

TO REGULATE OR NOT TO REGULATE?  
A COMPARISON OF GOVERNMENT RESPONSES TO PEER-TO-  
PEER LENDING AMONG THE UNITED STATES, CHINA, AND  
TAIWAN

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KEYWORDS

Regulatory sandbox, the United States, China, Taiwan, P2P lending, Financial technology (FinTech), “More Principles-Based” financial regulation (MPBR), Financial Technology Development and Innovative Experimentation Act (the FinTech Sandbox Act)

ABSTRACT

*With the worldwide revolution in financial technology (“FinTech”), Peer-to-Peer (“P2P”) lending, an alternative funding channel, has grown rapidly over the past decade. P2P lending benefits digital financial inclusion by providing an online platform to facilitate direct trades between borrowers and lenders with limited intermediation by traditional financial institutions. During P2P lending transactions, a significant amount of transaction records are accumulated, thus creating a FinTech-driven credit assessment mechanism to help underserved borrowers, who are often turned down by traditional financial intermediaries, obtain credit. P2P lending business models as well as government responses to those models differ. For example, the United States has been reactive, requiring platforms to fully comply with the extant securities regulation, while China, though initially hands-off, has also become reactive, limiting P2P platforms to the information intermediation model due to a series of P2P failures. Taiwan’s regulatory response to P2P lending, led by its Financial Supervisory Commission (“FSC”), the sole financial market watchdog in Taiwan, started as reactive, warning that the P2P lending industry should not cross four major red lines drawn under existing regulatory and business structures. The Taiwanese government, however, has become more*

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*proactive—at least in form, introducing the Financial Technology Development and Innovative Experimentation Act (the “FinTech Sandbox Act”) to permit cautious regulatory experimentation. Though a positive effort, this act may, in substance, be an ineffective means to address the regulatory dilemma between prudential regulation and financial competition and innovation. This is because the government lacks the institutional incentive to replace the existing regulatory regime with something truly proactive. We propose a structural change in the current institutional design that could reallocate the authority of financial competition and innovation to a more motivated financial agency, separate from and independent of the FSC, that would be better positioned to safeguard financial competition and innovation enabled by FinTech.*

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## INTRODUCTION

With the growth of financial technology (“FinTech”), many internet technology companies, having accumulated a large number of users and transaction records via online platforms, have begun to provide financial services without significant intermediation by traditional financial institutions. Since the first Peer-to-Peer (“P2P”) lending platform was launched in 2005, this type of FinTech transaction has turned into a global market with a variety of distinct business models and promising growth rates.<sup>1</sup> In general, P2P or marketplace lending is defined as “lending money to borrowers without going through a traditional financial intermediary such as a bank.”<sup>2</sup> P2P platforms apply innovative credit scoring models which are “heavily data-driven, employ semi-automated risk assessment methods[,] and leverage nontraditional data points.”<sup>3</sup> These models and techniques help borrowers who face challenges when trying to obtain credit through traditional channels acquire loans, thus enhancing digital financial inclusion.<sup>4</sup> However, new risks may emerge from financial innovation. For example, derivatives and securitization could transfer and alter risk in a sophisticated way, which—due to their risk-shifting characteristics—could, in turn,

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1. *The Future of Fintech—A Paradigm Shift in Small Business Finance*, WORLD ECONOMIC FORUM 12 (Oct. 2015), [http://www3.weforum.org/docs/IP/2015/FS/GAC15\\_The\\_Future\\_of\\_FinTech\\_Paradigm\\_Shift\\_Small\\_Business\\_Finance\\_report\\_2015.pdf](http://www3.weforum.org/docs/IP/2015/FS/GAC15_The_Future_of_FinTech_Paradigm_Shift_Small_Business_Finance_report_2015.pdf).

2. *Id.*

3. *Id.*

4. Tobias Berg, Valentin Burg, Ana Gombović, & Manju Puri, *On the Rise of FinTechs – Credit Scoring Using Digital Footprints* 28 (NBER Working Paper No. w24551, 2018), <https://ssrn.com/abstract=3163781> (“Particularly in developing countries, the inability of the unbanked population to participate in financial services is often caused by a lack of information infrastructure, such as credit bureau scores. Many countries have therefore already started leveraging digital technologies to promote financial inclusion.”). For digital financial inclusion, *see also* *G20 High-Level Principles for Digital Financial Inclusion*, GLOBAL PARTNERSHIP FOR FINANCIAL INCLUSION i (2016), <http://www.gpfi.org/sites/default/files/documents/G20%20High%20Level%20Principles%20for%20Digital%20Financial%20Inclusion%20-%20Full%20version-.pdf> (noting that in this digital era, digital financial inclusion benefits efficient interconnection between participants in the market, and that the method of creating adaptive regulatory approaches and the method for accelerating the use of digital technologies will be crucial to improve financial access and achieve universal financial inclusion).

contribute to the global financial crisis.<sup>5</sup> Similarly, in the case of P2P lending, “the general misalignment of interest has been raised as critical, as marketplaces issue loans but often don’t retain any risk.”<sup>6</sup> When the credit issued is of lower quality, the risk of default will increase.<sup>7</sup> We can thus observe some inherent systemic risks with unforeseeable consequences on P2P platforms.<sup>8</sup>

In addition, a finding by Transparency Market Research even states that the opportunity in the global P2P market will be worth \$897.85 billion by 2024, an increase from \$26.16 billion in 2015.<sup>9</sup> In light of the increase in P2P lending over the past decade, many financial regulators across jurisdictions have attempted to “balance the traditional regulatory objectives of financial stability and consumer protection—the focus of post-Crisis regulatory changes—with the objectives of promoting growth and innovation” in the past several years.<sup>10</sup> Because the Financial Supervisory Commission (“FSC”), which is the sole financial market watchdog in Taiwan charged with both consumer protection and prudential regulation, is inclined to adopt a conservative civil-law approach by setting forth detailed rules that market participants must follow, the development of FinTech-enabled financial services such as P2P lending would be restrained due to the regulatory gap.<sup>11</sup>

In reality, even though the Taiwanese government has, in form, become more proactive by enacting the Financial Technology Development and Innovative Experimentation Act (the “FinTech Sandbox Act”), an official regulatory sandbox to permit cautious regulatory experimentation, the FSC, in substance, might actually be

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5. Dirk A. Zetzsche, Ross P. Buckley, Janos N. Barberis, & Douglas W. Arner, *Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation*, 23 *FORDHAM J. CORP. & FIN. L.* 31, 36-37 (2017).

6. WORLD ECONOMIC FORUM, *supra* note 1, at 16.

7. *Id.*

8. *Id.* at 17.

9. *Peer-to-Peer Lending Market - Global Industry Analysis, Size, Share, Growth, Trends and Forecast 2016 – 2024*, TRANSPARENCY MARKET RESEARCH (2016), <https://www.transparencymarketresearch.com/peer-to-peer-lending-market.html> (last visited July 4, 2018).

10. Zetzsche et al., *supra* note 5, at 34.

11. *Fa Zhan Jin Rong Ke Ji, Jian Li Si Wei Yao Tiao Zheng [Regulatory Philosophy Need Be Adapted in Facilitating Financial Technology]*, GONG SHANG SHI BAO [INDUSTRY & BUS. TIMES] (Oct. 9, 2017) (Taiwan), <http://opinion.chinatimes.com/20171009000028-262113> (noting the incumbent Chairman Gu of the FSC emphasized that the Taiwanese legal system is a civil law system and that unless authorized by statutes or regulations administrative agencies have difficulty in permitting the provision of financial products or services not yet authorized). For a discussion on the FSC charged with both consumer protection and prudential regulation, see Chang-hsien Tsai, *Choosing Among Authorities for Consumer Financial Protection in Taiwan: A Legal Theory of Finance Perspective*, in *THE POLITICAL ECONOMY OF FINANCIAL REGULATION* 219, 239-43 (Emilios Avgouleas & David Donald eds., 2019).

reactive in genuinely embracing FinTech. This is caused by the absence of institutional incentives to devote its resources to substituting the existing regime with a new style of regulation. This may be because the FSC may easily be subject to the regulatory capture, inertia, and risk-averse decision-making. Within our proposed reform framework to regulate such FinTech-enabled services such as P2P lending in Taiwan, in the short term, the institutional philosophy of “more principles-based” financial regulation (“MPBR”) should be embedded in the FSC’s mindset when implementing the FinTech Sandbox Act.

Nevertheless, we would like to direct further discussion about government responses to FinTech towards the regulatory design of a stronger and more independent competition authority for consumer financial products and services. Specifically, for the long run, we would propose a structural change in institutional design, i.e., reallocating the authority of financial competition and innovation to a motivated financial agency. With a professional agency that is separate from and independent of the FSC (the sole financial regulator in Taiwan with a predominant focus on prudential regulation), this newly created single financial agency would be better positioned to safeguard competition and innovation in the financial market enabled by FinTech. This more structural change in the extant financial system and their own style of regulation would also promote effective competition in the interests of consumers, while providing long-term regulatory certainty for FinTech-driven financial market development.

This paper examines the business models of P2P or marketplace lending and compares respective regulatory responses to alternative finance options such as P2P lending across the United States, China, and Taiwan. Next, by examining Taiwan’s change in regulatory responses, this paper emphasizes how institutional design and incentives are likely to play a significant role in developing the FinTech market with the benefits of digital financial inclusion. Part I and Part II introduce business models and regulatory frameworks of P2P lending in the United States and China. Part III discusses potential violations of extant financial laws and regulations in major business models of P2P lending in Taiwan. Part IV advocates for creating an independent agency to act separately from the FSC and to exclusively control its own rulemaking, supervision, and enforcement of consumer financial competition measures in Taiwan. This proposal for a more proactive and structural approach to FinTech would help bring the issue of financial competition and innovation to the attention of the government, so that we can further prevent undue external influences from regulatory capture, institutional inertia, and risk-averse decision-making by financial regulators. Meanwhile, this body would be better suited to offer a truly independent

perspective on competition and innovation within the financial system, so as to refrain from driving FinTech firms away from Taiwan and prevent them from relocating overseas due to long-term regulatory uncertainty.

### I. P2P LENDING IN THE UNITED STATES

Prosper, a P2P platform first launched in the U.S. in 2006, funded \$20 million in loans within 9 months; a year later, Lending Club was launched and became the largest U.S. P2P lending platform. Currently, Prosper and Lending Club enjoy 98% of the U.S. market share.<sup>12</sup> The P2P lending industry's success can be attributed to timing. After the global financial crisis in 2008 (“GFC”), “the resulting increase in political scrutiny—alongside the fact that interest rates continue[d] to remain stubbornly low—created an opportunity for peer to peer lenders to project themselves as an accessible alternative for borrowers.”<sup>13</sup>

With U.S. P2P lending, a majority of lenders are institutional investors (e.g., asset managers, pension funds, and hedge funds).<sup>14</sup> Increasingly, retail and institutional investors are separated by platforms as institutional lenders are the only category of investors that can invest in more risky loans.<sup>15</sup> Even though U.S. policy-makers offered little support for P2P lending, partnerships between banks and P2P lending firms have been building since the outset.<sup>16</sup> For example, a deal between Citi and Lending Club was announced in April 2015; bank-P2P lender partnerships like this would supply extra funding to small and medium-sized enterprises, which would provide legitimacy to P2P lending.<sup>17</sup>

#### A. A Bird's Eye View of Business Models

Instead of being an information intermediary between lenders and borrowers or selling loans to investors wholesale, a number of U.S. P2P

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12. Ed Bell, *How Did P2P Lending Evolve? A Three Minute History*, HARMONEY (Apr. 22, 2014), <https://www.harmony.co.nz/blog/how-did-p2p-evolve-a-three-minute-history-lesson>.

13. Reema Mannah, *Holding Profit Margins: Reducing the Pressures Imposed by Peer to Peer Lending*, TITLESOLV (Sept. 23, 2015), <http://www.titlesolv.com/hot-topics/holding-profit-margins-reducing-the-pressures-imposed-by-peer-to-peer-lending/>.

14. WORLD ECONOMIC FORUM, *supra* note 1, at 13.

15. *Id.*

16. *The Complex Regulatory Landscape for Fintech: An Uncertain Future for Small and Medium-Sized Enterprise Lending*, WORLD ECONOMIC FORUM 18 (2016), [http://www3.weforum.org/docs/WEF\\_The\\_Complex\\_Regulatory\\_Landscape\\_for\\_FinTech\\_290816.pdf](http://www3.weforum.org/docs/WEF_The_Complex_Regulatory_Landscape_for_FinTech_290816.pdf).

17. *Id.* In contrast to the more market-driven partnership between P2P platforms and banks in the United States, Taiwanese financial regulators in 2016 highly encouraged banks and P2P platforms to collaborate with each other. This intervention was aimed to require the platforms to comply with existing law and regulations applied to banks. See *infra* Parts III.B.1 and IV.D.

lenders would issue notes backed by loans that are selected and funded by the investors on P2P platforms.<sup>18</sup> Formally, the platform lender retains those loans. In practice, “the credit risk is passed on to the investor because the notes entitle the investor to payment only when borrowers make payments on the loans.”<sup>19</sup> For example, as a lender expresses interest in a potential borrower on the Lending Club platform, with WebBank (a Utah-chartered industrial bank) lending to the borrower, “Lending Club permanently retains ownership of the borrower indebtedness.”<sup>20</sup> Thereafter, Lending Club’s debt instrument or notes are sold to the lender, “who becomes a creditor of the platform rather than a borrower.”<sup>21</sup> The Lending Club platform is obliged by these notes to “pay an amount derived from borrower payments.”<sup>22</sup> These transactions can be categorized under the asset securitization model and are likely subject to federal securities law as discussed below.<sup>23</sup>

## *B. The Regulatory Framework*

### 1. The Securities Act of 1933

While Prosper requested a no-action letter after its launch in February 2006, the U.S. Securities and Exchange Commission (“SEC”) was not willing to give an assurance that no action would be brought against platform lenders for securities law violations.<sup>24</sup> On November 24, 2008, the SEC issued a Cease and Desist Order (the “Order”) to Prosper based upon the Supreme Court’s precedents in *Howey*<sup>25</sup> and *Reves*,<sup>26</sup> arguing that those notes issued by Prosper were securities as defined in Section 2(a)(1) of the Securities Act.<sup>27</sup> Since Prosper had not registered with the SEC prior to the Order, the SEC determined that Prosper should register

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18. WORLD ECONOMIC FORUM, *supra* note 16, at 15.

19. *Id.*

20. Andrew Verstein, *The Misregulation of Person-to-Person Lending*, 45 UC DAVIS L. REV. 445, 476-77 (2011).

21. *Id.*

22. *Id.*

23. *See id.* at 459-60, 465. *See also* Eric C. Chaffee & Geoffrey C. Rapp, *Regulating Online Peer-to-Peer Lending in the Aftermath of Dodd-Frank: In Search of an Evolving Regulatory Regime for an Evolving Industry*, 9 WASH. & LEE L. REV. 485, 517 (2012) (discussing that the securitized loans (i.e., the notes) that are sold in P2P lending transactions would be similar to the mortgage-backed securities that are securities under federal securities law).

24. Verstein, *supra* note 20, at 475.

25. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-300 (1946).

26. *Reves v. Ernst & Young*, 494 U.S. 56, 56-58 (1990).

