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INTRODUCTION: THE SEC AT 75

*Barbara Black**

I. INTRODUCTION

The genesis of this symposium topic was, in part, driven by the calendar—2009 is the seventy-fifth anniversary of the Securities and Exchange Commission (SEC).¹ The choice was also a consequence of two events that took place in March 2008, just as planning for the 2009 symposium got underway. The Department of the Treasury, under the leadership of Treasury Secretary Henry M. Paulson, Jr., released its Blueprint for a Modernized Financial Regulatory Structure (Blueprint)² that set forth a series of recommendations designed to remodel the U.S. financial markets and make them more competitive with foreign markets. Unfortunately, just a few weeks earlier, the financial markets experienced the shocking collapse of The Bear Stearns Companies, Inc. (Bear Stearns), one of the nation's largest investment banking firms.³ Although at the time SEC Chair Christopher Cox described the event as unprecedented,⁴ Bear Stearns turned out to be the first of many large institutions to fail, in what collectively is described as the 2008 financial meltdown. These events, and Bernard Madoff's December 2008 confession that he had, for decades, run a \$50 billion Ponzi scheme in plain sight of the SEC,⁵ shifted the focus of reform from reasserting

* Charles Hartsock Professor of Law and Director, Corporate Law Center, University of Cincinnati College of Law. The Twenty-Second Annual Symposium, New Models of Regulating the Financial Markets: The SEC at 75, was held on April 3, 2009. This Introduction bears the date of November 1, 2009. Jerrod Kuhn, Corporate Law Fellow and University of Cincinnati College of Law 2010, assisted with the research.

1. The SEC assumed responsibility for federal securities regulation in September 1934. JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET* 107 (3d ed. 2003).

2. DEP'T OF THE TREASURY, *BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE* (2008).

3. See OFFICE OF INSPECTOR GEN., U.S. SEC. & EXCH. COMM'N, *SEC'S OVERSIGHT OF BEAR STEARNS AND RELATED ENTITIES: THE CONSOLIDATED SUPERVISED ENTITY PROGRAM* 5-6 (2008) (describing Bear Stearns' collapse).

4. *Turmoil in U.S. Credit Markets: Examining the Recent Actions of Federal Financial Regulators: Hearings Before the S. Comm. on Banking, Hous., & Urban Affairs*, 110th Cong. (2008) (testimony of Christopher Cox, Chairman, U.S. Sec. & Exch. Comm'n), available at <http://www.sec.gov/news/testimony/2008/ts040308cc.htm>.

5. See OFFICE OF INSPECTOR GEN., U.S. SEC. & EXCH. COMM'N, *INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME (Public Version) 1* (2009), available at <http://www.sec.gov/news/studies/2009/oig-509.pdf>.

international dominance to restoring confidence in the integrity of the system.⁶ During this period, many critics faulted the SEC for its failure of leadership.⁷ Moreover, because the financial meltdown knew no national borders, there was increasing recognition that solutions could not be simply domestic. Indeed, in April 2009, immediately preceding this symposium, world leaders at the G-20 Summit debated the creation of a global regulator whose power would cross national borders to regulate international financial services firms.⁸ After the symposium, public discussion and debate intensified with the June 2009 release of the Obama Administration's Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation (Financial Regulatory Reform).⁹ In short, the initial concept—that the SEC's anniversary would provide a timely opportunity to examine proposals for regulatory reform—proved to be a good one.

Heeding the advice of Professor James D. Cox,¹⁰ this Introduction begins with a brief look back at the creation of the SEC and then examines the present-day agency's expression of its mission. It next reviews the Blueprint's assessment of the agency and its proposal for reform and then turns to the Obama Administration's Financial Regulatory Reform and its proposals relating to the SEC. Finally, this Introduction describes five issues to which the panelists paid particular attention: the SEC's mission, competition among financial markets, the proposal to merge the SEC and the Commodity Futures Trading Commission (CFTC), the role of financial market networks in systemic risk regulation, and the regulation of credit default swaps from an international perspective. This Introduction concludes by expressing doubt, based on efforts to date, of achieving meaningful financial reform.

6. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 2 (2009).

