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The Wider Context: The Future of Capital Markets Regulation in Developed Markets

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ABSTRACT

At a time of such great turbulence, looking to the future directions of capital markets and their regulation in developed economies is a particularly risky business. We are in the midst of a great sea change.

Nevertheless, there are several current, and readily observable, phenomena which are likely to shape capital markets regulation in the near future. First of all, the blurring of the distinctions between developed and developing markets themselves, as well as that between domestic and international markets, has put into question the adequacy of existing regulatory frameworks. Also, the transatlantic dialogue, London – New York, has given way to the rise of “multipolarity”; in an age of instantaneous transmission of information, capital and risk, competing centres of gravity have emerged. In addition, centuries-old market institutions are undergoing a period of dynamic change, producing the equivalent of regulatory jetlag. Among international actors, there are calls for what may be the somewhat indiscriminate widening of the “perimeter” of regulation; costs of compliance mount, regulatory uncertainty sets in. To the numerous, conflicting and perhaps unrealisable, goals associated with capital markets regulation has been added detection and prevention of systemic risk. The two great, albeit quite different, capital market regulatory models (those of the United States and the United Kingdom) have taken a beating; it is an open question as to what will take their place. Finally, in face of the virtually insurmountable difficulties of actually creating a World Financial Regulator (to say nothing of its desirability), two organisations, one created in direct response to the Global Financial Crisis, and the other, decades-old, are filling the void.

None of these factors operates independently, of course; all interact, contributing to the potential uncertainty and complexity of outcomes.

The Wider Context: The Future of Capital Market Regulation in the Developed Markets

Cally Jordan

INTRODUCTION

“All in all, the future global financial regulatory landscape is more likely to resemble a Japanese garden, with new details and perspectives emerging at each step, than a centralized and symmetrical jardin à la française. Consistency will not be uniformly achieved, the boundary between global and local decision-making will remain in flux and controversial, and a spirit of experimentation and institutional entrepreneurship will be required.”

(Stéphane Rottier, Nicolas Véron, 2010)

At a time of such great turbulence, looking to the future directions of capital markets regulation in developed economies is a particularly risky business. We are in the midst of a great sea change.

Nevertheless, there are several current, and readily observable, phenomena which are likely to shape capital markets regulation in developed economies in the near future:

- The blurring of distinctions between developed and developing, domestic and international, markets.
- The rise of “multipolarity” and dispersion of capital market centres.
- The transformation of market institutions such as stock exchanges.
- The changing “perimeter” of regulation and potential indiscriminate overregulation.
- The rethinking of regulatory goals.
- The questioning of established regulatory models.
- The future role of the Financial Stability Board (FSB) and the International Organization of Securities Commissions (IOSCO).

None of these factors operates independently, of course; all interact, contributing to the potential uncertainty and complexity of outcomes.

1. Blurring of Distinctions

For decades now, we have become accustomed to segregating capital markets, considering separately “developed” and “developing” markets.¹ These distinctions, popular in the financial press, are reinforced by the formal distinctions along similar lines institutionalised by international organisations, such as the International Monetary Fund (IMF) and The World Bank.

Even now, these distinctions are less and less compelling, at least among large economies. In response to the global financial crisis, the G8 quickly transmogrified into the G20.² No one doubts the significance of China among the world's leading capital markets; the HKEx, that gateway to China, is now the largest exchange in the world by some measures.³ Brazil's BM&FBOVESPA, the consolidated futures, commodities and securities exchange, has zoomed from near oblivion to fourth largest in the world, in less than ten years.⁴

Contemporaneously, another longstanding distinction, between domestic and international capital markets, is blurring, a fact also brought home by the global financial crisis. Financial contagion, a regional phenomenon associated with the Asian financial crisis of 1997-1998, went global. Contagion demonstrated graphically (and disastrously) that capital markets were not watertight compartments, constrained by geographical boundaries and regulated by the exercise of national authority.⁵

The blurring of these distinctions has put into question the adequacy of existing regulatory frameworks as well as proposed regulatory responses. New powerhouses such as China and Brazil, for better or worse, may be going their own regulatory way. Experiences with the development, implementation and assessment of international financial standards are fraught with difficulty.⁶ The recently created FSB, successor to that failed initiative, the Financial Stability Forum, is still in its infancy.

