in Taiwan. Only two years after its passage, Taiwan's government created the GISA Board and enacted the GISA Regulations and then shortly thereafter the Private Portal Regulations. Although both regulations are mostly a product of the legal transplantation of the CROWDFUND Act, a closer examination of Taiwan's rules, structures, and procedures as well as of the practical experiences of some of the typical participants, reflects Taiwan's path dependence on the high level of investor protection underlying local securities regulations.

This Article argues that the legal transplantation of the GISA Regulations and the Private Portal Regulations has both bright sides and dark sides. The bright side of Taiwan's two-step liberalization policy, the Double-Track system to legalize equity crowdfunding, is that the GISA Board can play an interim leading role in shaping how an equity crowdfunding platform should be run legitimately among its private peers in the near future. The dark side, from a public choice perspective, is that groups with vested interests, such as existing securities firms, may lobby to create entry barriers for potential private equity crowdfunding platforms. Nevertheless, the conflict of interest with the GTSM persists with respect to its incentive to run the GISA Board, due to the dominant government presence, as well as its dual roles as a player and referee in equity-crowdfunding regulation.

As demonstrated through doctrinal, qualitative and public choice analyses, both regulations in Taiwan may cause unbearable compliance costs to startups, ultimately compromising the goal of small business capital formation. The legal transplant of U.S. regulation of equity crowdfunding in Taiwan seems to be turning out to be simply one of form rather than of substance — with vast implications, particularly in terms of Taiwan's role and position in the rapidly changing "startup" global economy.

