

# Mandatory Escrow Account As A Manifestation Of Good Faith In Peer-To-Peer Lending

Oti Handayani<sup>1</sup> , Adi Sulistiyono<sup>2</sup> , Yudho Taruno Muryanto<sup>3</sup>

<sup>1,2,3</sup> Faculty of Law, Universitas Sebelas Maret Surakarta, Indonesia

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## Abstract

This study was aimed at analyzing manifestation of the principle of good faith in financial services business 4.0 Peer to Peer Lending (P2P Lending) in the form of mandatory escrow accounts in financial system used by the P2P Lending in Indonesia as referred to in Article 24 paragraph (1) POJK No. 77/POJK.01/2016. This study belongs to a normative legal research that is prescriptive and technical/applied. This study is the result of legal research using a legal approach and a conceptual approach. It used primary legal materials and secondary legal materials. The legal materials were collected through technique of literature study and analyzed using qualitative methods. The results of this study indicated that P2P lending cannot provide credit, it can only act as an intermediary between the fund lenders and borrowers, therefore fundraising and bookbuilding must be stored in an Escrow Account for a maximum of 2 days to avoid fund misappropriation as well as a means of money laundering and distribution of terrorism funds. Such rule, on one hand, does not provide a conducive space for organizers to maximize the funds (not in accordance with Posner's Pareto efficiency) since the prevention instrument has not been optimally used until the Escrow Account as a good faith in the P2P Lending applies to lenders and borrowers, but not to loan providers. On the other hand, the banking sector also does not agree because having to transfer funds to other banks in a short period of time can affect banking liquidity, meanwhile the instrument for preventing these concerns has not been optimally used. For this reason, the impact on the P2P Lending performance is not optimal as a driver of financial inclusion in developing financial business in the digital era 4.0.

**Keywords:** good faith, escrow account, efficiency

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## I. Introduction

God's command to seek knowledge in science and technology as stated in QS. Alaq: 1-5 is a witness to how important knowledge is until Allah SWT commands it in Qur'an. The phenomenon of digital

era (Industrial Revolution 4.0) in the form of internet has connected people from all over the world in one finger only. Service industries in disruption era 4.0 offers products with promising quality in which consumers are very selective in making their choices, meaning that some caution is needed, and the consumers trust factor may come from upstream to downstream, from the quality to the time the products are received by consumers according to the defined time.<sup>1</sup> Trust is the keyword to the development of service industry business, which is reflected in good faith in business era 4.0 in financial services sector which has been made in the form of technology, i.e., Escrow Accounts, as conveyed by the Financial Services Authority (Indonesian: Otoritas Jasa Keuangan/OJK).<sup>2</sup>

Technology and legal science are part of science where the object of legal science is legal norms. Besides, human behavior is also the object of legal science. Human relations are objects of legal science only in the context of legal relations as relationships governed by legal norms.<sup>3</sup> Legal norms include Peer to Peer Lending (P2P Lending) with Financial Services Authority Regulation (Indonesian: Peraturan Otoritas Jasa Keuangan/POJK) No. 77/POJK.01/2016. Article 24 paragraph (1) asserts that the Provider must use an Escrow Account and Virtual Account in the context of Information Technology-Based Lending Services. Paragraph (2) asserts that the Provider must provide a virtual account for each Lender. Paragraph (3) asserts that to repay the loan, the borrower makes payment through the Provider's Escrow Account to be forwarded to the Lender's Virtual Account.

P2P lending cannot provide credit, it can only act as an intermediary between the lender and the borrower, therefore fundraising and bookbuilding must be kept in an escrow account for a maximum of two days. It has a possibility that if the fund is deposited for more than two days, fund misappropriation and even fraud may also occur.<sup>4</sup> Another thing is that P2P Lending is part of Fintech, which according to the Financial Transaction Reports and Analysis Center (Proses Pelaporan dan Analisis Transaksi Keuangan/PPATK), one of the Fintech abuses was found in a terrorism case in 2016 committed by a suspect named Bahrin Naim who allegedly used a number of online payment accounts, such as Paypal and Bit Coin to get funding to finance the action. PPATK said that it is difficult to track financial transactions using Fintech since the recording system is not directly connected to banking.<sup>5</sup> Of the 2,700

