**ENFORCEMENT AND INVESTOR PROTECTION DEPARTMENT**

In the matter of:

**SEC-EIPD Case No. 2018-0977**

**FUNDKO AND**
**FINTECHNOLOGY INC.**
Respondent.
x-----------------------------------x

# DECISION

This resolves the complaint filed by *Mr. Kany Vic G. Perez* against **FINTECHNOLOGY INC. ("FINTECHNOLOGY" for brevity),** a registered domestic corporation doing business under the name **"FUNDKO"** with Company Registration No. CS201616581 issued on December 7, 2017.

The primary purpose of **FINTECHNOLOGY** as stated in its Articles of Incorporation is:

> "To engage in and carry on the business of development, marketing, operation, management and provision of internet goods and services through existing telecommunications facilities, including mobile applications, , and without acting as a provider of value added telecommunications services (e-commerce covering goods of different kinds), provision of logistic services and support for on-demand services through mobile devices and web-based request and related services as well as

> payment services with the exception of payment services requiring permission under statutory stipulations, acting and/or appointment of others as general agent or representative for any customer support for individuals or business entities, and all other services relating to the aforementioned business inside and outside the Philippines through subsidiaries or otherwise."

It is also stated in its Articles of Incorporation that **FINTECHNOLOGY** has an authorized capital stock of **Fifteen Million Pesos (15,000,000.)** divided into fifteen million common shares with a par value of **one peso (Php1.00)** per share.

Aside from the complaint of *Mr. Perez*, this Commission has also received queries from the public about the legalities of **FUNDKO** such as whether or not it is a registered company and/or licensed or authorized to solicit investments from the public or an authorized lending company.

In his verified complaint filed on May 15, 2019 with this Department, *Mr. Perez* stated, inter alia, that on various dates, he received electronic messages from **FINTECHNOLOGY**. According to him, **FINTECHNOLOGY** is offering, through electronic messages, an investment opportunity called *"receivable discounting",* enticing the general public, the complainant included, to invest money for a promise of profits within the range of 1.5% to 2.9% interest return per transaction. Said investment product was initially introduced by **FUNDKO** through an online platform www.fundko.com for peer to peer lending. The platform serves as the link or connect between the borrowers and investors/lenders.

Due to the enticing offer of the company, the complainant invested money in varying amounts of from **Fifteen Thousand (Php15,000.00)** to as much as **Fifty-six Thousand Pesos (P56,000.00)** on various dates. For each investment transaction, **FUNDKO** sent the corresponding terms and conditions of their investment products to the complainant.

The following pertinent terms and conditions of each contract state, inter alia:

> "Section 8.2. - All loans shall be made solely by and between the Borrowers and Lenders, and shall be

the sole responsibilities of the actual parties thereto, without any participation from Fundko.

Section 8.7. - Lender appoints Fundko merely as its agent (i) for the communication of any Loan Acceptance, whether as Borrower or Lender; (ii) for receipt of communications of acceptance of any Loan Applications; (iii) to be the collection agent for any Lender/s for outstanding loans; and (iv) to execute on parties behalf any agreements or deeds in relation to matched and accepted Loan Offers including, without limitation, the Loan Contract.

xxx."

Acting on the complaint, this Department conducted a conference with the representatives of **FUNDKO/FINTECHNOLOGY**.

During the conference, the investigating team required the parties to submit their position paper.

In compliance with the directive of the investigating team, **FINTECHNOLOGY** through its counsels, submitted its Position Paper and argued, inter alia, that:

(a) The interest imposed does not constitute as securities as defined under the Republic Act No. 8799 also known as the Securities Regulation Code (SRC);

(b) **FINTECHNOLOGY** is not an Investment House involved in quasi-banking operations that requires separate authority from the *Bangko Sentral ng Pilipinas*; and

(c) **FINTECHNOLOGY/FUNDKO** should not be classified as a lending company under the Lending Company Regulation Act of 2007 stating, among others, that the term "engaged in the business of lending" is not expressly defined by RA 9474.

