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Cooperation before Consolidation in Investor Protection Symposium: The Promise and Perils of Convergence in Financial Regulation and Consumer Protection

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I. INTRODUCTION

The aftermath of the financial crisis yielded much soul searching on how regulatory structures should evolve to prevent future crises and how to protect investors and consumers.[1] Useful discussion of changes to the regulatory system must include acknowledgment of that system's current organizational state of affairs and its propriety.

 Associate Professor, The University of Alabama School of Law. I would like to thank Dean Mark Brandon, my colleagues on the faculty, and the Alabama Law School Foundation for their generous support of my research. I thank Aaron Smith and Brian Church for excellent research assistance. I also thank the editors of the *Tulane Law Review* and participants in its Symposium.

1. *See, e.g.*, Gretchen Morgenson & Louise Story, *Naming Culprits in the Financial Crisis*, N.Y. TIMES, Apr. 14, 2011, at B1. One particularly interesting aspect of the crisis aftermath is the focus on larger-player issues, such as firms that may have become too-big-to-fail. *See, e.g.*, *Tarullo Discusses Systemic Risk*, [2009] 202 Bank Dig. Online (CCH) ¶ 5065 (Oct. 22, 2009) (noting the Federal Reserve Governor's emphasis on the too-big-to-fail problem in regulatory reform). Certainly, collapses of large institutions can affect smaller, retail purchasers of financial products. However, this Symposium should be praised for emphasizing regulatory schemes that may seek to protect more directly the smaller players. This recognizes a deep tradition of agencies protecting retail investors. Moreover, when retail investors are protected and feel confident in product markets, they seem more likely to continue to participate in those markets, adding to the strength of the economy. Capital markets, for example, utilize investors in stocks to help fund the operation and expansion of businesses through payment for those ownership interests represented by stocks. If confidence dries up, economic participation may fail, causing future volatility and economic crises.

Students of regulation related to the protection of investors and consumers of financial products will be well aware that in the United States, a variety of administrative agencies and government actors are involved in the regulatory process meant to provide such protection. For instance, at the federal level, the United States Securities and Exchange Commission (SEC) is tasked with protecting investors in financial products defined as securities[2] through a variety of mechanisms, including oversight of markets and the intermediaries offering these products.[3] Traditionally, the United States Commodity Futures Trading Commission (CFTC) took the lead on issues related to products falling within the realm of a futures contract.[4] The United States Department of the Treasury (Treasury), the Board of Governors

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2. Under the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, "unless the context otherwise requires," a "security" is defined as

> any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

Id. § 3(a)(10), 15 U.S.C. § 78c(a)(10) (2012); *accord* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 1.6 (5th ed. 2005) (discussing tests that determine whether an interest is a "security" and identifying classes of exempted securities).

3. *See* HAZEN, *supra* note 2, § 1.4 (discussing the role of self-regulatory organizations, including exchanges).

4. In regulating contracts for the future delivery of commodities, the CFTC deals with a broad array of derivatives because the definition of "commodity" is so broad. Under the Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936), a "commodity"

> means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions . . . and motion picture box office receipts (or any index, measure, value, or data related to such receipts), and all services, rights, and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.

Id. § 1a(9), 7 U.S.C. § 1a(9).

of the Federal Reserve System (Fed), and associated entities have focused on banking products.[5] Of course, state-level regulators, such as state securities commissions[6] or providers of state banking charters,[7] can be involved in such processes as well. Indeed, for some products, state regulators may be characterized as the leaders on regulatory schemes, such as those for insurance products.[8]

This U.S. organizational approach certainly is not the only one available. Other nations have sought to unify regulatory authority over a wider array of financial products and services in more centralized bodies, such as financial services authorities.[9] Moreover, the increasingly globalized nature of financial products and services, with even retail consumers sometimes participating in foreign markets, raises the question of whether such unified regulators should perhaps be extended to the vesting of regulatory authority in a global, unified regulatory body with control of purchaser-related issues for a wide array of products.[10]

This Symposium creatively and usefully brings together scholars from the capital markets and consumer financial products regulatory worlds to contemplate such possible convergence and consolidation. This is both innovative and necessary because scholars in those worlds face their own unique product end-user issues with approaches that might vary from one world to another. More provocatively, the Symposium organizers suggest that convergence of regulators and approaches from those different worlds may have perils in addition to benefits. Accordingly, as tasked by the Symposium's structure, my contribution focuses on a securities law perspective on the

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5. *See generally* KENNETH SPONG, BANKING REGULATION: ITS PURPOSES, IMPLEMENTATION, AND EFFECTS 15-34 (5th ed. 2000) (reviewing the history of U.S. banking and the development of regulatory institutions).

6. *See, e.g.*, *About the Commission*, ALA. SEC. COMMISSION, http://asc.alabama.gov/about.aspx (last visited May 24, 2016).

7. *See, e.g.*, ALA. ST. BANKING DEP'T, http://www.banking.alabama.gov (last visited May 24, 2016).

8. *See State Insurance Regulation*, NAT'L ASS'N INS. COMMISSIONERS, http://www.naic.org/documents/consumer_state_reg_brief.pdf (last visited May 24, 2016).

9. *See, e.g.*, *Licensing, Supervision, Implementation, Regulation*, FINMA, https://www.finma.ch/en/finma/activities/ (last visited May 24, 2106); *cf. Financial Services Agency*, FIN. SERVICES AGENCY 2-3 (Feb. 2016), http://www.fsa.go.jp/en/about/pamphlet.pdf (describing the evolution of government organization relating to certain financial matters in Japan).

10. *See* Nu Ri Jung, *The Present and Future of the Financial Services Industry: Convergence, Consolidation, Conglomeration, and Collaboration*, 29 QUINNIPIAC L. REV. 729, 731-33, 742, 778-79, 789 (2011) (noting the industry's global expanse).

convergence issue and, more specifically, on some possible perils.[11] In introducing such perils, while focusing on the convergence issues' overlay with the securities laws, I particularly illustrate issues surrounding and faced by U.S. securities laws and regulators. However, I also hope at least to raise some possible issues about international convergence as well, in keeping with the *Tulane Law Review*'s strong tradition of providing insights from comparative and international law.

Accordingly, in Part II, I begin by identifying some practical difficulties raised by consolidation of regulatory agencies. While consolidation might offer some benefits, as a baseline for analysis, it is useful to contemplate the likelihood and costs of being able to accomplish consolidation in the near term. In Part III, I place these concerns in the contemporary context of crisis-driven regulatory changes. This context may help explain why some find consolidation particularly attractive now as a matter of political utility, which does not necessarily correspond to legal efficacy. This Part views potential consolidation as a candidate for ill-advised crisis regulation, which is problematic for the reasons explored in my prior scholarship. Of course, even if consolidation is difficult and problematic, one also must ask whether, absent consolidation, it is even possible for the existing regulatory agencies to work together to solve contemporary problems. Accordingly, in Part IV, I provide a case study of how multiple regulators worked together, absent consolidation, to achieve investor protection. More specifically, I explore the efforts of multiple government regulators related to the introduction of single-stock futures and related investor protections. With knowledge of the possibility of cooperation addressing investor protection concerns, in Part V, I suggest possible cooperative efforts that might be utilized *prospectively* and further institutionalized to help address future concerns related to protecting investors.

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11. It is useful to note that this Article does not claim that consolidation is never appropriate or useful. In some instances, consolidation may lead to more uniform approaches to protecting investors and consumers. Moreover, in some nations with different markets, resources, and overall government structures, consolidated financial authorities may make more sense. Indeed, the size and nature of the U.S. capital market can be quite different than that of other nations. *See Vision and Reality: Animating Europe's Capital Markets*, ECONOMIST, Sept. 12, 2015, at 68, 68-69 (comparing the European market to the U.S. market). My purpose is more to raise issues and potential problems related to consolidation involving the U.S. regulatory system in the shorter term as an effort to stabilize the economy.

II. PRACTICAL DIFFICULTIES OF CREATING A CONSOLIDATED REGULATOR

At first glance, one must acknowledge how financial government agency consolidation might be attractive to some regulatory reformers. At the most basic level, the current U.S. regulatory structure's complexity might create confusion as to which regulator is in charge of what products, services, or other issues, which might be alleviated by a one-stop regulatory shop. In addition, to the extent the current array of agencies and governmental bodies regulate products and services for the same potential set of purchasers, putting those products' and services' regulation under the metaphorical roof of a single agency could lead to the development of a more unified approach to regulation.

However, such perceptions are far from incontrovertible. If investor confusion over who regulates what matter is the true issue, then education about appropriate government resources available to them at the proper agency or body may be the more direct solution. Such education ultimately may lead the investor to an individual governmental party with more expertise in the investor's concern or question.[12] And it seems, from the investor's perspective, that the larger concern may be the substance of the rules that protect her, rather than who promulgates those rules.