Despite widely publicised pressures to "internationalise" capital markets regulation, there remains a joker in the pack: the national interest. In the United States, the intensely domestic focus of the US Congress is offset, to a certain degree, by an experienced and internationally aware regulator, the Securities and Exchange Commission (SEC). But the SEC is not insulated from the isolationist winds blowing through Congress. And, elsewhere, there are vivid examples of the "national" interest prevailing even over obvious self interest, for example, in the rejection by the Australian Parliament of the proposed merger of the Singapore Exchange with the Australian Exchange.⁷

2. Rise of Multipolarity

There was a time when world capital markets revolved around the twin poles of London and New York. The hegemony of their market practices and regulatory models was somewhat shaken by the Lamfalussy Report in 2001, a wakeup call for European capital markets and their regulators,⁸ and then, a few years later, with the creation of NYSE-Euronext in 2007. Both Paris and Brussels were brought squarely into the picture. But the transatlantic dialogue, by industry and regulators alike, continued to drown out other discussions.

No longer. As Rottier and Véron of the Breugel Institute (a Brussels think tank) persuasively argue⁹, the once dominant capital markets of the transatlantic corridor are being challenged by the emergence of other centres of gravity, in Asia, Latin America and the Middle East. Hong Kong's brand new "dim sum" bond market¹⁰ is an example, attracting issuers such as the World Bank and McDonald's, issuers which would ordinarily be found raising capital in the exempt Eurobond market.

Another story, that of Brazil's BM&FBOVESPA is an especially dramatic one, even by "emerging" markets standards. At the end of the 1990s, the BOVESPA, as it then was, considered shutting down. Trading in Brazilian equities had migrated to the NYSE and the American Depositary Receipt or ADR market;¹¹ there had been virtually no initial public offerings done in Brazil over a period of several years. Concerted action by regulators, legislators and the BOVESPA itself (such as the creation of the Nova Mercado or Corporate Governance Listing Board) revitalised Brazilian capital markets. The BM&FBOVESPA, now the fourth largest exchange in the world,¹² recently announced a cross-listing arrangement with a Chinese counterpart, the HKEx.¹³ And, ironically, given that ADRs nearly undermined the very existence of the BOVESPA, it is now possible for non-Brazilian companies to create BDRs, Brazilian Depositary Receipts, for trading in Brazil.

There are any number of reasons why rival financial centres would be siphoning capital market flows away from London and New York. The disarray of markets and regulation in both the US and the UK immediately springs to mind, as does technology which permits the instantaneous transmission of information, capital and, as we all discovered recently, risk.

3. Transformation of Market Institutions

The traditional stock exchange is a powerful and very visible symbol of capitalism, with its imposing architecture and seeming timeless solidity. This centuries old market institution, however, is undergoing a radical transformation. The flurry of international mergers and consolidations, completed, proposed and failed, are an outward manifestation of the transformative effect of technological change. The formal institutional realignments are belatedly catching up with the technological reality.

Much has been written about the fading importance of the traditional stock exchange and the rise of competing, virtual exchanges. The Goliaths are changing business models,¹⁴ scrambling for strategic geographic advantage and embracing new products.¹⁵ As the merger route has proved a bumpy one, alliances or alignments are appearing.¹⁶ Markets, of any kind, have cultures though and roots extending back millennia. Despite the flash of international mergers, local markets, in one form or another, will persist; the niche markets of Luxemburg and Switzerland, for example. And, as recent experience with NYSE-Euronext demonstrates, even the biggest of international mergers has not erased the "local" markets involved.

All of this frenetic activity however produces the equivalent of regulatory jetlag. Regulators are still trying to adjust to that groundbreaking transatlantic merger of NYSE-Euronext. Occurring barely four years ago, it now seems to have taken place in a different lifetime. The great market upheaval and change taking place has put enormous stress on even the most basic principles of regulation and market practice, segregation of clients' accounts for example.¹⁷

Traditional self-regulation of market institutions has been marginalised in many places,¹⁸ especially by the rising tide of formal regulation. However, given the rapidly changing nature of market institutions themselves and the impossibility of adequate or comprehensive regulatory responses, at least in the short term, new varieties of self-regulation are likely to appear.

