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I. INTRODUCTION

From the enactment of the Sarbanes–Oxley Act[1] in 2002 through 2008, influential voices in the political, business, and academic communities expressed growing concern that the U.S. capital markets were losing their competitive advantage.[2] While commentators identified a number of factors as contributing to this decline, they singled out, in particular, higher U.S. regulatory compliance costs and liability risks. The U.S. Department of Treasury, under the leadership of Treasury Secretary Henry Paulson, spearheaded efforts to reexamine regulatory structure and emphasized the competitive pressures that foreign markets posed for the U.S. securities markets.[3] The Treasury's *Blueprint for a Modernized Financial Regulatory Structure*, released in March 2008, warned that the "threat to U.S. competitiveness appears to be real and growing"[4] and urged reforms "to protect the competitiveness of the U.S. public capital markets."[5]

The Securities and Exchange Commission (SEC), in turn, considered a number of deregulatory proposals that would ease barriers to entry. Thus, in 2008, the agency eliminated the requirement that foreign private issuers selling securities in the U.S. restate their financial statements, prepared under International Financial Reporting Standards

* Charles Hartsock Professor of Law and Director, Corporate Law Center, University of Cincinnati College of Law. The Twenty Third Annual Symposium, Globalization of Securities Markets: Competition or Coordination?, was held on March 5, 2010. This Introduction bears the date of October 10, 2010.

1. 15 U.S.C. § 7201 *et seq.* (2006).

2. *See, e.g.*, COMM'N ON THE REGULATION OF U.S. CAPITAL MARKETS IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS (2007) (sponsored by the U.S. Chamber of Commerce); Kate Litvak, *The Effect of the Sarbanes–Oxley Act on Non U.S. Companies Cross-Listed in the U.S.*, 13 J. CORP. FIN. 196 (2007).

3. COMM. ON CAPITAL MKTS. REG., INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 3–4 (2006) (the "Paulson Report") (describing globalization of the capital markets as a significant development and noting that foreign capital markets, unlike the U.S., often benefit from more adaptive regulatory structures).

4. U.S. DEP'T OF TREASURY, BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE 1 (2008).

5. *Id.*

(IFRS), to conform to U.S. Generally Accepted Accounting Principles (GAAP).[6] The SEC also released a Roadmap that set forth a process that would lead to the use of IFRS by domestic issuers in 2014.[7] It launched a mutual recognition program that would exempt foreign stock exchanges and foreign broker–dealers from SEC registration so long as they complied with home-country regulations deemed compatible with U.S. regulation.[8] The SEC also proposed a rule that would increase the range of services foreign broker–dealers could offer in the U.S. without registering with the agency.[9] While the rationale for these actions was to increase market efficiency and liquidity and enhance investor protection,[10] the SEC was likely influenced as well by the perception that the U.S. capital markets no longer possessed their previous dominance.

The global financial meltdown of 2008, however, changed the tenor of the discussion and brought an increased awareness of the interconnectedness of the markets, the need for more effective regulation to deal with systemic risk, and the importance of a coordinated approach toward securities regulation.[11] In contrast to the prior deregulatory approach, the Obama Administration's *Financial Regulatory Reform* called for strengthening international cooperation to raise international regulatory standards.[12] Its proposed reforms included improved

6. Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards Without Reconciliation to U.S. GAAP, Exchange Act Release No. 57,026, 73 Fed. Reg. 986 (Jan. 4, 2008). These developments are analyzed in Steven M. Davidoff, *Rhetoric and Reality: A Historical Perspective on the Regulation of Foreign Private Issuers*, 79 U. CIN. L. REV. 619 (2010).

7. Roadmap for the Potential Use of Financial Statements Prepared in Accordance with International Financial Reporting Standards by U.S. Issuers, Exchange Act Release No. 58,960, 73 Fed. Reg. 70,816 (Nov. 21, 2008). These developments are analyzed in William W. Bratton, *Heedless Globalism: The SEC's Roadmap to Accounting Convergence*, 79 U. CIN. L. REV. 471 (2010).

8. *See* Ethiopis Tafara & Robert J. Peterson, *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT'L L.J. 31 (2007). These developments are analyzed in Chris Brummer, *Territoriality as a Regulatory Technique: Notes from the Financial Crisis*, 79 U. CIN. L. REV. 499 (2010).