This latter concern makes a potential consolidated regulator's efforts to develop more uniform approaches across products ripe for more careful consideration. In other words, would the development of the same rules across products and services be *better* rules and be more appreciated by consumers? This notion is potentially not without controversy.

First, current differences between regulatory bodies on how they regulate consumer products and services reflect knowing choices and different goals for the separate regulatory schemes.[13] A comparison of the SEC and the Federal Deposit Insurance Corporation (FDIC) helps highlight this point. When a consumer deposits money in an FDIC-

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12. The SEC's Office of Investor Education and Advocacy helps facilitate this education. *See Office of Investor Education and Advocacy*, SEC, http://www.sec.gov/oiea (last modified Mar. 8, 2014).

13. The example that follows compares certain securities and banking regulation. However, even within the securities regulatory scheme, regulation can vary across different products and intermediaries, as illustrated by Professor Arthur Laby's contribution to this Symposium. *See* Arthur B. Laby, *Regulatory Convergence and Organizational Culture*, 90 TUL. L. REV. 1181 (2016).

insured account up to banking law's limits, a return of that money is guaranteed, even if the bank goes out of business.[14] In contrast, the SEC does not guarantee an investor repayment should she make a poor investment choice. SEC regulation tends to focus on disclosure and transparency, with investors bearing the consequences of their own choices after making decisions with information related to those choices available.[15]

Second, beyond the broader issue of possible benefits of different regulatory goals for different products and services, in focusing on big-picture principles across products and services, might the staff and leadership of consolidated regulators lose track of the differences between the financial products and services and the accompanying differences of how one details their regulation? One aspect of the current organizational structure of multiple agencies is that each agency's more specific mission presumably encourages that agency to focus on gaining and utilizing expertise in more specific areas of more specific products and services. A securities regulator should learn about specific securities products and services and should establish relationships with the stakeholders, both those purchasing and selling those products.[16] Questions arise as to whether such expertise and relationships would develop in a megaorganization such as a consolidated regulator overseeing many more products and services.

Notwithstanding the above discussion on possible problems with the supposed benefits to investors that advocates of agency consolidation might raise, one can still question whether those advocates or those offering the counterarguments are correct. It is ultimately

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14. *See* FDIC, http://fdic.gov (last visited May 24, 2016).

15. Indeed, the extensive nature of the disclosure regime over the years has led the SEC to use regulation to better integrate the large amounts of disclosure. *See* 1 HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES LAW HANDBOOK § 3:1-:3 (2015).

16. Different techniques, such as roundtable discussions, are employed currently to communicate with stakeholders. *See, e.g.*, *Proxy Voting Roundtable*, SEC, https://www.sec.gov/spotlight/proxy-voting-roundtable.shtml (last modified May 21, 2015); *see also infra* notes 29-30 and accompanying text (discussing the SEC's use of roundtables and concept releases to reach out to stakeholders).

Something else to contemplate when considering agency staff at a consolidated regulator, as opposed to staff at separate agencies, is the uncertain effects of rent-seeking opportunities and agency capture. Public choice theory offers insights into the importance of considering self-interest and the motivations of bureaucrats. *See* James Gwartney & Richard E. Wagner, *The Public Choice Revolution*, *in* READINGS IN PUBLIC CHOICE ECONOMICS 3 (Jac C. Heckelman ed., 2004). In light of such insights, it is important to contemplate whether a colossal regulator joining together multiple regulatory issues under a single roof might make treatment of such issues more opaque and foster rent-seeking opportunities, leading to suboptimal regulation.

speculative to draw firm conclusions about a hypothetical consolidated agency's actions. It is hard to predict with certainty how the staff of a consolidated agency would act on investor issues or how the agency would interact with consumers and other stakeholders in the financial industry and markets. Accordingly, while I might share some of these preliminary concerns about consolidation's benefits, neither I nor others can guarantee them coming to fruition. However potentially diminished, there may be some benefits related to a consolidated agency. It is useful for a moment to assume, notwithstanding those concerns, that some benefits might ultimately be achieved. However, even in such an instance, it does not follow that consolidation would be costless or practically possible.

Practical difficulties of creating a consolidated agency are far more objectively likely to be realized. From a securities law perspective, one might begin understanding this by exploring not only the current nature of the SEC as an entity, but also the superstructure of parties outside the SEC that are involved critically in the existing securities regulation process.

The SEC is not a simple monolith. The internal structure of the SEC is complex and changes over time. While the five Commissioners appointed by the President and confirmed by the United States Senate are the public face of the organization, they are joined by approximately 4,600 staff, who reside in the Washington D.C. headquarters and eleven offices in regions around the country.[17] In Washington, SEC activities are further divided into five divisions and close to two-dozen additional offices that have a wide variety of functions and subject-matter foci.[18] Changes have included the addition of new divisions, such as the creation in 2009 of the Division of Economic and Risk Analysis.[19] And even long-standing divisions cycle through a variety of tasks over time.[20] Activities in different divisions and offices might include some or all of a variety of functions, from general policy analysis to rulemaking, to collection

17. *What We Do*, SEC, http://www.sec.gov/about/whatwedo.shtml (last modified June 10, 2013). The nature of the relatively few Commissioners is even more complex than it might appear at first glance because they cannot include more than three from the same political party. *Id.*

18. *Id.*; *see also Securities and Exchange Commission Organization Chart*, SEC, http://www.sec.gov/images/secorg.pdf (last visited May 24, 2016) (illustrating the organizational layout of SEC divisions and offices).

19. *See Economic and Risk Analysis*, SEC, http://www.sec.gov/dera (last modified May 17, 2016).

20. *See* Kenneth M. Rosen et al., Lecture, *Panel Discussion: Celebrating Thirty Years of Market Regulation*, 9 FORDHAM J. CORP. & FIN. L. 295, 301-05 (2004).

and review of filings, to inspections, to litigation in administrative actions and federal courts; as a result, at times various parties at the SEC serve very different roles as policy makers, detectives, educators, prosecutors, or judges and more.[21] It is not the function of this Article to detail the specific functions of each individual SEC office and division. Even basic descriptions could help fill a book.[22] What is important is that the functions of the SEC and how those functions are divided amongst personnel are not the same as at other administrative agencies.[23] Accordingly, as an initial matter, it seems naïve to believe that such functions could quickly and easily be merged with those of other financial regulators in a consolidated agency.[24]

The practical difficulties, however, do not end with trying to integrate the SEC's complex internal structure with that of other government bodies. The SEC's own staff only serves as the beginning of its efforts to regulate capital markets. Given the size of the financial markets, it is not surprising that the U.S. regulatory system leverages the efforts of those outside government to help with capital market regulation. Particularly important are self-regulatory organizations (SRO)—nongovernmental entities with regulatory functions.[25] For example, the Financial Industry Regulatory Authority (FINRA) is an SRO critical to the regulation of brokers and certain markets that engages in oversight functions of a wide variety, including member regulation, enforcement, fraud detection, market intelligence, adjudication, market regulation, transparency, and economic analysis.[26]

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21. *What We Do*, *supra* note 17.

22. *See, e.g.*, LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION (4th ed. 2001) (noting the extensive functions of the SEC).

23. *Cf., e.g.*, *The Bureau*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/about-us/the-bureau/ (last visited May 24, 2016) (illustrating the organizational structure of the Consumer Financial Protection Bureau); *CFTC Organization*, CFTC, http://www.cftc.gov/About/CFTCOrganization/index.htm (last visited May 24, 2016) (describing the structure and divisions of the CFTC).

24. Perhaps this might be simpler, albeit still difficult, if as a baseline, each existing U.S. regulatory body had the same types of functions and was organized the same way. However, this is not the case.

25. *See* 15 U.S.C. § 78s (2012) (prescribing SRO regulation); *see also* STEVEN MARK LEVY, REGULATION OF SECURITIES: SEC ANSWER BOOK 1-65 to -66 (4th ed. Supp. 1 2016) ("U.S. securities markets are to a large extent self-regulated by broker-dealer firms and by self-regulatory organizations (SROs), under SEC oversight.").

26. *See Oversight*, FINRA, http://www.finra.org/industry/oversight (last visited May 24, 2016); *About FINRA*, FINRA, http://www.finra.org/about (last visited May 24, 2016). Interestingly, FINRA itself is the result of consolidation of some predecessor SROs related to the New York Stock Exchange and the National Association of Securities Dealers. *See* Order Approving Proposed Rule Change To Amend the By-Laws of NASD To Implement Governance and Related Changes To Accommodate the Consolidation of the Member Firm

One of the ways that the SEC can use SROs to assist its mission in a directed fashion is by utilizing the SEC's legislatively granted right to review SRO rules.[27] Beyond SROs, even individual market participants have responsibilities to help maintain fair markets.[28]

In addition, the SEC does not only use a complex network of securities industry participants to help oversee markets and enforce existing policies. The SEC also reaches out to stakeholders to help formulate policies in the first instance. This might be through actions such as roundtables[29] as well as concept releases,[30] in anticipation of possible formal rulemaking.