27. Order Instituting Cease-And-Desist Proceedings against Prosper Marketplace, Inc., Securities Act Release No. 8984, 94 SEC Docket 1913 (Nov. 24, 2008) (cease-and-desist order).

as a public company with the SEC and “should only sell notes through a prospectus with an effective registration statement.”<sup>28</sup> Subsequent to the issuance of the Order, all of the U.S. P2P platform lenders either filed registration statements with the SEC or just folded up.<sup>29</sup>

## 2. GAO Report

Subsequent to the GFC, according to Section 989F(a)(1) of the Dodd–Frank Wall Street Reform Act (the “Dodd–Frank Act”), the U.S. Government Accountability Office (“GAO”) was assigned to research and develop an “optimal Federal regulatory structure” for the P2P lending industry.<sup>30</sup> In July 2011, the GAO published a report to identify two primary options for regulating P2P lending: “(1) continuing with the current bifurcated federal system—that is, protecting lenders through securities regulators and borrowers primarily through financial services regulators, which will include the newly formed CFPB—or (2) consolidating borrower and lender protection under a single federal regulator, such as CFPB.”<sup>31</sup> However, the GAO was incapable of giving a complete recommendation as to which option Congress should select.<sup>32</sup> Whereas Prosper lobbied the U.S. House of Representatives and the Senate to sponsor a provision under the Dodd–Frank Act that would have made the CFPB the main regulator of P2P lending, exempting their industry from securities regulation—the Senate refused to pass this provision.<sup>33</sup>

## 3. U.S. Treasury White Paper

In May 2016, Lending Club announced CEO Renaud Laplanche’s resignation “after an internal review found a sale of \$22 million in near-prime loans to a single investor which was in violation of company policy and the investor’s ‘express instructions.’”<sup>34</sup> Soon after, the U.S. Treasury Department (“Treasury”) published a white paper regarding its

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28. Verstein, *supra* note 20, at 476.

29. *Id.*

30. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 989F(a)(1), 124 Stat. 1376, 1947 (2010).

31. GAO-11-613, *Person-to-Person Lending: New Regulatory Challenges Could Emerge as the Industry Grows*, U.S. GOV’T ACCOUNTABILITY OFFICE 42 (2011), <http://www.gao.gov/new.items/d11613.pdf>. The CFPB is the acronym for the Consumer Financial Protection Bureau.

32. Verstein, *supra* note 20, at 523.

33. Chaffee & Rapp, *supra* note 23, at 526.

34. Samantha Sharf, *Lending Club CEO Resigns after Internal Sale Review*, FORBES (May 9, 2016), <https://www.forbes.com/sites/samanthasharf/2016/05/09/lending-club-ceo-resigns-after-internal-sale-review/#787143c570f2>.

review of the online marketplace lending industry.<sup>35</sup> This white paper “establishe[d] an overview of the evolving market landscape, review[ed] stakeholder opinions, and provide[d] policy recommendations,” while acknowledging “the benefits and risks associated with online marketplace lending” and highlighting “certain best practices applicable both to established and emerging market participants.”<sup>36</sup>

In order to facilitate access to credit through the continued development of online marketplace lending, this white paper made recommendations to the federal government and private sector participants to support “more robust small business borrower protections and effective oversight”; ensure “sound borrower experience and back-end operations”; promote “a transparent marketplace for borrowers and investors”; expand “access to credit through partnerships that ensure safe and affordable credit”; support “the expansion of safe and affordable credit through access to government-held data”; and facilitate “interagency coordination through the creation of a standing working group for online marketplace lending.”<sup>37</sup>

#### 4. OCC Guidance Paper

In March 2016, the Office of the Comptroller of the Currency (“OCC”) issued a paper which provides a regulatory framework for responsible innovation, stressing “the importance of financial institutions being receptive to technological innovation, while emphasizing risk management and corporate governance.”<sup>38</sup> In December 2016, the OCC further announced that they would charter FinTech companies supplying bank services and products as “special

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35. *Opportunities and Challenges in Online Marketplace Lending*, U.S. DEPARTMENT OF THE TREASURY (2016).

36. *Id.* at 1.

37. *Id.* at 28-33.

38. *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective*, OFFICE OF THE COMPTROLLER OF THE CURRENCY (2016), <https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf>. See also Chip MacDonald, Lisa M. Ledbetter, Stephen J. Obie, James C. Olson, Heith D. Rodman, & William M. Atherton, *The OCC’s Responsible Innovation Framework and Fintech Bank Charters—Latest Developments*, JONES DAY (Jan. 2017), <http://www.jonesday.com/the-occs-responsible-innovation-framework-and-fintech-bank-charterslatest-developments-01-13-2017/>. Under the OCC’s definition, responsible innovation means “the use of new or improved financial products, services, and processes to meet the evolving needs of consumers, businesses, and communities in a manner that is consistent with sound risk management and is aligned with the bank’s overall business strategy.” OCC, *Responsibility Innovation*, <https://www.occ.treas.gov/topics/responsible-innovation/index-innovation.html> (last visited Mar. 3, 2018).

purpose national banks.”<sup>39</sup> The announcement was followed by the OCC’s release of a guidance paper (the “Guiding Paper”), titled “Exploring Special Purpose National Bank Charters for Fintech Companies,” which offered preliminary guidance on the process of the special purpose charter.<sup>40</sup>

From a FinTech firm’s perspective, “the most significant benefit associated with such a charter would be that the application of many state laws to the firm would be preempted.”<sup>41</sup> On the other hand, since the National Bank Act charters and governs all national banks, including special purpose national banks, a FinTech company with such a charter would be subject to “the provisions of the act that prescribe the bank’s corporate organization and structure (e.g., classes of shares, voting rights, number of directors, and term of office) and circumscribe the activities that the bank is permitted to conduct.”<sup>42</sup> However, even if the OCC actually granted such FinTech charters, the type of company that would be regarded as a FinTech company is not clear yet.<sup>43</sup>

### C. Summary

The Securities Act of 1933 provides that “the offer and sale of securities must be registered unless an exemption from registration is

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39. Patrick Doyle, David F. Freeman, Jr., Brian McCormally, & Pratin Vallabhaneni, *Arnold & Porter Discusses OCC Plan to Charter FinTech Firms as Special Purpose National Banks*, *The CLS Blue Sky Blog* (Dec. 8, 2016), <http://clsbluesky.law.columbia.edu/2016/12/08/arnold-porter-discusses-occ-plan-to-charter-fintech-firms-as-special-purpose-national-banks/>.

40. OCC, *Exploring Special Purpose National Bank Charters for Fintech Companies* (2016), <https://www.occ.gov/topics/bank-operations/innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf>. In July 2018, the OCC officially began accepting applications for special purpose national bank charters from “nondepository financial technology (fintech) companies engaged in the business of banking.” OCC, *OCC Begins Accepting National Bank Charter Applications From Financial Technology Companies*, <https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html> (last visited Apr. 24, 2019). Nevertheless, a federal judge recently made the FinTech charter go into hibernation due to similar lawsuits brought by state banking regulators such as the New York Department of Financial Services. Randall D. Guynn & Margaret E. Tahyar, *The Fintech Charter Goes into Hibernation*, DAVIS POLK (May 3, 2019), <https://www.finregreform.com/single-post/2019/05/03/the-fintech-charter-goes-into-hibernation/>.

41. Hilary J. Allen, *A US Regulatory Sandbox?*, 31 (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3056993](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3056993).

42. Michael Nonaka, *OCC to Issue Special Purpose National Bank Charters to Fintech Companies*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Dec. 11, 2016), <https://corpgov.law.harvard.edu/2016/12/11/occ-to-issue-special-purpose-national-bank-charters-to-fintech-companies/>.

43. The OCC only gives some examples: “marketplace lenders, payment services providers, digital currency and distributed ledger technology companies, and financial planning and wealth management companies.” Doyle, Freeman, McCormally, & Vallabhaneni, *supra* note 39.

available.”<sup>44</sup> For example, Title III of the Jumpstart Our Business Startups Act of 2012 added Securities Act Section 4(a)(6), offering an exemption from registration for some crowdfunding transactions.<sup>45</sup> Nevertheless, under the asset securitization model, P2P lending is out of the scope of the exemption of securities regulations. After the SEC started to regulate P2P lending platforms via the extant securities regulation, U.S. P2P platforms were required to sell the notes by prospectus and file annual and quarterly reports. Perhaps because of increased scrutiny by the SEC, P2P platforms such as Prosper and Lending Club increased their minimum required credit scores, which were “substantially higher than domestic microfinance institutions require.” Paradoxically, “the SEC’s effort to regulate the industry created barriers to entry for economically marginal and geographically isolated borrowers.”<sup>46</sup>

Despite the fact that the GAO and U.S. Treasury used to consider how to supervise the growing FinTech industry in a more appropriate way, the OCC took the position in the Guidance Paper that if innovative products or services provided by FinTech firms are tantamount to traditional activities, like paying checks and lending money, such companies would be allowed to receive special purpose charters.<sup>47</sup> Nonetheless, the OCC would charter FinTech firms and regulate them as banks by “impos[ing] capital requirements and ask[ing] firms to submit financial inclusion plans in the spirit of the Community Reinvestment Act, as well as resolution plans”; however, if FinTech startups were required to comply with this sort of regulation, they would spend too

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44. *Regulation Crowdfunding: A Small Entity Compliance Guide for Issuers*, U.S. SECURITIES AND EXCHANGE COMMISSION (2016), <https://www.sec.gov/info/smallbus/secg/rccomplianceguide-051316.htm> (hereinafter *Reg. CF*). See also Tao Yu & Wei Shen, *Funds Sharing Regulation in the Context of the Sharing Economy: Understanding the Logic of China’s P2P Lending Regulation*, 35 COMPUTER L. & SECURITY REV. 42, 53 (2019) (describing that “[t]he P2P lending regulation in the US is a subdivision of securities regulation under which P2P lending platforms are treated as issuers by the Securities and Exchange Commission (SEC)” whereas “the equivalent in the UK is similar to a banking regulatory system.”).

45. See *Reg. CF*, *supra* note 44.; Chang-hsien Tsai, *Legal Transplantation or Legal Innovation? Equity Crowdfunding Regulation in Taiwan after Title III of the U.S. JOBS Act*, 34 B.U. INT’L L.J. 233, 236, 240-1, 245 (2016).

46. Lisa T. Alexander, *Cyberfinancing for Economic Justice*, 4 WM & MARY BUS. L. REV. 309, 345 (2013).

47. Nonaka, *supra* note 42. See also Lalita Clozel, *State Regulators Sue OCC over Fintech Charter*, *American Banker* (2017), <https://www.americanbanker.com/news/state-regulators-sue-occ-over-fintech-charter> (“For [F]in[T]ech companies, the national charter could be an opportunity to skip the state-by-state licensing system and only deal with a single federal regulator and set of requirements.”).

much time and money.<sup>48</sup>

## II. P2P LENDING IN CHINA

It is reported that P2P lending in China has “nearly quadrupled to a staggering \$150 billion in 2015, more than ten times the size of US marketplace lending originations.”<sup>49</sup> At the same time, however, those P2P platforms do not have the same restrictions as banks do, and because they are not registered as traditional financial intermediaries, there are substantial concerns about scandals, fraud, and other P2P failures.<sup>50</sup> Some commentators compare the P2P lending transactions to “Ponzi schemes,” meaning that they “attract[] lenders through high interest rates, and us[e] the lent funds to pay off preceding lenders.”<sup>51</sup> The P2P lending industry in China illustrates how business models of online P2P lending from the Western world can evolve in a different and comparably less developed legal and regulatory environment.<sup>52</sup> This is a market-oriented response to the limited opportunities open to smaller businesses for obtaining financial services from banks and to the low returns offered to savers or investors.<sup>53</sup> We can categorize P2P lending in China into the following four major business models.

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48. Allen, *supra* note 41, at 32. Similarly, as discussed below, Taiwanese financial authority, the FSC, highly encouraged the partnership between banks and P2P platforms; their purpose is also to govern P2P platforms via existing law and regulations applied to banks. *See infra* Parts III.B.1 and IV.D.

49. Alistair Milne & Paul Parboteeah, *The Business Models and Economics of Peer-to-Peer Lending*, EUROPEAN CREDIT RESEARCH INSTITUTE, 18 (May 2016), <https://www.ceps.eu/system/files/ECRI%20RR17%20P2P%20Lending.pdf>.

50. *See* Matthew Miller & Richard Borsuk, *China Issues Details of Rules to Tackle Online Financial Risk*, REUTERS (Oct. 13, 2016), <https://www.reuters.com/article/us-china-finance-internet/china-issues-details-of-rules-to-tackle-online-financial-risk-idUSKCN12D0UI>; Sara Hsu, *China's Poor P2P Lending Models*, THE DIPLOMAT (Feb. 12, 2014), <https://thediplomat.com/2014/02/chinas-poor-p2p-lending-models/>.

51. *See* Hung-Yi Chen & Chang-hsien Tsai, *Changing Regulations of Peer-to-Peer Lending in China*, 36(11) BANKING & FIN. SERVICES POL'Y REP. 13, 16-17, 19-20 (2017), available at <https://ssrn.com/abstract=3166867>; Hsu, *supra* note 50.

52. Milne & Parboteeah, *supra* note 49.

53. *See* Robin Hui Huang, *Online P2P Lending and Regulatory Responses in China: Opportunities and Challenges*, 19 EUR. BUS. ORG. L. REV. 63, 65-68 (2018); Bonnie G. Buchanan & Cathy Xuying Cao, *Quo Vadis? A Comparison of the Fintech Revolution in China and the West* 19 (SWIFT Institute Working Paper No. 2017-002, 2018), <https://swiftinstitute.org/research/quo-vadis-a-comparison-of-the-fintech-revolution-in-china-and-the-west/> (describing “[t]here is a general shortage of credit in China because banks prefer to lend to big SOEs.”). *See also id.*, at 30 (taking Ezubao, “a 50 billion yuan (USD 7.6 billion) pyramid scheme established in 2014 that eventually impacted 900,000 investors in less than a two year period” as an example of a Ponzi scheme; attributing its continuing to accelerate the growth before its collapse in 2016 to that “Chinese investors sought alternatives to the volatile Chinese stock market and slowing real estate market”).

### A. Major Business Models

#### 1. The Information Intermediation Model

P2P platforms in China vary considerably. In the information intermediation model, P2P lending companies provide a platform as a trading market to match lenders and borrowers, letting them exchange information and make the direct trade themselves.<sup>54</sup> Under this model, lenders bear all credit risks derived from borrowers, and the platforms do not provide guarantees or indemnities for borrowers' defaults.<sup>55</sup> For example, Paipaidai (拍拍貸), China's first P2P lending platform, which was launched in 2007, introduced a bidding process to lending projects.<sup>56</sup> In this model, the loan interest is determined solely by borrowers and lenders. Meanwhile, lenders in the Paipaidai platform bear the default risk of the borrowers without guarantees given by the platform.<sup>57</sup>

#### 2. The Guarantee Model

Under the guarantee model, a P2P platform not only matches lenders and borrowers but also provides guarantees for the lender's principal and interests usually by cooperating with an associated guarantee company.<sup>58</sup> If a loan default occurs, the platform or the guarantee company compensates lenders and the lenders transfer the loan claims to the platform or the guarantee company for the follow-up debt

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54. Liang Shan (單良), *Jhongguodalu Wanglu Jiedai Pingtai Kuaisu Fajhan: Sihda P2P Wangdai Moshih Fensi* (中國大陸網路借貸平台快速發展: 4大P2P網貸模式分析) [*Rapid Development of Chinese Online Lending Platforms: An Analysis of the Four Major P2P Lending Models*], 77 TAIWAN YINHANJIA (台灣銀行家) [THE TAIWAN BANKER] 46, 47 (2016).