7. Mary Schapiro, at her confirmation hearing to be the new SEC Chair in January 2009, identified as her top priority to "move aggressively to reinvigorate enforcement at the SEC." Sarah N. Lynch, *SEC Nominee Schapiro Promises to "Reinvigorate" Enforcement*, DOW JONES NEWSWIRES, Jan. 15, 2009.

8. See Mark Landler & David E. Sanger, *World Leaders Pledge \$1.1 Trillion to Tackle Crisis*, N.Y. TIMES, Apr. 3, 2009, at A1, available at http://www.nytimes.com/2009/04/03/world/europe/03summit.html?_r=1&scp=1&sq=%22global%20regulator%22%20%22G-20%20Summit%22&st=cse. The topic for the Twenty Third Annual Symposium, scheduled for March 5, 2010, is *The Globalization of Securities Regulation: Competition or Coordination?*

9. DEP'T OF THE TREASURY, *supra* note 6.

10. James D. Cox, *Reinventing the SEC by Staring into Its Past*, 78 U. Cin. L. Rev. 459 (2009).

II. THE SEC AS “THE INVESTOR’S ADVOCATE”

The SEC, the self-described Investor’s Advocate,¹¹ was created after a two-year Senate Banking and Currency Committee investigation into stock exchange practices led by Ferdinand Pecora, the Committee’s counsel. Pecora used the investigation to discredit the laissez-faire economic policies of the pre-New Deal era by exposing the shady securities dealings and lucrative financial arrangements of Wall Street.¹² The establishment of an independent agency whose authority was exclusively securities regulation, however, was an accident resulting in large part from the New York Stock Exchange’s lobbying efforts to weaken securities legislation¹³ and its fear of the Federal Trade Commission, on whom the Securities Act of 1933 had conferred authority. While the Roosevelt Administration resisted industry efforts to require that at least one SEC commissioner be a stock exchange member,¹⁴ many reformers found incredible President Roosevelt’s selection of Joseph P. Kennedy, a businessman with a checkered business background, as the first SEC Chair.¹⁵ The SEC was thus born in politics, and securities regulation has remained closely linked to politics ever since.

It is overly cynical, however, to attribute the continual debate over the SEC’s role in financial regulation solely to politics. There is also a legitimate ongoing debate over the agency’s mission. The SEC consistently states that its mission is “to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”¹⁶ To this end, it identifies several strategic goals that include enforcing the federal securities laws, establishing effective regulation of trading markets and their participants, and facilitating investors’ access to information.¹⁷

11. The phrase is attributed to William Douglas and is posted on the SEC’s website. See Mary Schapiro, Chairman, U.S. Sec. & Exch. Comm’n, Address to the Council of Institutional Investors (Apr. 6, 2009), available at <http://www.sec.gov/news/speech/2009/spch040609mls.htm>.

12. SELIGMAN, *supra* note 1, at 1–2.

13. *Id.* at 97.

14. *Id.* at 99.

15. *Id.* at 103.

16. U.S. Sec. & Exch. Comm’n, The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, <http://www.sec.gov/about/whatwedo.shtml> (last visited Feb. 28, 2010). International securities regulators also include reduction of systemic risk as an objective. See INT’L ORG. OF SEC. COMM’NS, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (1998), available at <http://www.riskinstitute.ch/144440.htm> (identifying protection of investors, ensuring that markets are fair, efficient, and transparent, and reduction of systemic risk as objectives).

17. See U.S. Sec. & Exch. Comm’n, Draft Strategic Plan for Fiscal Years 2010–2015, at 4 (Oct. 8, 2009), available at <http://www.sec.gov/about/secstratplan1015.pdf>. The identified strategic goals are

The felicity of the phrasing of this tripartite mission, however, cannot gloss over its conflicting purposes.¹⁸ Increased corporate disclosure, for example, may protect investors, but may also increase costs of capital formation; thus, Congress requires the SEC, in its rulemaking process, to examine the regulatory burden investor protection may impose on competition and capital formation.¹⁹ Even a hypothetical single purpose of investor protection presents the question of what investors the agency should be protecting, because investors are not a monolithic group with identical interests. Current shareholders in a corporation, for example, may not want the managers to disclose publicly the corporation's current financial difficulties because it would result in decreased stock prices and might further damage the corporation. Potential investors in the corporation, conversely, want timely, forthright disclosure of all information material to an assessment of the corporation's prospects. Thus, appropriate resolution of tensions among investors with different interests is not straightforward and obvious.