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<sup>1</sup><https://www.kompasiana.com/karnalifaisal/5e023e0cd541df6d161a09b2/merawat-loyalitas-konsumen-di-era-revolusi-industri-4-0?page=all> retrieved July 20, 2020

<sup>2</sup> <https://www.wartaekonomi.co.id/read90715/ojk-escrow-account-penting-untuk-tingkatkan-kepercayaan>

<sup>3</sup> Hans Kelsen, *Teori Hukum Murni Dasar-Dasar Ilmu Hukum Normatif*, cetakan ke xvii, Bandung, Nusa Media, hlm. 80

<sup>4</sup> <https://www.cnbcindonesia.com/tech/20180714150423-37-23546/ojk-fintech-dilarang-himpun-dana-masyarakat>

<sup>5</sup> <https://katadata.co.id/pingitaria/finansial/5e9a56b01d77d/ppatk-temukan-indikasi-aliran-dana-terorisme-lewat-fintech>

illegal P2P Fintechs observed by the Investment Alert Task Force (SWI), 22 percent of servers for illegal operations are found in Indonesia, 34 percent in other countries (abroad), and 44 percent is unknown yet. Foreign funds included in the P2P Lending Provider is inseparable, between the licensed and unlicensed ones, because investors do not only invest in one P2P Lending, thus it is not surprising that illegal P2P Lending is rife and keeps growing.<sup>6</sup>

Anticipating this, OJK stipulates that funds from lenders may only settle for two days.<sup>7</sup>This has been complained by industry owners who request that the use of Escrow Account should be extended to 60 days or even eliminated. The regulation is detrimental to the P2P Lending industry owners. For instance, Reynold Wijaya, the CEO and Co-Founder of Modalku, said that his industry has been disadvantaged because the time is too short. If it was changed to 60 days, it would provide flexibility for industry owners. In addition to the industry owners, the parties from banks also do not agree with the regulation because they must transfer funds to other banks in a very short time. As a result, this may affect banking liquidity. Also, they see that the P2P Lending business is already 100% subject to the banking system, therefore it must comply with applicable banking regulations.<sup>8</sup>

## II. Reserch Methods

This study is a normative legal research that is prescriptive with a statue approach and conceptual approach. The types and sources of data are primary legal materials obtained from the 1945 Constitution, Act of the Republic of Indonesia No. 21/2011 and other related laws and regulations, including Regulation on Financial Services Authority No. 77/POJK.01/206. The secondary legal materials were obtained from books, literature, official documents, scientific works, and legal journals of experts. The data analysis method used in this study is a qualitative method.

## III. Results and Discussion

Traditional contracts have been based on the principle of freedom of contract through a balanced negotiation process between parties.<sup>9</sup>The transaction is at first done face-to-face and the process of sending goods to the buyer as well as money to the seller takes place without involving the third party.

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<sup>6</sup><https://www.msn.com/id-id/ekonomi/bisnis/ppatk-temukan-investasi-pinjaman-online-mirip-pola-pencucian-uang/ar-AAPOjH?ocid=msedgdhp&pc=U531>

<sup>7</sup><https://finansial.bisnis.com/read/20190702/89/1118961/aturan-trust-bagi-fintech-harus-segera-disusun>

<sup>8</sup><https://www.finansialku.com/escrow/>

<sup>9</sup>Herlien Budiono, 2007, *Kumpulan Tulisan Hukum Perdata di Bidang Kenotariatan*, Citra Aditya Bakti, Bandung, p. 1 in Ery Agus Priyono, *Peranan Asas Itikad Baik dalam Kontrak Baku (Upaya Menjaga Keseimbangan Bagi Para Pihak)*, Jurnal Diponegoro Private Law Review Vol. 1 No. 1 Nov 2017

The transaction practice has the risk of fraud, especially by the seller, where the buyer has transferred an amount of money according to the price plus shipping costs, but the seller does not send the goods that have been paid to the buyer.<sup>10</sup> Such fear of fraud can be minimized or even avoided by using an Escrow Account. Etymologically, the term escrow comes from the French *escroue* which is the loan word from Latin *escroda*, meaning “strip of parchment”. The term was adopted into English to become *escrow* which initially only meant “a roll of parchment paper for document writing” and then its use developed to refer to a deed stored in an escrow.<sup>11</sup>