55. *Id.*

56. A loan project is successful if the total loan amount is met within a limited period of time; if the full loan amount cannot be raised during the limited period, the loan project fails. Jing-Jie Jhang (張靜婕) & Rong-Zong Jian (簡榮宗), *P2P Daikuan Fuwu Pingtai Falu Wunti Chutan* (P2P貸款服務平台法律問題初探) [*Preliminary Study on Legal Issues of P2P Lending Platforms*], www.LawTw.com (台灣法律網).

[http://www.lawtw.com/article.php?template=article\\_content&area=free\\_browse&parent\\_path=,1,1573,&job\\_id=203436&article\\_category\\_id=2049&article\\_id=120368](http://www.lawtw.com/article.php?template=article_content&area=free_browse&parent_path=,1,1573,&job_id=203436&article_category_id=2049&article_id=120368) (last visited May 6, 2018).

57. The information intermediation model is also called the "client segregated account model," in which "all funds from lenders and borrowers are managed by a segregated account which is separated from the platform's balance sheet." Huang, *supra* note 53, at 70.

58. Shan, *supra* note 54, at 47. This model is also called the "guaranteed return model," where "[a]s the platform plays a similar role to that of the traditional bank, this type of online lending is said to have 'bank-like functions.'" Huang, *supra* note 52, at 71.

collection.<sup>59</sup> Hongling Capital (紅嶺創投), for example—one of the earlier P2P lending platforms in China, which was launched in 2009—<sup>60</sup> owns a guarantee company and “offers a wide range of loan products in both secured and unsecured categories offering yields of 7-10% to investors.”<sup>61</sup> Before the Chinese government started to supervise the P2P lending industry more strictly in 2015, most P2P platforms in China, under competitive pressure from the market, provided guarantees for a loan’s principal and interests.<sup>62</sup> Those platforms, however, specified neither the source, usage, or scale of their reserves for guarantees, nor did they clarify whether or not the guarantees were provided only within the cap of the reserves.<sup>63</sup>

### 3. The Asset Securitization Model

Within the asset securitization model the financial institutions or other companies partition the assets, which can generate cash flow income, and then repackage them into a standard form of securities, creditworthiness of which is enhanced through appropriate internal or external credits. Those securities are finally sold to investors on the financial market, with Prosper and Lending Club as noted examples.<sup>64</sup> In China, some guarantee companies and microfinance firms have established their own P2P platforms or collaborate with other P2P lending platforms to sell the guaranteed products or microfinance assets to the general public through the platforms.<sup>65</sup> China’s Lufax (陸金所), originally incubated by Pingan Insurance Group, adopts a model similar to the asset securitization model explained above.<sup>66</sup> Under this model,

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59. See Shan, *supra* note 54, at 47; WANG JIHI-CHENG (王志誠) ET AL., HULIANGWANG JINRONG JIHI JIANLI JIHIH (互聯網金融之監理機制) [THE SUPERVISION MECHANISM OF INTERNET FINANCE] 43-44 (2017).

60. Spencer Li, *Are Chinese Platforms Abandoning the Peer-to-Peer Model?*, CROWDFUND INSIDER (Dec. 4, 2015), <https://www.crowdfundinsider.com/2015/12/78231-are-chinese-platforms-abandoning-the-peer-to-peer-model/>.

61. See *id.*; TSAI-CHING LIU (劉彩卿) ET AL., JINRONG YANJIU FAZHAN JIJIN GUANLI WEIYUAN HUI (金融研究發展基金管理委員會) [FOUNDATION OF FINANCIAL RESEARCH AND DEVELOPMENT], FEI YINHANGYE BANLI JINRONG YEWU ZHI GUOWAI FAZHAN QUSHI JI YINYING ZHIDAO (非銀行業辦理金融業務之國外發展趨勢及因應之道) [FOREIGN DEVELOPMENT TREND OF FINANCIAL SERVICES PROVIDED BY THE NON-BANK INDUSTRY AND THE SOLUTIONS] 13, 53 (2015) (hereinafter NON-BANK INDUSTRY).

62. See Siang-Rong Ye (葉湘榕), *P2P Jiedai De Moshih Fongsian Yu Jianguan Yanjiou* (P2P 借貸的模式風險與監管研究) [Research on Model Risk and Supervision of P2P Lending], 3 JINRONG JIANGUAN YANJIU (金融監管研究) [FINANCIAL SUPERVISORY RESEARCH] 73 (2014); Buchanan & Cao, *supra* note 53, at 30.

63. Ye, *supra* note 62.

64. See *supra* Part I.A; WANG ET AL., *supra* note 59, at 42-44.

65. Shang, *supra* note 54, at 47.

66. See Li, *supra* note 60; WANG ET AL., *supra* note 59, at 44; Yu & Shen, *supra* note 44, at 49.

special purpose vehicles (“SPVs”) or trust funds are formed as bankruptcy remote entities to isolate financial risks from the platforms, thus protecting investors’ interests.<sup>67</sup>

#### 4. The Debt Assignment Model

Under the debt assignment model, a lender, in cooperation with a P2P platform, provides loans to borrowers and then sells the loan claims to investors on the platform; this way, investors and borrowers do not transact directly.<sup>68</sup> CreditEase or Yixin (宜信) adopts this model to lend money to borrowers on the platform before finding investors to channel their funds into loans.<sup>69</sup> Yixin’s CEO, Ning Tang, as an individual lender, lends his money to borrowers whose credit ratings were certified through Yixin’s offline credit verification process. Thereafter, Yixin splits the loans and packages them into products which investors can buy from Tang Ning on the Yixin platform.<sup>70</sup> Although some scholars argue that bankruptcy remote entities such as SPVs or trust funds differentiate the asset securitization model from the debt assignment model,<sup>71</sup> others maintain that these two models are actually the same.<sup>72</sup>

#### *B. The Regulatory Framework*

Following several years of rapid growth in internet finance,<sup>73</sup> the Chinese government gave up its previous hands-off approach to monitoring online financial products or services after the outbreak of scandal, fraud, and high-profile P2P failures. In fact, in July 2015, the Chinese government introduced its first major guidance policy on

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67. WANG ET AL., *supra* note 59, at 42-43.

68. This model is also called the “platform lender model,” “originate-to-distribute model,” or “market place lending,” where “the platform is the one who originates loans to the borrowers . . . proactively without the need for the matches to actually occur.” Huang, *supra* note 53, at 71.

69. Hsu, *supra* note 50.

70. WANG ET AL., *supra* note 59, at 41. *See also* Hsu, *supra* note 50 (“Under this model, the investors may end up lending to several borrowers, or several investors may lend to one borrower. In some cases, loans are pooled and the debt is transferred to investors.”).

71. *See supra* Part II.A.3.

72. *See, e.g.*, Wen Xiao-Bo (文曉博), *P2P Zhaiquan Liuzhuan Yu Zichan Zhengquanhua De Falu Fenxi* (P2P 債權流轉與資產證券化的法律分析) [*Legal Analysis of P2P claims Transfer and Asset Securitization*], 1 FAZHI YU SHEHUI (法制與社會) [LEGAL SYSTEM AND SOCIETY] 99, 100 (2015).

73. The so-called internet finance in China means “a joint product of internet and the financial sector,” which is “more commonly referred to as Fin[T]ech in other jurisdictions.” *See* Huang, *supra* note 53, at 64.

internet finance as explained below.<sup>74</sup>

### 1. Guiding Opinions on Enhancing Positive Development of Internet Finance

The Guiding Opinions on Enhancing Positive Development of Internet Finance (the “Guiding Opinions”) is “a broad framework that ‘actively encourages the development of internet finance platforms’ and is intended to ‘encourage innovation and support the steady development of internet finance’ with ‘moderately loose regulatory policies.’”<sup>75</sup> Under the Guiding Opinions, P2P platforms are designated as information intermediaries for borrowers and lenders: they shall neither participate in the transaction, nor shall they pool or transform financial assets in any other way.<sup>76</sup> According to the requirement of establishing custodian accounts (independent from platforms) with a “qualified banking institution,” the Guiding Opinions “appointed the China Banking Regulatory Commission (CBRC) as [the] P2P lending supervisory agency.”<sup>77</sup> Based on the overall requirements and supervisory principles provided under the Guiding Opinions, China’s government introduced additional regulatory measures discussed below.

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74. See *The Rise of Peer-to-Peer Lending in China: An Overview and Survey Case Study*, THE ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS 20 (2015), [http://www.accaglobal.com/content/dam/ACCA\\_Global/Technical/manage/ea-china-p2p-lending.pdf](http://www.accaglobal.com/content/dam/ACCA_Global/Technical/manage/ea-china-p2p-lending.pdf) (hereinafter *Rise of Peer-to-Peer Lending*); Miller & Borsuk, *supra* note 50. For the Chinese “zen” approach to emerging FinTech practices by doing nothing, see Zetzsche et al., *supra* note 5, at 50 (“China is often applauded for adopting a laissez-faire approach before designing a comprehensive regulatory system approach for the new environment. . . . In practice, this meant that China’s need for regulatory sandboxes was limited, as China itself represented a sandbox on a national level.”) (footnote omitted).

75. *Rise of Peer-to-Peer Lending*, *supra* note 74, at 20.

76. See ZHONGHUA RENMIN GONGHEGUO CAIZHENG BU ZHONGGUO RENMIN YINHANG (中國人民銀行) [PEOPLE’S BANK OF CHINA] ET AL., GUANYU CUJIN HULIANWAN JINRONG JIANKANG FAZHAN DE ZHIDAO YIJIAN (關於促進互聯網金融健康發展的指導意見) [GUIDING OPINIONS ON ENHANCING POSITIVE DEVELOPMENT OF INTERNET FINANCE] (promulgated and effective July 18, 2015) (China) (hereinafter GUIDING OPINIONS); *Rise of Peer-to-Peer Lending*, *supra* note 74, at 20.

77. See *id.*; Chen & Tsai, *supra* note 51, at 20. In March of 2018, the CBRC and China Insurance Regulatory Commission (“CIRC”) were merged and is now be known as the China Banking and Insurance Regulatory Commission (“CBIRC”), where the People’s Bank of China (“PBOC”) “will take over the legislative and rulemaking functions of the CBRC and CIRC, a significant increase in power, while CBIRC . . . will play the role of policy executor.” Angelito P. Bautista Jr, *China Merges Its Banking and Insurance Regulators*, THE ASIAN BANKER (Apr. 25, 2018), <http://www.theasianbanker.com/updates-and-articles/china-merges-its-banking-and-insurance-regulators>.

## 2. Interim Measures for the Administration of the Business Activities of Online Lending Information Intermediary Institutions

In August 2016, the CBRC issued the Interim Measures for the Administration of the Business Activities of Online Lending Information Intermediary Institutions (the “Interim Measures”). The purposes of the Interim Measures are to regulate the business activities of P2P lending, to protect the legal rights and interests of lenders, borrowers, and platforms, to promote the sound development of the online lending industry, and to satisfy the investment and financing demands of small and medium-sized enterprises (“SMEs”) and individuals in a more effective manner. The Interim Measures reaffirm that P2P platforms should be positioned as information intermediaries for borrowers and lenders.<sup>78</sup> According to the measures, the P2P platforms must be recorded and registered with local financial regulatory departments after obtaining their business licenses from company registries.<sup>79</sup> In November 2016, the CBRC, together with the Ministry of Industry and Information Technology and State Administration of Industry and Commerce, issued the Guidelines on the Administration of Recordation and Registration of Online Lending Information Intermediary Institutions (the “Registration Guidelines”).<sup>80</sup> The Registration Guidelines reaffirm that the competent authority only processes registration and filing of the P2P lending companies’ basic information and does not endorse their operating capabilities, compliance, and credit status.<sup>81</sup>

The Chinese regulatory approach may be described as relatively flexible and hands-off in terms of the creation of online lending platforms, aside from “cases of major risk events and outright criminal

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78. See ZHONGGUO YINHANGYE JIANDU GUANLI WEIYUANHUI (中國銀行業監督管理委員會) [CHINA BANKING REGULATORY COMMISSION] ET AL., WANGLUO JIEDAI XINXI ZHONGJIE JIGOU YEWU HUODONG GUANLI ZHANGXING BANFA (網絡借貸信息中介機構業務活動管理暫行辦法) [INTERIM MEASURES FOR THE ADMINISTRATION OF THE BUSINESS ACTIVITIES OF ONLINE LENDING INFORMATION INTERMEDIARY INSTITUTIONS] (hereinafter INTERIM MEASURES) (promulgated and effective Aug. 24, 2016) (China); Chen & Tsai, *supra* note 51, at 20.

79. See INTERIM MEASURES § 5; Huang, *supra* note 53, at 73.

80. CBRC, WANGLUO JIEDAI XINXI ZHONGJIE JIGOU BEIAN DENGJI GUANLI ZHIYIN (網絡借貸信息中介機構備案登記管理指引) [GUIDELINES FOR FILING AND REGISTRATION OF ONLINE LENDING INFORMATION INTERMEDIARY INSTITUTIONS], WANGDAIZHILIA (網貸之家), <http://baike.wdzj.com/doc-view-4284.html> (last visited Apr. 3, 2018).

81. See Huang, *supra* note 53, at 73 (“As the Chinese regime adopts a registration procedure rather than an approval process, the platform can get registered as long as they provide all relevant supporting materials.”).

violations.”<sup>82</sup> The Interim Measures still prefer market forces illustrated by industry self-regulation; in fact, “regulators are more interested in controlling undesired activities rather than setting legal barriers to entry (e.g., a license and permit system).”<sup>83</sup> While the new regulatory requirements for P2P lending providers are relatively hands-off, the CBRC officials have foreshadowed a list of 12 forbidden activities as red lines for the P2P lending industry.<sup>84</sup> These 12 forbidden activities are “the focus of the draft rules as engaging in any of these will likely result in a complete shutdown of operations and possible prosecution by law enforcement.”<sup>85</sup>

To name a few forbidden activities mentioned above, according to the Interim Measures, P2P platforms shall not provide lenders with guarantees or promise “guaranteed returns on principal and interest,” not directly make loans to borrowers, and not structure “loans into investment products with maturity mismatch.”<sup>86</sup> In addition, the Interim Measures require that P2P platforms shall not accept and manage lenders’ funds, or build the “fund pool”; instead they must distinguish sub-accounts for their clients and establish a third-party depository system for customer funds with a qualified banking institution.<sup>87</sup> In other words, the information intermediation model becomes the only one that meets the aforementioned requirements, outlawing the aforementioned debt assignment, asset securitization, and guarantee models.<sup>88</sup>

In order to protect consumers, P2P platforms shall manage and grade the risk tolerance levels of the lenders while controlling the loan amount within a certain limit.<sup>89</sup> Moreover, platforms shall fully disclose borrowers’ basic information, loan products, rating process, the funds used in the unexpired loan products and other related information, while periodically making public their financial conditions and business

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82. See Spencer Li, *Regulations Galore Part II: Peer to Peer Lending in China*, CROWDFUND INSIDER (Jan. 18, 2016), <https://www.crowdfundinsider.com/2016/01/80326-regulations-galore-part-ii-peer-to-peer-lending-in-china/>; Huang, *supra* note 53, at 73. See also Buchanan & Cao, *supra* note 53, at 43 (noting that “[i]n the early days of the Chinese P2P market Chinese regulators had taken a hands-off approach to regulating online consumer loans.”); Yu & Shen, *supra* note 44, at 49 (describing that “[f]rom 2006 (when CreditEase, the first Chinese P2P lending company, was founded) to 2015, China’s regulators employed a laissez faire approach towards this burgeoning and emerging industry.”).