III. THE BUSH ADMINISTRATION'S BLUEPRINT: A DEREGULATORY APPROACH

The Blueprint's central concern is that the U.S. financial markets have lost their competitive advantage:

Maturing foreign financial markets and their ability to provide alternate sources of capital and financial innovation in a more efficient and modern regulatory system are pressuring the U.S. financial services industry and its regulatory structure . . . Treasury believes it must ensure that the U.S. regulatory structure does not inhibit the continued growth and stability of the U.S. financial services industry and the economy as a whole.²⁰

Consistent with this approach, the Blueprint identified several critical deficiencies in the U.S. system of regulation in which separate agencies regulate across functional lines of financial services such as banking, insurance, securities, and futures. The current system lacks a single regulator to monitor systemic risk, creates jurisdictional disputes among

consistent with those set forth in the agency's previous Strategic Plan; see U.S. Sec. & Exch. Comm'n, 2004–2009 Strategic Plan 3 (Aug. 5, 2004) available at <http://www.sec.gov/about/secstratplan0409.pdf>.

18. I have previously questioned whether the SEC's distribution of funds to defrauded investors is consistent with its mission. See generally Barbara Black, *Should the SEC be a Collection Agency for Defrauded Investors?*, 63 BUS. LAW. 317 (2008).

19. 15 U.S.C. § 77b(b) (2006); see also *American Equity Investment Ins. Co. v. Sec. & Exch. Comm'n*, 572 F.3d 923, 936 (D.C. Cir. 2009) (remanding SEC rule to SEC for consideration of its effect on competition and efficiency).

20. DEP'T OF THE TREASURY, *supra* note 2, at 2–3.

agencies with respect to new products and services that slow innovation, and duplicates regulatory activity.²¹

The Blueprint sets forth a series of short- and longer-term recommendations designed to achieve its goal of a more efficient and competitive regulatory structure. In particular, the Blueprint is critical of what it describes as the SEC's "rules-based" approach to regulation,²² which it contrasts with the CFTC's "principles-based" approach.²³ Thus, it calls for the eventual merger of the SEC and the CFTC, with adoption by the combined agency of the CFTC's regulatory philosophy.²⁴ The Blueprint also proposes greater reliance on industry self-regulation.²⁵ The Blueprint's vision of the optimal regulatory structure makes the SEC's diminished role clear; an expanded Federal Reserve would have authority over market stability and prudential financial regulation,²⁶ and business conduct regulation and corporate disclosure, parts of the core SEC mission, would be divided between two weaker agencies.²⁷

While the Blueprint is a product of the prevailing deregulatory philosophy prior to the 2008 financial meltdown, two of its goals—the need for a systemic regulator and the harmonization of financial regulation—remain central goals of the Obama Administration's reform agenda. The latter, however, shifts the emphasis from avoiding duplication to closing regulatory loopholes.

IV. THE OBAMA ADMINISTRATION'S FINANCIAL REGULATORY REFORM: A NEW FOUNDATION?

After the shocking and profoundly unsettling financial collapse of 2008, restoring confidence in the financial system needed to become the focus of regulatory reform.²⁸ Accordingly, although the Financial Regulatory Reform makes many of the same recommendations as the Blueprint, consumer and investor protection replace competitive advantage as the dominant message:

21. *Id.* at 4–5.

22. *See id.* at 11–12.

23. *See id.* at 12. For an astute analysis debunking the rules-based vs. principles-based dichotomy, see Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of "Principles-Based Systems" in Corporate Law, Securities Regulation, and Accounting*, 60 VAND. L. REV. 1411 (2007).

24. DEP'T OF THE TREASURY, *supra* note 2, at 11–12.

25. *Id.* at 12.

26. *Id.* at 15–19.

27. *Id.* at 19–21.