The Common Law system recognizes escrow which is often used in various kinds of business payment transactions, for the benefit of parties in main agreement. Escrow is a legal document containing a legal agreement in which an asset, generally in the form of money, is sent by the grantor to the third party to be kept for a certain time until a defined condition arises to be subsequently handed over to the grantee.<sup>12</sup> The term escrow developed as a means of financing, i.e., Escrow Agreement. It is essentially a deposit of documents, securities, goods or money in a neutral and impartial party with specific instructions on how, in what way, and to whom the escrow holder hands over the documents, goods or money.<sup>13</sup> Escrow Account, in Indonesian, is defined as a joint account used to accommodate special funds where the procurement is performed through certain letters following the agreement between the funder and the parties concerned in the funds.<sup>14</sup> Another definition of Escrow Account is stated in Article 4A paragraph (1) of the Regulation of Bank Indonesia No. 3/11/PBI/2001 concerning Amendments to the Regulation of Bank Indonesia No. 2/24/PBI/2000 concerning Current Account Relationship between Bank Indonesia and External Parties, i.e., an account opened specifically for a specific purpose to accommodate funds entrusted to Bank Indonesia based on certain requirements under a written agreement.<sup>15</sup>

Regarding the P2P Lending, Escrow Account is an account provided by a third party (escrow agent) to accommodate and distribute funds to parties involved in online transactions. The escrow agent in Escrow Agreement gets the transfer of rights in online lending and borrowing transactions by referring to power of attorney from the Lender and Borrower to an agent. The transfer of power of attorney

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<sup>10</sup><https://www.simulasikredit.com/definisi-escrow-account/> retrieved June 20, 2020

<sup>11</sup>Rusli Pandika, “*Escrow Suatu Perjanjian Pengantaran*”, *Law Review*, Faculty of Law, Universitas Pelita Harapan Vol. 1 No. 3, March 2002, p. 2

<sup>12</sup><https://www.finansialku.com/escrow/> retrieved June 20, 2020

<sup>13</sup>Rusli Pandika, “*Escrow Suatu Perjanjian Pengantaran*”, *Law Review*, Faculty of Law, Universitas Pelita Harapan Vol. 1 No. 3, March 2002, p. 2

<sup>14</sup><https://www.simulasikredit.com/definisi-escrow-account/> retrieved June 20, 2020

<sup>15</sup> Bank Indonesia, Peraturan Bank Indonesia No. 3/11/Pbi/2001 Tentang Perubahan atas Peraturan Bank Indonesia No. 2/24/Pbi/2000 Tentang Hubungan Rekening Giro antara Bank Indonesia dengan Pihak Ekstern.

referred to in the Escrow Agreement has elements as set in the power of attorney agreement as stipulated in Book III of the Civil Code Chapter 16 Article 1792 to Article 1819. The power of attorney agreement is only additional or assessor whose implementation basically follows the main agreement, i.e., an agreement between the principal or in other words, the escrow agreement becomes a clause in the main agreement.

In economics, the concept of efficiency derives from the concept of microeconomics, i.e., theory of producers as an attempt to maximize profits or **minimize costs from the** producer's point of view. The company's point of view recognizes three kinds of efficiency, i.e., technical efficiency, allocative efficiency, and economic efficiency. The first efficiency reflects the company's ability to achieve optimal output levels by using certain or minimal input levels. The second efficiency reflects the company's ability to optimize the use of its inputs with a price structure and technology that is equated with Pareto efficiency, i.e., production inputs are used efficiently if these inputs are no longer possible for improving a business without making at least the condition of another business to be worse. The last efficiency is a combination of technical efficiency and allocative efficiency. It is implicitly the concept of least cost production, i.e., a production company is said to be economically efficient if the company uses costs in which the cost per unit of output is the most minimal one.<sup>16</sup>In line with economics, Posner also analyzes the perspective of economic efficiency with the Pareto efficiency criteria "... that a situation is efficiency-enhancing if at least one person can be made better off without making anyone else worse off." Furthermore, Posner also added, "A legal change is efficiency-enhancing if the gains to the winners exceed the losses to the loser, and thus, the winners could, hypothetically, compensate the losers for their losses and still be better off."<sup>17</sup>