83. See Li, *supra* note 82; Huang, *supra* note 53, at 73.

84. INTERIM MEASURES § 10.

85. Li, *supra* note 82.

86. INTERIM MEASURES § 10.

87. See INTERIM MEASURES § 28; Huang, *supra* note 53, at 74; Chen & Tsai, *supra* note 51, at 21.

88. See Huang, *supra* note 53, at 72 (underscoring that “the online lending platform cannot act as a financial intermediary”).

89. INTERIM MEASURES §§ 17 & 26.

operations.<sup>90</sup> Local regulators can scrutinize poorly rated platforms; depending on the type of non-compliance these platforms can or cannot be held accountable.<sup>91</sup> Meanwhile, local regulators should advise P2P lending platforms on how to meet the requirements or shut down disqualified platforms.<sup>92</sup>

### 3. Guidelines for Online Lending Fund Depository Business

Due to the absence of third-party supervision of P2P lending in China in the previous years, many P2P platforms constructed fund pools, encroaching or misappropriating customers' funds, and even absconding with the funds, severely damaging customers' interests.<sup>93</sup> By the end of 2016, only 4% of the total number of platforms operate with the bank depository system.<sup>94</sup> As both the Guiding Opinions and Interim Measures require P2P platforms to establish a third-party depository system for customer funds with a qualified banking institution, in February of 2017, the CBRC further issued Guidelines for Online Lending Fund Depository Business (the "Depository Guidelines") to specify the principles of fund depository business.<sup>95</sup> The Depository Guidelines stipulate that customer funds and platform self-owned funds shall be kept and managed separately, and that commercial banks as custodians "do not provide guarantee for online lending activities and will not be held liable for lending defaults."<sup>96</sup>

### 4. Self-regulatory Rules of Information Disclosure

In October 2016, in order to meet the requirement from the Guiding Opinions and the Interim Measures, the National Internet Finance Association of China (the "NIFAC")—organized by the People's Bank of China ("PBOC") along with related regulatory agencies—issued self-regulations for information disclosure (the "Self-Regulations") to

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90. INTERIM MEASURES §§30-32. For detailed introduction to information disclosure, *see* Huang, *supra* note 53, at 75-76; Chen & Tsai, *supra* note 51, at 21.

91. Li, *supra* note 82.

92. INTERIM MEASURES §44.

93. CBRC, WANGLUO JIEDAI ZIJIN CUNGUAN YEWU ZHIYIN DA JIZHE WEN (網絡借貸資金存管業務指引答記者問) [ANSWERS TO JOURNALISTS' QUESTIONS ON GUIDELINES FOR ONLINE LENDING FUND DEPOSITORY BUSINESS] (2017), <http://www.cbrc.gov.cn/chinese/home/docView/A5A5F5AB66FA4E74A9988D07C79B7BCB.html> (last visited July 12, 2018).

94. *Id.*

95. CBRC, WANGLUO JIEDAI ZIJIN CUNGUAN YEWU ZHIYIN (網絡借貸資金存管業務指引) [GUIDELINES FOR ONLINE LENDING FUND DEPOSITORY BUSINESS] (promulgated and effective Feb. 22, 2017) (China).

96. *See* Huang, *supra* note 53, at 74-75.

increase information transparency and enable the investing public to jointly monitor and prevent fraud or moral hazard.<sup>97</sup> The Self-Regulations propose 96 disclosure indicators, including 65 mandatory indicators and 31 encouraged indicators.<sup>98</sup> The Self-Regulations divide the indicators into three types of information: institutional information, operational information, and information on loan projects.<sup>99</sup> The information disclosure obligations vary with the scale of platforms.<sup>100</sup> That is, larger platforms with more risks bear higher disclosure obligations. The NIFAC has set a threshold in the application process for membership, which requires the platform to disclose the information for more than three months according to the Self-Regulations.<sup>101</sup> If false or fraudulent information is disclosed, the platform becomes ineligible for membership within two years of such disclosure.<sup>102</sup>

### C. Summary

The business models of P2P lending in China are diverse, and each model may come with different kinds or levels of risks. For instance, “[c]redit risk is compounded in cases where the principal has been guaranteed, and P2P lenders may rapidly face a crisis of liquidity or

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97. GUIDING OPINIONS §19; INTERIM MEASURES §34. The NIFAC, as a semi-private regulator, was established in December 2015 for regulating the internet finance industry, which includes P2P lending, under its self-regulatory rules. Chen & Tsai, *supra* note 51, at 21.

98. ZHONGGUO HULIANGWANG JINRONG XIEHUI (中國互聯網金融協會) [NATIONAL INTERNET FINANCE ASSOCIATION OF CHINA], *Zhongguo Huliangwang Jinrong Xiehui Huliangwang Jinrong Xinxi Pilu Zilu Guanli Guifan* (中國互聯網金融協會互聯網金融信息披露自律管理規範 [NIFAC Rule on Self-Regulation of Information Disclosure]), Wang Dai Zhi Jia (網貸之家) [Wangdaizhijia], <http://www.wdzt.com/zhuanti/xpbz/> (last visited Apr. 23, 2018) (hereinafter *Self-Regulations*). ZHONGGUO HULIANGWANG JINRONG XIEHUI (中國互聯網金融協會) [NATIONAL INTERNET FINANCE ASSOCIATION OF CHINA], *Hu Liang Wang Jin Rong Xin Xi Pi Lu Biao Zhun: P2P Wang Dai* (互聯網金融信息披露標準：P2P 網貸) [*Standard on Internet Financial Information Disclosure for Online Lending*], Wang Dai Zhi Jia (網貸之家) [Wangdaizhijia], <http://www.wdzt.com/zhuanti/xpbz/> (last visited Apr. 23, 2018) (hereinafter *Standards*). To more officially list in detail the disclosure requirements the P2P lending platforms should obey, CBRC promulgated the “Disclosure Guidelines” in August of 2017. CBRC, WANGLUO JIEDAI XINXI ZHONGJIE JIGOU YEWU HUODONG XINXI PILU ZHIYIN (網絡借貸信息中介機構業務活動信息披露指引) [GUIDELINES FOR THE DISCLOSURE OF INFORMATION ON THE BUSINESS ACTIVITIES OF ONLINE LENDING INFORMATION INTERMEDIARY INSTITUTIONS] (promulgated and effective Aug. 23, 2017) (China). Therefore, commentators indicate that the “existing Chinese regulations constitute a “One + Three” regulatory system for the P2P lending industry”, that the “One” is the “Interim Measures” of 2016, and that the “Three” refers to the “Registration Guidelines” of 2016, the “Depository Guidelines” of 2017, and the “Disclosure Guidelines” of 2017. Yu & Shen, *supra* note 44, at 50-52.

99. See *Standards*, *supra* note 98. For detailed examples of these three types, see Huang, *supra* note 53, at 76.

100. See *Standards*, *supra* note 98.

101. *Self-Regulations*, *supra* note 98, §2.

102. *Self-Regulations*, *supra* note 98, §27.

solvency when borrowers become delinquent.”<sup>103</sup> In addition, under the asset securitization and debt assignment models, “the investors may end up lending to several borrowers, or several investors may lend to one borrower. In some cases, loans are pooled and the debt is transferred to investors.”<sup>104</sup> In these cases, the P2P lending company has additional responsibility to ensure the credibility of borrowers.<sup>105</sup>

Given the rapid development of internet finance, the Chinese regulators initially were more interested in cracking down on undesired activities, rather than imposing legal barriers to entry such as a licensure regime.<sup>106</sup> A list of 12 forbidden activities in the Interim Measures represents the primary focus of the regulators, for the purposes to “promote risk management and establish much-needed ground rules to limit the prevalence of unsound practices and illegal activity in the industry.”<sup>107</sup> Industry self-regulation is touted in the document as the ideal approach.<sup>108</sup> Since the Chinese government made it clear that “P2P platforms should be positioned as information intermediaries” only, “mainstream P2P products have been standardized to the extent that they are defined as assets reflecting actual lending relationship.”<sup>109</sup> Accordingly, as both the Guiding Opinions and the Interim Measures emphasize that P2P lending companies shall act as information intermediaries, P2P platforms can only adopt the information intermediation model. However, it may be disputed that other models, not least the asset securitization and debt assignment models, should be completely forbidden simply because they imply more potential risks. Though others may suggest that, in the meantime, the competent authorities should, to an extent, allow these models with the premises of appropriate supervision in terms of containing potential systemic risk

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103. Hsu, *supra* note 50.

104. *Id.*

105. *Id.*

106. Li, *supra* note 82.

107. *Id.*

108. *Id.* Nevertheless, a large number of P2P lending platforms in China collapsed in June and July of 2018, causing many defaults. Chen Jia, *Regulator to Clamp Down on P2P Loans, Stock as Collateral*, CHINA DAILY (Aug. 28, 2018), <http://www.chinadaily.com.cn/a/201808/28/WS5b849353a310add14f388102.html>. Thus, it is expected that China’s financial regulators would further tighten regulation on internet finance; for example, new regulations were announced in August 2018, requiring that local governments “set up ‘communications windows’ where investors can complain, that “[n]ew P2P companies and platforms are strictly banned”, and that “[t]hose that do not repay their loans will be blacklisted under China’s social-credit rating system.” Amanda Erickson, *Chinese Anger Grows As ‘Get Rich Quick’ Investment Schemes Go Bust*, THE WASHINGTON POST (Sept. 3, 2018), [https://www.washingtonpost.com/world/asia\\_pacific/chinese-anger-grows-as-get-rich-quick-investment-schemes-go-bust/2018/08/29/4a1cd5a2-a45b-11e8-b76b-d513a40042f6\\_story.html?noredirect=on&utm\\_term=.d98647e2779a](https://www.washingtonpost.com/world/asia_pacific/chinese-anger-grows-as-get-rich-quick-investment-schemes-go-bust/2018/08/29/4a1cd5a2-a45b-11e8-b76b-d513a40042f6_story.html?noredirect=on&utm_term=.d98647e2779a).

109. *P2P Lending Market in China*, BOAO REVIEW & LUFAX.COM 14, <http://blog.lendit.com/wp-content/uploads/2015/04/Lufax-white-paper-Chinese-P2P-Market.pdf> (last visited Apr. 8, 2018).

and protecting consumer interest. Next, we will examine P2P lending in Taiwan, laying foundation for a comparison among the United States, China, and Taiwan regarding regulatory responses to P2P lending, in particular, and FinTech, in general.<sup>110</sup>

### III. P2P LENDING IN TAIWAN

P2P lending in Taiwan developed quite a while later than in the United States and China. One reason for this is that financial institutions in Taiwan did not experience tightened monetary conditions nor did they feel the credit crunch; therefore, financial consumers did not face the urgent need to find alternative financing channels after the GFC in 2008.<sup>111</sup> Also, individuals in Taiwan perceive savings and personal credit differently than those in Europe and the United States. In Taiwan, most people with saving habits have less demand for short-term microfinance (such as tuition fees, housing repairs, and travel funds), and people with funds are less willing to lend money to others without trust and full information.<sup>112</sup> In addition, Taiwanese financial regulations have always been formulated in a positive-list approach, meaning that only financial products or services that have been evaluated and approved by competent authorities would be permitted in trade.<sup>113</sup> Therefore, without specific applicable regulations, Taiwan's P2P platforms remain on the sidelines or underground, fearing the potential violations of laws and regulations and the following legal enforcement.<sup>114</sup>

The FSC, the sole watchdog for the whole financial market in Taiwan, has said that, in spite of the widespread advanced internet technology, the financial market in Taiwan is relatively smaller than in the United States and China; therefore, competition between financial

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110. *See infra* Part IV.A.

111. According to the statistics from the Central Bank of the Republic of China (Taiwan), the loan balances of major banking institutions have grown year by year; despite experiencing the GFC in 2008, the annual growth rate of loans and investments still increased. NON-BANK INDUSTRY, *supra* note 61, at 64-66.

112. *Id.* at 77.

113. Gu Xiang-Yi (谷湘儀) & Xu Ying-Shu (徐瑩書), *P2P Wanglu Jiedai Pingtai Zhi Falu Wenti* (P2P 網路借貸平臺之法律問題) [*Legal Issues of P2P Lending Platforms*], in CAIJIN FA: XIN SHANGZHAN JIYUAN (財經法: 新商戰紀元) [FINANCIAL LAW: NEW BUSINESS WAR ERA] 209, 220-21 (LCS & Partners eds., 2016).

114. *Id.*

institutions in Taiwan is highly intense.<sup>115</sup> The FSC also states that Taiwanese financial institutions such as banks, credit unions, and credit departments in local farmers' and fishermen's associations provide ample capital and various types of loan projects to meet diverse financing needs for individuals and SMEs at reasonable interest rates.<sup>116</sup> With concerns about current circumstances of over-banking, the FSC hesitated to decide whether to formally authorize the P2P lending industry in Taiwan.<sup>117</sup>

On the other hand, not all borrowers are satisfied with services provided by traditional financial institutions; even though there are many banks in Taiwan, financial products introduced by banks are quite similar.<sup>118</sup> Since the banks' loan approval standards are too strict for many borrowers, those who fail to meet these high standards can only borrow money from the underground financial market.<sup>119</sup> SMEs, online micro businesses, and start-ups in culture and creativity industries emerging in recent years find it difficult to evaluate their output value in their infancy and, in turn, find it difficult to get loans from traditional banks.<sup>120</sup> Such entrepreneurs may address their financing demands via alternative financing channels, e.g., P2P lending platforms. Specifically, recent research reports state that "[a]cross the period 2013-2016 the average annual growth rate for the alternative finance industry in Taiwan was close to 200%"; thus, "peer-to-peer business lending was by far the leading alternative finance model with \$42.5 million raised in

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115. See Zhen-Ling Peng (彭禎伶), *Kaifang P2P Jinrong Zeng Min-Zong: Fengxian Xu Zifu* (開放 P2P 金融 曾銘宗: 風險須自負) [*If P2P Finance Liberalized, Consumers Should Be at Their Own Risk, Zeng Min-Zong Said.*], ZHONG GUO SHI BAO (中國時報) [CHINA TIMES] (July 17, 2015), <http://www.chinatimes.com/newspapers/20150717000044-260202>; Bing-Hang Fan (范秉航), *Cong Dianfushi De Chuangxin Kan Shuwei Jinrong Langchao Xia De Taiwan* (從顛覆式的創新, 看數位金融浪潮下的台灣) [*Look at Taiwan on the Digital Financial Waves from the Perspective of Disruptive Innovation*], TAIWAN JINGJI YANJIU YUAN (台灣經濟研究院) [TAIWAN INSTITUTE OF ECONOMIC RESEARCH] (Sept. 28, 2015), <http://www.tier.org.tw/comment/pec5010.aspx?GUID=bb31ae61-a3f1-44a6-9353-5d6ff25c9288>.

116. JINRONG JIANDU GUANLI WEIYUAN HUI (金融監督管理委員會) [FINANCIAL SUPERVISORY COMMISSION R.O.C.], JIN RONG KE JI FA ZHAN CE LUE BAIPI SHU (金融科技發展策略白皮書) [FINTECH DEVELOPMENT STRATEGY WHITE PAPER] 26 (2016) (Taiwan) (hereinafter WHITE PAPER).