9. Exemption of Certain Foreign Broker or Dealers, Exchange Act Release No. 58,047, 73 Fed. Reg. 39,182 (July 8, 2008).

10. *See, e.g.*, Press Release, Sec. & Exch. Comm'n, Statement of the European Commission and the U.S. Securities and Exchange Commission on Mutual Recognition in Securities Markets, (Feb. 1, 2008), *available at* http://www.sec.gov/news/press/2008/2008-9.htm (stating that mutual recognition "offers significant promise as a means of better protecting investors, fostering capital formation and maintaining fair, orderly, and efficient transatlantic securities markets").

11. *See, e.g.*, Timothy F. Geithner, Sec'y of Treasury, Remarks at the Brookings Institution (Oct. 6, 2010) (describing the past two years as a "period of unprecedented international cooperation").

12. U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 8 (2009) (noting that "[w]ithout consistent supervision and regulation, financial institutions will tend to move their activities to jurisdictions with looser standards, creating a race to the bottom and intensifying systemic risk for the entire global

oversight of the global financial markets and the global financial firms whose financial instability caused so much damage to the global economy.[13]

International organizations also came forth with revitalized regulatory agendas that emphasized cooperation. For example, the Financial Stability Forum, subsequently re-established as the Financial Stability Board (FSB),[14] released principles for cross-border cooperation in crisis management in recognition that "the growing interactions between national financial systems require international cooperation by authorities."[15] The principles called for coordinated actions to prepare for financial crises, including the sharing of information and development of common support tools,[16] and internationally coordinated solutions to manage financial crises.[17] In response to the G-20 Leaders' call for a review, the Joint Forum, established in 1996 under the aegis of the Basel Committee on Banking Supervision (the Basel Committee), the International Organization of Securities Commissions (IOSCO), and the International Association of Insurance Supervisors to deal with issues common to the banking, securities, and insurance sectors, released a report that recommended improvements to strengthen financial regulation[18] as part of a global effort to reform and strengthen financial regulation.[19] The report emphasized the systemic risk posed by financial groups that operate "through networks of legal entities and structures" and that "are often active across multiple jurisdictions and with multiple interdependencies."[20] It also articulated as a guiding principle that "[c]onsistent implementation of international standards is critical to avoid competitive issues and regulatory arbitrage."[21]

This Symposium was held on March 5, 2010, while policy makers and regulators were grappling with complex issues of reform and restructure in the aftermath of the financial crisis. Congress was

financial system").

13. *Id.* at 16–18, 80–88.

14. The re-establishment of the Financial Stability Forum as the Financial Stability Board, which included expanding its membership, strengthening its institutional foundations, and enhancing its mandate, is set forth in Robert B. Ahdieh, *Imperfect Alternatives: Networks, Salience, and Institutional Design in Financial Crisis*, 79 U. CIN. L. REV. 527 (2010).

15. FIN. STABILITY FORUM, FSF PRINCIPLES FOR CROSS-BORDER COOPERATION ON CRISIS MANAGEMENT 2 (2009).

16. *Id.* at 2–3.

17. *Id.* at 3–4.

18. THE JOINT FORUM, REVIEW OF THE DIFFERENTIATED NATURE AND SCOPE OF FINANCIAL REGULATION: KEY ISSUES AND RECOMMENDATIONS (2010).

19. *Id.* at 1.

20. *Id.* at 3.

21. *Id.* at 4.

debating the legislation that it subsequently enacted as the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank),[22] and the Basel Committee had released a proposal to strengthen global capital and liquidity requirements (Basel III).[23] How would these competing forces—competition and coordination—play out in the debate? This was the overarching question the panelists addressed in the Symposium and in their articles.

II. THEMES FROM THE SYMPOSIUM

This collection of articles provides a rich and sophisticated commentary on international financial regulation that reflects diverse viewpoints, from which a number of intertwining themes emerge.