According to Alain Pellet, the definition of a general principle is an unwritten rule of law that is broad in nature. A principle should be distinguished from a moral code, i.e., they are simply another form of legal order, albeit of a more abstract and general character.<sup>18</sup>One of the principles of a universal agreement is *goede trouw* (good faith). Based on *Kamus Besar Bahasa Indonesia* (the Indonesian Dictionary), good faith means trust or firm belief.<sup>19</sup>According to Wirjono Prodjodikoro, good faith is

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<sup>16</sup> Aam SlametRusydia, *Efisiensi Dan Stabilitas Bank Umum Syariah di Indonesia*, *Jurnal Ilmu Akuntansi* Volume 11 (2), 2018

<sup>17</sup>Revina Aprilia Dewantari, Munawar Kholil, *Penerapan Teori Efisiensi dalam Pendekatan Rule of Reason Pada Pembuktian Kasus Persaingan Usaha Tidak Sehat*, *Privat Law* Vol. VI No 2 Juli - Desember 2018

<sup>18</sup>Matthias Goldmann, *Putting Your Faith in Good Faith: A Principled Strategy for Smoother Sovereign Debt Workouts*, *Yale Journal of International Law*, Vol. 41, No. 2 - special online issue, 2016

<sup>19</sup> **Kamus Besar Bahasa Indonesia**

needed since law cannot reach future conditions.<sup>20</sup>The principle of good faith in Islam is essential in implementing an agreement since disputes usually happen from the good faith of parties. It is written in Q.S. Al-Baqarah: 284 which means “To Allah belongs all that is in heaven and earth. Whether you reveal what is in your hearts or hide it, Allah will bring you to account for it. He will forgive whom He will and punish whom He will; He has power over all things.” **Intention is the basis of every human matter and muamalah, meaning that the law for an action is very dependent on the intention and purpose of human’s act.**<sup>21</sup>

The principle of Promissory Estoppel is known in the Common Law system, i.e., to prevent a person who gives a promise (promisor) from retracting his/her promise, while the party who receives the promise because of his/her belief in the promise has done something or has not done something which results in the loss suffered by the borrower if the promisor is allowed to retract his/her promise. This principle is often **equated with the principle of good faith**. The principle of good faith is intended to offset risks that require **mutual trust from the parties**.

Civil Law, which is held by Indonesia, in Article 1338 paragraph (3) of the Civil Code, it is stated that an agreement must be carried out in **good faith**.<sup>22</sup>The parties involved in the contract must carry out the substance of contract based on the trust or firm belief or good will of the parties.<sup>23</sup>In the event of electronic transactions, it is further regulated in Article 3 of Act of the Republic of Indonesia No. 11/2008 concerning Information and Electronic Transactions. It is stated that the use of information technology and electronic transactions is carried out based on the principles of legal certainty, benefit, prudence, **good faith**, and freedom to choose technology or be technologically neutral. Good faith in this case means that in conducting electronic transactions, the parties **do not aim** to intentionally and without rights or against the law **cause any loss to other party in the event that the/she does not know it**.<sup>24</sup>

The principle of good faith as universal ethics is an indispensable requirement in social interactions that aims to offset risks that need **mutual trust from the parties**. In the past, trust was held because of direct interaction over a long period of time. While in the digitalization era 4.0 with a wide scale, scope and complexity, it has then established information technology and production processes that are

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<sup>20</sup>Wiryo Prodjodikoro, 2006, *Asas-Asas Hukum Perjanjian*, Sumur, Bandung, p. 56

<sup>21</sup>Khusniah, Fikri Robiatul (2017) *Tinjauan hukum Islam terhadap prinsip itikad baik dalam pendaftaran hak merek di Indonesia: Analisis Putusan Mahkamah Agung nomor 264 k/pdt.sus-hki/2015 antara PT Inter Ikea System by Swedia dengan PT Ratania Khatulistiwa*. Undergraduate thesis, Universitas Islam Negeri Maulana Malik Ibrahim

