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Christopher C. H. CHEN
Singapore Management University, chchen@smu.edu.sg

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Christopher CHEN Chao-hung

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Christopher CHEN Chao-hung

Assistant Professor of Law, Singapore Management University

Abstract

This article compares new product intervention rules in Singapore, Hong Kong and Taiwan for complex structured investment products. Singapore's approach is to improve firms' internal safeguard, while Hong Kong's approach is to require prior authorisation for new unlisted structured investment products by the securities regulator. Taiwan's approach is to have a self-regulatory body reviewing a product beforehand. This article argues that it is difficult to review the merit of a financial product in advance and thus it is difficult to have a true gatekeeper for toxic financial products. Before product intervention, we must first identify clear objectives. Regulators have to strengthen the accountability of the reviewer and create concrete review standards if additional *ex ante* product review is preferred. Regulators may also consider setting up some minimum standards for retail financial products through public debate in order to filter unwanted features from the retail market.

Keywords

Investor protection, product intervention, unlisted structured investment product, derivative, suitability.

I. INTRODUCTION

Is it possible to prevent toxic financial products from reaching retail customers by having additional safeguard or ensuring them meeting some minimum standards? There is no doubt that a firm should not recommend or promote a product that is unsuitable to a customer. Thus, a firm should review the suitability of a product internally. However, a further question is whether it is necessary to have an extra regime to ensure that a retail financial product promoted is not too 'toxic' in the first place to protect investors from unsuitable financial products, similar to the treatment of poisonous food or hazardous products.

In this article, we will consider new product intervention rules in Hong Kong, Singapore and Taiwan (the Three Asian Tigers), all of which suffered from the fallout of retail structured notes triggered by the collapse of Lehman Brothers (Lehman) in 2008.[1] All three jurisdictions strived to improve financial consumer protection. Among all the investor protection regimes, this article finds that the Three Asian Tigers all try to strengthen *ex ante* review of structured product in order to ensure that retail investors are less likely to suffer from complex financial instruments. However, there are significant differences among the approaches taken by the three jurisdictions. This is the focus of this article.

This article will argue that, compared with physical goods, it is difficult to conduct a substantive review of the merit of a financial product. As we will introduce below, Singapore chooses to enhance a firm's internal safeguard for suitable products, while Hong Kong introduces a prior authorisation regime to ensure the quality of product disclosure. Unfortunately, Taiwan law seems to lack enough details to make the whole regime effective when it delegates the responsibility of reviewing a product to a self-regulatory body. Clear objectives, the accountability of a product reviewer and how a reviewer would review a product would be critical to the success of product intervention.

The discussion in this article may offer valuable lessons for mainland China, which currently enjoys a huge market for so-called 'wealth management' products,[2] and for regulators

[1] Christopher Chen, 'The Resolution of the Structured Notes Fiasco in Hong Kong, Singapore, and Taiwan' (2013) 34(4) *Company Lawyer* 119, 119-121.

[2] There is no official data about the size of China's wealth management market. However, according to the Wall Street Journal, citing data offered by Fitch Ratings, about 10 trillion yuan (about US$1.6 trillion) is invested in

in other parts of the world. This article will focus on the application of product intervention rules to unlisted structured investment products (USIPs), which are generally considered to be more complex and riskier. However, the argument in this article might also benefit any discussion relating to other less sophisticated financial products (e.g. life policies or pension plans) in the future.

In the following parts, Part II will introduce the perils of USIPs that raised the need for product intervention. Part III will give a short introduction to new rules in Hong Kong, Singapore and Taiwan. Part IV will compare and examine the advantages and disadvantages of the approaches taken in each jurisdiction. We will also consider other potential approaches that have not been taken by regulators in the three countries. Part V offers some conclusions.

II. THE NEED FOR PRODUCT INTERVENTION FOR UNLISTED STRUCTURED INVESTMENT PRODUCTS

USIPs are financial products that combine features of a conventional financial instrument (eg, a bond) and a financial derivative. Retail USIPs arose in the Three Asia Tigers against the backdrop of high savings rates and low interest rates, which created the demand for more exotic investment products for income. USIPs may allow investors to enjoy decent fixed investment income by referring to other underlying assets (*cf.* stocks or gold). Due to the nature of financial derivatives, USIPs may also allow investors to invest in assets that may not be directly available to them (e.g. foreign stocks). For example, the Pinnacle Notes Series 11 sold in Singapore linked to a basket of shares, including the Hong Kong Stock Exchange and three Chinese entities in addition to two other Singaporean companies.[3]

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wealth management products. Dinny McMahon, 'Why You Should Worry About China's Wealth Management Products' *Wall Street Journal* (15 Oct 2012) <http://blogs.wsj.com/chinarealtime/2012/10/15/why-you-should-worry-about-chinas-wealth-management-products/> accessed 7 January 2014. The Financial Times also reported that '[t]he total outstanding issuance of these products reached RMB6.7tn at the end of the third quarter [of 2012], up 47 per cent from the end of last year, according to the regulator.' Simon Rabinovitch, 'China Investment Products Draws Complaints' *Financial Times* (27 Dec 2012) <http://www.ft.com/intl/cms/s/0/53c75f8e-5004-11e2-a231-00144feab49a.html#axzz2GKBMhEzX> accessed 7 January 2014.

[3] Documentation could be found in <http://www.morganstanley.com/pinnaclenotes/index.html> accessed 9 January 2014.

In Hong Kong and Singapore, the main culprits of the structured notes saga were credit-linked notes, which in essence allowed investors to invest in the credit risk of reference entities through an embedded credit default swap.[4] In Taiwan, equity-linked structured notes have caused most damage.[5] Many investors suffer directly due to the collapse of Lehman, acting as an issuer, guarantor or a related party. Investors may also suffer losses if Lehman was one of the reference entities or associated with the collateral that secured the notes.

The global financial crisis exposed several flaws in the retail USIPs market in the Far East. For example, several firms failed to highlight risks of underlying securities securing the notes.[6] Arguably some structured notes (e.g. credit-linked notes) were too exotic to be suitable for ordinary investors. The underlying problem is that many retail investors did not quite understand the true nature of structured products, let alone complex contractual wordings that define investors' rights and obligation.[7] As Lord Collins notes in *UBS v HSH Nordbank AG*, '[t]he contractual documentation in this matter consists of more than 500 pages and its size and complexity, which … make it easier to understand, if not to excuse, why senior banking figures … had little understanding of this market and of the risks their institutions were undertaking.'[8] There is no reason to suggest that an ordinary retail investor could have done a better job.