4 The Changing “Perimeter” of Regulation

Capital markets, especially international capital markets, have always thrived on regulatory arbitrage, much of which has been relatively benign: grease to the wheels of finance. The Eurobond market, for example attracted stellar issuers such as The World Bank and McDonald’s and has been remarkably resistant to formal regulation, seemingly without untoward consequences.

But the existence of “unregulated” markets, obvious to anyone close to the industry, apparently came as a great surprise to much of the world. In the United States, the volume of privately placed securities (that escape most of the regulatory apparatus) exceeded that of publicly offered securities for the first time several years ago. Now, the dominant capital market in the United States is the private placement market. As the name implies, it is a private market, and one not subject to the glare of public scrutiny.

So now, establishing the “perimeter” of regulation is the new mantra of the FSB, the IMF, The World Bank, IOSCO. Among other things, and crudely put, this implies sweeping the varied and multi-faceted world of derivatives into the regulatory net. Although indiscriminate regulation of derivative products has been plaintively decried recently by the head of the International Swaps and Derivatives Association,¹⁹ the forces of torrential regulation are not abating.

At the heart of this particular issue is the artificial, and historically determined, definition of a “security” in the United States, a product of the fragmented and fiercely territorial regulatory landscape there. The most well-known financial regulator, the SEC, has never had jurisdiction over most derivatives; that authority lies, for the most part, with a competing regulator, the Commodities and Futures Trading Commission (CFTC). Although this artificial distinction among financial products (which results in competing regulatory oversight) has been eliminated (or never adopted) in many other places in the world, it appears destined to persist in the United States.²⁰ Some exchanges in the United States, tied as they are now to specified financial products that are aligned with the jurisdiction of their primary regulator, would welcome the elimination of these distinctions and an expanded range of tradable products. In emerging markets, some early adopters of the US regulatory model may demonstrated the same product/market/regulator fragmentation (Korea, for example), but elimination of the distinctions has been occurring, and without any undue reticence.

Certainly, the avalanche of regulation precipitated by the global financial crisis is worrisome. Irrespective of the wisdom, or not, of its substantive provisions, very little of the Dodd Frank Act²¹ has actually been implemented.²² Costs of compliance mount, regulatory uncertainty sets in. By the time implementing agencies such as the SEC plough through their assigned reports and other mandates, the world’s capital markets will inevitably have moved on.

5. Rethinking Regulatory Goals

Addressing systemic risk has popped up everywhere as a new goal of capital markets regulation.²³ That capital markets, especially international capital markets, could be purveyors of systemic risk appears ridiculously obvious in hindsight. Systemic risk concerns, though, had

been the bailiwick of prudential regulators, proceeding on an institution by institution basis, not capital markets regulators.

Simply adding systemic risk to what is now quite a lengthy list of capital markets regulatory goals, however, does not necessarily produce results. It may, in fact, be adding one more goal to an already long list of conflicting, potentially unrealisable, goals. The effectiveness of capital markets regulation, especially in the United States, is already undermined by the accretion, over time, of numerous, ideologically determined objectives.

Take, for example, section 2(b) of the Securities Act of 1933:²⁴

Whenever pursuant to this title the Commission [SEC] is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

So here we have stated goals, enshrined in legislation, the oldest, and original, being investor protection.²⁵ However, the later legislated goals, efficient markets, promotion of competition and capital raising, counterbalance, not to say undermine, the original goal of (retail) investor protection. The efficient market hypothesis has long served as a justification for a non-interventionist approach to market regulation, decidedly at odds with retail investor protection. Much the same can be said of promotion of competitiveness and capital formation, an example of political ideology disguised as capital markets regulation. US capital markets legislation is laced through with these competing regulatory goals, intensifying its already dysfunctional nature.

This may explain the creation of the new US Bureau of Consumer Financial Regulation and its oversight by the Federal Reserve.²⁶ Taking retail investor protection, to a certain extent at least, out of the purview of the SEC is quite a radical step, an implicit acknowledgement of the regulatory difficulties engendered by the burden of competing goals. However, the creation of new, separate “consumer” or retail investor protection agencies (and there may be emulators elsewhere)²⁷ entails different kinds of risk, in particular that of low level expertise and lack of regulatory “clout”.