117. See Peng, *supra* note 115; Fan, *supra* note 115.

118. Huang Qi-Xiu (黃麒修), *Con Luo Ji Tui Lun Kan Tai Wan FinTech Chan Ye Fa Zhan* (從邏輯推論看台灣 FinTech 產業發展) [*A Perspective of Logic on FinTech Industrial Development in Taiwan*], TAIWAN ZIJIN JIAOYI SUO (台灣資金交易所) [TAIWAN FUND EXCHANGE] (May 2, 2017), <http://blog.taiwanfundexchange.com.tw/?p=726>.

119. *Id.*

120. NON-BANK INDUSTRY, *supra* note 61, at 78-79.

2016.”<sup>121</sup>

### A. Business Models Exemplified

In May 2016, the FSC released the FinTech Development Strategy White Paper (the “White Paper”) with aims to help “innovate the digital technology and create . . . smart finance.”<sup>122</sup> The White Paper states that P2P lending provides a direct lending intermediary where the process of private lending or retail finance market is quickly facilitated, and that in the meantime, through Big Data analysis, P2P platforms have established a forecasting mechanism to detect the credit risks earlier and address them effectively.<sup>123</sup> What P2P lending companies do—matching both parties in private lending contracts—falls outside the definition of any financial business requiring *ex ante* authorization from the FSC under Taiwanese financial laws.<sup>124</sup> The aforementioned statement may suggest that P2P lending would (or should) merely act as an information intermediary in the FSC’s mindset. Next, we examine business models of current P2P lending companies operating in Taiwan.

#### 1. The Information Intermediation Model

Platforms that adopt the information intermediation model are information intermediaries that match lenders and borrowers, and do not arrange loans or get repayments from both sides. Lending parties make loans through banks or licensed third-party payment institutions. Lend & Borrow (“LnB”) offers an example to illustrate that borrowers first signal their loan demands and disclose their credit information for reviewing by the platform; thereafter, the platform assesses the loan interest rate and posts the loan application to the website for lenders to shop.<sup>125</sup> After creating a lending contract, lenders and borrowers would be notified of bank account numbers of their counterparties, which have been verified by the platform for loan making and repayment.<sup>126</sup> Nevertheless, even if LnB is not involved in the cash flow between

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121. *Yunyu Chengchang: Dier Ci Yatai Dicyu Wanglu Tidai Jinrong Hangye Baogao* (孕育成長：第二期亞太地區網路替代金融行業報告) [*Cultivating Growth: The 2nd Asia Pacific Region Alternative Finance Industry Report*], JIANQIAO DAXUE XINXING JINRONG YANJIU ZONGXIN (劍橋大學新興金融研究中心) [CAMBRIDGE CENTRE FOR ALTERNATIVE FINANCE], 66 (2017) (hereinafter *Cultivating Growth*).

122. WHITE PAPER, *supra* note 116, at 1.

123. *Id.* at 25.

124. *Id.* at 26.

125. XINYONG SHIJI (信用市集) [Lend & Borrower], *LnB Yunzuo Moshi* (LnB 運作模式) [*How LnB Works*], <https://www.lnb.com.tw/how-it-works.html> (last visited Apr. 23, 2017).

126. *Id.*

lenders and borrowers, providing guarantees for at least 70% of a loan's principal is part of LnB's business model.<sup>127</sup> Under its model, LnB provides guarantees for the lender's principal to a large extent by creating a trust of "guaranteed returns on principal." When the loan default occurs, the platform compensates lenders with the reserve from the trust, and lenders transfer the loan claims to the platform or the associated asset management company for subsequent debt collection.<sup>128</sup>

## 2. The Debt Assignment Model

Some of the P2P platforms in Taiwan seem to adopt the debt assignment model, where borrowers receive loans from lenders who then sell the loans to investors through the platform, such as Siangmindai.<sup>129</sup> Taiwan's debt assignment model, however, is different from its counterpart in China.<sup>130</sup> Specifically, Siangmindai does not lend money to borrowers in the name of the chief executive of the P2P lending company in the first place; it also does not divide the loans and package them into products that investors can buy on the platform. Instead, "advanced" members on the platform as lenders satisfy borrowers' loan demands in full, and may choose to hold the loans until the expiry dates or, earlier, split and sell loan claims to the "general" members on the platform.<sup>131</sup> The platform itself is not involved in the cash flow of lending activities.<sup>132</sup>

### *B. Legal Issues*

#### 1. The Regulatory Background

Due to the lack of customized regulations applicable to P2P lending, the FSC can only remind investors of the potential investment risks on P2P lending platforms, require those platforms to play a role of mere information intermediaries that match borrowers and lenders in a private lending contractual relationship under the Civil Code, and closely monitor those platforms to determine whether they cross red lines drawn

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127. WANG ET AL., *supra* note 59, at 54, 60. In this sense, LnB's business model is similar to the guarantee model in China. *See* Part II.A.2.

128. XIANG-YI (GRACE) GU (谷湘儀) ET AL., JIN RONG KE JI FA ZHAN YU FU LU (金融科技發展與法律) [THE FINTECH DEVELOPMENT AND THE LAW] 161, 163 (2017).

129. SIANGMINDAI (鄉民貸), *Yunzuo Fangshi* (運作方式) [How It Works], <https://www.lend.com.tw/work.html> (last visited Apr. 23, 2017).

130. *See* Part II.A.4.

131. WANG ET AL., *supra* note 59, at 54, 57-58; GU ET AL., *supra* note 128, at 161-62.

132. *See* SIANGMINDAI, *supra* note 129.

under the Security and Exchange Act (“SEA”), the Banking Act, the Act Governing Electronic Payment Institutions (the “EPI Act”),<sup>133</sup> and the Financial Asset Securitization Act (the “FASA”).<sup>134</sup> The FSC evaluated regulatory approaches to the P2P lending sector in May 2016, including enacting a specified act or amending the EPI Act to govern this sector.<sup>135</sup> However, officials finally decided that no statutes would be enacted or amended since P2P lending was characterized as pure private lending. Meanwhile, the FSC highly encouraged banks and P2P platforms to collaborate with each other, with a view to strengthening internal controls of those platforms and, in turn, lowering operational risks.<sup>136</sup>

## 2. The Information Intermediation Model

As mentioned above, under the information intermediation model, a loan contract is signed by both lenders and borrowers, and the platform does not intervene in the cash flow. All platforms would (or should) do is match borrowers and lenders, instead of accepting deposits, because such banking activities as accepting deposits shall be licensed by the financial authority in advance.<sup>137</sup> Therefore, P2P platforms function merely as brokers—a role that is governed under the Civil Code and its case law.<sup>138</sup> For example, Taiwan’s Civil Code stipulates that the loan interest rate shall not exceed 20 percent per annum.<sup>139</sup> In addition,

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133. Aiming to encourage the development of online financial innovations, the EPI Act was enacted in February 2015 to regulate online stored payments by non-banks after almost two years of discussions and debates between the financial authority and platforms. This EPI Act is known as the third-party payment law in Taiwan, providing a thorough legal basis for electronic payment services to be provided by third-party intermediaries on the internet.

134. WANG ET AL., *supra* note 59, at 212-14.

135. *Cultivating Growth*, *supra* note 121, at 68.

136. *See id.*; Press Release, Fin. Supervisory Commission, Jin Guan Hui Bei Cha Yin Hang Yu Wang Lu Jie Dai Ping Tai Ye Zhe He Zuo Zi Lu Gui Fan [Financial Supervisory Commission Files for Future Reference Self-Regulatory Rules on Collaboration between Banks and P2P Lending Platforms] (Dec. 7, 2017), [https://www.fsc.gov.tw/ch/home.jsp?id=96&parentpath=0,2&mcustomize=news\\_view.jsp&dataserno=201712070001&aplistdn=ou=news,ou=multisite,ou=chinese,ou=ap\\_root,o=fsc,c=tw&dtable=News](https://www.fsc.gov.tw/ch/home.jsp?id=96&parentpath=0,2&mcustomize=news_view.jsp&dataserno=201712070001&aplistdn=ou=news,ou=multisite,ou=chinese,ou=ap_root,o=fsc,c=tw&dtable=News) (noting that the FSC adopts the regulatory approach to P2P lending of “encouraging” collaboration between banks and P2P lending platforms by directing Taiwan’s Bankers Association to write their self-regulatory rules, while requiring P2P platforms not to cross red lines drawn under existing laws such as the SEA, the Banking Act, the EPI Act, and the FASA). When it comes to regulatory approaches to P2P lending, “[t]he regulation of P2P lending in the US is a security-based system while the equivalent in the UK is similar to a banking regulatory system.” Yu & Shen, *supra* note 44, at 53. The FSC’s “four-red-line” approach is arguably a combination of securities and banking regulatory models, as the SEA and the FASA are under the securities regulation while the Banking Act and the EPI Act are part of the banking regime.

137. Gu & Xu, *supra* note 113, at 226-28.

138. *Id.*

139. Minfa (民法) [Civil Code] §205 (promulgated Nov. 22, 1929, effective May 5, 1930) (Taiwan).

platforms shall accurately report the contractual matters of the proposed transaction to each party insofar as they know these matters, while not acting as an intermediary for a person who is notoriously insolvent or who does not have capacity to enter into the proposed contract.<sup>140</sup> Also, the platform has investigative duties regarding the contractual matters of the proposed transaction and the solvency or capacity of each party to enter into the proposed contract.<sup>141</sup> On the other hand, in the case of LnB, as it provides guarantees for lenders' principal to a large extent, it is uncertain whether it still acts as a pure information intermediary.<sup>142</sup>

### 3. The Debt Assignment Model

#### *a. Illegal Deposit Accepting*

Due to the financial vulnerability and externality inherent in the banking business operated by financial intermediaries, bank runs or bankruptcies are likely to impact the stability of the overall financial system.<sup>143</sup> As banks accept deposits from the general public and then lend the money to borrowers, their business model is highly financially leveraged where the banks do not own ample private funds.<sup>144</sup> Therefore, banking services are always regulated by the competent authorities prudentially.<sup>145</sup> As for the supervision of financial institutions, the competent authority usually adopts a licensure regime; only those regulated under banking law are authorized to accept deposits.<sup>146</sup> In light of the fact that accepting deposits is a bank's core business and may have a wide range of impacts, in order to protect depositors' interests, Taiwan's Banking Act expressly restricts that, unless otherwise provided by law, any institutions other than banks shall not accept deposits.<sup>147</sup> If P2P platforms undertake fund pooling to control the funds solicited from lenders, then it will no longer be merely

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140. Minfa (民法) [Civil Code] §567, para. 1 (promulgated Nov. 22, 1929, effective May 5, 1930, as amended Apr. 21, 1999) (Taiwan).

141. Minfa (民法) [Civil Code] §567, para. 2 (promulgated Nov. 22, 1929, effective May 5, 1930, as amended Apr. 21, 1999) (Taiwan).

142. See GU ET AL., *supra* note 128, at 170-71; Gu & Xu, *supra* note 113, at 231.

143. Jun-Yan Jiang (江俊彦), *Weifa Xijin Anjian Xingshi Guifan Zhi Yanjiu* (違法吸金案件刑事規範之研究：以銀行法與證交法間之體系違反為中心) [Study on Unauthorized Fund-Raising: Focusing on the Conflict between Banking Act and Securities and Exchange Act], 230 FAXUE CONGKAN (法學叢刊) [LAW JOURNAL] 133, 147 (2013).

144. *Id.*

145. *Id.*

146. GU ET AL., *supra* note 128, at 165.

147. YinHang Fa (銀行法) [Banking Act] §29-1 (promulgated and effective July 17, 1989) (Taiwan).

an information intermediary that matches lenders and borrowers; instead, it would be an institution that collects deposits from the general public, which may violate Articles 5-1, 29, 29-1, and 125 of the Banking Act.<sup>148</sup>

Under the debt assignment model in China,<sup>149</sup> a few P2P platforms such as Hongling Capital “developed a secondary market dedicated to their own products in a bid to increase product or debt liquidity, allowing creditors owning outstanding loans to trade remaining debts publicly for early investment recovery.”<sup>150</sup> In Taiwan, if funds are provided to borrowers through an associated or cooperative entity such as banks or third-party payment institutions on a P2P platform, the matching business may not be deemed the business exclusively permitted for banks, which shall be ex ante authorized by the competent authority.<sup>151</sup> Nevertheless, in the case of the debt assignment model illustrated by Siangmindai in Taiwan,<sup>152</sup> a question remains: even though lenders and borrowers are required to register with the platform to be a member for subsequent trades and only if a loan contract is entered into will funds be provided, would its business model fall within the element of “the general public” stipulated under Articles 5-1 and 29-1 of the Banking Act? According to Taiwan’s Supreme Court, whenever persons approached to solicit funds are not specified and the number of people may increase anytime, even though a portion of the persons coincidentally have qualifications, this may constitute a criminal breach under Article 125 of the Banking Act, i.e., the offense of illegal fund solicitation.<sup>153</sup>

### *b. Illegal Fund Raising*

Taiwan’s SEA provides that, except for government bonds or other

148. See Gu & Xu, *supra* note 113, at 226-27.

149. See Part II.A.4.

150. BOAO REVIEW & LUFAX.COM, *supra* note 109, at 14.

151. GU ET AL., *supra* note 128, at 166. The FSC warned in 2016 that the intermediation services provided by P2P lending platforms should not involve taking funds from the general public indirectly or directly such that their undertakings have anything to do with “accepting deposits” under the Banking Act and “accepting deposits of funds as stored value funds” under the EPI Act. See Press Release, Fin. Supervisory Commission, Jin Guan Hui Dui Yu Guo Nei Wang Lu Jie Dai Ping Tai Fa Zhan Xian Kuang Zhi Shuo Ming [FSC on the Current Development of Online Lending Platforms in Taiwan] (Apr. 14, 2016), [https://www.fsc.gov.tw/ch/home.jsp?id=96&parentpath=0,2&mcustomize=news\\_view.jsp&dataserno=201604140004&aplistdn=ou=news,ou=multisite,ou=chinese,ou=ap\\_root,o=fsc,c=tw&dttable=News](https://www.fsc.gov.tw/ch/home.jsp?id=96&parentpath=0,2&mcustomize=news_view.jsp&dataserno=201604140004&aplistdn=ou=news,ou=multisite,ou=chinese,ou=ap_root,o=fsc,c=tw&dttable=News) (hereinafter “Online Lending Platforms”); WANG ET AL., *supra* note 59, at 213-14.