In response to the structured notes saga, regulators in Hong Kong, Singapore and Taiwan all strived to strengthen investor protection rules, ranging from improving product disclosure to enhancing customer due diligence and suitability assessments. Hong Kong and Taiwan also sets up a new dispute resolution institution to address financial consumer complaints. It is not the purpose of this article to address details of these financial consumer protection rules. However, an interesting question is whether regulators should put in extra efforts to prevent unsuitable or even 'toxic' products from reaching retail investors in the first place.

[4] Christopher Chen, 'Product Due Diligence and the Suitability of Minibond: Taking the Benefit of Hindsight' (2011) Sing J Legal Studies 309, 311-314.
[5] Christopher Chao-hung Chen, 'Structured Notes Fiasco in the Courts: A Study of Relevant Judgments between 2009 and 2010' (2012) 10 Academia Sinica Law Journal 161, 173.
[6] MAS, *Investigation Report on the Sale and Marketing of Structured Notes linked to Lehman Brothers* iii (7 July 2009) <http://www.mas.gov.sg/en/News-and-Publications/Enforcement-Actions/2009/7-July-2009.aspx> accessed 7 January 2014.
[7] For example, a dispute arose in Singapore as to the exact meaning of the term 'credit event redemption amount' that appeared in four slightly different versions in the documentation. See *Soon Kok Tiang v DBS Bank Ltd* [2012] 1 SLR 397 (Court of Appeal, Singapore)
[8] [2008] EWHC 1529 (Comm), at [2].

There is a natural comparison between risky financial products and hazardous goods. For example, food and drug regulation has a labelling requirement that is comparable to product disclosure for financial instruments.[9] Some drugs have to be prescribed by a medical practitioner, whereas others can be bought on the high street. This approach is comparable to the mandatory advice rules for some financial products in Singapore[10] or the appropriateness assessment for complex financial products in the UK.[11] Governments might also ban a drug or food product completely if it is poisonous, which is similar to the power to ban a financial product under new UK regime.[12] Furthermore, new drugs often have to be approved by a regulator after a series of clinical trials. If we follow this line, an interesting question is whether the same approach can be applied to complex financial products.

Traditionally, the disclosure principle has been the dominant force behind securities regulations and consumer protection. According to this principle, it is essential to ensure that customers are given necessary information, and there should be less complaint if customers are given a chance to find out about a product before investing in it. This approach suits the aleatory nature of many investment products. Disclosure also supports the concept of *caveat emptor* and reinforces the idea of informed consent.

However, the bargaining strength between a financial firm and a customer can be unequal, and thus it been recognised that the '[c]onsumer is treated as incapable of informed consent to risk' and the 'public sector intervenes paternalistically in the interests of fairness'.[13] In other words, retail investors are more akin to end-users of a product rather than simply investors.[14] It has been suggested that the complexity of many financial products poses substantial challenges to consumers, especially 'in countries where financial literacy is low and where households have not gained long-term experience with making financial decisions.'[15] This supports the views that

[9] For example, Hong Kong law provides a list of information that should be disclosed in the offering documents. See the Code on Unlisted Structured Investment Products (Hong Kong, 2010), Appendix C.
[10] Notice on Recommendation on Investment Products (Singapore, FAA-N16)(June 2011, amended in 2012) paras 23 and 24.
[11] FCA Handbook COBS (UK) 10.2.1R and 10.4.1R.
[12] For example, the Financial Services and Markets Act 2000 (UK), s 137D (inserted by the Financial Services Act 2012 s 24); Financial Services Authority, *Product Intervention* (Feedback Statement 11/3, 2011) para 5.11.
[13] Joanna Benjamin, 'The Narratives of Financial Law' (2010) 30 OJLS 787, 799.
[14] Niamh Moloney, 'The Investor Model Underlying the EU's Investor Protection Regime: Consumers or Investors' (2012) 13(2) European Business Organization Law Review 169, 173-174.
[15] Roman Inderst, 'Retail Finance: Thoughts on Reshaping Regulation and Consumer Protection after the Financial Crisis' (2009) 10(3) EBOR 455, 460.

financial consumers must be protected from other parties or even themselves.[16] This gives rise to the idea of 'product intervention', which is similar to the precautionary approach considered in food and drug regulation.[17] As Professor Moloney puts it:

> Product intervention is also associated with a more intrusive approach to retail investor risk-taking, consistent with its association with consumerisation and closer intervention in the investor decision. Making a determination as to whether a product is not suitable for retail distribution, whether through governance/design oversight powers or prohibition powers, demands that difficult determinations are made as to the optimum levels of risk and choice in the retail market.[18]

In the UK, the financial regulator recognises that 'product design and decisions made by product designers about how – and to whom – products will be distributed play a significant role in determining consumer outcomes.'[19] Thus, a focus on 'these parts of the value chain [of a financial product] is necessary for consumer protection and as a means of stopping problems before they gain traction.'[20]

If we accept that product intervention is desirable at least for complex financial products like USIPs, the next question is how this could be achieved. It is obvious that there could be a variety of ways to regulate a retail financial product. One option might be to ban a product completely. In contrast, the UK approach is simply to reserve some power for financial regulators to remove a product from the market if it becomes too risky.[21] As we will introduce below, the approaches taken in the Three Asian Tigers all require an institution to review a product *ex ante* by requiring an institution to intervene before the point of sale. This is what this article generally calls as the 'gatekeeper' approach. Then, we must ask how to establish a gatekeeper and whether the gatekeeper approach would be effective to protect retail investors.

This is beyond the scope the scope of this article to suggest how far product intervention is necessary and whether the disclosure principle is sufficient to protect investors. However, by analyzing how product intervention is designed and enforced, it offers us a chance to consider ways to protect financial consumers. In the following two parts, we will first introduce the new

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[16] Inderst (n 15) 459-460.
[17] Moloney (n 14) 181.
[18] Moloney (n 14) 191.
[19] Financial Services Authority (n 12) para 1.13.
[20] Financial Services Authority (n 12) para 1.15.
[21] Above n 12.

rules in the Three Asian Tigers. Then, in Part III we will consider examine the gatekeeper approach in more details.

III. APPROACHES TAKEN BY THE THREE ASIAN TIGERS

This part first examines the new rules in Singapore, Hong Kong and Taiwan and the specific features and problems of each approach. We will further examine and compare the approaches in Part IV.