After a careful evaluation and analysis of the records and data gathered in the investigation, it shows that **FINTECHNOLOGY INC.** is indeed the owner and operator of www.fundko.com as categorically written in the

TERMS AND CONDITIONS in the copy of the contract attached to their Position Paper. It is also categorically stated in the Position Paper that **FINTECHNOLOGY** is an online peer to peer platform, operating on the website https://fundko.com/ wherein it uses the trade name **FUNDKO.**

Stripped of non-essential facts, this Department finds that the platform *https://fundko.com* is actually being used to perform, carry out, and/or promote lending activities of **FINTECHNOLOGY** and its so-called investors/lenders without any subsisting valid authority to operate as a lending company in violation of the provisions of *Republic Act 7494* otherwise known as *The Lending Company Regulation Act of 2007*.

Per verification with our SEC computer database and files on record of this Commission, it shows that **FINTECHNOLOGY** does not have a Certificate of Authority (CA) to engage in lending activities as required under Republic Act No. 7494.

Contrary to the argument posed by **FINTECHNOLOGY**, as aptly defined in *Section 3 of RA 7494*, the activities of the latter fall within the purview of a Lending Company, to wit:

> "Lending Company shall refer to a corporation engaged in granting loans from its own capital funds or from funds sourced from not more than nineteen (19) persons. It shall not be deemed to include banking institutions, investment houses, savings and loan associations, financing companies, pawnshops, insurance companies, cooperatives and other credit institutions already regulated by law. The term shall be synonymous with lending investors."

The operation of the platform **FUNDKO** is within the purview a lending company as it is designed to source capital funds from other persons as the so-called investors/lenders which, in turn, will be utilized to grant loans to the public borrowers.

The salient feature of a lending company is present in the mechanics and the purpose of the platform that carries out lending activities. The terms and conditions of the contract stating that the loan transaction is between the borrower and lender, is self-serving and not reflective of the true intent of the parties to the transaction. The platform, let alone, the position paper of **FINTECHNOLOGY**, utterly failed to show that the lender and the borrower would eventually be able to meet online or know each other. There is no real opportunity for the borrower to know the actual lender of the fund or vice versa. Neither the so-called lenders, particularly, the complainant, ever had the chance to know who borrowed their money. It is clear, however, that the loan transaction is effected through the platform of **FUNDKO** either through direct lending of its own capital funds or funds sourced from other unidentified or undisclosed persons/lenders/investors. It is plain to see that even if the capital funds are sourced from other persons, the platform gives the impression to the borrower that the contract of loan was dealt with a duly authorized lending institution or a lender granted with certificate of authority to do so.

The claim of **FINTECHNOLOGY/FUNDKO** that it is a mere intermediary or agent to a loan transaction is not legally feasible and shall not be countenanced without complying with the provisions of *RA 7494*. Even assuming that it is an intermediary or agent to a loan transaction, it should only perform lending activities in accordance with the requirements of the law. What cannot be done directly by the supposed lenders, cannot be done indirectly through the self-acclaimed online platform!

If we were to allow the platform to continue its operation in this wise, it would unduly open the floodgates to those similarly inclined individuals or corporations that they may engage in unauthorized lending activities without a Certificate of Authority from the Commission by simply going through a platform or online conduit such as **FUNDKO**. This practice would be inimical to the interest of the State and its avowed purpose and intent of curtailing unauthorized lending activities.

Furthermore, **FINTECHNOLOGY/FUNDKO** is not only engaged in unauthorized lending activities but also engaged in unauthorized online solicitation of investments from the public constituting an illegal offering or selling of securities in the form of *investment contract* in violation of Section 8 of the Securities Regulation Code.

Section 8 of the Securities Regulation Code provides:

> "**SEC. 8. *Requirement of Registration of Securities*.** – 8.1. Securities shall not be sold or offered for sale or distribution within the

> Philippines, without a registration statement duly filed with and approved by the Commission. Prior to such sale, information on the securities, in such form and with such substance as the Commission may prescribe, shall be made available to each prospective purchaser."