152. See Part III.A.2.

153. See Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 104 Tai Shang Zi No. 417 (104 台上字第 417 號刑事判決) (2015) (Taiwan); GU ET AL., *supra* note 128, at 166.

securities exempted by the Competent Authority, the public offering or issuing of securities shall be prohibited without an effective registration with the Competent Authority.<sup>154</sup> In applying for approval to publicly offer and issue securities, the issuer is required to submit a prospectus.<sup>155</sup> P2P platforms that convert a loan into an investment vehicle without permission from the Competent Authority may violate the aforementioned requirements under Taiwan's SEA.<sup>156</sup>

The SEC has declared that notes backed by loans that are selected and funded by investors on P2P platforms are deemed investment contracts and shall, thus, be regulated under the Securities Act.<sup>157</sup> Nonetheless, Taiwan's SEA enumerates all the regulated securities, albeit such securities do not include the promissory note issued by P2P platforms. The Ministry of Finance in Taiwan (the predecessor of the FSC) used to classify the following as SEA-governed securities—foreign investment-oriented securities and investment contracts into which overseas Chinese or foreigners enter to raise funds from local investors in Taiwan for outward investment in foreign jurisdictions; these regulatory practices do not clarify whether investment contracts are securities governed under the SEA.<sup>158</sup> If Taiwan's P2P platforms under the debt assignment model divide a loan into several sub-units and then issue similar notes to investors after they purchase any sub-unit of the loan, this business model will look like the U.S. P2P lending model of asset securitization before the SEC issued the Order in 2008, requiring Prosper to sell notes through a prospectus with an effective registration statement.<sup>159</sup> In this regard, the FSC issued a press release in 2016, warning that matching business conducted on P2P platforms cannot involve “publicly issuing securities” under SEA and “publicly issuing Beneficial Securities or Asset-Backed Securities” under the FASA. Thus, if the notes issued under the debt assignment model or even under the asset securitization model, just as in the form of payment dependent notes issued by Lending Club and Prosper in the United States, P2P lending companies in Taiwan may be criminally liable under Articles 22 and 174 of the

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154. Zhengquan Jiaoyi Fa (證券交易法) [Securities and Exchange Act] §22 para. 1 (promulgated and effective Apr. 30, 1968, as amended Jan. 11, 2006).

155. Zhengquan Jiaoyi Fa (證券交易法) [Securities and Exchange Act] §30 para. 1 (promulgated and effective Apr. 30, 1968, as amended June 12, 2002).

156. Jiang, *supra* note 143, at 153-54.

157. *See supra* Part I.B.1.

158. *See* ZHONGHUA MINGUO CAIZHENG BU (中華民國財政部) [MINISTRY OF FINANCE OF R.O.C.], Sept. 12, 1987 Tai Cai Zheng (2) Zi Di 00900 Hao Gonggao (76年9月12日臺財證(二)字第900號公告) (1987); Sept. 18, 1987 Tai Cai Zheng (2) Zi Di 6805 Hao Han (76年9月18日臺財證(二)字第6805號函) (1987); Oct. 30, 1987 Tai Cai Zheng (2) Zi Di 6934 Hao Gonggao (76年10月30日臺財證(二)字第6934號公告) (1987); Jiang, *supra* note 143, at 153.

159. *See supra* Parts I.A & B.1.

SEA or Articles 73 and 108 of the FASA.<sup>160</sup>

### C. Summary

As discussed above, some business models of P2P lending in Taiwan may violate the Banking Act, EPI Act, FASA, or SEA. However, whether requiring P2P platforms to register with the FSC in their infancy (hence bearing strict information disclosure obligations under the SEA or FASA), or requiring those platforms to apply for a bank/Electronic Payment Institution license under the Banking/EPI Act may significantly increase the cost to newly-established P2P platforms, hindering the concomitant financial innovation and inclusion. We may learn a lesson from the U.S. regulatory response to P2P lending. After the SEC tightened regulations of the P2P lending industry, P2P platforms such as Lending Club and Prosper raised the required threshold of borrowers' credit scores substantially; that way, P2P lending would essentially be unable to meet the loan demands of individuals or SMEs who have difficulties obtaining funds from the traditional financial institutions.<sup>161</sup>

Even if Taiwanese P2P lending platforms are required to act merely as an information intermediary, it can use information technology to review borrowers' credit and set loan interest rates in a more efficient way than traditional financial intermediaries do.<sup>162</sup> Lenders can subsequently rely on the credit scores provided and interest rates set by the platforms to select their lending projects. If this emerging credit assessment mechanism fails to enter the market, it would harm lenders' interests and those of economically marginal borrowers, compromising digital financial inclusion. Therefore, government responses to business models of P2P lending in particular, and to FinTech in general, would be the key.<sup>163</sup> From a broader perspective, during the early development of such innovative FinTech-enabled financial services as P2P lending, in order to prevent the FinTech industry from excessive exposure to legal risks due to regulatory uncertainty of business models, it is necessary to establish a flexible and proportionate regulatory regime where regulators and the regulated can collaborate, carry on a dialogue, and experiment

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160. See Online Lending Platforms, *supra* note 151; WANG ET AL., *supra* note 59, at 213.

161. See *supra* Part I.C.

162. See, e.g., Berg et al., *supra* note 4, at 7 (indicating that “[a] credit score based on the digital footprint should therefore serve as a benchmark for other models that use more elaborate sources of information that might either be more costly to collect or only accessible to a selected group of intermediaries”).

163. For comparing regulatory responses to P2P lending among the United States, China, and Taiwan, see *infra* Part IV.A.

with what would be more appropriate regulatory approaches.<sup>164</sup> In addition to the regulatory sandbox discussed below,<sup>165</sup> we could consider moving consumer financial competition into a separate and single agency for a more structural change in the extant financial regulation; that way prudential regulation concerns would not dominate over consumer financial competition sparked by FinTech innovations such as P2P lending.<sup>166</sup> This regulatory proposal is intended to focus the mission of consumer financial competition and innovation, including rulemaking, supervision, and enforcement, in the hands of a single professional agency, who would be at the same hierarchical level as the FSC, while simultaneously independent of it. Accordingly, a stronger and independent body exclusive for consumer financial competition and innovation could be best placed to foster healthy market competition among traditional financial institutions and FinTech firms that provide digital financial inclusion.

#### IV. AN ANALYSIS OF FINTECH REGULATORY FRAMEWORK IN TAIWAN: P2P LENDING AS AN EXAMPLE

##### *A. A Comparison of Regulatory Responses to P2P Lending*

As a commentator argues, to address the current issue that financial services remain expensive and inefficient, rather than a top-down structural change in regulation of incumbents that is subject to prohibitively high costs of political economy and coordination, “regulators should consider policies that promote low-leverage technologies and the entry of new firms.”<sup>167</sup> The current financial system might also be troubled by incumbents’ regulatory capture, creating entry barriers to new competitors.<sup>168</sup> When it comes to

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164. For detailed discussion on the spirit of MPBR, *see infra* Part IV.B.

165. *See infra* Part IV.C.

166. *See infra* Part IV.D.

167. Thomas Philippon, *The FinTech Opportunity* 1, 2–3, 9, 18 (NBER Working Paper No. 22476, 2016), <http://www.nber.org/papers/w22476>.

168. *See id.* at 16 (“FinTech firms will enter where they think they can make a profit, but there are many regions of the financial system where incumbents are entrenched and entry is difficult.”). *See also* Abraham J.B. Cable, *Institutionalized Disruption: The Rise of the Reformer Startup*, 12 HASTINGS BUS. L. J. 1, 12 (2015) (“[R]eformer startups represent the public interest. The success of their products exposes current regulation as wrongheaded. Reformer startups and their grassroots advocates educate, or expose, regulators and lawmakers who would otherwise be hopelessly anachronistic or beholden to incumbents.”). To illustrate the regulatory capture problem in regulating the P2P lending industry, commentators contend that [i]t is the Chinese commercial banks that called for heavy regulation towards P2P lending”, that “[t]hese big players have tried to maintain their monopolistic position in financial markets”, and that [r]egulators and legislators are likely to be influenced by lob-bying efforts due to information asymmetry.” Yu & Shen, *supra* note 44, at 56 (footnote omitted).

regulatory responses to Fintech startups, scholars examining the likelihood of promoting much structural change distinguish between two broad categories of change—“reactive” and “proactive”—as described below.<sup>169</sup>

*Reactive.* The first group includes countries in which nothing is being done. There is No Regulatory Talk or Action. The second group consists of countries in which there is partial or Fragmented Regulation of Fin[T]ech. Certain institutions, such as the Consumer Financial Protection Bureau (CFPB) in the United States, may offer certain safe harbor provisions for certain type of Fin[T]ech companies. Yet there appears little willingness to genuinely embrace the technology and its regulatory implications, nor is there any comprehensive plan as to how Fin[T]ech can or should be regulated.

*Proactive.* In such countries, there is a significant amount of regulatory attention paid to Fin[T]ech. Such attention can take the form of consultation papers, White Papers, or conferences. But action is limited and there is a risk that prioritizing Fin[T]ech can slide into an empty lip service aimed at projecting an image of regulatory action when, in reality, action is limited. . . . A second group of countries engage in what might be characterized as Regulatory Guidance. . . . A final group of countries have embraced the possibilities of Fin[T]ech by creating a so-called regulatory sandbox.<sup>170</sup>

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169. Mark Fenwick et al., *Fintech and the Financing of Entrepreneurs: From Crowdfunding to Marketplace Lending*, in THE ECONOMICS OF CROWDFUNDING: STARTUPS, PORTALS AND INVESTOR BEHAVIOR 103, 108 (Douglas Cumming & Lars Hornuf eds., 2018).

170. *Id.* at 119. In terms of “reactive” regulatory responses, as FinTech is also a type of technology, “[t]he regulation of any disruptive new technology is always going to be reactive and based on an uncertain and politicized factual basis.” Mark Fenwick, Wulf A. Kaal, & Erik P.M. Vermeulen, *Regulation Tomorrow: What Happens When Technology Is Faster than the Law?*, 6 AM. U. BUS. L. REV. 561, 574 (2017). Traditional regulation is characterized by a slow, deliberative, reactive, and sometimes even cumbersome process in response. See Alice Armitage, Andrew K. Cordova, & Rebecca Siegel, *Design Thinking: The Answer to the Impasse Between Innovation and Regulation*, 2 GEO. L. TECH. REV. 3, 13, 14, 25, 65 (2017). On the contrary, when it comes to “proactive” regulatory responses, some commentators normatively argue that “[l]awmaking and regulatory design needs to become more proactive, dynamic[,] and responsive . . . to promote innovation . . . of a disruptive new technology . . .” Fenwick et al., *supra* note 170, at 561, 584-85. Resonating with the aforementioned perspective, others maintain in the context of FinTech that “[r]egulatory sandboxes . . . provide an example of a shift away from traditional regulatory approaches and represent an attempt to embrace principles of *proactive, dynamic[,] and responsive regulation.*” Lev Bromberg, Andrew Godwin & Ian Ramsay, *Fintech Sandboxes: Achieving a Balance between Regulation and Innovation* 1 (2017), <https://www.ssrn.com/abstract=3090844> (emphasis added). See also *id.* at 13, 15-19 (promoting a more proactive regulatory response to disruptive technological innovation such as FinTech).

As an example of the U.S. government's response to FinTech, the SEC regulated P2P lending platforms in line with the extant securities laws, requiring P2P platforms to sell the notes by prospectus, and file annual and quarterly reports. In this regard, the SEC's response to FinTech firms, such as P2P platforms, was reactive.<sup>171</sup> Even though the GAO, U.S. Treasury, and OCC have considered how to supervise the growing FinTech industry, their initiatives reflect fragmented regulation of FinTech.<sup>172</sup> Moreover, the OCC's proposal of chartering FinTech firms and regulating them as banks appears to be reactive as well because it supports the extant entry barriers and banks' own style of regulation, which may cost FinTech startups too much time and money.<sup>173</sup>

As for the Chinese regulatory response to such FinTech, i.e., P2P lending, the Chinese government initially adopted a hands-off approach, but shifted toward a more reactive approach after a number of P2P failures.<sup>174</sup> The Chinese regulators brought in a list of 12 forbidden activities under the Interim Measures. As discussed earlier, both the Guiding Opinions of 2015 and the Interim Measures of 2016 stress that P2P platforms can only adopt the information intermediation model.<sup>175</sup>

When it comes to the Taiwanese government response to FinTech, even though P2P lending in Taiwan developed quite a bit later than in the U.S. and China,<sup>176</sup> the government initially seems to be reactive in releasing informal guidance, warning the P2P lending industry against crossing four major red lines, while highly encouraging the industry to collaborate with banks.<sup>177</sup> Nonetheless, Taiwan took a more proactive approach to FinTech in January 2018, creating a formal regulatory sandbox regime by enacting the Financial Technology Development and Innovative Experimentation Act (the "FinTech Sandbox Act"), which was promulgated by the President on January 31, 2018.<sup>178</sup> In theory,

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171. See *supra* Part I.B.1.

172. See *supra* Parts I.B.1, 2, & 3.

173. Fenwick et al., *supra* note 169, at 118.

174. Chen & Tsai, *supra* note 51, at 16-20.

175. See *supra* Parts II.B & C. Commentators argue that China's existing system regulating P2P lending "will exhaustively dictate how P2P lending platforms conduct their business", and that this rules-based anti-experimentalism approach lacks responsiveness and flexibility brought by principles-based experimental approach, probably hampering benefits from the P2P lending industry and stifling innovation in the sharing economy as a whole. Yu & Shen, *supra* note 44, at 55. For elaborating on the distinction between a principles-based regulatory regime and a rules-based regime, see *infra* Part IV.B.

176. See *supra* Part III.A.

177. See *supra* Parts III.B.1 & 3.

178. Jin Rong Ke Ji Fa Zhan Yu Chuang Xin Shi Yan Tiao Li (金融科技發展與創新實驗條例) [Financial Technology Development and Innovative Experimentation Act] (promulgated and effective Jan. 31, 2018),

under this approach, “[r]egulators create a regulatory sandbox in which they facilitate and encourage a space to experiment,” allowing “the ‘testing’ of new technology-driven services, under the supervision of regulators” and ensuring “that meaningful data can be gathered for the evaluation of risk in a safe environment”; the goal of such regulatory experimentation is that “[s]uch data can then facilitate evidence-based regulatory reform.”<sup>179</sup>

This article argues that Taiwan’s legislation of the regulatory sandbox cannot be proactive only in form. In substance, as a short-term goal in the reform agenda, a more principles-based strategy of financial regulation (or “MPBR”) is a key point, as is the regulatory attitude.<sup>180</sup> Such institutional philosophy should be embedded in the sandbox regime to make it “collaborative and dialogical, in the sense that regulators, incumbents and new service providers are engaged in an ongoing dialogue about the most effective means to gather relevant information and to identify the most appropriate regulatory model.”<sup>181</sup> As a long-term goal toward a structural change in the extant regulation of incumbents, we would propose reallocating competition authority to a motivated financial agency. This professional agency would be separate from and independent of the FSC—the sole financial market watchdog in Taiwan, charged with both consumer protection and prudential regulation. The newly created single financial agency would be better positioned to safeguard competition and innovation enabled by FinTech.<sup>182</sup>

### *B. More Principle-based Financial Regulation (“MPBR”) as Institutional Philosophy*

In designing the regulatory regime for such innovative FinTech-enabled financial services as P2P lending, regulators should rethink their regulatory basis or institutional philosophy especially in the context of global regulatory competition for attracting FinTech firms and markets.<sup>183</sup> In other words, from the perspective of both the FinTech-based industry and financial regulators, a change in regulatory attitude

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<https://law.fsc.gov.tw/law/EngLawContent.aspx?lan=E&id=2104&KW=Financial+Technology+Development+and+Innovative+Experimentation+Act> (hereinafter the “FinTech Sandbox Act”).

179. Fenwick et al., *supra* note 169, at 119.

180. *See infra* Part IV.B.

181. *See* Fenwick et al., *supra* note 169, at 119; Chang-Hsien Tsai & Kuan-Jung Peng, *The FinTech Revolution and Financial Regulation: The Case of Online Supply-Chain Financing*, 4(1) ASIAN J. L. & SOC’Y 109, 109, 116 (2017). For more explanation on the connection between MPBR and the regulatory sandbox, *see infra* Part IV.B.