A. Singapore

In response to the Lehman minibonds saga, Singapore has amended the Securities and Futures Act[22] and the Financial Advisers Act[23] in November 2012 to strengthen investor protection, mandating, for example, that there must be a product highlight sheet for structured notes and capital market products[24] and that a trustee for holders of debentures if an offer is made in or accompanied by a prospectus.[25] The amendment of the Financial Advisers Act also creates a statutory cause of action for financial consumers if a financial advisor fails to disclose or misrepresents certain information.[26] This is in addition to earlier efforts by the Monetary Authority of Singapore (MAS) to oblige a firm to know its customers, to conduct a suitability assessment of customers before selling a product,[27] and to strengthen sales practice at the point of sale.

One essential part of the regulatory reform is to enhance product due diligence based on the Financial Advisers Act to ensure that a financial adviser would only recommend a suitable product to a target customer segment.[28] The same requirement is also extended to other off-

[22] Cap 289, Revised Edition 2006.
[23] Cap 110, Revised Edition 2007.
[24] Securities and Futures Act (Singapore, cap 289, 2006 rev ed) ss 240AA and 309D, inserted in 2012 ('SGSFA').
[25] SGSFA ss 265A, 266, and 268A.
[26] Financial Advisers Act (Singapore) ss 25(5A) and 26(1C)('SGFAA')
[27] Notice on Recommendations on Investment Products (Singapore, FAA-N16, 2011) and Guidelines on Fair Dealing – Board and Senior Management Responsibilities for Delivering Fair Dealing Outcomes to Customers (Singapore, 2009)(Fair Dealing Guidelines).
[28] Financial Advisers Regulation (Singapore) Reg 18B ('SGFAR').

exchange investment products.[29] However, the new law does not prescribe a prior authorisation regime like that for collective investment schemes.[30] The MAS did not explain why it does not consider a similar regime (as Hong Kong did) for USIPs; but it seems that the MAS did not contemplate a prior authorisation regime in its consultation paper.[31]

In essence, the new law requires that financial adviser[32] can only recommend a 'new product' if every member of the 'senior management' of the adviser (as a firm) is 'personally satisfied himself that the new product is suitable' and must have 'personally approved the sale or marketing of the new product to the target client'.[33] No product can be recommended if it is considered unsuitable for the target clients.[34] A financial adviser has to assess a few elements of a USIP (e.g. type of target client, investment objective, risk, costs and promotion process) before recommending a new product.[35] An adviser must also review product documentation and consider whether target customers could understand it.[36] A financial adviser may be liable to a customer if he or she recommends a product without reasonable basis.[37] However, it seems that the new regulation (i.e. Reg 18B) does not affect products already on the market.[38]

By definition, 'senior management' means 'any person for the time being holding the office of chief executive officer (CEO) or executive director of the financial adviser, including any person carrying out the duties of any such office if the office is vacant.'[39] Thus, the product due diligence exercise is not merely the call of some managers or a collective decision of a firm's board of directors. It is raised to the top executive level. The MAS seems to expect that the due care exercised by every member of the senior management of a firm will be sufficient to reduce the chance of releasing unsuitable products into the market.

[29] SGFAR Reg 18B(9).
[30] SGSFA s 285.
[31] MAS, 'Regulatory Regime for Listed and Unlisted Investment Products, Consultation Paper P003-2010 (Jan 2010); and MAS, 'Proposed Amendments to the Financial Advisers Regulations', Consultation Paper P015-2010 (Oct 2010).
[32] The term 'financial adviser' may include both licensed financial advisers or exempt financial advisers such as banks or insurance companies. SGFAA s 23(1).
[33] SGFAR Reg 18B(3). However, by unanimous consent, the senior management of a financial adviser can appoint another person or committee to approve a new product. SGFAR Reg 18B(4).
[34] SGFAR Reg 18B(8).
[35] SGFAA s 27(2); SGFAR Reg 18B(2). See also Fair Dealing Guidelines para 2.2.2.
[36] Fair Dealing Guidelines paras 2.2.2 and 2.2.3.
[37] SGFAA s 27(1).
[38] Kee Yang Low, 'Product Suitability, Due Diligence and Management Responsibility: The New Regime of Regulation 18B of the Financial Advisers Regulation' (2012) 24 SAcLJ 298, 301.
[39] SGFAR Reg 18B(9).

In short, Singapore's approach is to improve the internal safeguards of a financial adviser to ensure that a new USIP will be suitable for at least some customers. One point worth noting is that Singapore's enhanced product due diligence requirement is founded on the regulation of financial advisers. Thus, the requirement is built on a firm recommending a USIP to a customer. This means that the new product due diligence requirement does not affect transactions through a discretionary account or on an execution-only basis (e.g. trading in a stock exchange) if there is no element of advice. In other words, product intervention in Singapore is required only when a firm recommends a product to a customer. We will further analyse Singapore's approach in Part IV.

B. Hong Kong

Similar to Singapore, Hong Kong also suffered from Lehman minibonds.[40] This led to an amendment of the Securities and Futures Ordinance in 2011, preceded by a new Code of Unlisted Structured Product (Code) in 2010, to strengthen investor protection rules to prevent the same saga from occurring again.

In particular, the amendment of the Securities and Futures Ordinance in 2011 gave the Hong Kong Securities and Futures Commission (HKSFC) the power to authorise 'structured products'[41]. S 104A(1) of the HKSFO states that '[o]n an application by any person, the [HKSFC] may authorize a structured product, subject to the condition specified in subsection (2) and to any other conditions it considers appropriate'. S 104A(2) only specifies that for a structured product a financial institution must provide a person approved by the HKSFC to be the 'approved person' who will be the main contact for USIPs sold in Hong Kong.[42] The prior authorisation requirement for USIPs seems to be consistent with the regulation of collective investment schemes.[43] This is in addition to an investment advisers' obligation to understand a product.[44] Further procedural details are provided in the FAQ section of the HKSFC's website.[45]

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[40] Hong Kong Securities and Futures Commission, *Issues Raised by the Lehman Minibonds Crisis: Report to the Financial Secretary* (2008) 28 <http://www.sfc.hk/sfc/doc/EN/general/general/lehman/Review%20Report/Review%20Report.pdf> accessed 7 January 2014.

[41] The term is defined in the Securities and Futures Ordinance (Hong Kong) cap 571, Schedule 1 s 1A (HKSFO).

[42] HKSFO s 104A(2) and (3).

[43] HKSFO s 104, See also Code on Investment-linked Assurance Schemes (Hong Kong, 2010) and Code on Unit Trusts and Mutual Funds (Hong Kong, 2010).