<sup>22</sup>Ery Agus Priyono, *Peranan Asas Itikad Baik dalam Kontrak Baku (Upaya Menjaga Keseimbangan bagi Para Pihak)*, Jurnal Diponegoro Private Law Review Vol. 1 No. 1 Nov 2017

<sup>23</sup>Salim HS, *Hukum Kontrak: Teori dan Teknik Penyusunan Kontrak*, 12<sup>th</sup> Printing, Sinar Grafika, Jakarta, 2017 p. 11

<sup>24</sup>Explanation of Act of the Republic of Indonesia No. 11/2008 concerning Information and Electronic Transactions Article 3

automatically controlled which may have an impact on low production costs. The establishment of digital technology that has a massive impact on human life around the world leads to a great dependence on information technology, particularly on their cellphones. Good faith in P2P Lending begins when the Provider gets a permit to operate until it is then used by the community.<sup>25</sup>The automation system in all activity processes has become the basis for trading transactions, among others is the automation of good faith or P2P Lending trust that is manifested in the Escrow Account.

In P2P Lending, there must be a protection of lenders' funds by focusing on fraud risk and credit risk. Also, it is aimed at maintaining lenders' expectation to feel safe and comfortable. No shadow banking or ponzi schemes is allowed in P2P Lending. Escrow Account as a manifestation of the principle of good faith or promissory estoppel in financial services business is regulated in POJK No. 77/POJK.01/2016.<sup>26</sup>In Article 24, all parties in P2P Lending, such as Lenders, Providers, and Borrowers are protected. The Escrow Account managed by the provider guarantees the lender to allocate funds to the right borrower, and the borrower is guaranteed that the funds he/she has returned will be forwarded to the lender. Mandatory of the use of Escrow Account in P2P Lending also applies in other countries, including India.<sup>27</sup>Escrow Account is a guarantee of security for funding transaction in P2P Lending. The use of Escrow Accounts in P2P Lending benefits both parties since the security features of transactions through Escrow Accounts apply to both parties as long as they send/hand over assets each other. In the transaction, both parties have obligations they must fulfill. If one of the obligations is not fulfilled, the transaction can be canceled or cause any disadvantage to one of the parties. When the buying and selling process is carried out online without having face-to-face transaction, there are doubts about the fulfillment of the obligations. Escrow Accounts as a means of financing for online businesses, including P2P Lending, are intended for activities to help out one another as long as it is not against the law.<sup>28</sup>

Article 24 POJK No. 77/POJK.01/2016 is urgently needed to encourage a healthy business ecosystem. P2P Lending providers must ensure the security of public funds, while in the aspect of protecting

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<sup>25</sup>AnitaKhoirunisa, AgusSuwandono,HelithaNoviantyMughtar, *Implementasi Besaran Bunga Peer To Peer Lending Berdasarkan Asas Itikad Baik Dalam Pemanfaatan Teknologi Informasi Serta Pengawasannya*, Widya Yuridika, Jurnal Hukum, Vol. 3 No. 1, June 2020

<sup>26</sup> OJK's Regulation No. 77/POJK.01/2016 Article 24 clause (1) The Provider must use an escrow account and virtual account for Information Technology-based Lending and Borrowing Services, clause (2) The Provider must provide a virtual account for each Lender, clause (3) In order to repay the loan, the Borrower shall make payments through the Provider's escrow account to be forwarded to the Lender's virtual account.

<sup>27</sup> Rao Sudha P., Anand M.R., *Peer to Peer Lending in India; Regulation and Response*, Journal Prajnan, Vol XLVIII No. 2 2019-20

<sup>28</sup>Muhamad Fatkul Mujib *Tinjauan Hukum Islam terhadap Pembayaran Fee Pada Jual Beli Secara Online Via Rekening Bersama di Forum Jual Beli Kaskus*, in Undergraduate Thesis, Faculty of Sharia and Law, Walisongo State Islamic University Semarang, 2017

national interests, they must be able to prevent the risk of money laundering, terrorism financing, and disturbances in financial system stability. Therefore, the P2P Lending provider must not deal with the fund and must use an **Escrow Account**.<sup>29</sup>This is also an implementation of good faith of the P2P Lending providers because, by not carrying out activities in the event that the borrower does not know it, therefore it will create a sense of mutual trust between the parties. As a financial service that involves many parties, including lenders, providers, and borrowers, this business should give the same benefits for the parties as what Posner states in Pareto Efficiency perspective, i.e., where no one person can be made better off, without making someone else worse off. Furthermore, if the benefit for the winning party exceeds the loss for the losing party, and then the winning party can compensate the loss for the losing party, then the losing party is still better off.