In times of limited governmental financial resources and budget cutting,[31] leveraging of knowledge, expertise, and—as is the case for SROs especially—oversight by nongovernmental actors becomes critical. If integration of complex individual agencies that are structured differently and serve different functions is practically difficult, fully integrating broader, unique regulatory networks with those outside government, established over the course of decades and associated with such agencies, would seem even more perilous.

It is worth noting that just as this fuller SEC regulatory network is different from that of other U.S. financial regulators, it certainly is different from those of regulators of other nations,[32] making agency consolidation at the global level an even trickier prospect. However, stories from abroad are useful in making some additional points on the difficulties of implementing consolidation. First, the road to consolidation is a long one. For example, even in the limited area of securities-focused regulation, Canada has spent decades trying to

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Regulatory Functions of NASD and NYSE Regulation, Inc., Exchange Act Release No. 56,145, 72 Fed. Reg. 42,169 (July 26, 2007). Even the consolidation of these entities' regulatory functions was a multiyear effort. *See* Kenneth M. Rosen, *Financial Intermediaries as Principals and Agents*, 48 WAKE FOREST L. REV. 625, 635-36 (2013).

27. *See* 15 U.S.C. § 78s(b)(1).

28. For example, broker-dealers become part of the process through requirements imposed upon them to supervise registered representatives who work for them. *See* 1 NORMAN S. POSER & JAMES A. FANTO, BROKER-DEALER LAW AND REGULATION §§ 9.01-.03 (4th ed. Supp. 2009) (describing the supervisory responsibilities).

29. *See, e.g.*, Press Release, SEC, SEC To Hold Roundtable on Proxy Voting (Jan. 27, 2015), https://www.sec.gov/news/pressrelease/2015-15.html.

30. *See, e.g.*, Possible Revisions to Audit Committee Disclosures, Securities Act Release No. 9862, Exchange Act Release No. 75,344, 80 Fed. Reg. 38,995 (July 8, 2015).

31. *See* Kristina Peterson & Nick Timiraos, *Congress Passes Bill To Fund Government Through Dec. 11*, WALL STREET J., http://www.wsj.com/articles/senate-passes-government-funding-bill-prior-to-midnight-deadline-1443623598 (last updated Sept. 30, 2015, 8:29 PM) (noting ongoing government funding issues).

32. As already noted above, some nations have single financial regulatory bodies, while others do not.

move from more localized regulation to the creation of a federal securities regulator.[33] Second, even regions where more formal institutional mechanisms exist for consolidation with the express purpose of integration, such as the EU, arguably have not achieved full economic policy integration,[34] especially on investor-related issues.[35] And third, even individual nations held up as models of financial regulatory integration have reevaluated and arguably backed off from unified authorities; for example, the United Kingdom's Financial Services Authority has devolved into two separate entities, the Financial Conduct Authority and the Prudential Regulation Authority.[36]

Notwithstanding these examples of attempted consolidation from abroad and the above discussion of the practical difficulties of moving toward consolidation in the United States, impracticability does not necessarily equate to impossibility. Government-body reorganization does sometimes occur.[37] Further consideration is necessary,

33. Ben Dummett, *Canada Names Chairman of Proposed National Securities Regulator*, WALL STREET J. (July 24, 2015, 5:01 PM), http://www.wsj.com/articles/canada-names-chairman-of-proposed-national-securities-regulator-1437771680.

34. Recent negotiations over the Greek debt crisis and its relation to eurozone members of the euro currency, which itself has not even attracted membership by all EU members, shows the practical problems of convergence as well. *See, e.g.*, *Greece Debt Crisis: EU Summit Cancelled as Talks Continue*, BBC NEWS (July 12, 2015), http://www.bbc.com/news/world-europe-33497353.

35. The formal EU process for policy making on company-related law is often a long one, including the issuance of expert reports that may not even lead to full changes of policies on this front. *See, e.g.*, *Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids*, EUR. COMMISSION (Jan. 10, 2002), http://ec.europa.eu/internal_market/company/docs/takeoverbids/2002-01-hlg-report_en.pdf.

36. *See* FIN. SERVICES AUTHORITY, http://www.fsa.gov.uk (last visited May 24, 2016); George Parker & Brooke Masters, *Osborne Abolishes FSA and Boosts Bank*, FIN. TIMES, http://www.ft.com/intl/cms/s/0/0203b99e-797f-11df-b063-00144feabdc0.html (last updated June 16, 2010, 10:28 PM).

37. Probably one of the most recent examples was the consolidation of certain functions in the recently created United States Department of Homeland Security. Of course, it is not clear that the strong emotional-related factors of the new agency's creation after September 11, 2001, are present in the financial-regulatory realm. *See Creation of the Department of Homeland Security*, U.S. DEP'T HOMELAND SECURITY, http://www.dhs.gov/creation-department-homeland-security (last updated Sept. 24, 2015); Kelley Beaucar Vlahos, *10 Years of DHS: Blessing or 'Bureaucratic Monstrosity'?*, FOX NEWS (Dec. 8, 2012), http://www.foxnews.com/politics/2012/12/08/10-years-dhs-blessing-or-bureaucratic-monstrosity.html.

Even closer in time to the wake of the financial crisis—which was closely linked to derivatives issues handled by two regulators, the SEC and CFTC—and with emotions running high and the apparent interest of the Dodd-Frank author Representative Barney Frank in a merger, no SEC/CFTC merger occurred, despite the fact that the merger had been suggested for decades. *See* Dina ElBoghdady, *Proposed Exchange Merger Brings Renewed Calls To Consolidate SEC and CFTC*, WASH. POST (Dec. 21, 2012), https://www.washington particularly of why possible agency consolidation continues to find advocates notwithstanding these impracticalities.

III. CONSOLIDATION AS AN ITERATION OF CRISIS REGULATION

Thorough analysis of actual or potential regulation requires evaluation not only of the terms of regulation, but also of the context in which that regulation is promulgated. In particular, regulation in the wake of a crisis may raise specific types of red flags. Were agency consolidation to move forward now, it might constitute crisis regulation and suffer such regulation's potential drawbacks.

My previous scholarship has focused extensively on the phenomenon of "crisis regulation"—new financial regulation quickly promulgated in the wake of crises and scandals. As that scholarship illustrates, crisis regulation is not unique to the most recent financial crisis. While the Dodd-Frank Wall Street Reform and Consumer Protection Act[38] (Dodd-Frank) and legislative efforts proximate in time to Dodd-Frank's passage may constitute a more recent iteration of crisis regulation in the wake of the last financial crisis,[39] prior crises brought their own regulatory changes, such as those embodied in the Sarbanes-Oxley Act of 2002[40] following the Enron scandal.[41] One of the motivations for crisis regulation may be a desire for government actors to quickly claim credit for solving problems that aggravate the general public. Indeed, such actors may compete with one another to develop bigger solutions first and to claim credit for such solutions in the eyes of the public.

Because political actors themselves, or through their superiors, are ultimately responsible to the public and because continued government employment may depend on satisfying the public, this

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post.com/business/economy/proposed-exchange-merger-brings-renewed-calls-to-consolidate-sec-and-cftc/2012/12/21/29f4d34c-4bab-11e2-b709-667035ff9029_story.html.

38. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, 15, 22, 31, 42 U.S.C. (2012)).

39. *See* Kenneth M. Rosen, *"Who Killed Katie Couric?" and Other Tales from the World of Executive Compensation Reform*, 76 FORDHAM L. REV. 2907 (2008) (discussing reform efforts in the wake of scandals and crises).

40. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28, 29 U.S.C.).

41. *See* Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097 (2003) (arguing that reporting requirements imposed by the Sarbanes-Oxley Act of 2002 in the wake of the Enron scandal are flawed).

should not be surprising. However, quick responsiveness[42] does not equate necessarily with optimal regulatory solutions or even with addressing the problems that led to a crisis or scandal in the first instance.[43] Although the idea of consolidation of financial regulators in the United States is not entirely new, given past decisions not to move forward with consolidation and especially considering the last Part's discussion of the practical difficulties of such consolidation, it is interesting to consider what might motivate current advocacy of the consolidation position.[44] Given the prominence of crisis regulation in recent years, it is not illogical to contextualize some advocating agency consolidation as proffering a grand-scheme solution to the grand-level financial crisis that still lingers as a public concern.[45]

To the extent one is emboldened to push agency consolidation forward as a quick fix to the fundamental issues of investor protection that continue to exist after the crisis, those analyzing such advocates' proposals will find useful my categorization of concerns with this crisis-regulation approach on another issue. In particular, my prior work examining the issue of executive compensation reform illustrates this point.