The Code of Unlisted Structured Investment Products (the 'Code') sets out more detail, including the eligibility requirements for a product issuer or a guarantor[46] and certain requirements regarding the form of product documentation and advertisement materials,[47] some post-sale obligations (eg, continuing disclosure obligations)[48] and a cooling-off period of at least five days.[49] In addition, Hong Kong law also require USIPs to meet certain minimum requirements or specifications. For example, the reference assets of USIPs must be acceptable to the HKSFC.[50] The HKSFC will consider whether the performance of an index or a basket of shares could be controlled or influenced by one party or a group of parties.[51] The HKSFC requires a guarantee or collateral securing USIPs to meet certain standards.[52]

In short, Hong Kong seems to adopt the approach that new USIPs must be authorised by the financial regulator, along with certain minimum standards. In this way, the HKSFC can ensure that a USIP meets certain specifications without the regulator conducting a full substantive review. We will further examine Hong Kong's approach in Part IV.

C. Taiwan

Since the collapse of Lehman, over 60,000 complaints have been filed with the Bank Association of Taiwan for mediation or adjudication,[53] resulting in over 100 lawsuits before the end of 2010 alone.[54] The first regulatory response was to issue new 'Regulations Governing Offshore Structured Products' in 2009 (amended in 2010) to strengthen the regulatory regime for offshore structured notes. The Financial Consumer Protection Act (FCPA) was passed in 2011 to

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44 Hong Kong Securities and Futures Commission, FAQs on 'Suitability Obligations of Licensed and Registered Persons who are Engaged in Financial Planning and Wealth Management Business Activities' <http://www.sfc.hk/web/EN/faqs/intermediaries/supervision/suitability-obligations-of-investment-advisers/2007-05-08.html#3> accessed 7 January 2014.

45 Hong Kong Securities and Futures Commission, Procedures of Application for Authorization Relating to Structured Investment Products under the Code on Unlisted Structured Investment Products <http://www.sfc.hk/web/EN/faqs/product-authorization/procedures-of-app-for-auth-relating-to-sip-under-the-code-on-unlisted-structured-investment-products.html> accessed 7 January 2014.

46 Code of Unlisted Structured Investment Products (Hong Kong), Chapter 3 (USIP Code).

47 USIP Code, Chapter 6 and Appendices C and D.

48 USIP Code, Chapter 7.

49 USIP Code, 8.3.

50 USIP Code, 5.7 and 5.8.

51 USIP Code, 5.7.

52 USIP Code, 5.9 to 5.17.

53 Bank Association of Taiwan <http://www.ba.org.tw/all.aspx?sn=673> accessed 15 March 2013.

54 Chen (n 5) 165.

impose some general duties on financial firms, including the general principle of fairness, a duty to know a customer and conduct a suitability assessment and a duty to explain the product[55]. The FCPA also created a statutory cause of action to allow customers to claim compensation if there is misselling of financial products.[56] The Financial Ombudsman Institution,[57] an alternative dispute resolution channel for financial consumer complaints, opened its doors in January 2011.

With regard to produce intervention, a key regime in terms of the topic of this article is to require a self-regulator to review a USIP before it is offered to retail customers.[58] The regulator also reserves the power to ban a product if it may endanger the market.[59] To help a self-regulatory body review a USIP, the FSC published a guideline in 2010 to assist self-regulatory bodies to review USIPs.[60]

Two further points are worth noting at this stage. First, the prior review regime for USIPs follows a similar regime for offshore investment funds.[61] This is similar to Hong Kong's approach. Second, the new rules issued under the FPCA specify that banks or securities firms must evaluate the suitability of a financial product for a customer, and that banks should also set up an internal product review committee to review financial products before they hit the shelf.[62] The risk level of a product is singled out as a factor that a firm must specify.[63] However, unlike Singapore, there is no further requirement for a product to be approved by senior management. Nor is there any need to acquire prior approval from the FSC itself. It is also unclear whether a bank's duty ends when it duly sets up a product review committee. Unlike Hong Kong, there is also no specific minimum standard for USIPs under Taiwan. This may undermine the effectiveness of Taiwan's approach, which will be further examined in Part IV.

[55] Financial Consumer Protection Act (Taiwan), art 7 to 10 ('FPCA').
[56] FPCA art 11.
[57] FPCA art 13.
[58] Regulations Governing Offshore Structured Product (Taiwan), art 18-19 ('TWOSP Regulations').
[59] TWOSP Regulations, art 19(3).
[60] Regulations of Review and Management of Offshore Structured Products (Taiwan), art 8 to 16, and 18-20 ('TWOSP Review Regulations').
[61] Regulations Governing Offshore Funds (Taiwan), art 27.
[62] Rules Governing Financial Services Firms Ensuring Financial Products or Services Suitable for Financial Consumers (Taiwan), art 6.
[63] Ibid.

IV. LOOKING FOR A GATEKEEPER – A COMPARISON

In Part III, we have introduced new rules in the Three Asian Tigers. In this part, we will further compare the approaches taken in the three countries. On the face of it, it is a choice between relying on a firm's internal safeguard or an external control. Singapore has adopted the former approach, whereas Hong Kong and Taiwan have chosen the latter. We will argue that the success of the 'gatekeeper approach' lies on the accountability of such a gatekeeper and how the gatekeeper conducts its review. To view from this light, each jurisdiction's approach has its own merits but each has its problems, which reflect the difficulty to conduct *ex ante* review for financial instruments. In the end, we will reflect upon the rules in the three jurisdictions and consider the future of product intervention for complex financial instruments.

A. The Impracticality of a Substantive Review by a Third Party

We may first consider whether it is feasible to have a credible third party (e.g. government, trade association, professional firms, etc) to review the merit of a retail investment product in order to prevent unsuitable financial instruments reaching the hands of retail customers? This would represent a strong form of product intervention. However, this article will argue that the nature of investment and financial instrument makes it quite difficult to define the suitability of a USIP in advance. This underlines the approaches taken in the three jurisdictions.

First, the nature of investment implies taking risk so that there is no real safe financial product in any sense. As Professor Benjamin asks: 'What does it mean to protect consumers when they are sold financial risk positions'?[64] The basic rule of finance tells us that a higher return must be accompanied by higher risk. It is thus impossible to have a truly 'safe' financial product. This makes financial products different from food and drugs, whose toxicity may be tested and tried in a lab.

[64] Benjamin (n 13) 800.

Second, unlike food or drugs, there is no universal measure on the suitability of a financial instrument. Suitability can only be measured in relation to a customer. A speculative USIP may be suitable for a billionaire, but not necessarily for a middle-class retiree. Without target customers or customer segments, a product reviewer could at best second-guess the risk appetite of a target group of customers and their investment purposes so as to determine a product's suitability. This may undermine the effectiveness of any *ex ante* review regime.