Additionally, given the beating which the efficient market hypothesis has taken lately, it will be interesting to see whether “efficiency” goals drop out of the regulatory mix. Certainly, there is already reregulation of professional investors occurring and a tacit admission that disclosure is not enough, particularly with respect to retail products.²⁸

Shifting demographics and investment patterns too may force reconsideration of regulatory goals and their relative priority. The popularity of more conservative investment products or ones which may have a greater or lesser degree of government backing (for example, Pfandbriefe, covered bonds, Canada Mortgage Bonds) may in fact be indicative of the market substituting for ineffective regulation (which may be as it should be).

And, one area of the market in developed economies which has been subject to chronic regulatory neglect constitutes a disaster in waiting: pension funds and insurance products. The

potential political ramifications of regulatory and institutional failure in this area are explosive. For example, the investment models and regulatory guidelines of many large pension schemes in the United States, such as TIAA-CREF²⁹ or CalPERS³⁰, may be now wildly out of touch with the new realities of the marketplace (eg., blithe assumptions of a 6% “safe” return on investment). In addition, the benefits which they provide to retirees are based on the operation of complex, insurance-like products which few retirees understand. If these scenarios ring a familiar bell, they should be sounding an alarm, given recent events. As the demographic profile of the United States shifts inexorably towards an older population, the stresses on these plans can only increase. A failure would bring misery to millions, many of them educated, vocal, voters.³¹

6. Questioning Regulatory Models

For decades now, the United States and the United Kingdom have provided capital markets regulatory models for the world. Although quite different in structure and regulatory philosophy, mini SECs and FSAs are scattered all over the globe. However, the original models themselves are in disarray and under attack on the home front. In the United States, the fragmentation and complexity of regulatory oversight of capital markets will continue, flying in the face of logic and common sense. If anything, it will be more of the same, but more of it. At least one positive sign, though, is the SEC-CFTC-FINRA³² alliance which now presents a more coordinated face to the world.

In London, the much emulated consolidated financial regulator, the FSA, is currently in the process of being dismembered, again flying in the face of logic and common sense. “[T]here was not a clear-cut case for outright abolition of the Financial Services Authority. Fixing it was a solid option in principle and it was politics that dictated a different result”.³³

There is much to lament in each of these instances. The United States has missed the crisis-driven opportunity to rationalise and consolidate its capital markets regulatory framework. The United Kingdom has trashed a sound regulatory model that had not demonstrably fallen into disrepair. The reorganisation of regulatory functions, an effort sapping endeavour, comes at a time when regulatory energies could be put to better use elsewhere.

But, especially in the case of the FSA, many other places in the world, which had adopted its consolidated financial regulator model, are now left high and dry. Economies such as France or Germany will make their own decisions to carry on, but small jurisdictions and emerging markets face a dilemma, whether to persist with a now defunct model or, yet again, follow the latest UK path, irrespective of its merits.

7. Role of the Financial Stability Board (FSB) and the International Organization of Securities Commissions (IOSCO)

Crisis has brought to the surface a number of ideas that rise and sink with various currents. One idea, and a misguided one, is the creation of a World Financial Authority, a supra national financial regulator structured perhaps along the lines of the WTO. Given the virtually insurmountable difficulties of actually creating such a regulator (to say nothing of its

desirability), two organisations, one created in direct response to the global financial crisis, and the other, decades-old, are filling the void.

In the aftermath of the Asian financial crisis, the Financial Stability Forum (FSF) was created in 1999 with a mandate to serve as both a prophylactic against and as an “early warning” beacon for impending cross-border financial crisis. That it failed miserably at either task is indisputable.³⁴ Its successor, the FSB, has an even more challenging mandate, in much choppier financial waters.³⁵ Will the FSB escape the fate of its predecessor (i.e. irrelevance)? Its early focus on G-SIFI (Globally Systemically Important Financial Institutions) is fraught with difficulty; housed at the Bank for International Settlements in Basel, it would be hard for the FSB to escape a central bank mentality (lacking in capital market sensibilities); and, arguably, it is working on the margins (credit rating agencies and executive compensation).