In that work, I looked at congressional crisis regulation on executive compensation reform as illustrating troubling competition between the legislative and executive branches.[46] More specifically, I examined a congressional proposal to force the SEC to adopt specific disclosure reforms related to compensation, even as the SEC had just moved forward with new rules in this area.[47] This led me to identify multiple concerns created by such crisis regulation.

First, the legislation seemed to constitute part of a trend of the United States Congress to impose untailored regulatory solutions on executive agencies; rather than allowing the SEC to utilize its expertise

42. It is interesting that in 2015, many appear to perceive us still to be in the wake of the financial crisis and its aftermath. In part, this likely is because of spin-off crises that linger in a very serious way, such as the previously mentioned debt crisis in Europe. *See Greece Debt Crisis: EU Summit Cancelled as Talks Continue*, *supra* note 34.

43. *See, e.g.*, Fisch & Rosen, *supra* note 41, at 1112-22 (noting the mismatch of required SEC attorney responsibility rules with the solution of the underlying Enron problems).

44. *See* ElBoghdady, *supra* note 37 (noting the SEC/CFTC merger example).

45. This is not to suggest this as a universal motivation. Again, suggestions of governmental consolidation are not entirely new, and some have advocated it for a long time. The point here is that for those who might wish to have consolidation as a quick fix for crises, crisis-regulation dangers may accompany such efforts.

46. *See* Rosen, *supra* note 39, at 2909-10.

47. *See id.* at 2923.

and existing authority to tailor regulatory solutions after careful consideration and consultation with a variety of stakeholders through the administrative rulemaking process to see if the SEC's solutions worked, the legislation sought to tell the SEC that it must promulgate additional rules with legislatively prescribed content.[48] My analysis emphasized how, in contrast, the SEC's more deliberative administrative rulemaking process that had preceded congressional involvement in this instance unveiled specific problems with the SEC's original proposed rule, which were corrected before the rule went into effect.[49]

Second, the legislation failed to recognize fully the role of reform synergies.[50] Reform-synergy issues come in different forms. For example, when multiple government actors with regulatory authority decide to address problems related to the same crisis or scandal, too little appreciation may be given to how these different efforts interact with each other.[51] One might think of this as proper regulatory sequencing, where it may be very sensible to see whether the first promulgated regulatory solution works before rushing to add another solution that is dependent upon, or perhaps even at odds with, the first. This reemphasizes the need for deliberative creation of regulation, rather than regulation forged in the crucible of scandal.[52] Another synergy issue is how crisis regulation on some subjects affects the prospects of addressing other problems brought out by a crisis that require reform.[53] In other words, when determining how one reform affects another, one should not only look at how reforms on the same subject have synergistic effects, but also expand one's analysis to a broader array of reforms.

Third, the legislation did not consider hidden costs, especially as they relate to an agency's ability to prioritize some reforms over others, given limited resources to engage in rulemaking and other types of regulatory activities. As Congress imposes regulatory structures in legislation, it necessarily may limit agency efforts to deal with other, more important problems first.[54]

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48. *Id.* at 2927-30.

49. *See id.* at 2910-23.

50. *Id.* at 2930-31.

51. *See id.*

52. *See* Kenneth M. Rosen, *Mickey, Can You Spare a Dime?* DisneyWar, *Executive Compensation, Corporate Governance, and Business Law Pedagogy*, 105 MICH. L. REV. 1151, 1166-68 (2007) (book review).

53. *See* Rosen, *supra* note 39, at 2931.

54. *See id.* at 2932; *see also Examining the Settlement Practices of U.S. Financial Regulators: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 48-49 (2012) [hereinafter *Hearing*] (statement of Kenneth M. Rosen, Professor of Law, The University of

Although executive compensation and agency consolidation are different subjects for crisis reforms, the three categories of concerns expressed above potentially apply to both. Ultimately, the methodology for consolidating agencies would be legislative action that imposes the will of Congress on executive agencies, arguably in the most extreme way—in imposing consolidation, not only would Congress fail to leave discretion to agencies to take a first stab at the crisis-related problems it perceives to be fixing through consolidation, but Congress would go even further than imposing a policy solution by constraining how existing agency personnel organize themselves to analyze and address problems. Congress would do so by saying that agency staff must reorganize with other regulators in the consolidated agency. The deliberative rulemaking processes of the old agencies would thus be undermined.[55]

Agency consolidation also potentially triggers regulatory-synergy costs. Given the still-recent nature of the financial crisis, major legislative initiatives already undertaken to deal with the crisis, such as Dodd-Frank, and ongoing efforts by agencies to attempt to implement new regulatory mandates that Congress has already imposed, it is hard not to imagine the possibility of major disruption that might be caused by agency consolidation at this time. It is useful to explore this point. The SEC has been reporting on its efforts on the mandatory rulemaking required by Dodd-Frank, which remained incomplete going into the fall of 2015.[56] SEC Chair Mary Jo White, in a statement on Dodd-Frank's five-year anniversary, noted the breadth of both the efforts taken in the implementation of the statute and the SEC's initiative in response to issues raised in financial markets. It is useful to provide much of the statement in the Chair's own words to illustrate the synergy issue:

> The Commission and our fellow regulators have been working hard to strengthen our nation's financial systems by implementing the rules mandated by the Dodd-Frank Act and by enacting other critical reforms to protect investors and our markets. . . .

Alabama School of Law) (noting the significance of agency freedom to allocate resources, including in their enforcement programs).

55. This is not to suggest that Congress inherently always must leave agencies in their current forms. But as I suggest in my prior work, Congress often operates best when it identifies problems with agency operations through the oversight process before choosing the nuclear-type solution of imposing congressional will, which would be more appropriate for situations of agency recalcitrance. *See* Rosen, *supra* note 39, at 2933-40.

56. *See Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, SEC, https://www.sec.gov/spotlight/dodd-frank.shtml (last modified June 1, 2016).

The Commission has taken action to address virtually all of the mandatory rulemaking provisions of the Dodd-Frank Act, and at the same time we have focused on additional measures to bolster our financial infrastructure. Within a year of the legislation taking effect, the Commission began bringing greater transparency and oversight to hedge fund and other private fund advisers with an extensive series of reforms. The Commission also established stronger standards for the clearinghouses that stand at the center of the global financial system and built an enhanced program for their supervision.

Since I became Chair a little more than two years ago, the agency has continued to advance reforms for stronger, more resilient financial markets. Working with our fellow financial regulators, we finalized the Volcker Rule's restrictions on proprietary trading and investments by banks. To combat the inflated credit ratings that contributed to the crisis, the Commission adopted a comprehensive package of reforms to the governance and management of the credit rating agencies. We put in place the foundational rules for a new regulatory framework for security-based swaps.

The Commission set up new safeguards to protect municipalities and investors in the municipal securities markets from conflicted advice and unregulated advisors. We adopted wide-ranging rules for the asset-backed securities market that increase the accountability of securitizers and better protect investors. And we proposed a suite of mandated rules to improve the transparency of executive compensation and require executives to pay back compensation that they were awarded erroneously.

The overarching objective of these rulemakings is to promote the long-term sustainability of the U.S. financial system. That is also the objective of the other powerful tools that the Dodd-Frank Act gave the SEC, such as the whistleblower award program and other enhancements to the SEC's enforcement authority. The whistleblower program has increased the efficiency of our program by expanding whistleblower protections and remedies for retaliation while creating powerful incentives for whistleblowers to come forward with evidence of financial wrongdoing.

While the worst of the financial crisis is behind us, the Commission intensively continues its critical work beyond the Dodd-Frank Act to fulfill our obligation to protect investors, enhance market stability, and promote capital formation. Doing so today requires a dynamic, persistent assessment of the risks to investors and markets, as well as to the financial system as a whole.