182. *See infra* Part IV.D.

183. Fenwick et al., *supra* note 170, at 584.

would be needed to address the issue of how FinTech-based products and services should be regulated.<sup>184</sup> What follows is an introduction of two distinct types of regulatory regimes: a principles-based regulatory regime and a rules-based regime. A principles-based regime imposes more flexible compliance obligations.<sup>185</sup> Since the majority of the potential participants in FinTech industries are start-ups, the principles-based approach may provide start-ups with the benefit of flexibility in their infancy; nonetheless, the higher cost of legal compliance associated with a rules-based approach would be balanced by being more attractive to investors given that regulatory clarity and legal predictability could be important for start-ups and investors.<sup>186</sup> Nevertheless, a strategy of MPBR would help more rapidly respond to the challenges arising from the complexity and innovative nature of modern financial markets.<sup>187</sup> The MPBR represents a shift in institutional philosophy from a historically predominant rules-based regulatory regime to a less prescriptive approach.<sup>188</sup>

When it comes to general regulatory responses to FinTech,

[i]n between the traditional choices of doing nothing and developing completely new regulatory frameworks, regulators can carve out pockets of activities (i.e., [.] defined by product, scope[,] or scale) where participants can benefit on a case-by-case basis from regulatory forbearance (such as “no-action” letters in the United States) or from restricted licenses or special charters (such as the [U.S.] OCC’s for banks).<sup>189</sup>

No matter the form through which the government responds to FinTech, regulatory forbearance, restricted licenses, and special charters

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184. Douglas W. Arner, János Barberis, & Ross P. Buckley, *The Evolution of FinTech: A New Post-Crisis Paradigm*, 47 GEO. J. INT’L L. 1271, 1311 (2016).

185. *Id.* at 1311-12.

186. *Id.* at 1312.

187. Dan Awrey, *Regulating Financial Innovation: A More Principles-Based Proposal?*, 5 BROOK. J. CORP. FIN. & COM. L. 273, 273 (2011). Even if a principles-based regulatory regime may not provide the clarity and certainty provided by the rules-based regulatory regimes, a principles-based regulatory regime could be more dynamic and effective in keeping regulatory pace with the times. ROBERT BALDWIN ET AL., UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 303 (2012). *See also* Allen, *supra* note 41, at 12 (“As for regulators, the hope is that principles-based regulation will remain relevant as industry practices change, and thus make regulatory arbitrage more difficult—it is harder to arbitrage the spirit of a principle than the letter of a narrower rule.”).

188. Awrey, *supra* note 187, at 282-83 (“MPBR reflects a tacit acknowledgement that the effectiveness of a regulatory regime in delivering desired regulatory outcomes is a product not just of statutory design, but also *institutional philosophy*.”) (emphasis in original).

189. Zetsche et al., *supra* note 5, at 58-59 (emphasis in original) (alteration in original). *See also id.* at 59 (“The practical effect of forbearance through no-action letters, restricted licensing, or special charters is that of *partial exemptions* or *dispensation* within a broader regulatory framework.”).

exemplify the spirits of FinTech regulation, which would embrace regulatory humility, namely risk-based proportionate MPBR.<sup>190</sup> To be sure, some may be concerned that informal case-by-case regulatory guidance would be a temporary tool and that, if lasting too long, could bring about another kind of legal uncertainty. Therefore, regulators of FinTech firms across an increasing number of jurisdictions including Taiwan have shifted to a more formal and structured regulatory experimentation, i.e., regulatory sandboxes, as discussed below.

### C. An MPBR-embedded Regulatory Sandbox?

The UK Financial Conduct Authority (“FCA”) adopted the regulatory sandbox, permitting “financial innovation to be carried out in experimental ways within the parameters of regulatory approval and monitoring.”<sup>191</sup> This regulatory sandbox is a “‘safe place’ in which businesses can test innovative products, services, business models[,] and delivery mechanisms without immediately incurring all the normal regulatory consequences of engaging in the activity in question.”<sup>192</sup> On the one hand, the regulatory sandbox would signify that the FCA introduced a formal form of proportionate governance without excessive regulation, which is aligned with the spirit of MPBR.<sup>193</sup> On the other hand, the UK leading the adoption of the regulatory sandbox indicates a horizontal experimentation across different jurisdictions that they are engaging in regulatory competition “naturally” by adjusting their financial regulation with a view to facilitating the establishment and operation of domestic and foreign FinTech firms.<sup>194</sup> If a jurisdiction intends to lead the global regulatory competition for attracting FinTech firms, MPBR-embedded strategies of policy/regulatory experimentation

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190. Tsai & Peng, *supra* note 181, at 125. At least in the early stage of emerging FinTech businesses,

when dealing with a new innovative technology, regulators could start by issuing informal guidance under the umbrella of a pre-existing principles-based framework. By allowing startups to take a flexible approach to regulatory compliance, rather than investing limited startup funds on researching legal rules and how to comply with them, a principles-based approach could encourage innovation by such firms.

Allen, *supra* note 41, at 15.

191. Iris H-Y Chiu, *Fintech and Disruptive Business Models in Financial Products, Intermediation and Markets- Policy Implications for Financial Regulators*, 21 J. TECH. L. & POL’Y 55, 64 (2016).

192. *Regulatory Sandbox*, FINANCIAL CONDUCT AUTHORITY 2 (2015), <https://www.fca.org.uk/publication/research/regulatory-sandbox.pdf> (last visited July 20, 2018).

193. *See* Chiu, *supra* note 191, at 64.

194. Douglas W. Arner, János Barberis, & Ross P. Buckley, *FinTech, RegTech and the Reconceptualization of Financial Regulation*, 37 NW. J. INT’L L. & BUS. 371, 376, 408-9 (2017).

should be pursued with a shift in intuitional philosophy toward light-touch or humble regulation.<sup>195</sup> As a necessary complement and more structured change in FinTech regulation, such market-based regulatory mechanisms as the regulatory sandbox would be supportive to FinTech development, if regulators grasped the spirit of MPBR that is supposed to be reflected in the regulatory sandbox, that is, a style of “collaborative regulation that facilitates . . . policy experimentation.”<sup>196</sup>

Following the trend of creating the regulatory sandbox as a more proactive and experimental model, the FSC has also incorporated versions of the FinTech regulatory sandbox proposed by several cross-party Taiwanese legislators. In December 2017, a synthesized version of the FinTech Sandbox Act was introduced and, in early 2018, was formally passed by the legislature and promulgated by the President. The FinTech Sandbox Act intends to provide a way for FinTech startups to safely test newly developed FinTech-enabled financial services or products<sup>197</sup> by temporarily exempting them—at least to an extent—from complex financial regulations.<sup>198</sup> Due to the fact that Taiwan has a tradition of heavily regulating the financial industry with a rules-based institutional regime, the FinTech Sandbox Act is important as it is necessary to enact a statute to thoroughly overcome financial regulatory barriers to allow both regulators and the regulated to carry out these policy experiments.<sup>199</sup> Without the Act, even if FSC officials wanted to adopt any regulatory forbearance approach similar to U.S. no-action letters, restricted licensing, or special charters, judges would probably hold these forbearance approaches in violation of mandatory law; the downsides of the forbearance-based case-by-case experimental model for regulators would be that “the regulators’ conduct may be found to be negligent if not backed up by the legislature” and that “[t]his prospect of potential liability may lead to sub-optimal levels of dispensation practice.”<sup>200</sup>

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195. See Tsai & Peng, *supra* note 181, at 116, 118. To illustrate whether regulatory choices such as the regulatory sandbox as a form of regulatory experimentation would affect levels of investment across jurisdictions, scholars empirically study the government responses to FinTech in 17 jurisdictions. They find that “in those countries with a more proactive response—particularly involving Regulatory Guidance or Regulatory Experimentation—there is evidence that this proactive approach makes the jurisdiction more attractive as a potential location for starting Fin[T]ech operations.” Fenwick et al., *supra* note 169, at 120.

196. See Tsai & Peng, *supra* note 181, at 126-27; Fenwick et al., *supra* note 169, at 124.

197. The FinTech Sandbox Act, *supra* note 178, art. 1.

198. The FinTech Sandbox Act, *supra* note 178, arts. 25-26.

199. Jhih-Cheng Wang (王志誠), *Jin Rong Ke Ji Fa Zhan Yu Chuang Xin Shi Yan Tiao Li Zhi Li Fa Ji Ping Shi* (金融科技發展與創新實驗條例之立法及評譯) [Commentary on Financial Technology Development and Innovative Experimentation Act], 31(1) CUN KUAN BAO XIAN ZI XUN JI KAN (存款保險資訊季刊) [CDIC QUARTERLY BULLETIN] 1, 18 (2018).

200. Zetzsche et al., *supra* note 5, at 62-63.

In particular, according to experimental results within the sandbox, a competent authority must review whether existing laws and regulations should be amended, or whether there is a need to issue regulatory guidance.<sup>201</sup> In addition, on a regular basis, the competent authority is required to improve itself by reviewing and amending relevant laws and regulations, while rendering necessary assistance to FinTech businesses.<sup>202</sup> Theoretically, Taiwan's legislature would, via these provisions, embed the institutional philosophy of MPBR in the mindset of the FSC by creating a collaborative governance environment premised on real trust and shared understanding. In this environment, regulators, traditional service providers, and FinTech innovators can carry on an ongoing, sophisticated, and iterative regulatory dialogue regarding effective experiments to gather relevant information and to identify an appropriate regulatory model, while working together "to ensure that appropriate consumer protection safeguards are built into

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201. Art. 17 of the FinTech Sandbox Act stipulates:

- (1) Where an innovative experimentation is inventive, effectively increasing the efficiency of financial services, reducing operational and use costs, or enhancing the interests of financial consumers and enterprises, the competent authority should take the following actions in consideration of the implementation status of the innovative experimentation:
  1. Reviewing and revising relevant financial regulations.
  2. Providing assistance to the applicant in starting a business or entering into strategic cooperation [with relevant organization].
  3. Making referrals to relevant government agencies (institutions) or organizations or funds that offer business startup assistance.
- (2) If it is decided by the competent authority that relevant financial laws should be amended, the competent authority should, no later than three (3) months after the end of the innovative experimentation, complete an amendment draft of the financial laws and submit the draft to the Executive Yuan for review.

The FinTech Sandbox Act, *supra* note 178, arts. 17.

202. Paragraphs 2 and 3, Art. 18 of the FinTech Sandbox Act provide:

- (1) The competent authority should establish and periodically review financial technology development policy, actively provide financial technology enterprises with necessary assistance, guidance and counseling services, and regularly invite representatives of the financial technology industry and representatives of related government agencies to discuss and coordinate financial technology development related matters. The guidance and assistance mechanism for financial technology development will be prescribed by the competent authority.
- (2) The competent authority shall, within three (3) months after the end of each year, submit a written report to the Legislative Yuan on the promotion of financial technology development, the results of innovative experimentation and regulatory amendments made therefor for the year, and disclose the content of the report on its website.

The FinTech Sandbox Act, *supra* note 178, art. 18, ¶ 2 - 3.

new products and services.”<sup>203</sup> Notably, the shift toward MPBR via the legislative sandbox would not necessarily be a deregulatory move because closer supervision/engagement between FinTech enterprises and financial authorities could effectively substitute for the clearer limits to business models currently imposed by hard rules; such strict regulatory scrutiny into FinTech startups is advocated by legacy financial institutions. Some might wonder: in practice, could the Taiwanese regulatory sandbox effectively prevent such FinTech industry, like P2P lending, from excessive exposure to legal risks due to regulatory uncertainty of business models, since Articles 17 and 18 of the FinTech Sandbox Act appear to have established a regulatory regime where regulators and the regulated can collaborate, carry on a dialogue, and experiment with what would be more appropriate regulatory approaches?

*D. The Political Economy of Regulating P2P Lending and Its Implications for FinTech Regulation in Taiwan*

The enactment of Articles 17 and 18 of the FinTech Sandbox Act might merely be a temporary tool to spur a shift in the institutional philosophy of Taiwanese financial regulators in the short term. At least in the long run, Taiwan could consider reforming the structure of its financial regulatory system by adopting a stronger authority to safeguard financial competition and innovation where prudential regulation concerns do not always predominate over consumer FinTech competition and innovation. A professional consumer financial competition body that is separate from and independent of the FSC, possessing exclusive control over its own rulemaking, supervision, and enforcement of consumer financial competition measures in Taiwan, would benefit FinTech development contributing to digital financial inclusion.

Specifically, the FinTech Sandbox Act tasked the FSC with publishing regulations and rules for the Act to be implemented.<sup>204</sup> Accordingly, the FSC issued a press release in April 2018 and announced the FinTech Sandbox Act would be officially implemented on April 30, 2018,<sup>205</sup> while adding an appendix titled “Instructions and

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203. See Tsai & Peng, *supra* note 181, at 117, 126; Awrey, *supra* note 187, at 285-86; Zetzsche et al., *supra* note 5, at 61-62, 79; *Regulatory Sandbox Lessons Learned Report*, FINANCIAL CONDUCT AUTHORITY 3 (2017), <https://www.fca.org.uk/publication/research-and-data/regulatory-sandbox-lessons-learned-report.pdf> (hereinafter “*Regulatory Sandbox Report*”).

204. See, e.g., The FinTech Sandbox Act, *supra* note 178, art. 18, ¶ 1.

205. See Press Release, Fin. Supervisory Commission, Jin Rong Ke Ji Fa Zhan Yu Chuang Xin Shi Yan Tiao Li Ji San Xiang Shou Quan Fa Qui Jiang Yu Yi Ling Qi Nian Si Yue San Shi Ri Shi Xing [Financial Technology Development and Innovative Experimentation Act Is about to Be Implemented

FAQ of Financial Technology Innovative Experimentation Laws and Regulations” (“Sandbox FAQ”).<sup>206</sup> The Sandbox FAQ states that under the FinTech Sandbox Act, the term “innovative experimentation” means utilizing technological innovation or business model innovation to undertake experimentation of financial business that requires the permission, approval, or concession of the competent authority, and that if any innovative experiment is not made on the aforementioned financial business (*e.g.*, *P2P lending platforms*), there is no need for application to the FSC.<sup>207</sup> Why did the FSC give this unwelcome informal guidance for the P2P lending? This unfriendly guidance could allegedly be traced back to 2016, when the FSC had initially taken a reactive approach by issuing a press release in April 2016 and releasing its FinTech White Paper in May 2016, suggesting that P2P lending platforms would (or should) merely act as an information intermediary. In practice, we cannot but doubt that “the strength of industry groups and labor” may have “want[ed] to curb incentives to FinTech firms and support existing subsidies and barriers to entry.”<sup>208</sup> This is especially apparent based on the FSC officials’ 2016 decision to highly encourage banks and P2P platforms to collaborate with each other as it was the FSC’s aim to pressure FinTech-based P2P platforms to comply with existing law and regulations applied to banks—thus, “supporting the

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on Apr. 30, 2018] (Apr. 26, 2018), [https://www.fsc.gov.tw/ch/home.jsp?id=96&parentpath=0,2&mcustomize=news\\_view.jsp&dataserno=201804260001&aplistdn=ou=news,ou=multisite,ou=chinese,ou=ap\\_root,o=fsc,c=tw&dtable=News](https://www.fsc.gov.tw/ch/home.jsp?id=96&parentpath=0,2&mcustomize=news_view.jsp&dataserno=201804260001&aplistdn=ou=news,ou=multisite,ou=chinese,ou=ap_root,o=fsc,c=tw&dtable=News) [hereinafter “Sandbox Press Release”].