First, never underestimate the importance of politics in the debate over regulatory reform. In his study of U.S. regulation of foreign private issuers,[24] Professor Steven M. Davidoff demonstrates that the administrative rulemaking process can be subject to the same political vicissitudes as the legislative process. He provocatively argues that the rhetoric of "mutual recognition" and "global competition" was used to advance "a political economy and interest group story" for the benefit of key business constituencies.[25] The result was deregulation in the name of competitiveness, with reduced concern for protecting retail investors and other domestic interests. As a consequence, regulation of foreign private issuers is "one-size-fits-all" and fails to take into account the different risk profiles presented by Chinese issuers compared with European issuers.[26] This is significant because in the past year there have been fourteen initial public offerings by foreign private issuers in the U.S., eleven of them from mainland China, none of them from Europe.[27]

In his analysis of the contrasting approaches toward global convergence in accounting standards, Professor William W. Bratton also relates a narrative of interest group politics.[28] GAAP, he tells us, "has come to be seen as one of the deadweight domestic regulatory costs that

22. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

23. Press Release, Basel Comm. on Banking Supervision, Consultative Proposals to Strengthen the Resilience of the Banking Sector Announced by Basel Committee (Dec. 17, 2009), *available a*t http://www.bis.org/press/p091217.htm.

24. Davidoff, *supra* note 6.

25. *Id.* at 620.

26. *Id.* at 620, 645.

27. *Id.* at 643.

28. Bratton, *supra* note 7.

make U.S. capital markets unattractive to foreign issuers."[29] In 2008 the SEC, in what Professor Bratton describes as a "global panic attack,"[30] issued its Roadmap that sets forth a process that would lead to discarding GAAP for the use of IFRS by domestic issuers. The SEC thus demonstrated its impatience with the slower, ongoing convergence project of the Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB) to develop compatible standards. Professor Bratton first highlights some normative implications of a switch to IFRS and then develops the argument for the importance of an independent standard-setter. Specifically, he argues that a switch to IFRS would give the preparers of financial statements (managers and auditors) the upper hand over the users of financial statements.[31] FASB achieved public accountability and funding only after many years of hard work and only with SEC support; the IASB, in contrast, is dependent on private funding, principally from auditing firms, and has only recently set up a monitoring board.[32] Professor Bratton argues that the financial crisis has changed the debate and that the Roadmap should be scrapped so that the more deliberative process of convergence can move forward.[33]

Currently, the SEC is still scheduled to decide in 2011 whether IFRS would become exclusive, although SEC Chair Mary Schapiro has stated that the convergence projects currently underway between FASB and IASD must be completed before the decision can be made.[34] The Chairman of the IFRS Advisory Council, however, recently stated that convergence with the FASB would no longer be its prime consideration and that it would instead focus on serving those who have adopted IFRS.[35]

Second, never underestimate the power of global financial conglomerates. Professor James A. Fanto explores whether the dismantling of global financial conglomerates may be warranted because of the economic and political threats they represent.[36] From fall 2008

29. *Id.* at 491.

30. *Id.* at 497.

31. *Id.* at 474.

32. *Id.* at 486.

33. *Id.* at 496.

34. Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n, Speech by SEC Chairman: Statement at SEC Open Meeting – Global Accounting Standards (Feb. 24, 2010), *available at* http://www.sec.gov/news/speech/2010/spch022410mls-accounting.htm.

35. Denise Lugo, *Accounting Principles: IFRS Chairman Says FASB Convergence Not Future Priority, May Approach Others*, Sec. L. Daily (BNA), Oct. 6, 2010.

36. James A. Fanto, *"Breaking Up is Hard To Do": Should Financial Conglomerates Be Dismantled?*, 79 U. CIN. L. REV. 553 (2010).

until mid-2009, the consistent approach of both the Bush and Obama Administrations was to stabilize financial conglomerates, rework their capital support, and oversee their rehabilitation.[37] As a result, the surviving conglomerates returned to profitability, executive compensation increased, and there was greater industry concentration.[38] In its second year, however, the Obama Administration put forth several proposals for breaking up conglomerates, including a tax aimed at large investment banking-dominated conglomerates, the "Volcker Rule" that would prohibit conglomerates from sponsoring hedge funds and engaging in proprietary trading, and size limits on regulated financial conglomerates.[39] Professor Fanto first sets forth the problems caused by financial conglomerates during the financial crisis, often arising from their securities activities: systemic risk, risk management, commoditization and opaqueness of financial products, compensation policies, conflicts of interest, and government support and politics. After reviewing the arguments for and against break-up as well as alternative approaches, he concludes that while many of the problems presented by financial conglomerates argue for their break-up, strong political pressures and the orientation of international financial regulation mean that in all likelihood "conglomerates will endure," even though they cannot be effectively risk-managed.[40]

Indeed, although Congress proclaimed that Dodd–Frank put an end to "too big to fail,"[41] in fact the legislation contemplates modest limitations on the size and riskiness of the global financial conglomerates. The newly established Financial Stability Oversight Council (FSOC) can identify "systemically important" companies and recommend heightened prudential standards,[42] and systemically important companies will be subject to systemic regulation and other fees that might serve as a disincentive to large size.[43] The "Volcker Rule" restricts banks from proprietary trading and limits private equity and hedge fund investments to three per cent of tier 1 capital, phased in over several years.[44] Finally, the Federal Reserve (Fed) can, if it finds that a firm presents a "grave

37. *Id.* at 558–59.