To address the risk of a recurrence of the investor runs we saw during the crisis, for example, we adopted transformative rules that will fundamentally change the way money market funds operate. We also now require additional safeguards from the broker-dealers who manage

> customers' securities and cash. And we are continually working to assess and address specific elements of today's equity market structure to optimize them in the interests of investors and public companies.
>
> The Dodd-Frank Act was designed to strengthen our financial system, and the Commission has furthered that goal both through our implementation of the statute and through our own initiatives. Lasting reform—not just "checking the box" for a list of rules—is the only way we can safeguard against another financial crisis. With increased transparency, better investor protections, and new regulatory tools, the Commission continues to work towards a stronger marketplace and financial future for all Americans.[57]

Chair White's statement suggests the enormity of the number of regulatory changes affecting issues such as investor protection, even primarily from the SEC's perspective and in about only a five-year period. Notwithstanding her report card on the high overall percentage of completed mandatory rulemakings—and indeed, the SEC already has completed at least sixty-one of these rulemakings—by the SEC's own count, some rules still remain for final adoption.[58] Again, the regulatory-synergies issue and regulatory sequencing center on seeing how reforms play out before implementing additional reforms that might not work most effectively with the prior ones. It seems unfathomable that one can determine whether the huge volume of reforms already undertaken—or already mandated to be undertaken—have been in place long enough to solve adequately earlier problems or do not solve them in a way that indicates broader institutional reform, such as agency consolidation, is needed as an alternative solution.

The synergy issue on this point links closely to the regulatory prioritization concern for crisis regulation as well. Congress already has required agency officials to devote an enormous amount of resources to mandatory rulemakings under Dodd-Frank. As just explained, all items on the task list have not been entirely accomplished.[59] Requiring agency consolidation presumably would create a long, new list of tasks to integrate staffs of the various agencies, which would further take resources away from other rulemakings that the regulatory staff might view as critical and from other regulatory efforts, such as investor education and enforcement of

57. Mary Jo White, *Statement on the Anniversary of the Dodd-Frank Act*, SEC (July 16, 2015), https://www.sec.gov/news/statement/statement-on-the-anniversary-of-the-dodd-frank-act.html (emphasis omitted).

58. *See Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra* note 56.

59. *See id.*

already-existing rules. Resources likely also would be drained from cutting-edge projects that Chair White's statement implies are significant, such as addressing the globalized nature of markets.

This likely would not only be an issue for securities-related investor protection issues, but also ones under the current consumer financial product regulatory umbrella. Dodd-Frank also created the new Consumer Financial Protection Bureau (CFPB).[60] The CFPB was tasked with a wide array of responsibilities, from education to enforcement, to research, to rulemaking, with a special consumer focus.[61] Controversy over its existence and the confirmation of its leader already hindered the CFPB from starting to address its agenda.[62] Accordingly, it is unclear how existing CFPB regulation would synergize with regulation in these areas under a consolidated regulator, given the slow start in creating these new regulations. And reopening the wounds related to the CFPB leadership and organization controversies as part of an agency-consolidation process likely would further subtract from dedicating resources to its variety of tasks already identified at its inception.

The above concerns expressed about consolidation certainly counsel caution on any regulator consolidation project, but they do not complete the story. Even if consolidation is undesirable, more limited convergence is not necessarily undesirable. Some issues that are related to protections of product end users do cross over between regulators. It would provide some comfort if effective mechanisms existed for existing agencies to cooperate to coordinate their approaches on these issues.

IV. A CASE STUDY OF COOPERATION

As an initial matter, it is useful to establish that cooperation and coordination between existing regulators on issues affecting the individuals under their care is possible. Fortunately, this is not only a possibility, but something that can be done effectively. A short discussion of an example—the regulatory framework for the introduction of single-stock futures[63] and other defined security futures

60. *The Bureau*, *supra* note 23.

61. *Id.*

62. *See* Jim Puzzanghera, *GOP Stalls Confirmation of Consumer Agency Nominee*, L.A. TIMES (Sept. 7, 2011), http://articles.latimes.com/2011/sep/07/business/la-fi-consumer-bureau-cordray-20110907.

63. A "single-stock future" is a contract for the delivery of a stock at a future date for an agreed-upon price. *See Single Stock Future*, DICTIONARY OF FINANCE AND INVESTMENT TERMS (9th ed. 2014).

products in U.S. markets under the Commodity Futures Modernization Act of 2000[64] (CFMA) and related efforts of the SEC and CFTC to share regulatory responsibilities related to the relevant products—will prove useful.[65]

For numerous years prior to the CFMA's enactment, the Shad-Johnson Accord banned trading these futures.[66] To end the ban, it became necessary to determine whether these futures should be treated as securities or commodity futures, which, in turn, would affect whether the SEC or CFTC possessed regulatory authority over the products.[67]

Early versions of legislation advocated by some parties would have bifurcated regulatory treatment of the products depending on whether the futures traded on securities or futures exchanges.[68] The SEC cautioned that this might create regulatory arbitrage opportunities, as well as potentially unequal investor protections for purchasers depending on whom they bought the futures from.[69] For instance, securities law traditionally focuses on the need for securities intermediaries to determine the suitability of investments.[70]

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64. *See* Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, app. E, 114 Stat. 2763, 2763A-365 to -461 (codified as amended in scattered sections of 7, 11, 12, 15 U.S.C. (2012)).

65. For a discussion of shared regulation as it specifically relates to the regulation of financial intermediaries—broker-dealers and futures commission merchants who often help consumers trade—see Rosen, *supra* note 26, at 627-28, 635-42. *See also* 2 EDWARD F. GREENE ET AL., U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS § 13.04[3] (11th ed. 2015) (discussing the exceptions and exemptions from mandatory clearing and trading).

66. *See* Bloomberg News, *Single-Stock Futures Trading Ban May End*, L.A. TIMES (May 9, 2000), http://articles.latimes.com/2000/may/09/business/fi-28014. Prior Chairs of the SEC and CFTC agreed to this decision after questions arose as to which agency possessed jurisdiction over such products. *See* Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (codified as amended in scattered sections of 7, 15, 18, 29 U.S.C.); U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-00-89, CFTC AND SEC: ISSUES RELATED TO THE SHAD-JOHNSON JURISDICTIONAL ACCORD 2-7 (2000).

67. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 66, at 5-7; William Neikirk, *Gramm, Lugar Confident of Futures Bill Passage*, CHI. TRIB. (May 12, 2000), http://articles.chicagotribune.com/2000-05-12/business/0005120282_1_single-stock-futures-commodity-futures-trading-commission-senators.

68. *See* MARK JICKLING, CONG. RESEARCH SERV., RS20560, THE COMMODITY FUTURES MODERNIZATION ACT 5 (2003).

69. *See* Annette L. Nazareth, *Testimony Concerning H.R. 4541, the Commodity Futures Modernization Act of 2000*, SEC (June 4, 2000), http://www.sec.gov/news/testimony/ts102000.htm.

70. *See* HAZEN, *supra* note 2, § 14.16; *see also* Lewis D. Lowenfels & Alan R. Bromberg, *Suitability in Securities Transactions*, 54 BUS. LAW. 1557 (1999) (noting the significance of the suitability doctrine).

The Chairs of the SEC and CFTC ultimately composed a joint regulatory plan for these futures that largely was incorporated into the CFMA's final enacted version.[71] The CFMA treats the products as both securities and futures, and markets and intermediaries trading the products need to register with both agencies to submit themselves to the different regulatory schemes.[72] Special "notice" registration was made available to limit the administrative burden of complying with both the securities and futures regulatory frameworks.[73]

Armed with the knowledge that cooperation is possible, as illustrated by the single-stock-future narrative, next it is useful to provide some ideas on how cooperation between regulators can be encouraged and facilitated.

V. FACILITATING COOPERATION

Even if massive agency consolidation may be ill-advised, room for improvement exists on how the current multiagency system, with different actors focused on protecting investors and consumers, operates. In a world of multiple regulatory actors, more attention should be paid to how to facilitate those actors' cooperation and coordination.[74] In this Part, I briefly describe some existing cooperation mechanisms and how these or new cooperation mechanisms might be enhanced. Hopefully, this will provide ideas for discussion not only at this Symposium, but also for future research.

A. *Utilized Mechanisms*

As a starting point, it is useful to recognize that the separate government actors already do not act in bubbles, unaware of and noncommunicative with their fellow regulators. Interactions between actors may be informal or on a one-off basis, but their dealings with one another at times have been facilitated by ongoing groupings. While it is not within the scope of this Article to consider all such arrangements, some examples at the domestic and international levels highlight this point.

Recall that in the single-stock-futures narrative, the Chairs of the SEC and CFTC came together to present a way for Congress to meld

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71. *See* JICKLING, *supra* note 68.

72. *News Story Supplement: Summary of SEC/CFTC Agreement*, SEC, http://www.sec.gov/news/extra/cftcagre.htm (last modified Sept. 19, 2000).