28. DEP'T OF THE TREASURY, *supra* note 6, at 2.

We must build a new foundation for financial regulation and supervision that is simpler and more effectively enforced, that protects consumers and investors, that rewards innovation and that is able to adapt and evolve with changes in the financial market.²⁹

Consistent with that theme, the Financial Regulatory Reform sets forth five key objectives:³⁰

1. *Promote robust supervision and regulation of financial firms.* The Federal Reserve would supervise all financial institutions whose failure poses a threat to financial stability; a new Financial Services Oversight Council would improve agency coordination; and the SEC would have authority to require registration of hedge funds and other private pools of capital.³¹

2. *Establish comprehensive supervision of financial markets.* Regulatory agencies would have increased authority to regulate securitization markets, over-the-counter (OTC) derivatives, and credit rating agencies and would harmonize the regulation of securities and futures.³²

3. *Protect consumers and investors from financial abuse.* A new independent agency, the Consumer Financial Protection Agency (CFPA), would protect consumers of financial products and services from unfair, deceptive, and abusive practices.³³

4. *Provide government with tools it needs to manage financial crisis.* The Federal Reserve would have new authority to deal with failing institutions.³⁴

5. *Raise international regulatory standards and improve international cooperation.* The focus would be on international consensus on core issues, such as regulatory capital standards, oversight of global financial markets, supervision of internationally active financial firms, and crisis prevention and management.³⁵

29. *Id.*

30. *Id.* at 3–4.

31. *Id.* at 3, 5–6, 10–13, 19–42.

32. *Id.* at 3, 6–7, 13–14, 43–54.

33. *Id.* at 3, 7–8, 14–16, 55–75.

34. *Id.* at 4, 8, 16, 76–79.

35. *Id.* at 4, 8–9, 16–18, 80–88.

The Financial Regulatory Reform is, at its core, a minimalist plan that, with few exceptions, does not propose radical change. While the proposed CFPB is an innovative proposal and the Financial Regulatory Reform's linchpin for consumer protection, it is under heavy attack from business groups³⁶ and may not be enacted.³⁷ Like the Bush Administration's Blueprint, the Obama Administration's plan contemplates that the Federal Reserve—which, under the leadership of its previous Chair, Alan Greenspan, relied on market discipline to curb excesses³⁸—will become the primary systemic risk regulator.³⁹ In addition, a Financial Services Oversight Council would, with some additional powers, replace the President's Working Group on Financial Markets to provide coordination and counsel.⁴⁰ Rather than merging the SEC and CFTC, the Financial Regulatory Plan calls for harmonizing futures and securities regulation through the agencies' mutual agreement; contrary to the Blueprint's endorsement of the CFTC's principles-based regulatory approach, it calls for the two agencies to "build a common foundation for market regulation . . . on principles of regulation that are *significantly more precise* than the CEA's current 'core principles.'"⁴¹

The Financial Regulatory Reform also recommends some enhancements of existing SEC authority: it would require hedge funds and other private pools of capital to register with the SEC;⁴² the SEC and CFTC would regulate OTC derivatives;⁴³ additional investor protections would be adopted, including a fiduciary duty standard for broker-dealers that offer personalized advice to retail investors;⁴⁴ and the SEC's sanctions power would be increased.⁴⁵ In turn, the SEC has

36. The U.S. Chamber of Commerce leads the opposition with a \$2 million advertising campaign. Brody Mullins, *Chamber Ad Campaign Targets Consumer Agency*, WALL ST. J., Sept. 8, 2009, at A4; Stop the CFPB, <http://stopthecfpa.com/> (sponsored by the U.S. Chamber of Commerce).

37. However, the House Financial Services Committee, by a 39–29 vote, approved legislation that would establish the CFPB on October 22, 2009. Press Release, H. Comm. on Fin. Servs., Financial Services Committee Votes to Create the Consumer Financial Protection Agency (Oct. 22, 2009), available at http://www.house.gov/apps/list/press/financialsvcs_dem/pressCFPA_102209.shtml.

38. Greenspan has confessed error. See *The Financial Crisis and the Role of Federal Regulators: Hearing Before H. Comm. on Oversight and Gov't Reform*, 110th Cong. 2 (2008) (testimony of Dr. Alan Greenspan), available at <http://oversight.house.gov/images/stories/documents/20081023100438.pdf>.