206. *Jin Rong Ke Ji Chuang Xin Shi Yan Fa Gui Wen Da Ji [Instructions and FAQ of Financial Technology Innovative Experimentation Laws and Regulations]*, FIN. SUPERVISORY COMMISSION (Apr. 26, 2018), <https://www.mjib.gov.tw/userfiles/files/35-%E6%B4%97%E9%8C%A2%E9%98%B2%E5%88%B6%E8%99%95/files/%E5%AF%A6%E5%8B%99%E5%95%8F%E7%AD%94%02-06-13.pdf> (last visited July 21, 2018) (hereinafter *Sandbox FAQ*).

207. *Id.* at 1 (emphasis added).

208. See Fenwick et al., *supra* note 169, at 118; Amos Chen, *P2P Ye Zhe Yu Yin Hang Zhu Guan Ji Guan De San Jiao Xi Ti San Fang Wu Fa Hao Hao He Zuo Dou Shi Ka Zai Xin Ren Wen Ti [The Triangular Relations among P2P Companies, Banks and the Competent Authority: Lack of Trust Contributes to Collaborative Failure among the Three Parties]*, TECHORANGE (July 26, 2016), <https://buzzorange.com/techorange/2016/07/26/p2p-taiwan/>. As discussed below, the FSC’s aggressive calls for P2P platforms’ partnering with rather than competing against banks constitute a type of entry barriers to digital innovation. See Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 234 (2018). Moreover, “banks are publicly subsidized and insulated from competition.” *Id.*

extant financial system and their own style of regulation.”<sup>209</sup> Along these lines, the Taiwanese government appears to have shifted to a more proactive response to FinTech by legislating the FinTech Sandbox Act to permit cautious regulatory experimentation. This shift, however, is arguably just in form—the FSC, in substance, may be more committed to the existing style of regulation, lacking incentives to abandon the current approach in favor of the newly mandated alternative approach. This may be because the FSC could be subject to regulatory capture, regulatory inertia, and the tendency of government agencies to be averse to risk.<sup>210</sup> Ergo, even a more structured change in the current financial regulation such as the FinTech Sandbox Act might also be troubled by the FSC’s conservative implementation;<sup>211</sup> we might therefore expect the effectiveness of the Taiwanese legislative sandbox to be limited as commentators similarly argue that “there is a risk that prioritizing

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209. See *supra* Part III.B.1; GU ET AL., *supra* note 128, at 159-60, 173. See also Editorial, *Jin Guan Hui Jian Guan Si Wei De Yan Hua [The Evolving Regulatory Philosophy of the Financial Supervisory Commission]*, GONG SHANG SHI BAO [INDUSTRY & BUS. TIMES] (Taiwan) (May 2, 2018), at A2 (noting that the FSC’s policy on P2P lending platforms is to encourage banks to invest in those platforms to acquire control or even 100% shareholding and thus to have those platforms comply with existing law and regulations applied to banks). We have discussed that the OCC has considered possibilities of offering special-purpose FinTech charters in Part I.B.4. Similar to FSC’s calls for partnering with banks, “[t]he OCC emphasized that the new license would not ‘weaken the competitive position of existing banks,’ but, if anything, would ‘level the playing field’ by ensuring regulations currently applied to national banks also applied to [F]in[T]ech.” Van Loo, *supra* note 208, at 260.

210. See *supra* Part IV.A; MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 358 (2009) (noting that “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). Government agencies such as the FSC tend to be averse to risk, “defensive, threat-avoiding, scandal-minimizing,” and “reluctant to take on activities that embrace seemingly intractable problems and that are fraught with the danger of unintended consequences including regulatory failure and criticism.” STEARNS & ZYWICKI, *supra* note 192, at 348 (footnotes omitted). This might also be due to regulatory inertia, i.e., “the tendency of regulators to adhere to their original proposed rules and to resist change, even when that change may make rules more effective.” Asaf Eckstein, *Regulatory Inertia and Interest Groups: How the Structure of the Rulemaking Process Affects the Substance of Regulations* 1, 7-11, <https://ssrn.com/abstract=2285593> (last visited July 21, 2018). See also Bromberg et al., *supra* note 170, at 13, 15 (arguing that regulators should avoid regulatory inertia, and be more proactive and adaptive in regulating new technologies and business models as in the FinTech industry). For other applications of regulatory/institutional inertia, see, e.g., Melissa J. Luttrell, *The Social Cost of Inertia: How Cost-Benefit Incoherence Threatens to Deraile U.S. Climate Action*, 25 DUKE ENVTL. L. & POL’Y F. 131 (2014); Cass R. Sunstein, *On Not Revisiting Official Discount Rates: Institutional Inertia and the Social Cost of Carbon* (Oct. 21, 2013), <https://ssrn.com/abstract=2343379>.

211. See Editorial, *Ping Yi Wang Lu Yin Hang Zhi Zhao De Bao Shou Zheng Ce [Commentary on the Conservative Policy for Online Bank Licensure]*, GONG SHANG SHI BAO [INDUSTRY & BUS. TIMES] (Taiwan), (July 3, 2018), at A2 (hereinafter *Conservative Policy*) (noting that even though the legislature enacted the FinTech Sandbox Act with the strong ambition to encourage financial innovation, the FSC is so conservative in implementation that many startups with blockchain technologies and financial innovations decide not to apply for entrance into the sandbox and even relocate their whole teams overseas after finding from the officials that staying within the sandbox would expose their technology and business development to more uncertainty).

Fin[T]ech can slide into . . . empty lip service aimed at projecting an image of regulatory action when, in reality, action is limited.”<sup>212</sup>

What implications can be drawn from the regulation of P2P lending for FinTech regulation at large in Taiwan? From an institutional design perspective, we would propose reallocating competition authority to a motivated financial agency to provide long-term regulatory certainty for FinTech-driven financial market development by stimulating financial competition and innovation. Firstly, some would propose finding an existing agency to be reallocated the authority of FinTech supervision.<sup>213</sup> To be sure, the FinTech Sandbox Act stipulates that the term “competent authority” as used in this Act shall mean the FSC, and that “[t]o develop innovative financial technologies, assist in innovative experimentation applications, and review and evaluate the feasibility and effectiveness of innovative experimentation in a professional manner, the competent authority should have a dedicated unit in place to handle related matters.”<sup>214</sup> Accordingly, the FSC establishes the Financial Technology Development and Innovative Center (the “FinTech Sandbox Center”).<sup>215</sup> However, the Sandbox Center is still placed under the FSC and easily subject to the drawbacks of regulatory capture and inertia. In addition, mission conflict would haunt the

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212. Fenwick et al., *supra* note 169, at 119. Being seen doing something had tangible benefits for both legislators and the FSC as executive-branch rule-makers and enforcers. This political action is well described by Aviram’s bias arbitrage theory. *See, e.g.*, Amitai Aviram, *Bias Arbitrage*, 64 WASH. & LEE L. REV. 789 (2007); Amitai Aviram, *The Placebo Effect of Law: Law’s Role in Manipulating Perceptions*, 75 GEO. WASH. L. REV. 101 (2006). For an application of the bias arbitrage theory to financial regulation, *see* Tsai, *supra* note 11, at 239-43. We may observe a similar phenomenon in the case of equity crowdfunding regulations in Taiwan, where a gap may exist “between rhetoric (public-spirited justifications) and reality (rent-seeking),” as the public choice explanation predicts. *See* Tsai, *supra* note 45, at 267-77.

213. WANG ET AL., *supra* note 59, at 292.

214. The FinTech Sandbox Act, *supra* note 178, art. 2.

215. Fin. Supervisory Commission, Jin Rong Ke Ji Fa Zhan Yu Chuang Xin Zhong Xin She Zhi Yao Dian Ji Zu Zhi Tu [Establishment Guidelines and Organizational Chart for the Financial Technology Development and Innovative Center] (Feb. 22, 2018), [https://www.fsc.gov.tw/ch/home.jsp?id=479&parentpath=0,7,478&mcustomize=onemessages\\_view.jsp&dataserno=201602230001&aplistdn=ou=data,ou=20160223020901,ou=one,ou=chinese,ou=ap\\_root,ou=fsc,c=tw&dttable=O20160223020901](https://www.fsc.gov.tw/ch/home.jsp?id=479&parentpath=0,7,478&mcustomize=onemessages_view.jsp&dataserno=201602230001&aplistdn=ou=data,ou=20160223020901,ou=one,ou=chinese,ou=ap_root,ou=fsc,c=tw&dttable=O20160223020901). *See also* Fin. Supervisory Commission, Important Measures: Preview of Draft Regulations Proposed in Accordance with the Authorization by the Financial Technology Development and Innovative Experimentation Act (Apr. 11, 2018), [https://www.fsc.gov.tw/en/home.jsp?id=74&parentpath=0,2&mcustomize=multimessage\\_view.jsp&dataserno=201804110001&aplistdn=ou=bulletin,ou=multisite,ou=english,ou=ap\\_root,ou=fsc,c=tw&dttable=Bulletin](https://www.fsc.gov.tw/en/home.jsp?id=74&parentpath=0,2&mcustomize=multimessage_view.jsp&dataserno=201804110001&aplistdn=ou=bulletin,ou=multisite,ou=english,ou=ap_root,ou=fsc,c=tw&dttable=Bulletin) (indicating that “the FSC has expanded the role and function of the FinTech Office and changed its name to ‘Financial Technology Development and Innovation Center,’ which is responsible for tasks, such as developing Fin[T]ech and conducting innovative experiments. The Center also provides counseling and coaching service on Fin[T]ech business.”).

FinTech Sandbox Center under the FSC,<sup>216</sup> since the FSC (charged with a predominant focus on prudential regulation), like U.S. prudential regulators, would focus more on the safety and soundness of banks than financial competition and innovation.<sup>217</sup>

Therefore, at least in the long run, we propose a further structural change in the extant financial system and their own style of regulation, that is, creating a professional agency that is separate from the FSC (the sole financial market watchdog in Taiwan); the newly created single financial agency can provide a truly independent perspective, so as to mitigate the mission conflict conundrum because of trying to pursue financial competition and innovation through a naturally conservative prudential regulator. On the one hand, this reallocation of the authority of financial competition and innovation to a newly created single financial agency would better position regulators to safeguard healthy market competition and navigate innovation enabled by FinTech contributing to digital financial inclusion.<sup>218</sup> On the other hand, the creation of such a new agency is also in line with the objective of creating FCA's seminal regulatory sandbox—"promoting effective competition in the interests of consumers".<sup>219</sup> Moreover, this more

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216. See Van Loo, *supra* note 208, at 269 ("Interdisciplinary research has underscored that in designing regulators, 'a key danger to avoid is giving a single agency conflicting responsibilities.'") (footnote omitted).

217. See Tsai, *supra* note 11, at 222 (indicating that the FSC "under the current financial regulatory architecture is a unified regulator and tends to focus more on prudential regulation concerns . . ."). For mission conflict, especially in the context of U.S. FinTech regulation, see Van Loo, *supra* note 208, at 236-37, 263, 270. See also *id.*, at 257 (illustrating that "regulators focused on bank safety and soundness may view competition as a threat to their primary mandate. These two themes—insufficient attention to competition and overemphasizing the survival of big banks—permeate the institutional design flaws that undercut financial innovation.").

218. As mentioned in Part IV.C, during the legislative process of the FinTech Sandbox Act, startups and Wan-Ju Yu, a leading legislator from the ruling party (who is one of the main advocates for startups), used to call for the competent authority of the FinTech Sandbox should be elevated to as high-level as the Cabinet so as to have a more independent perspective from the FSC's; however, due to considerations to have the bill passed as soon as possible, the version with the FSC as the competent authority was ultimately passed. Syueh-Huei Lu (呂雪慧), *Jian Li Sha He Jin Rong Yeh Shuai Sian Shih Yan* (監理沙盒 金融業率先實驗) [*The Financial Sector Would Be Forerunners in Experimenting with the Regulatory Sandbox*], JHONG SHIH DIAN ZH BAO (中時電子報) [CHINA TIMES], (Feb. 20, 2017), <https://www.chinatimes.com/newspapers/20170220000027-260202>. Therefore, our regulatory proposal is intended to focus the mission of consumer financial competition and innovation, including rulemaking, supervision, and enforcement, in the hands of a single professional agency, who would be at least at the same hierarchical level as the FSC, while simultaneously independent of it. Of course, fleshing out the detailed regulatory design of the new agency charged with the authority of financial competition and innovation would remain a difficult issue requiring more research. In my further research, I would give detail of the alternative structure that I envision, including how much and what form of regulatory authority this agency would have, how "independent" such an agency would need to be (e.g., to what degree it would be susceptible to oversight, and therefore external influences), and just as significant, who would coordinate the inevitable overlap with the prudential regulator (and how).

219. *Regulatory Sandbox Report*, *supra* note 203, at 3.

proactive response would help prevent local Taiwanese FinTech startups from voting with feet;<sup>220</sup> this more proactive approach would meanwhile help Taiwan's government keep regulatory pace with other jurisdictions in the global regulatory competition for innovative FinTech startups.<sup>221</sup>

#### CONCLUDING REMARKS

The U.S. reactively regulated P2P lending start-ups under its extant securities regulations, setting forth regulation that may be intentionally strict so as to contain industrial development. In contrast, after a slew of major P2P scandals, including outright criminal violations, the Chinese government abandoned the initial hands-off regulatory approach and became reactive as well, by requiring business models of Chinese P2P lending to be limited to the information intermediation. Therefore, in China, other models, such as the asset securitization model or debt assignment model, can no longer be adopted.

When it comes to government responses to P2P lending in Taiwan, the FSC had been reactive by highly encouraging collaboration between P2P platforms and banks, actually implying that the platforms need to comply with laws and regulations applied to banks. The Taiwanese government became more proactive when it enacted the statute to implement the regulatory sandbox, the FinTech Sandbox Act, in January 2018. However, such a proactive shift in response to FinTech may have been proactive in form alone, as the legislative sandbox may not be an effective means to address regulatory dilemmas between prudential regulation and financial competition and innovation. Whereas the legislature attempted to embed the institutional philosophy in the FSC via the FinTech Sandbox Act, the FSC would in practice remain reactive in response to FinTech, such as P2P lending, by continuing to engage in conservative implementation, while maintaining a predominantly prudential focus due to being susceptible to regulatory capture and inertia. This pattern of activity prioritizes financial stability over financial competition and innovation. Therefore, at least in the long run, a structural change in institutional design of the financial system may be necessary to spur a transformation of the regulatory attitude of financial regulators towards an MPBR strategy of collaborative dialogical governance.

In order to refrain from forcing FinTech startups to exit from Taiwan

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220. See Fenwick et al., *supra* note 169, at 120.

221. *Conservative Policy*, *supra* note 211 (highlighting that the FSC is quite conservative in implementing the FinTech Sandbox Act such that many startups with blockchain technologies and financial innovations decide not to apply for entrance into the sandbox and even relocate their whole teams overseas).

and relocate overseas due to long-term regulatory uncertainty, we could preliminarily consider a holistic reform agenda, i.e., adopting a fully independent consumer financial competition watchdog. With a newly created single professional agency playing the role of promoting financial competition and innovation for consumers independently from the FSC, the concerns of fostering healthy competition in offering digital financial services or products such as P2P lending to traditionally underserved consumers might be brought a real step closer from the periphery of Taiwan's domestic financial system, to the power found at its apex.