73. *Id.*

74. *Cf.* Rosen, *supra* note 39, at 2936-38 (discussing the role of Congress in coordination).

the two agencies' regulatory expertise, schemes, and efforts to help protect investors related to the newly permitted security futures products. However, this was not the first time these regulators encountered each other. They had experience with each other. Both were members of the President's Working Group on Financial Markets (Working Group). That group, which President Ronald Reagan initially endorsed by a presidential executive order, consisted of the leaders of the SEC, the CFTC, the Fed, and the Treasury.[75] Although presidential endorsement of the Working Group may have been inspired at that time by the famed market break of 1987,[76] the Working Group has operated over numerous years. In this continuing engagement, the Working Group even undertook its own research and produced publications as new issues arrived in a variety of subject-matter areas.[77]

Such groupings can be even more formalized with *both* congressional and presidential endorsement. More recently, a statute established the Financial Stability Oversight Council (FSOC).[78] Under the statutory mandate, there is

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75. *See* Exec. Order No. 12,631, 3 C.F.R. § 559 (1989).

76. For instance, the 1988 executive order noted the Working Group's purposes and functions, some of which directly referenced the market break of 1987:

> Recognizing the goals of enhancing the integrity, efficiency, orderliness, and competitiveness of our Nation's financial markets and maintaining investor confidence, the Working Group shall identify and consider:
>
> (1) the major issues raised by the numerous studies on the events in the financial markets surrounding October 19, 1987, and any of those recommendations that have the potential to achieve the goals noted above; and
>
> (2) the actions, including governmental actions under existing laws and regulations (such as policy coordination and contingency planning), that are appropriate to carry out these recommendations.

Id.

77. *See, e.g.*, Working Grp., *The Long-Term Availability and Affordability of Insurance for Terrorism Risk*, TREASURY (Apr. 2014), https://www.treasury.gov/initiatives/fio/reports-and-notices/Documents/PWG_TerrorismRiskInsuranceReport_2014.pdf; Working Grp., *Money Market Fund Reform Options*, TREASURY (Oct. 2010), https://www.treasury.gov/press-center/press-releases/Documents/10.21%20PWG%20Report%20Final.pdf; Working Grp., *Policy Statement on Financial Market Developments*, TREASURY (Mar. 2008), https://www.treasury.gov/resource-center/fin-mkts/Documents/pwgpolicystatemktturmoil_03122008.pdf.

78. Council voting members include the Treasury Secretary, the Chair of the Fed, the Comptroller of the Currency, the Director of the CFPB, the SEC Chair, the FDIC Chair, the CFTC Chair, the Federal Housing Finance Agency Director, the National Credit Union Administration Chair, and a presidentially appointed insurance expert. *Financial Stability Oversight Council: About FSOC*, TREASURY, http://www.treasury.gov/initiatives/fsoc/about/Pages/default.aspx (last updated May 19, 2015,

> collective accountability for identifying risks and responding to emerging threats to financial stability. It is a collaborative body chaired by the Secretary of the Treasury that brings together the expertise of the federal financial regulators, an independent insurance expert appointed by the President, and state regulators.
>
> The Council has important new authorities to constrain excessive risk in the financial system. For instance, the Council has the authority to designate a nonbank financial firm for tough new supervision to help minimize the risk of such a firm from threatening the stability of the financial system.
>
> Additionally, to help with the identification of emerging risks to financial stability, the FSOC can provide direction to, and request data and analyses from, the newly created Office of Financial Research (OFR) housed within Treasury.[79]

Like the Working Group, FSOC and its related staff have produced reports on several subjects—for FSOC, sometimes this is pursuant to specific congressional mandate.[80] But as a newer cooperation enterprise, FSOC is especially worth watching because not only does FSOC have the formality of statutory endorsement, but it also has more particularized powers, such as the abilities to designate entities

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4:26 PM). However, as noted below, additional stakeholders—such as state insurance, banking, and securities commissioners—are included in an advisory capacity. *Id.*

79. *Id.*

80. *See, e.g.*, FSOC, *Report to Congress on Study of a Contingent Capital Requirement for Certain Nonbank Financial Companies and Bank Holding Companies*, TREASURY (July 2012), https://www.treasury.gov/initiatives/fsoc/Documents/Co%20co%20study%5B2%5D.pdf; FSOC, *Report to the Congress on Actions Taken in Response to the U.S. Government Accountability Office's Report Entitled, "National Credit Union Administration: Earlier Actions Are Needed To Better Address Troubled Credit Unions,"* TREASURY (June 2012), https://www.treasury.gov/initiatives/fsoc/studies-reports/Documents/Report%20to%20the%20Congress%20on%20Actions%20Taken%20in%20Response%20to%20the%20U.S.%20GAO's%20Report%20on%20National%20Credit%20Union%20Administration.pdf; FSOC, *Report to the Congress on Prompt Corrective Action*, TREASURY (Dec. 2011), https://www.treasury.gov/initiatives/fsoc/studies-reports/Documents/FSOC%20PCA%20Report%20FINAL.pdf; FSOC, *Report to the Congress on Secured Creditor Haircuts*, TREASURY (July 2011), https://www.treasury.gov/initiatives/Documents/Report%20to%20Congress%20on%20Secured%20Creditor%20Haircuts.pdf; FSOC, *Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds*, TREASURY (Jan. 2011), https://www.treasury.gov/initiatives/Documents/Volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf; FSOC, *Study & Recommendations Regarding Concentration Limits on Large Financial Companies*, TREASURY (Jan. 2011), https://www.treasury.gov/initiatives/Documents/Study%20on%20Concentration%20Limits%20on%20Large%20Firms%2001-17-11.pdf; Chairperson of FSOC, *Study of the Effects of Size and Complexity of Financial Institutions on Capital Market Efficiency and Economic Growth*, TREASURY (Jan. 2011), https://www.treasury.gov/initiatives/fsoc/studies-reports/Documents/Study%20of%20the%20Effects%20of%20Size%20and%20Complexity%20of%20Financial%20Institutions%20on%20Capital%20Market%20Efficiency%20and%20Economic%20Growth.pdf.

that pose risks to financial stability[81] and to engage in rulemaking.[82] Although FSOC is relatively new, it has engaged in numerous activities, and it is interesting as a coordinating mechanism; FSOC frequently takes account of member actions to give a more comprehensive view of total risk regulation in the United States.[83]

Cooperation and coordination mechanisms certainly are not limited to domestic efforts such as those described above. In the securities world, for example, the International Organization of Securities Commissions (IOSCO) has brought together securities regulators for cooperation and coordination projects since 1983; as of last fall, IOSCO had grown to 200 members from its initial 11.[84] IOSCO certainly is not vested with the authority to impose specific laws regarding investor protection or other matters on member states that might be seen as full convergence;[85] thus, it is interesting how it accomplishes its work. IOSCO has opted to try to draw up consensus documents to get members at least to agree to shared principles as they undergo their own work in their jurisdictions.

Notably, in 2010, IOSCO issued its "Objectives and Principles of Securities Regulation."[86] Protecting investors is among the three regulatory objectives.[87] While not prescribing the exact content of regulations for members, the document provides a shared sense of how each should proceed with the regulatory enterprise.[88] In addition to

81. *Financial Stability Oversight Council: Designations*, TREASURY, http://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx (last updated July 27, 2015, 4:38 PM).

82. *Financial Stability Oversight Council: Rulemaking*, TREASURY, http://www.treasury.gov/initiatives/fsoc/rulemaking/Pages/default.aspx (last updated Feb. 4, 2015, 5:44 PM).

83. *See* FSOC, *2015 Annual Report*, TREASURY 87-104 (2015), http://www.treasury.gov/initiatives/fsoc/studies-reports/Documents/2015%20FSOC%20Annual%20Report.pdf.

84. *See About IOSCO*, IOSCO, http://www.iosco.org/about/?subsection=about_iosco (last visited May 24, 2016).

85. In the securities context, the difficulties of achieving greater consolidation and fuller international convergence are illustrated by the stagnation over the last decade of efforts to achieve a broad mutual-recognition regime in the United States. Mutual recognition essentially involves one jurisdiction that is comfortable enough with the laws of another such that the jurisdiction forgoes certain regulation of entities from the other that came to the jurisdiction's borders, because the laws of the other jurisdiction are sufficiently akin to its own. *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, 32 (2007) (proposing that certain foreign entities dealing with U.S. persons not be required to register in the United States conditionally, based on other types of substituted compliance).

86. *See Objectives and Principles of Securities Regulation*, IOSCO (June 2010), http://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf.

87. *See id.* at 3.