IOSCO, on the other hand, has been in existence since 1983. Originally a somewhat informal talk shop for developed economy securities regulators and institutions, the composition of its membership and its role has changed dramatically in the last decade. IOSCO is now an important forum for the exchange of information among capital markets regulators all over the world, in both developed and developing economies. The Technical Committee of IOSCO was instrumental in the development of International Financial Reporting Standards. IOSCO has assumed the role of a standard setter, and given the considerable technical expertise of its members, an informed and knowledgeable one. In addition, it has now taken on some aspects of a think tank, such as the OECD, in undertaking research and publishing technical reports. IOSCO may be transforming itself into a body somewhat akin to the now superseded Committee of European Securities Regulators, better known by its acronym, CESR.³⁶

CONCLUSION

We could indulge in more, much more, speculation as to the future of capital market regulation in developed markets. But for now, let’s leave the speculating to the punters and the hedge funds, and take a look back in five years’ time.

* This essay is based on the presentation, “The Wider Context: The Future of Capital Market Regulation in Developed Markets”, Local Capital Markets Development Legal and Regulatory Work Advisory Panel, EBRD, London, UK, 15 April 2011.

¹ Even finer distinctions have developed such as “emerging”, “transitional” and “frontier” markets.

² The G7 expanded to 19 countries and the European Union in 1999 due to the financial crises of the late 1990s and a recognition that emerging economies had been excluded from global financial discussion and governance. The countries added in 1999 were Argentina, Australia, Brazil, China, the European Union, India, Indonesia, Mexico, Russia, Saudi Arabia, South Africa, the Republic of Korea and Turkey. In September 2009, the G20 formally replaced the then G8 as the major forum for discussions among finance ministers and central bankers.

³ ‘LSE and Canada’s TMX agree merger’, *Financial Times*, London, 8 February 2011.

⁴ Ibid.

⁵ “Securities regulatory regimes around the world, largely developed on the conceptual basis of segregated national markets, are fast being outpaced by market developments and are finding themselves unable to address effectively the realities of the accelerating integration of global capital markets”. Aaron Unterman (2008), “Exporting risk:

global implications of the securitization of U.S. housing debt” *Hastings Business Law Journal*, Vol. 4(1), pp. 77-135.

⁶ See Cally Jordan (2009), “Does ‘F’ stand for failure: the legacy of the Financial Stability Forum”, *Legal Studies Research Papers*, Melbourne Law School Research Paper No. 429, pp. 1-28.

⁷ The Australian Parliament rejected the merger on April 5 2011 after the Foreign Investment Review Board determined a merger was not in Australia’s best interests.

⁸ “There is no serious alternative available. The status quo would entrench the continuation of European financial market fragmentation. This means lost benefits. Lost opportunities ... with European savings diverted to foreign market places.” Alexandre Lamfalussy (2001), “Final report of the committee of wise men on the regulation of European securities markets”, Brussels, 15 February 2001, pp. 1-115, 8 (‘Lamfalussy Report’).

⁹ Stéphane Rottier and Nicolas Véron (2010), “The new disintegration of finance”, Breugel Institute, 10 September 2010, pp. 1-2.

¹⁰ Lingling Wei and Carol Chan (2011), “Turmoil stings Yuan bonds”, *Wall Street Journal*, 28 September 2011, p 1. The term describes the RMB dominated, Hong Kong based bond market and is “driven by the amount of RMB deposits available for investment in Hong Kong and by the supply of debt from issuers in mainland China”: Luis Sanchez (2010), “What is the dim sum bond market and why it could be the next bubble”, *Business Today*, Princeton University, 13 August 2010, p. 1.

¹¹ See John C. Coffee (2002), “Competition among securities markets: a path dependant perspective”, Columbia University Law School, Center for Law and Economic Studies Research Paper No. 192, 25 March 2002, pp. 1-32.

¹² James Wilson (2011), “BaFin approves Deutsche Börse-NYSE merger”, *Financial Times*, London, 12 September 2011.