38. *Id.* at 559.

39. *Id.* at 560–63.

40. *Id.* at 585.

41. U.S. SENATE COMM. ON BANKING, HOUSING, & URBAN AFFAIRS, BRIEF SUMMARY OF THE DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 1 (2010), *available at* http://banking.senate.gov/public/_files/070110_Dodd_Frank_Wall_Street_Reform_comprehensive_summary_Final.pdf.

42. Dodd–Frank Act, Pub. L. No. 111-203, §§ 115, 165, 124 Stat. 1376 (2010).

43. §§ 155(d), 318(c).

44. § 619.

threat to the financial stability of the United States," require it to divest assets and activities.[45] In addition, the Basel III standards impose stricter standards for capital, leverage, and liquidity.[46] To date, however, the government's emphasis on preventing "too big to fail" is not on reducing the size of firms. Instead, regulators assert that, under the new regulatory system, firms will have to manage better their risk, and regulators will provide more effective supervision. Furthermore, in the event of firm failure, regulators point to the provisions on orderly liquidation[47] to contain the effects. Thus, Fed Chairman Ben Bernanke identified a three-part strategy to address "too big to fail": (1) reduce excessive risk-taking; (2) implement orderly liquidation; and (3) increase resiliency of financial system.[48] Yet the solution of an orderly liquidation process for global financial conglomerates is untested, and many doubt whether it will work to prevent future financial crises.[49]

Third, while regulators espouse the importance of cooperation and coordination, much work needs to be done to overcome territoriality and competition. Professor Chris Brummer provides a framework for viewing the role of national regulators as sources of international finance law.[50] In particular, Professor Brummer examines the use of extraterritoriality as a regulatory strategy. He argues that "territorial" authority in financial regulation "in practice constitutes a diverse array of tactics employed by national authorities to exert authority over mobile market participants."[51] Because globalization limits the effectiveness of territoriality as a regulatory technique, regulators increasingly emphasize the "softer" process of international cooperative efforts in information sharing and development of norms.[52] He concludes, nonetheless, that territoriality remains a central element in international coordination,

45. § 121. *See* Posting of Simon Johnson to The Baseline Scenario, http://baselinescenario.com/2010/07/09/the-kanjorski-surprise-%e2%80%93-now-it-gets-interesting/ (July 9, 2010, 6:06 AM) (suggesting it could have a meaningful impact on banking industry).

46. Press Release, Bank for Int'l Settlements, Group of Governors and Heads of Supervision Announces Higher Global Minimum Capital Standards (Sept. 12, 2010), *available at* http://www.bis.org/press/p100912.htm.

47. Dodd–Frank Act §§ 201–217.

48. Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Statement before the Financial Crisis Inquiry Commission (Sept. 2, 2010). *See also* Sheila C. Bair, Chairman, Fed. Deposit Ins. Corp., Statement before the Financial Crisis Inquiry Commission (Sept. 3, 2010) (in the event firms do not manage risks better, orderly liquidation will contain the problem).

49. *See, e.g.*, James H.M. Sprayregen & Stephen E. Hessler, "*Orderly Liquidation Authority" under the Dodd–Frank Act*. INSOL WORLD, 3rd Quart. 2010, at 23, *available at* http://www.kirkland.com/siteFiles/Publications/ARTICLES%20-%20PRINTING%20ALLOWED%20-%20INSOL%20World%20-%20Sprayregen_Hessler.pdf.

50. Brummer,*supra* note 8.

51. *Id.* at 501.