88. *See id.* at 4-12.

such general pronouncements, the organizational structure of IOSCO utilizes a committee system for more specific, substantive discussions and initiatives on particular subject matters. For example, Committee 8 focuses on issues related to retail investors, especially financial literacy and investor education, as well as advising the IOSCO Board on investor protection matters for retail customers.[89] With such standing committees in place, IOSCO can ascertain what members are doing and thus where regulation might need to go.[90]

Just as cooperative bodies in the United States work on issues such as financial risk, international fora exist for doing so as well. The Financial Stability Board (FSB) and its predecessor, the Financial Stability Forum (FSF), exemplify these bodies. In the wake of the Asian Financial Crisis in 1999, the FSF came into existence; it followed a call by the Group of 7 Ministers and Governors for new structures to increase cooperation among financial institutions and supervisory bodies around the globe.[91] The FSF would identify systemic vulnerabilities, suggest possible actions to address problems, and help coordinate financial authorities in maintaining stability.[92]

Notwithstanding aspirations surrounding its creation, FSF's actual efforts proved insufficient to prevent the instability surrounding the 2008 financial crisis.[93] FSF itself reflected upon its work, for example, when its Chairman, Mario Draghi, explained, "In response to the challenges presented by the global financial situation, and recognizing the global nature of financial markets, we believe that the FSF must expand to a broader membership of emerging economies."[94] Ultimately, in April 2009, the FSB replaced the FSF.[95]

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89. *Committee on Retail Investors (Committee 8)*, IOSCO, http://www.iosco.org/about/?subsection=display_committee&cmtid=20 (last visited May 24, 2016).

90. For example, IOSCO's "Final Report on Sound Practices for Investment Risk Education" utilized the experience of Committee 8 members to proffer its findings. *See* Bd. of IOSCO, *Sound Practices for Investment Risk Education: Final Report*, IOSCO 22-48 (Sept. 2015), http://www.iosco.org/library/pubdocs/pdf/IOSCOPD505.pdf.

91. *Our History*, FSB, http://www.fsb.org/about/history/ (last visited May 24, 2016).

92. Jason Liberi, Comment, *The Financial Stability Forum: A Step in the Right Direction . . . Not Far Enough*, 24 U. PA. J. INT'L ECON. L. 549, 567 (2003).

93. Some have criticized the poor precrisis efforts of the FSF. *See, e.g.*, Enrique R. Carrasco, *The Global Financial Crisis and the Financial Stability Forum: The Awakening and Transformation of an International Body*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 203, 207-08 (2010); Cally Jordan, *Does "F" Stand for Failure: The Legacy of the Financial Stability Forum* (Melbourne Law Sch., Legal Studies Research Paper No. 429, 2009), http://papers.ssrn.com/sol3/abstract_id=1478527.

94. Press Release, FSF, Financial Stability Forum Chairman Supports the G20 Call To Broaden the FSF's Membership (Nov. 13, 2008), http://www.fsb.org/wp-content/uploads/pr_081113.pdf (internal quotation marks omitted).

95. *Our History*, *supra* note 91.

Changes for the new entity included increased membership and a more formal organizational structure, including leadership positions, a steering committee, and consensus-based decision making for plenary matters.[96] These new structures also reflected the aspirations for a better global economy expressed at the now similarly expanded G20 group of nations, which hoped to "establish the much greater consistency and systematic cooperation between countries, and the framework of internationally agreed high standards, that a global financial system requires."[97] Later, in a 2011 declaration, the G20 reached a consensus to "strengthen FSB's capacity, resources and governance" by giving the FSB "a corresponding institutional standing, with legal personality and greater financial autonomy."[98] By 2013, the FSB became a not-for-profit entity under Swiss law.[99]

This is not to suggest that today's FSB constitutes legally binding convergence of international financial law.[100] Rather, the FSB "operates by moral suasion and peer pressure" to form standards that members commit to implementing.[101] Members can "recuse themselves at any time" from the FSB's activities or policy making when they "are not consistent with [the members'] legal or policy frameworks."[102] Presumably, the sanction for failing to comply is the reputational harm of doing so.[103] Notwithstanding such limitations, the

96. Stephany Griffith-Jones et al., *Introduction and Overview*, *in* THE FINANCIAL STABILITY BOARD: AN EFFECTIVE FOURTH PILLAR OF GLOBAL ECONOMIC GOVERNANCE? 6, 7 (Stephany Griffith-Jones et al. eds., 2010), https://www.cigionline.org/sites/default/files/FSB%20special%20report_2.pdf.

97. *London Summit—Leaders' Statement*, IMF 3-4 (Apr. 2, 2009), https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf.

98. *2011 Cannes Summit Final Declaration*, G20 INFO. CTR. (Nov. 4, 2011), http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html.

99. *Our History*, *supra* note 91; *see also* Thomas Spencer & Elizabeth Hipwell, *Coordinating, Mandating, Monitoring: What Can the Post-2015 Climate Regime Learn from Global Financial Governance?*, 2013 CARBON & CLIMATE L. REV. 293, 299 ("The transition from the FSF to the FSB was intended . . . to strengthen its authority, relevance and independence, and thus ultimately its efficacy.").

100. *See What We Do*, FSB, http://www.fsb.org/what-we-do/ (last visited May 24, 2016).

101. *Id.*

102. *Articles of Association of the Financial Stability Board (FSB)*, FSB 3 (Jan. 28, 2013), http://www.fsb.org/wp-content/uploads/AoA-26-March-2015-FINAL.pdf.

103. *See* Adam S. Posen, *Testimony Submitted to the Senate Committee on Banking, Housing, and Urban Affairs Hearing on "The Role of the Financial Stability Board in the U.S. Regulatory Framework,"* U.S. SENATE COMMITTEE ON BANKING HOUSING & URB. AFF. 6 (July 8, 2015), http://www.banking.senate.gov/public/_cache/files/b9f2617a-7440-45a8-8632-58b5c2206739/33A699FF535D59925B69836A6E068FD0.posentestimony7815.pdf.

FSB hopefully is better positioned to find and address potential systemic problems.[104]

While they may not be perfect and are subject to improvement over time, the story of these domestic and international cooperation and coordination organizations indicates that they have the potential to evolve and expand and to serve significant functions over time. That makes it useful to briefly identify some ideas for the regulatory-coordination agenda going forward.

B. Ideas for Improvement

In briefly identifying ideas for regulatory cooperation institutions and a coordination agenda going forward, it is useful to frame the discussion as a set of principles for the agenda.

First, products of regulator cooperation likely will only be as good as the inputs from separate regulators engaged in the cooperation. Stated slightly differently, to be the best participants in collaborative processes, those participants need to put their own houses in order as they begin to engage in those processes. While this may seem clearly evident, certain hazards might prevent such self-reflection and hard work from happening. Unfortunately, under some circumstances, without preventive tactics, a shirking story may occur; temptation might exist to blame problems on the coordination organization, rather than its members.[105]

The last Part, for instance, told the story of the demise of the FSF and noted the critique of the FSF for failing to predict the 2008 financial crisis.[106] Such a critique may be warranted, but it is dangerous to stop there. Nations making up the FSF individually did not adequately anticipate the crisis and engaged in policies that may have provoked the crisis. Even if the coordinating organization has some of its own staff, it is unlikely that it will have the capacity to do the heavy lifting without the active engagement of the membership. This is a benefit of the IOSCO committee approach noted above,[107] in

104. *See* Michael S. Barr, *Who's in Charge of Global Finance?*, 45 GEO. J. INT'L L. 971, 998 (2014) ("[The FSB makes it] harder for concerns to fall between the cracks of narrowly focused standard-setting bodies.").

105. Professor Hilary Allen, another participant at this Symposium, also has raised concerns about shirking by regulators. *See* Hilary J. Allen, *Financial Stability Regulation as Indirect Investor/Consumer Protection Regulation: Implications for Regulatory Mandates and Structure*, 90 TUL. L. REV. 1113 (2016).

106. *See supra* note 93 and accompanying text.

107. *See supra* notes 86-90 and accompanying text.

which member participants are relied upon explicitly as part of the process of creating collaborative products.

Second, specific tasks on a detailed agenda may yield specific results. One takeaway from the examples utilized in this Article might be that more detailed organizational structures of cooperation entities create better coordination results.[108] However, the fact that an organization has more formal committees does not mean it necessarily will get more done. A more nuanced view is that an organization is assisted by possessing mechanisms that generate a detailed, robust project list. The value of a committee at IOSCO that focuses specifically on retail investors and education is that it hopefully includes members interested in and motivated to act on these particular issues with specific ideas on how to proceed. For example, knowledgeable committee members may become aware in their home jurisdictions of particularly complex financial products that befuddle investors, leading to a specific project or report that relates to those products, which may positively impact investors.

Third, and closely related to the last two principles, cooperative organizations benefit from substantial research resources. Moreover, these resources must be adequate to engage in both backward-looking and proactive analysis. Just as crisis spurs regulation, it also becomes easy fodder for research for many,[109] myself included. Certainly, coordinating organizations need resources to study why crises occurred, and resources for that task may be forthcoming, given the angst and calls for action following a crisis. Understanding past problems is certainly one component of preventing future ones, but so is identifying new issues and new forms of problems.[110]

This raises the question of how a coordinating body might identify the new problems through research and also reveal areas ripe for cooperative efforts to address those problems. A starting point may be to establish a research baseline. As noted, today's studies by

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108. For example, discussion of the transition from the FSF to the FSB noted the inclusion of more formal organizational structures. *See supra* text accompanying note 96.