Third, even if we focus only on the risk of a USIP,[65] it is problematic to define the riskiness of a product with a single label, given that an investment in a USIP could be exposed to a variety of risks (e.g., market risk or liquidity risk). Moreover, it is also quite obscure how risky that a product must be to be classified as 'highly risky' (or in contrast, low risk or medium risk). This requires further study not only in the finance sphere but also in other disciplines (such as psychology) to better understand the gap between a valuation model and investors' cognition of risk. Without further elaboration, any *ex ante* review based purely on the riskiness of a USIP could be arbitrary and even misleading. In fact, many Lehman-related structured notes would have been reasonably safe (with decent collateral and carefully chosen reference entities) had Lehman not filed for bankruptcy protection. This shows that the analysis of risk of a USIP must have multiple facets. This undoubtedly increases the difficulty of a third party reviewer to review the riskiness of a product.

Fourth, a more balanced view is that a third party reviewer could examine whether the reward offered by a USIP is sufficient to meet the risk of the product. A product might be unsuitable if it offers limited gain against total or unlimited loss. Taking equity-linked investments (ELIs) embedded with a put option—a product popular in Hong Kong after the financial crisis—as an example, investors have to put in a lump sum of money as the principal amount and receive a higher interest payment by selling a put option to a counterparty bank. The premiums for the put option make up for the higher interest rates. However, the gains from these ELIs are usually limited (as there is no capital gain), yet investors may lose all of their

[65] Tradition, risk has been the main focus of the suitability assessment. Chen (n 4) 319-320, citing Stephen B Cohen, 'The Suitability Rule and Economic Theory' (1971) 80(8) Yale LJ 1604, 1606.

investment if the market goes down.[66] This raises the question of whether products of this kind should be precluded from the market, which may not be perceived by some customers as fair.

If we use this criterion, then a product should be prevented from entering the market if there is a risk-reward mismatch. However, if we choose this standard, a third party reviewer must examine the pricing models adopted by different banks and their various underlying assumptions and the use historical data, which may vary from the one bank to another. This may raise concerns about whether a reviewer is only capable of reviewing the risk-reward match with hindsight. Without a consensus on how best to price a USIP among academics and market participants, a universal pricing approach could stifle market innovation and open the door for arbitrage.

In sum, this article argues that it is not feasible to require a third party to conduct a substantive review of the merits of USIPs before they are sold. On this basis, we can then move on the compare and discuss the approaches taken in Singapore, Hong Kong and Taiwan.

B. Enhanced Internal Safeguard Approach in Singapore

There are a few benefits of Singapore's approach to enhance internal safeguard of a financial adviser. First, it may save regulatory costs and it is more flexible. It is also relatively easy to comply with, and thus offers more certainty. The regulator only has to investigate and inspect to ensure that the firm is in full compliance with the rules. Second, Singapore's approach may avoid the problems of having a third party conducting a substantive review of a USIP, as senior management of a firm should have access to more detailed information about target customers and the pricing model of a USIP that the firm plans to sell. Third, by placing more emphasis on the approval of senior management, it also maintains some room for the development of new products for suitable customers. There is also less danger of hindsight by the regulator. There is no reason to suggest that the MAS could do a much better job if all senior

[66] For example, 'Non-Capital Protected Unlisted Callable Equity Linked Investments Linked to a Basket of Securities' offered by the Standard Chartered Bank in Hong Kong, which received authorisation on 31 January 2013. See Hong Kong Securities and Futures Commission, List of Investment Products <http://www.sfc.hk/productlistWeb/searchProduct/SIP.do> accessed 7 January 2014.

executives of the board of a financial adviser, who should be fit and proper,[67] approve the suitability of a product.

However, a deeper question is how to ensure senior executives fully complying with the enhanced product due diligence requirement. Apart from direct regulatory pressure, there could be two regimes under Singapore law. First, non-executive directors may play its role. Although it has been argued that '[i]t would be extraordinary if non-executive directors were to be excluded [from the product due diligence exercise]'[68], the role of a non-executive director in product due diligence is not very clear, apart from asking questions, giving advice or urging executives to carefully consider the suitability issue. While the product due diligence exercise does not require the approval of non-executive directors, the presence of non-executive directors might also raise an issue whether the board needs to reach a unanimous decision if the suitability of a USIP is discussed at a board meeting.[69] There is no clear answer to these issues so far.

This article argues that it should be correct to leave non-executive directors out of the product due diligence exercise. After all, they are not part of the management team and are not involved in day-to-day operation of a firm. To require non-executive directors to be personally satisfied with the suitability of a new USIP may place undue burden on non-executive directors, who might not have sufficient knowledge or experiences on details of complex financial instruments. However, non-executive directors can still make their opinions known. Thus, they should be helping executives to make a correction and supervising them complying with rules. However, they need not be part of the product due diligence exercise. Nonetheless, it may be too naïve to believe that non-executive or even independent directors alone would be sufficient to warrant the compliance with product due diligence requirement.

Second, the success of Singapore's approach eventually depends on directors' liability when they approve a new USIP when they are not 'personally satisfied' with its suitability. However, under Singapore law, a director is allowed to delegate his power or authority to other managers,[70] and in general Singapore courts will be 'reluctant to take to task a director who has

[67] See Guidelines on Fit and Proper Criteria (Singapore, FSC-G01, 2012).
[68] Low (n 38) 310.
[69] Low (n 38) 310.
[70] Companies Act (Singapore, cap 50, 2006 rev ed) s 157C.

bona fide delegated his functions and/or powers to competent subordinates.'[71] The MAS also allows the board to unanimously designate another person to be responsible for undertaking the suitability review.[72] If the board decides to delegate its power to subordinates, then its role is reduced to supervision[73] and every member of the senior management must ensure that the designated person fulfils the requirements.[74]

In reality, the development of a new product is in all likelihood bottom-up, and the responsibility of senior management is likely to be limited to supervising the suitability of the end product. Thus, directors may not be found liable if they reasonably rely on the opinion of their subordinates (or even fellow directors) on the suitability of a product, unless they have personal knowledge and experience of making such judgments.[75] The regulator may also face a similar problem if it tries to penalise a firm for failure to comply with the product due diligence requirement.

Moreover, the Financial Advisers Act and the Financial Advisers Regulations do not create a direct cause of action to allow an investor to sue the senior management for damages if they fail to comply with the product due diligence requirement. Thus, the only person to pursue a director's liability must be the company. Nonetheless, the company probably would not have sufficient incentives to pursue an executive for approving an unsuitable product unless the company is held liable for its customers or is fined by the regulator. As Singapore court has not shown much favour to investors claiming misselling of structured notes[76], it is doubtful how far the company might be willing to pursue the liability of its senior management for the failure to comply with the product due diligence requirement.