52. *Id.* at 524.

even though unilateral, territorially-based regulatory export has become increasingly difficult.[53]

Professor Robert B. Ahdieh and Andrea M. Corcoran, in turn, present complementary approaches to the importance of cooperation and information-sharing to prevent or remediate financial crises and address the limitations on effective cross-border regulation. Professor Ahdieh focuses on the choice of institutional design as he explores what regulatory structures and institutions are likely to be the most effective in preventing and alleviating financial crises.[54] He first sets forth an account of financial crises as grounded in the multiple equilibrium character of the financial markets and develops a framework of the critical determinants of salience—familiarity, visibility, uniqueness, and authority—that institutions should possess in order to coordinate market participants around the high-level equilibrium of lending, investment, and spending. He next explores the role of transnational regulatory networks in the financial crisis and explains that constraints on institutional salience resulted in the networks' limited role in the crisis.[55] Finally, he focuses on the restructuring of the FSB to illustrate certain inherent limits of networks and to suggest institutional reforms that might improve their effectiveness in financial crises.

Andrea Corcoran examines the proposal by the FSB to require biennial peer reviews of the G-20 countries using existing key standards and codes in order to address a key issue: whether enforcement of existing global standards for capital markets, particularly those related to cooperative information exchange, can be expected to prevent or remedy a future financial crisis.[56] She first examines the limitations in the existing IOSCO Standards, particularly gaps in addressing prudential risks and other systemic vulnerabilities and gaps in information sharing. Cooperative information-sharing, she points out, may not be forthcoming where insufficient funds are available to satisfy all claims.[57] In addition, the standards do not adequately address the canon of country specificity and the problem of regulatory arbitrage.[58] She then sets forth a number of proposed reforms in terms of both substance and procedure, while noting the inherent limits on information sharing

53. *Id.*

54. Ahdieh, *supra* note 14.

55. *Id.* at 546.

56. Andrea M. Corcoran, *Globalization Report Cards for Securities Regulators: National Enforcement of International Capital Market Standards for Information Sharing and Cooperation and the Prevention of Financial Crises*, 79 U. CIN. L. REV. 651 (2010).

57. *Id.* at 664.

58. *Id.* at 666–68.

and cooperation.

Fourth, harmonization and centralization are worthy goals to strive for, even if far off. Dodd–Frank underscores the importance of international policy coordination. The statute authorizes the President to coordinate through international policy channels policies to limit the "scope, nature, size, scale, concentration, and interconnectedness" of financial conglomerates.[59] It also mandates the FSOC to consult with its counterparts and international organizations on "matters relating to systemic risk to the international financial system"[60] and the Federal Reserve Board to consult with its counterparts and appropriate multilateral organizations "to encourage comprehensive and robust prudential supervision and regulation for all highly leveraged and interconnected financial companies."[61] Nevertheless, the current system of international securities regulation is essentially based on a model of regulatory competition as nations attempt to attract issuers, investors, and other market participants to their shores. Professor Eric C. Chaffee argues that the current system fostered a "race-to-the-bottom" that culminated in the lax regulation at the heart of the financial crisis.[62] Professor Chaffee articulates a bold alternative vision—a centralized global securities regulator with monitoring, regulating, and enforcement powers that would set a baseline of regulation from which nations could choose to depart upwardly. Professor Chaffee argues that this model would minimize systemic risks, benefit market participants, and allow the U.S. to retain a central role.[63] He then outlines an evolutionary process through two case studies of long-term evolutionary institution building, the development of securities regulation in the U.S., and the development of securities regulation in the European Union. The common characteristics of the two case studies, he argues, "include evolution based on political stress, evolution based on the failure of institutions to achieve their intended goals, and a consistent trajectory toward harmonization and centralization."[64]

III. CONCLUSION

In the post-financial crisis era, there is consensus that the

59. Dodd–Frank Act, Pub. L. No. 111-203, § 175(a), 124 Stat. 1376 (2010).

60. § 175(b).

61. § 175(c).

62. Eric C. Chaffee, *Contemplating the Endgame: An Evolutionary Model for the Harmonization and Centralization of International Securities Regulation*, 79 U. CIN. L. REV. 587, 588 (2010).

63. *Id.* at 601.

64. *Id.* at 612–13.

interconnectedness of financial markets requires a global approach to securities regulation. Expressions about the importance of cooperation and coordination, however, mask strong underlying sentiments based on politics and territorial competition. The hard work is ahead, as policymakers and regulators move from the abstract to the concrete. It remains very much to be seen how these countervailing forces will play out in the implementation of Dodd–Frank and international regulatory efforts. Stay tuned for the 2012 Symposium, which will address the implementation of Dodd–Frank.