39. DEP'T OF THE TREASURY, *supra* note 6, at 3–4.

40. *Id.*

41. *Id.* at 50 (emphasis added); see also *infra* notes 55–70 and accompanying text.

42. *Id.* at 37.

43. *Id.* at 46–47.

44. *Id.* at 70–72.

45. *Id.* at 72.

committed to do better in the future.⁴⁶ Unfortunately, this is an SEC commitment that follows every regulatory failure and does not inspire much confidence.⁴⁷

V. SYMPOSIUM PANELISTS

The 2009 securities law symposium came at a significant crossroads for financial regulation. Not only was there a transition between administrations with contrary philosophies, but also the financial crisis of 2008 highlighted the need for change. The symposium panelists addressed, in particular, five important issues in the debate over financial reform.

A. The SEC's Mission

In his article, Professor James D. Cox observes that the SEC has survived because its broad rulemaking authority permits flexibility and adaptability, and investor protection is a largely noncontroversial mission.⁴⁸ Thus, he argues that the agency should avoid politically charged issues on the periphery of its core mission and return to industry and market practices—issues the agency was primarily created to address. As Professor Cox points out, an SEC study of financial services firms in the post-Gramm-Leach-Bliley era might have alerted the agency to their precarious highly leveraged financial condition.⁴⁹ Finally, he asserts that what the agency needs is not new laws, but renewed commitment to its mission.⁵⁰

B. Competition Among Financial Markets

Does the Blueprint's focus on restoring the dominance of the U.S. financial markets have any staying power after the 2008 financial meltdown? Professor Adam C. Pritchard, in a provocative article, argues that neither New York nor London will prevail in the current regulatory environment.⁵¹ London ascended over New York in the

46. See Lynch, *supra* note 7.

47. See generally Barbara Black, *Are Retail Investors Better Off Today?*, 2 BROOK. J. CORP. FIN. & COM. L. 303 (2008) (assessing the SEC's performance in response to the conflicted research and mutual fund scandals).

48. Cox, *supra* note 10, at 461.

49. *Id.* at 463.

50. *Id.*

51. Adam C. Pritchard, *London as Delaware?*, 78 U. Cin L. Rev. 473 (2009).

competition for listings because it offered significant advantages in the post-Sarbanes Oxley (SOX) era; liquidity and a light regulatory touch proved more attractive than any “bonding” premium provided by SOX.⁵²

The United Kingdom’s response to the 2008 financial meltdown, however, has mirrored that of the United States; it too “succumbed to populist backlash.”⁵³ Thus, tightened limits on leverage for institutions deemed “too big to fail” create opportunities for hedge funds and other firms that do not need the backing of a lender of last resort and for jurisdictions that will commit to less regulation.⁵⁴ Moreover, the value of exchange listings has plummeted because of technologies in trading.⁵⁵ Accordingly, Professor Pritchard concludes, neither New York nor London is likely to provide an important listing advantage in the future.

C. SEC-CFTC Merger

Both Professor Roberta S. Karmel, a former SEC commissioner, and Professor Jerry W. Markham, a former CFTC attorney, believe that an SEC-CFTC merger warrants further study, although both recognize that political pressures defeated previous efforts.⁵⁶ Apart from that common ground, their views diverge greatly.

Professor Karmel characterizes the Blueprint as a “highly political document” reflecting the Bush Administration’s ideology of deregulation.⁵⁷ Nevertheless, she argues for serious reconsideration of an SEC-CFTC merger.⁵⁸ The longstanding turf battles between the SEC and the CFTC, with the Federal Reserve playing an active role on behalf of banks, distracted the agencies from their regulatory purpose.⁵⁹ Although there were plenty of warning signs about the dangers of excessive securities credit and poor regulation of OTC derivatives, none of the three regulators took any action.⁶⁰ An SEC-CFTC merger would lead to better regulation of the markets, she argues, because (1) it would

52. *Id.* at 488.

53. *Id.* at 490.

54. *Id.* At 495.

55. *Id.* At 498.