Therefore, this article is not too optimistic that directors will be liable for breaches of the product due diligence rules in Singapore, except when there is a clear drop in the standard of care

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[71] *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162, [20] (VK Rajah JC)(High Court)(*Vita Health*).
[72] SGFAR Reg 18B(4).
[73] *Vita Health* (n 71) para [21].
[74] SGFAR Reg 18B(4).
[75] *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 (Yong Pung How CJ)(High Court). See also Low (n 38) 306.
[76] In 2013, the Chief Justice of Singapore overwhelmingly dismissed a plaintiff's claim of a bank misselling structured investment product, overruling the High Court's decision that was in favour of the investor. This sets the tone of current Singapore law. See *Deutsche Bank AG v Chang Tse Wen* [2013] SGCA 49, overruling *Deutsche Bank Ag v Chang Tse Wen* [2012] SGHC 248, [2013] 1 SLR 1310.

exercised or when a director otherwise breaches his or her duties. It remains to be seen how the courts will set the standard for the executives of financial institutions with regard to product due diligence requirements.[77] This article does not suggest that the court should take a more active stance in the case of product intervention than the court normally does in other company cases. However, if so, the reliance on the liability rule to ensure the quality of the product due diligence exercise may be questionable.

C. External Safeguard in Hong Kong and Taiwan

The approaches adopted by Hong Kong and Taiwan counts on a third party institution to give a green light to a new USIP before it hits the market. However, we also see that Hong Kong and Taiwan differ in certain regards.

The primary difference between Hong Kong and Taiwan is that Hong Kong relies on the securities regulator, whereas in Taiwan the responsibility belongs to a self-regulatory body. It worth noting that Taiwan's approach has the benefit of having a credible third party institution to conduct prior product review without having the government directly stepping into the mud. On the one hand, Taiwan's approach may prevent the general public from having the impression that a certain financial product has the government's backing or is even guaranteed by the government to be 'safe'.[78] On the other, the regulator could still control the product intervention regime by monitoring the self-regulatory body that is responsible for product review.

A bigger issue is how to review a product. In Hong Kong, the website of the HKSFC explains that the '[HKSFC] authorisation involves the review of offering documents, and in some cases the structural features of a particular product, to see if certain impartial benchmarks are met and the required information is disclosed.[79] The objective is to enhance product

[77] Low (n 38) 305-306.

[78] Even in Hong Kong, to avoid giving a false sense of safety to retail investors, the HKSFC requires a firm to place a disclaimer in product documentation stating that 'The Commission takes no responsibility of the contents of this document, makes no representation as to its accuracy or completeness and expressly disclaims any liability whatsoever for any loss howsoever arising from or in reliance upon the whole or any part of the contents of this documentation. The Commission's authorization does not imply its endorsement or recommendation of the structured investment products referred to in this document.' USIP Code, Appendix, para 33.

[79] Hong Kong Securities and Futures Commission, List of Investment Products <http://www.sfc.hk/productlistWeb/searchProduct/main.do> accessed 7 January 2014.

disclosure and to increase transparency with respect to investment products offered to the public in Hong Kong.[80]

Therefore, it seems that the HKSFC only reviews product documents to ensure that the language used and information given meet the regulatory standards set out in the Code of Unlisted Structured Product. This fits into Hong Kong's disclosure-based approach to regulate financial products.[81] Although an applicant must submit details of any valuation policy or methodology in respect of a USIP,[82] there is nothing to suggest that the HKSFC will review its substance.

Given the difficulty of conducting a meaningful review of the merits of complex financial products, it seems reasonable that the HKSFC only commits to review product documentation and to ensure that product disclosure rules have been properly complied with. However, Hong Kong law complements the prior authorisation regime by implementing certain minimum standards, which could be deemed by the general public to be a proxy for unsuitable products. With some minimum standards, at least the regulator can avoid firms offering extraordinarily exotic products to retail customers while maintaining the disclosure principle for the financial market. If we follow this approach, the next question is how to set the minimum standard. This will be further discussed in the next section.

In contrast, the main problem in Taiwan is that it is unclear how a self-regulatory body will review a USIP. By assigning the responsibility to a self-regulatory body, Taiwan's financial regulator seems to expect that a self-regulatory body could review the merit of a USIP. However, it is doubtful whether the members of a review committee, who are normally scholars or professionals, will have sufficient understanding of the market and the product itself to conduct a meaningful review.

The regulator does not offer much guidance. The guideline issued by the Financial Supervisory Commission (FSC) mainly deals with the formation of the review committee and certain procedural issues (e.g., the appeals process and costs).[83] Other key points in the guideline

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[80] HKSFC, 'Consultation Paper on Proposals to Enhance Protection for the Investing Public' 15 (Sep 2009) in <http://www.sfc.hk/edistributionWeb/gateway/EN/consultation/doc?refNo=09CP3> accessed 6 January 2014.
[81] HKSFC (n 44) 8.
[82] USIP Code, Appendix C paragraph 40.
[83] Regulations of Review and Management of Offshore Structured Products (Taiwan), art 8 to 16, and 18-20.

include the form of documentation,[84] the eligibility of the applicant[85] and information that should be disclosed (such as financial statements, reference prices and material changes in credit ratings).[86] It is certain that the self-regulatory body in Taiwan must also review the risk level of a USIP based on information provided by the applicant.[87] The self-regulatory body could reject a product if it is too risky.[88] However, it is still quite obscure as to how the review committee will review the risk level of a product.

Otherwise, there are few clues as to how a product committee would review a USIP. Current Taiwan law does not set out any minimum standard as Hong Kong does. Without more concrete standards, the effect of having a separate panel to review a product under a self-regulatory body might be much diluted. This may hinder financial innovation if a review committee is hostile toward a product that they do not understand well. However, the product intervention regime may not be much more than a formality if they look no further than the form of product documentation.

Moreover, it is also not clear about responsibility that a self-regulatory body or committee members would assume. If they will be found liable for the failure of a product that they have reviewed, then it is foreseeable that self-regulatory bodies will have significant difficulty in finding suitable persons to conduct a meaningful review. However, if there is no liability at all, there is very little control of the quality of a product review. If this is the case, it may undermine the overall effectiveness of Taiwan's approach.