The law must be able to create “stability” as its role in economic development, i.e., to balance and accommodate competing interests. Moreover, “predictability” means predicting the consequences of steps taken for the benefit of the majority of people. While “fairness” refers to equal treatment in order to maintain market mechanism.<sup>30</sup>As an institution that drives financial inclusion, P2P Lending needs to be given wide wings so that it can fly to reach all the interests of the community. It is time for P2P Lending Operators to be given the freedom to be tied to an Escrow Account. The period of deposited funds in the Escrow Account must also provide space for the provider to maximize it, moreover the Escrow Agent is given the same obligations as bank customers so that they should get the same rights or at least be given a period that is looser than the current one (two day only).<sup>31</sup>Money laundering and/or terrorism financing as another concern can be avoided by submitting a beneficial owner as stated in POJK No. 23/POJK.01/2019 concerning Amendments to Financial Services Authority Regulation Number 12/POJK.01/2017 concerning the Implementation of Anti-Money Laundering and Prevention of Terrorism Financing Programs in Financial Services Sector by maximizing strict supervision of the flow of Escrow Account funds through several agencies, such as Ministry of Finance, Directorate General of Taxes, OJK, PPATK, Corruption Eradication Commission (Komisi Pemberantasan Korupsi/KPK), or make some arrangement as that of carried out in the United States which requires that the provider is only

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<sup>29</sup>HeryuchaRomanna Tampubolon, *Seluk-Beluk Peer to Peer Lending Sebagai Wujud Baru Keuangan di Indonesia*, Jurnal Bina Mulia Hukum, Vol. 3 No. 2 (2019), March 2019

<sup>30</sup> Adi Sulistiyono & Muhammad Rustamaji, *Hukum Ekonomi sebagai Panglima*, Masmedia Buana Pustaka, Sidoarjo, 2009, p. 51

<sup>31</sup> Sinaga, Leonard Pandapotan, *Prinsip Keterbukaan Beneficial Owner (BO) Perusahaan Terbuka terhadap Upaya Pencegahan dan Pemberantasan Tindakan Pidana Pencucian Uang (TPPU)*, 2018, Postgraduate Thesis, Faculty of Law, Universitas Sumatera Utara

allowed to accept accredited investors registered with the US Securities and Exchange Commission (SEC).<sup>32</sup>

#### IV. Conclusion

The principle of good faith as universal ethics is an indispensable requirement in social interactions that is aimed at offsetting risks that require mutual trust from the parties. Trust is the key word for the development of service industry business in digital era 4.0 in which automation system in all activities has become the basis for electronic transactions, including P2P Lending. Its manifestation of the principle of good faith is stated in mandatory Escrow Account as regulated in Article 24 POJK No. 77/POJK.01/2016 which provides a sense of security in transactions since both parties have obligations that must be fulfilled, therefore if one of the obligations is not fulfilled, the transaction can be canceled. As a financial services business that involves Fund Provider, Fund Provider and Borrower, P2P Lending should provide the same benefits to the parties as Posner's opinion in Pareto Efficiency. OJK stipulates that funds in the Escrow Account managed by the provider may only be deposited for two days in the event of money laundering and/or terrorism financing. In fact, the P2P lending business has been one hundred percent subject to banking system so that their rights and obligations as customers should be the same as other customers. On the other hand, the parties from banking sector also do not agree since they have to transfer funds to other banks in a short period of time and it may affect banking liquidity. While an instrument for preventing such problem has not been used to its full potential. In the end, this affects non-optimal performances of P2P Lending as a driving force in financial inclusion for developing the financial business in digital era 4.0.

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<sup>32</sup> Nemoto, Storey, Huang, *Optimal Regulation of P2P Lending for Small and Medium-Sized Enterprises*, ADBI Working Paper Series, No. 912, January 2019

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