56. Roberta S. Karmel, *The Future of the Securities and Exchange Commission as a Market Regulator*, 78 U. Cin. L. Rev. 501 (2009); Jerry W. Markham, *Merging the SEC and the CFTC—A Clash of Cultures*, 78 U. Cin. L. Rev. 537 (2009).

57. Karmel, *supra* note 56, at 504.

58. *Id.*

59. *Id.*

60. *Id.* at 517.

end counterproductive jurisdictional squabbling and allow the agency to focus on what regulation is in the public interest, (2) it would produce a bigger, and presumably more prestigious, powerful, and independent agency, and (3) the SEC needs to be reenergized and reinvigorated.⁶¹ The final consideration is especially important because the SEC has a huge agenda: securities credit needs to be curtailed, broker-dealer capital adequacy rules need to be revised, OTC derivatives require regulation, a new short sale rule should be considered, hedge fund managers should be required to register as investment advisers, and investment adviser regulation should be improved.⁶²

Professor Markham, in contrast, finds that the Blueprint provides a reasoned approach to regulation that remains relevant in addressing the failures of the current regulatory structure.⁶³ He argues that regulatory reform is needed to address the existing haphazard, ineffective, and punitive regulatory approaches taken by both agencies. An SEC-CFTC merger will only be effective, however, if the new regulator operates under a principles-based regulatory system—a cultural change that would be difficult for the SEC to accept. Specifically, the agencies have different regulatory approaches toward floor traders, suitability rules, margin requirements, insider trading, customer account insurance, and short sales.⁶⁴

As discussed previously, the Financial Regulatory Reform abandons the Blueprint's proposal to merge the SEC and the CFTC and instead speaks of "harmoniz[ing]" their regulation.⁶⁵ It calls on the agencies to identify their differences and either explain why they are "essential to achieve underlying policy objectives" or recommend changes.⁶⁶ In response, the SEC and CFTC issued a joint report on October 16, 2009, highlighting the agencies' fundamental differences and outlining efforts to increase regulatory harmonization.⁶⁷ The report details the evolution of the CFTC and the negative effect that the introduction and complexity of derivative financial products had on jurisdictional issues between the two agencies.⁶⁸ Thus, the report recommends a series of moderate

61. *Id.*

62. *Id.*

63. Markham, *supra* note 56, at 552.

64. *Id.*

65. DEP'T OF THE TREASURY, *supra* note 6, at 43.

66. *Id.* at 50–51.

67. U.S. COMMODITY FUTURES TRADING COMM'N & U.S. SEC. & EXCH. COMM'N, A JOINT REPORT OF THE SEC AND THE CFTC ON HARMONIZATION OF REGULATION (2009), available at <http://www.cftc.gov/stellent/groups/public/@otherif/documents/ifdocs/opacftc-secfinaljointreport101.pdf>.

68. *Id.* at 2.

reforms to align more closely the SEC and CFTC. Specifically, the report suggests legislation establishing a more precise and efficient method of reviewing jurisdictional questions between the agencies,⁶⁹ calls for several joint programs to fill the loopholes that permeate the current regulatory framework,⁷⁰ and urges uniformity in standards for various players in the financial sector to alleviate confusion in the industry.⁷¹

D. Financial Market Networks

Professor Olufunmilayo B. Arewa discusses financial market networks and argues for greater recognition of the threats they pose to systemic risk.⁷² The credit crisis illuminated regulators' inability to keep up with changes in the financial markets, such as electronic trading, product innovation, and proprietary trading, that led to greater linkages across markets and products and, as a result, caused a cascading effect across markets.⁷³

She recommends that regulatory reform consider to a greater extent the implications of market activities and trading practices for systemic risk and create regulatory structures that promote creation of incentives for individual market participants to better manage risk. This approach will require significant changes by Congress (away from fundamental regulation) and significant changes in risk assessment and management by both regulators and market participants. In addition, there must be mechanisms to better monitor regulators' effectiveness.⁷⁴

E. SEC Regulation of Credit Default Swaps: An International Perspective

Professor Janis Sarra looks at the regulation of derivatives, specifically credit default swaps, from an international perspective.⁷⁵

69. *Id.* at 87.

70. *Id.* at 93, 94.