In sum, by comparing the rules in Hong Kong and Taiwan, we find that it is necessary to identify clearly a regulatory objective, which may provide a guiding principle for product intervention. This provides the contrast between Hong Kong and Taiwan. Given the difficulty of a substantive review, Hong Kong places the responsibility with the regulator to mainly review the quality of disclosure documents. In contrast, Taiwan fails to clarify the responsibility and liability of a self-regulatory body when it commits to review a new USIP. Those factors show that the product intervention regime in Taiwan probably would not work as it is intended.

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[84] Ibid, art 4 to 5, 17.
[85] Ibid, art 17.
[86] Ibid, art 6 to 7, 17.
[87] Ibid, art 17.
[88] Ibid.

D. Towards a Minimum Standard Approach?

Given the potential deficiency of relying on internal safeguard or an external product reviewer, one might ask whether we should simply set out some minimum standards for USIPs, like minimum safety standards for food and drugs, if our goal is to reduce the chance of 'toxic' financial products reaching retail customers. The beauty of this approach is that we may preclude products with certain features from entering into the market in the first place without relying somebody (senior management, government or self-regulatory body) to determine its suitability. This is similar to the prohibition of poisonous food or unsafe goods.

However, a bigger question is how to determine appropriate minimum standards without stifling financial innovation and opening rooms for regulatory arbitrage. This underlines the challenge to reconcile product intervention with traditional disclosure principle. Do we still have to specify some unwanted features of USIPs if investors are given a chance to fully understand what they are purchasing? This is a question that this article cannot fully develop, but it may worth to consider in the future after examining the long-term effect of the approaches taken in the Three Asian Tigers. Against this backdrop, we will examine a few possible minimum standards in the next few paragraphs. We will also examine the minimum standards adopted under Hong Kong law.

First, following our discussion of suitability above[89], one simple standard could be that a USIP should not be too risky or with a reward-risk mismatch. However, as discussed above, it is not easy to prescribe a clear standard defining the riskiness of a product or the risk-reward mismatch with a simple label. In addition, if we use suitability (whatever the concept it may connote) as a minimum standard, it will then become a circular question regarding who and how to determine suitability of a USIP.

Moreover, if all USIPs must offer as much payout as potential losses, then they could become ever more speculative and might not be suitable for the mass market. This may already have happened to many Chinese banks, which are now trying to find ways to offer higher returns

[89] See above Part IV.A.

to satisfy customers.[90] This phenomenon may further endanger a bank's off-balance sheet risk exposure, as it will have to find ever more exotic ways to generate income.[91]

Second, another possible standard is to limit the type of structure that a firm can apply to a USIP (e.g. not something as complex as collateral debt obligations). However, the market reality is that USIPs satisfy the demand of middle-class investors who want a fixed income without too much speculation. It is arguable whether the state should behave like a nanny to prevent a USIP from the market if it is too complex, if there is sufficient security and a customer is fully aware of the substance and risk of a USIP. It is also arguable how complex is too complex to justify product intervention.

In addition, many financial products do not have strict and precise legal definition. If the definition of a particular transactional structure or product is not properly defined, legal uncertainty and regulatory arbitrage might take place. From an economic point of view, it has been argued that the market is more efficient with a variety of products on offer.[92] If we follow this view, there is no particular need to limit the type of structure or dismiss a USIP merely because they look complex.

Third, we might preclude certain asset classes from retail investors. The minibond saga in Hong Kong and Singapore indicates that credit-linked products (i.e., credit risk as an underlying asset) may not be desirable for retail customers. New Hong Kong law requires that the reference assets to which a USIP is linked should be acceptable to the regulator,[93] while Singapore and Taiwan law offers no such rule. In fact, most of the USIPs sold in Hong Kong since 2010 have been equity-linked products.[94] It is hard to say what asset classes other than equity and gold are or will be allowed in Hong Kong.

A more difficult task is to identify the asset classes that are acceptable or should be excluded. For example, credit-linked products often refer to corporate or sovereign bonds, which are perfectly normal investment instruments. Had it not for the collapse of Lehman (as arranger,

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[90] See above n 2.
[91] Ibid.
[92] Frank Partnoy and David A Skeel, Jr, 'The Promise and Perils of Credit Derivatives' (2007) 75 U Cin L Rev 1019, 1027-1028; Dan Awrey, 'The Dynamics of OTC Derivatives Regulation: Bridging the Public-private Divide (2010) 11(2) European Business Organization Law Review 155, 171-172.
[93] Hong Kong USIP Code, 5.7.
[94] Above n 66.

issuer or guarantor), many credit-linked notes in Hong Kong or Singapore might have been reasonably safe. Thus, it may not be entirely fair to denounce credit-linked notes merely because they caused problems in 2008.

Moreover, more popular asset classes such as equities, commodities (such as gold) or foreign exchange rates can still be very risky. The general public may have more channels to find out about the movement of stock or commodity prices, but this does not mean that equities or commodities must be in general safer than other less conventional asset classes such as credit. In addition, even if we accept that credit-linked products are not convention, some popular rates such as interest rates or currency rates pose further problems. On the one hand, those rates are commonly used in real life and investors could easily track daily fluctuation of those rates. However, interest rate-linked or currency-linked USIPs could be much more complex than a credit-linked note. To take the dual-currency investment product sold by HSBC in Taiwan as an example, how much an investor could earn has to depend on the relationship between US dollar and Euro, with the investment placed in US dollar rather than in New Taiwan dollar.[95] While it is not difficult to find out the exchange rate between New Taiwan dollar, US dollar and Euro at any single day, the product is undoubtedly complex and ordinary investors may find it quite difficult to understand. This shows that the riskiness of a product also depends on how a product is structured. The underlying asset offers a starting point but it does not represent the whole story. Therefore, merely focusing on the class of underlying asset may miss the big picture.

In Hong Kong, the HKSFC will only consider a reference asset to be eligible if it is listed on the Hong Kong Stock Exchange with sufficient information available to the general public.[96] In contrast, Taiwan law provides that USIPs should not refer to stocks traded on the Taiwan Stock Exchange.[97] Though Taiwan's regulator offers no explanation of the rule, the reason may be due to foreign exchange control as the Central Bank does not want local investors to invest in local stock market via an offshore structured instrument. Nonetheless, the side effect is that the rule may increase the chance that a retail investor would not understand a USIP because reference entities are all foreign institutions. In contrast, Hong Kong law ensures that underlying

[95] See website of HSBC Taiwan: http://www.hsbc.com.tw/1/2/commercial-zh-TW/investments-tw/super-yield-investment-tw (assessed 20 January 2014).
[96] Above n 66.
[97] TWOSP Regulations, art 18.

assets to a USIP are local exchange-traded asset so that investors still have easy access to information, though the restriction under Hong Kong law might reduce the appeal of some USIPs. This shows that restricting the type of underlying assets may have other unintended effect.