109. *See* William Poole, Essay, *Causes and Consequences of the Financial Crisis of 2007-2009*, 33 HARV. J.L. & PUB. POL'Y 421 (2010); *Financial Crisis Inquiry Commission*, [2010] 31 Bank Dig. Online (CCH) ¶ 618 (Feb. 17. 2010) (noting a forum to discuss crisis causes).

110. One should not forget that given the regulatory-synergy and related concerns identified earlier, the new issues should include methodical study of reforms as promulgated, in order to become more informed prior to additional reform enactment.

regulators often focus on what caused a major problem after the fact.[111] However, there are examples of especially forward-thinking assessments of the regulatory landscape that seek to more broadly assess the current state of affairs in an effort to lay the groundwork for regulatory approaches in the future. In the securities world, one of the most famous examples is the 1963 so-called "Special Study."[112] A more recent example is the "Market 2000" report. This report, actually published in 1994, provides a forward-looking comprehensive exploration of the current state of equity markets, in anticipation of recommendations for future regulatory approaches.[113] Such research projects are useful models for new ones that might occur with some variations. For example, in an increasingly globalized economy, it would be useful for regulators participating in a cooperative organization to get back to the basics and simply provide research findings on the state of different types of markets in securities and other consumer financial products in countries around the world.[114]

This does not mean that the exact topics from older basic market studies should be the sole domain of a new, comprehensive global study. Some newer topics that might be useful to emphasize could include the impact of technology on markets. Financial product transactions increasingly are occurring through complex networks and technology-driven platforms. The state of the "new" market structure is rapidly evolving and critical to understand. Signs exist of potential future problems such as electronic trading stumbles.[115] One should not

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111. *See, e.g.*, Mark Carlson, *A Brief History of the 1987 Stock Market Crash with a Discussion of the Federal Reserve Response* (Fed, Divs. of Research & Statistics & Monetary Affairs, Fin. & Econ. Discussion Series, Working Paper No. 2007-13, 2006).

112. *See* SEC, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. DOC. NO. 88-95 (1963).

113. *See* DIV. OF MKT. REGULATION, SEC, MARKET 2000: AN EXAMINATION OF CURRENT EQUITY MARKET DEVELOPMENTS (1994).

114. While this may seem like a massive undertaking, models exist for international assessment as well. For example, the World Bank annually completes a "Doing Business" report that assesses business regulations for firms in over 180 nations; topics explored include how nations protect investors. *See, e.g.*, World Bank Grp., *Doing Business 2015: Going Beyond Efficiency*, DOING BUS. (2014), http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB15-Full-Report.pdf. One of the ways the World Bank accomplishes this enormous task every year is by leveraging private resources and calling on individual experts around the world to help with the research. *See id.* at 15-23. Of course, some may critique how well such assessments reflect reality. *See, e.g.*, *Pulling Rank: The Doing Business Report*, ECONOMIST, Sept. 26, 2015, at 77 (offering critiques of the "Doing Business" report). However, the assessments may help to move a dialogue on assessment techniques forward.

115. *See, e.g.*, Jose Pagliery, *Tech Fail! Explaining Today's 3 Big Computer Errors*, CNNMONEY (July 8, 2015, 2:13 PM), http://money.cnn.com/2015/07/08/technology/united-

wait for these problems to have more catastrophic effects before further study.[116] Technology also makes more complex financial derivative products possible, and a more systematic study of derivatives' use around the globe would be useful.[117]

Of course, more traditional topics also are ripe for additional exploration, especially microlevel issues of investor protection. In the wake of the financial crisis, much emphasis has been placed on the largest players in markets, especially given public angst about bailouts of large financial institutions.[118] This may obscure issues facing smaller, retail investors who also are critical market participants, collectively placing their dollars in capital markets that fuel the U.S. economy. More research should focus on issues such as broker-dealer regulation because those financial intermediaries deal with retail customers.[119]

A fourth principle for the broader cooperation agenda is to ensure a focus on, and contribution of, adequate resources for enforcement, in addition to research and policy making. It may garner more attention in some instances to be the regulator who discovers a problem or comes up with a new rule to address a problem, but no matter how well reforms are conceptualized, they likely will be irrelevant if new rules are not enforced. Moreover, sometimes better enforcement of existing rules might be a better alternative to spending limited resources on promulgating new rules.[120]

Some progress on cooperative enforcement efforts is being made at the domestic level. In November 2009, President Barack Obama created the Financial Fraud Enforcement Task Force (Task Force), joining the efforts of over two dozen agencies, regulators, and

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nyse-wsj-down/ (discussing computer problems at the New York Stock Exchange, United Airlines, and the *Wall Street Journal*).

116. *See* Jim Zarroli, *NYSE Halts Trading After Computer System Issues*, NPR (July 8, 2015, 4:30 PM), http://www.npr.org/2015/07/08/421225034/nyse-halts-trading-after-computer-system-issues (noting the New York Stock Exchange stoppage, which, on this occasion, did not cause stocks to plummet).

117. *See* Jonathan Lindenfeld, Note, *The CFTC's Substituted Compliance Approach: An Attempt To Bring About Global Harmony and Stability in the Derivatives Market*, 14 J. INT'L BUS. & L. 125, 125 (2015) (noting the CFTC Chair's remarks that risks do not know borders).

118. *See* Emily Stephenson & David Henry, *Bank Regulators Gain Ground Against Too-Big-To-Fail Bailouts*, REUTERS (Apr. 15, 2013, 1:52 AM), http://www.reuters.com/article/us-usa-banks-toobigtofail-idUSBRE93E06L20130415.

119. *See, e.g.*, Rosen, *supra* note 26, at 627-37.

120. *See Hearing*, *supra* note 54, at 48-49 (statement of Kenneth M. Rosen).

inspectors general from the federal, state, and local levels.[121] Members include the United States Department of Justice, SEC, CFTC, Federal Trade Commission, Internal Revenue Service, Treasury, Office of Thrift Supervision, Office of the Comptroller of the Currency, United States Department of Homeland Security, and the North American Securities Administrators Association, in addition to the numerous other organizations.[122] In an environment filled with desire to punish wrongdoers in the financial crisis, the President's executive order on the Task Force identified five missions:

> [1] to investigate and prosecute financial crimes and other violations relating to the current financial crisis and economic recovery efforts;
> [2] to recover the proceeds for such crimes and violations;
> [3] to address discrimination in the lending and financial markets;
> [4] to enhance coordination and cooperation among federal, state and local authorities responsible for the investigation and prosecution of financial crimes and violations; and
> [5] to conduct outreach to the public, victims, financial institutions, nonprofit organizations, state and local governments and agencies, and other interested partners to enhance detection and prevention of financial fraud schemes.[123]

Thus, the Task Force provides a cooperation mechanism in the enforcement context. Such a model might be used not only for financial-crisis-related wrongdoings, but also for other regulatory violation enforcement actions.

A final, fifth principle for the cooperation agenda is to be on the watch for opportunities to create cooperative networks of cooperative networks themselves. The international context provides an example of how this might be fruitful. FSOC's "2015 Annual Report" does not limit itself to discussing the regulatory activities of FSOC members. As it contemplates certain reforms, it actually makes specific reference to the IOSCO "Principles for Financial Benchmarks" and urges the consideration of those Principles by multiple U.S. regulatory agencies.[124] While there is not a legal convergence requirement that FSOC use its network of domestic regulators to impose an international cooperative network's approach to an issue, this indicates

121. *See First Year Report*, TASK FORCE 2.3, 3.3 (2010), http://www.stopfraud.gov/docs/FFETF-Report-LR.pdf.

122. *Id.*

123. *Id.* at 2.3-.4.

124. *See* FSOC, *supra* note 83, at 17.

the greater awareness that cooperative networks have of each other and an increased willingness to utilize ideas from fellow regulators both in the United States and abroad.

Hopefully, the cooperation-agenda principle of recognizing different entities' cooperative efforts, along with the other agenda principles discussed earlier, will be useful as the need for cooperation and coordination likely will increase in the future.

VI. CONCLUSION

Clearly, the presence of a large number of regulators who touch on investor and consumer issues both in the United States and abroad creates a situation in which these regulators may hinder each other's efforts or create inconsistencies in their approaches to problems. However, it does not follow that consolidation of agencies into single regulators necessarily furthers regulatory goals. Instead, especially in the short term, regulators and those who engage them should search out opportunities for cooperation and coordination.