71. *See, e.g., id.* at 90 (uniform fiduciary standards for all parties providing investment advisory services); *id.* at 90 (uniform record retention requirements); *id.* at 90–91 (uniform customer risk disclosure documents); *id.* at 91 (uniform private fund reporting requirements); *id.* at 92 (uniform authority for enforcement of aiding and abetting violations).

72. Olufunmilayo B. Arewa, *Financial Markets and Networks: Implications for Financial Market Regulation*, 78 U. Cin. L. Rev. 613 (2009).

73. *Id.* at 623.

74. *Id.* at 627.

75. Janis Sarra, *Financial Market Destabilization and the Role of Credit Default Swaps: An International Perspective on the SEC's Role Going Forward*, 78 U. Cin. L. Rev. 629 (2009).

She addresses the need to build greater international consensus on how to encourage the positive risk management aspects of derivatives, while slowing the speculative aspects that create transactional and systemic risk.⁷⁶ While the SEC's role in regulating OTC credit default swaps is currently limited to antifraud enforcement, its potential role includes transparency initiatives, regulatory oversight, rigorous enforcement, and encouragement of new governance norms. In short, there are many issues the agency must consider moving forward.⁷⁷

VI. CONCLUSION

As these descriptions make clear, the panelists offered diverse views on the appropriate regulatory role for the SEC of the future. At the time of this Introduction, there is reason to doubt whether the 2008 financial meltdown will result in major regulatory reform. First, as noted previously, the goals of the Financial Regulatory Reform are modest. The proposal itself acknowledges that more could be done, but asserts it is focusing on the essential, "to address the causes of the current crisis, to create a more stable financial system that is fair for consumers, and to help prevent and contain potential crises in the future."⁷⁸ To be sure, reform measures that offer a reasonable possibility of meeting these goals would be a worthy accomplishment.

Second, as the shock and panic of the 2008 financial meltdown recede from memory, the opportunity to use public indignation to drive change diminishes. While public outrage toward Wall Street remains strong, reflected principally in the outrage over executive bonuses,⁷⁹ to date, no

76. *Id.* at 639–40.

77. The House Financial Services Committee voted, by a 43–26 margin, to regulate OTC derivatives. Under the bill, all standardized swap transactions between dealers and large market participants would have to be cleared and must be traded on an exchange or electronic platform. The legislation sets forth parallel regulatory frameworks for the regulation of swap markets, dealers, and major swap participants. Rulemaking authority is held jointly by the CFTC (swaps) and the SEC (security-based swaps). The Treasury Department has authority to issue final rules if the agencies cannot agree. *See* Press Release, H. Comm. on Fin. Servs., Financial Services Committee Approves Legislation to Regulate Derivatives (Oct. 15, 2009), available at http://www.house.gov/apps/list/press/financialsvcs_dem/pressder_101509.shtml. The financial services industry has spent over \$220 million in 2009 on lobbying efforts; *see* DealBook, *House Panel Votes to Regulate Derivatives*, N.Y. TIMES, OCT. 15, 2009, <http://dealbook.blogs.nytimes.com/2009/10/15/house-panel-votes-to-regulate-otc-derivatives/?scp=2&sq=derivatives%20regulation%20lobbying&st=cse>.

78. DEP'T OF THE TREASURY, *supra* note 6, at 4.

79. Treasury and the Federal Reserve have taken steps to curb executive compensation in response to public indignation. *See* Press Release, U.S. Dep't of Treasury, The Special Master for TARP Executive Compensation Issues First Rulings (Oct. 22, 2009), available at <http://www.ustreas.gov/press/releases/tg329.htm>; Press Release, Bd. of Governors of the Fed. Reserve Sys. (Oct. 22, 2009), available at <http://www.federalreserve.gov/newsevents/>

present-day Ferdinand Pecora has stepped forward to use this sentiment to lead the effort for significant reform.

Accordingly, rebuilding confidence in the financial markets may depend on renewed efforts by the SEC to protect investors. This recalls Ferdinand Pecora's prediction to President Roosevelt about the Securities Exchange Act: "It will be a good or bad law depending upon the men [sic] who administer it."⁸⁰

press/bcreg/20091022a.htm.

80. SELIGMAN, *supra* note 1, at 100.