Fourth, if receiving a fixed income is behind many investments in USIPs, then we should consider whether retail USIPs should be secured so that investors will not have to take on much of the counterparty's credit risk when the investment matures. This corresponds to the problems seen in the structured fiasco in Asia, and may also address the problems currently experienced in China, where a bank has failed to repay wealth management products.[98] From this perspective, it may be suitable to have a minimum standard that USIPs must be secured by proper collateral.

In addition, the effectiveness of collateral depends on its quality. For example, the HKSFC requires that the collateral for a USIP (if any) must be either in cash or be liquid and transferable.[99] In addition, there must be an active secondary market for the collateral that should have a decent credit rating, and the collateral should not be issued by a party relevant to the product issuer or arranger or itself be a structured product.[100] This is to prevent a situation in which the issuing of structured notes is secured by another series of risky structured notes that loses significant value, as occurred during the financial crisis.[101] For example, in Singapore, there have been instances where collateral (in the form of debentures) has collapsed because it was another issue of structured notes somehow linked to Lehman.[102] Hong Kong has rightly imposed some minimum standards to address these concerns.

So far, only Hong Kong law has prescribed some standards regarding collateral.[103] However, even Hong Kong law falls short of requiring all USIPs to be secured by collateral. While this article argues that there is no need to restrict the underlying structure or underlying asset of a USIP, this article suggests that regulators should consider requiring it to be secured by proper collateral, especially when a USIP is in the form of a debt instrument. Unlike structured

[98] Reuters reported in December 2012 that Hua Xia Bank in China failed to repay a product upon its maturity, causing concerns for Chinese bank regulators. Michael Flaherty and Kelvin Soh, 'Too Big to Fail? China's Wealth Management Products Stir Debate', *Reuters* (19 December 2012) <http://www.reuters.com/article/2012/12/19/us-china-investment-wealth-idUSBRE8BI1GV20121219> accessed 7 January 2014.
[99] USIP Code, 5.13(a).
[100] USIP Code, 5.13(b) to (e).
[101] Chen, above n 4, 323.
[102] Pinnacle Notes in Singapore was an example of the collapse of Lehman leading to the failure of the collateral securing the notes. MAS (n 6) 4.
[103] Hong Kong USIP Code, 5.13.

deposit where customers might count on the counterparty banks' reputation and capital adequacy (though structured deposit is usually not covered by deposit insurance), retail investors of structured notes are exposed to the counterparty risk of the issuer, which is normally a special purpose vehicle that does not have a lot of capital. Given that structured notes would attract middle-class investors with a demand for higher fixed income, this article believes that structured notes are better to be secured by proper collateral in order to control the credit risk facing investors.

In sum, although a minimum standard approach may sound appealing following the collapse of Lehman, the difficulty lies on how to determine these minimum standards. Hong Kong law may offer the first step towards such an approach. However, Hong Kong law currently only focuses on asset class and the quality of collateral, and does not answer the most critical question of whether we should exclude less conventional reference assets from retail USIPs and whether USIPs should all be secured. This may be something that Singapore and Taiwan might consider in the future.

E. Lessons for the Future

From the discussion above, this article has shown that it is unrealistic to have a regulator or a third party to conduct a full review of the merits of a financial product due to the nature of investment. Singapore's approach to enhance internal safeguard may avoid problems associated with an external reviewer, but it is not apparent whether there will be sufficient liability or internal check-up to ensure that the internal safeguard will work effectively.

Is it better to rely on a third party to review a USIP *ex ante*? In Hong Kong, the regulator would step in but only to ensure the quality of disclosure documents that will be available to retail investors. This allows Hong Kong's regulator to steer away from conducting substantive product review. Yet Hong Kong law offers some minimum standards to ensure that USIPs must meet certain minimum specifications. While Hong Kong's approach seems to be plausible, Hong Kong's regulator is not really a gatekeeper of unsuitable financial products. We should also note that minimum standard in Hong Kong is rather limited.

In contrast, Taiwan's approach is to place the responsibility of product intervention on a self-regulatory body. While the idea looks sensible, Taiwan law fails to provide more concrete standards regarding how to review a USIP and to clarify the accountability of the self-regulatory body. These issues have to be addressed in order to make the regime in Taiwan more meaningful in the future.

Based on the discussion above, this article is of the view that the role of product intervention by *ex ante* review is limited due to the nature of financial investment and the lack of proper standard to define suitability in advance. This does not mean that we must denounce the approaches taken in the Three Asian Tigers. This article does not suggest that product intervention must be conducted in a certain way or for a certain purpose. It will take some years and probably a few more scandals for us to fully realise the effectiveness of the product intervention regimes in the three jurisdictions. For now, there are three key lessons that we can learn from the rules in the Three Asia Tigers.

First, it is necessary to identify clear regulatory objectives for product intervention. Hong Kong law makes it clear that the prior authorisation regime is meant to strengthen product disclosure. If we follow this line, then the next question is whether strengthening disclosure alone would be sufficient to protect financial consumers. It is a policy question that should be subject to regular public debate in the future.

Second, if the goal of product intervention is to prevent unsuitable products from reaching retail customers, we should carefully consider the accountability and potential liability of the person designated as the gatekeeper, no matter we rely on enhanced internal safeguard (as in Singapore) or an external reviewer (as in Taiwan). Given the difficulty to conducting a substantive review of the merit of a USIP, Singapore's approach has some edge over Taiwan's. The biggest problem in Taiwan is that the product review by a self-regulatory body lacks clear purpose and guideline, though the idea may have some advantage. However, in both jurisdictions, it remains unclear how likely the senior management of a firm or a self-regulatory body will be liable for their failure to spot unsuitable financial products. This is an underlying problem if we want to establish a gatekeeper to filter unsuitable retail financial products.

Third, we may further consider establishing some minimum standards and/or to substantiate some features of a USIP that the government deems to be unsuitable to retail customers. Although there are still considerable difficulties in establishing clear minimum standards without stifling financial innovation or having some other unwanted effects, this may be further considered via policy debates. Hong Kong law has fired the first shot, but there is still considerable room for further discussion.

V. CONCLUSION

Product intervention is a prominent feature of the current round of regulatory reforms for complex financial products in the Far East. We have found different approaches taken in the Three Asian Tigers to reduce the chance of unsuitable products entering into the market or to improve product disclosure. Probably only time will tell whether the new measures put in place in Singapore, Hong Kong and Taiwan are up to the challenges of the modern financial world. However, the approaches taken in the three jurisdictions might offer some lessons for other countries to take note.