It is very clear from the allegations of the verified complaint and the pertinent evidence gathered and adduced, consisting of the downloaded materials from the internet indicating online presence of **FUNDKO**, copies of the terms and conditions of the contract and electronic messages sent to the complainant and among others, that **FINTECHNOLOGY/FUNDKO** is offering a return of investment ranging from 1.5% to 2.9% interest per transaction. The very core of the sustainable existence of lending operation is to attract investors or solicit investments from the public to raise funds that will be used in granting loans to its borrowers. It cannot be said that the profits promised to the complainant represents the interests earned from the borrowers' payments. Since there was no showing that the complainant had been able to meet the borrower personally or online at any point from the time the money was invested or lent up to the actual receipt of payment from the borrower. In reality, the investor/lender directly deals only with **FINTECHNOLOGY/FUNDKO** with regard to the investment or capital. In the same vein that the borrower is merely transacting with **FINTECHNLOGY/FUNDKO** alone and not with the individual lender or group of lenders.

The presence of the essential elements of an *"investment contract"* is obvious because of the following features: a) There is an investment of money; b) In a common enterprise, i.e. the operation of **FUNDKO** which is an online lending activity or application; (c); There is an expectation of profits; and (d) The profits are primarily derived from the efforts of others, i.e. depending on the success of the lending activities or profits generated by the lending platform.

It must be noted that acquiring a primary registration with the Commission only grants juridical personality to the corporation and to operate within its purpose only but does not authorize it to issue, sell, or offer securities for sale nor to undertake investment activities without acquiring a prior registration and/or secondary license approved by the Commission.

However, based on the records of the Commission, **FINTECHNOLOGY/FUNDKO** is **NOT AUTHORIZED** to solicit investments from the public since it has not secured prior registration and/or license from the Commission as prescribed under **Sections 8 and 28 of the Securities Regulation Code (SRC).** Per verification of records and attestation from the Company Registration and Monitoring Department (CRMD), Markets and Securities Regulation Department (MSRD) and Corporate Governance and Finance Department (CGFD) of this Commission show and prove the fact that **FINTECHNOLOGY/FUNDKO** lacks the secondary license or permit to offer or sell securities required by law.

Finally, **FINTECHNOLOGY/FUNDKO** is also **NOT REGISTERED** either as a crowdfunding intermediary or funding portal under SEC Memorandum Circular No. 14, Series of 2019 or the Rules and Regulations Governing Crowdfunding. It bears stating also that the transaction between the complainant and FUNDKO was done prior to the enactment or approval of the crowdfunding rules and regulations by this Commission. As a matter of fact, FUNDKO's application as a crowdfunding intermediary was denied by the Commission en banc.

**WHEREFORE**, this Department finds **FINTECHNOLOGY AND/OR FUNDKO** liable for violation of Republic Act No. 7494 for engaging in unauthorized lending activities and is hereby **DIRECTED** to pay the penalty of **Fifty Thousand Pesos (Php50,000.00)** as provided for under SEC MEMORANDUM Circular No. 9 Series of 2010 issued on November 12, 2010[1] which imposes the penalty of **Ten Thousand Pesos (Php10,000.00)** plus **One Hundred Pesos (Php100,00)** daily penalty. However, the maximum penalty shall not exceed **Fifty Thousand Pesos (Php50,000.00)** as provided for under Section 12[2] of the Lending Company Regulation Act of 2007 as quoted below:

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[1] SEC MEMORANDUM Circular No. 9 Series of 2010 issued on November 12, 2010 Scale of Penalties for Lending Companies: The penalty for Operating a Lending Company Head Office without a certificate of authority is P10, 0000.00 plus P100.00 daily penalty.

[2] **SEC. 12.** ***Penalty.*** **-** A fine of not less than Ten Thousand Pesos (P10,000.00) and not more than Fifty thousand pesos (P50,000.00) or imprisonment of not less than six months but not more than ten (10) years or both, at the discretion of the court, shall be imposed upon:

1. Any person who shall engage in the business of a lending company without a validly subsisting authority to operate from the SEC.

"**SEC. 12. *Penalty*. - A fine of not less than Ten Thousand Pesos (P10,000.00) and not more than Fifty thousand pesos (P50,000.00)** or imprisonment of not less than six months but not more than ten (10) years or both, at the discretion of the court, shall be imposed upon:

1. Any person who shall engage in the business of a lending company without a validly subsisting authority to operate from the SEC."

Further, for its illegal online solicitation of investments from the public constituting illegal offering or selling of securities in the form of investment contracts without the required valid license or permit issued by the

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2. The president, treasurer and other officers of the corporation, including the managing officer thereof, who shall knowingly and willingly:

a. Engage in the business of a lending company without a validly subsisting authority to operate from the SEC;

b. Hold themselves out to be a lending company, either through advertisement in whatever form, whether in its stationery, commercial paper, or other document, or through other representations without authority;

c. Make use of a trade or firm name containing the words "lending company" or "lending investor" or any other designation that would give the public the impression that it is engaged in the business of a lending company as defined in this Act without authority;

xxx.

commission in violation of **Sections 8 [3] in relation to Sections 54[4] and 73[5] of the Securities Regulation Code**, the respondent **FINTECHNOLOGY/FUNDKO** is **DIRECTED** to pay the penalty of **One Million Pesos (Php1,000,000.00).**

The foregoing penalties is without prejudice to the filing of criminal charges against **FINTECHNOLOGY/FUNDKO** and its responsible officers for violation of **Republic Act No. 7494** for engaging in unauthorized lending activities and the provisions of the Securities Regulation Code (SRC) for

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[3] **Section 8.** *Requirement of Registration of Securities*. – 8.1. Securities shall not be sold or offered for sale or distribution within the Philippines, without a registration statement duly filed with and approved by the Commission. Prior to such sale, information on the securities, in such form and with such substance as the Commission may prescribe, shall be made available to each prospective purchaser.

[4] **SEC. 54. Administrative Sanctions. -** 54.1. If, after due notice and hearing, the Commission finds that: (a) There is a violation of this Code, its rules, or its orders; (b) Any registered broker or dealer, associated person thereof has failed reasonably to supervise, with a view to preventing violations, another person subject to supervision who commits any such violation; (c) Any registrant or other person has, in a registration statement or in other reports, applications, accounts, records or documents required by law or rules to be filed with the Commission, made any untrue statement of a material fact, or omitted to state any material fact required to be stated therein or necessary to make the statements therein not misleading; or, in the case of an underwriter, has failed to conduct an inquiry with reasonable diligence to insure that a registration statement is accurate and complete in all material respects; or (d) Any person has refused to permit any lawful examinations into its affairs, it shall, in its discretion, and subject only to the limitations hereinafter prescribed, impose any or all of the following sanctions as may be appropriate in light of the facts and circumstances:

(i) Suspension, or revocation of any registration for the offering of securities;

**(ii) A fine of no less than Ten thousand pesos (P10,000.00) nor more than One million pesos (P1,000,000.00) plus not more than Two thousand pesos (P2,000.00) for each day of continuing violation;**

(iii) In the case of a violation of Sections 19.2, 20, 24, 26 and 27, disqualification from being an officer, member of the Board of Directors, or person performing similar functions, of an issuer required to file reports under Section 17 of this Code or any other act, rule or regulation administered by the Commission;

(iv) In the case of a violation of Section 34, a fine of no more than three (3) times the profit gained or loss avoided as a result of the purchase, sale or communication proscribed by such Section; and

(v) Other penalties within the power of the Commission to impose. (Emphasis supplied).

[5] **SEC. 73. *Penalties*. -** Any person who violates any of the provisions of this Code, or the rules and regulations promulgated by the Commission under authority thereof, or any person who, in a registration statement filed under this Code, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall, upon conviction, suffer a fine of not less than Fifty thousand pesos (P50,000.00) nor more than Five million pesos (P5,000,000.00) or imprisonment of not less than seven (7) years nor more than twenty- one (21) years, or both in the discretion of the court. If the offender is a corporation, partnership or association or other juridical entity, the penalty may in the discretion of the court be imposed upon such juridical entity and upon the officer or officers of the corporation, partnership, association or entity responsible for the violation, and if such officer is an alien, he shall in addition to the penalties prescribed, be deported without further proceedings after service of sentence.

soliciting investments from the public without prior registration and/or license from the Commission.

**SO ORDERED**.

Pasay City. 17 June 2021.

**OLIVER O. LEONARDO**
Officer-in-Charge

Copy furnished:

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**FINTECHNOLOGY INC.**