¹³ There is a cross listing alliance consisting of the Hong Kong Exchanges and Clearing, BM&FBovespa of Brazil, the National Stock Exchange of India, the Bombay Stock Exchange, Johannesburg Stock Exchange and the two Russian exchanges that are in the process of merging - Micex and RTS - will cross-list each others' stock index futures and index options contracts.

¹⁴ Selling information flows and creating or reinforcing vertical “silos” of complementary businesses such as clearing and settlement.

¹⁵ “The challenge of great exchanges”, *Financial Times*, London, 13 February 2011. It is estimated that 37% of revenues of the proposed NYSE-Euronext-DeutscheBörse will be from derivatives and not traditional equity products.

¹⁶ Jeremy Grant (2011), “Six emerging market exchanges combine in cross-listing alliance”, *Financial Times*, London, 13 October 2011.

¹⁷ The recent bankruptcy of MF Global, with assets of \$US 41 billion is the eighth largest bankruptcy in U.S. history. At the time of writing \$US163 million of client funds could not be accounted for. Tom Braithwaite, John Gapper, Dan McCrum, Gregory Meyer, Kara Scannell and Hal Weitzman (2011), “‘It shouldn’t have taken positions so big - let alone the one it did’ - downfall of MF Global”, *Financial Times*, London, 5 November 2011.

¹⁸ Although fiercely defended in the United States. See Cally Jordan and Pamela Hughes (2007), “Which way for market institutions: the fundamental question of self regulation”, *Berkeley Business Law Journal*, Vol. 4, pp. 205-227.

¹⁹ Stephen O’Connor, ISDA Chairman, Managing Director and Global Head of OTC Client Clearing, recently gave an address on derivatives regulation at which he stated: “Should the regulations in each country or region be introduced without consistency, such institutions could be prevented from engaging in cross-border transactions and executing their global risk management strategies efficiently. This could potentially lead to regulatory arbitrage, segmented markets, reduction in liquidity, resulting in reduced market efficiency and increased systemic risk.” Stephen O’Connor (2011), “Chairman’s address”, Morgan Stanley 2011 ISDA Annual Japan Conference: *Shaping the Future of Derivatives*, 27 October 2011.

²⁰ In the aftermath of the global financial crisis, an attempt was made to formally consolidate the two major financial regulators in the United States, the SEC and the CFTC; although the attempt failed, there is now more formal cooperative measures undertaken. However, the number of financial regulators in the United States has multiplied, with the creation of new agencies such as the Bureau of Consumer Financial Protection, now under the aegis of the Federal Reserve.

²¹ *Dodd-Frank Wall Street Reform and Consumer Protection Act* 12 USC § 5301.

²² Professor Donald Langevoort speaking recently at the University of Sydney estimated only about 20% of Dodd-Frank reforms had been implemented. Donald Langvoort (2011), “Current U.S. and international trends in market

and share trading regulation”, speech given at the Supreme Court of New South Wales Annual Corporate Law Conference: *New Trends in Sharemarket Regulation*, 23 August 2011.

²³ Three new principles of securities regulation dealing with systemic risk were added to the IOSCO Objectives and Principles of Securities Regulation in June 2010:

1. Principle A (6) “The Regulator should have or contribute to a process to monitor, mitigate and manage systemic risk, appropriate to its mandate.”
2. Principle H (32) “There should be procedures for dealing with the failure of a market intermediary in order to minimize damage and loss to investors and to contain systemic risk.”
3. Principle I (38) “Securities settlement systems and central counterparties should be subject to regulatory and supervisory requirements that are designed to ensure that they are fair, effective and efficient and that they reduce systemic risk.”

²⁴ *Securities Act of 1933* 15 U.S.C. 77a-77mm.

²⁵ Dating back to the 1930s in the United States.

²⁶ The FSA is due to be replaced by two agencies in 2013. These are the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA). The mandate of the PRA is promotion of stable and prudent operation of the financial system, regulation of all deposit taking institutions, insurers and investment banks. The mandate of the FCA is the regulation of conduct in retail, wholesale financial markets and firms outside the scope of the PRA, a mandate which may be wider than the new U.S. Bureau of Consumer and Financial Regulation.

²⁷ In the UK, for example this will now be the mandate of the Financial Conduct Authority to commence in 2013.

²⁸ Sharlene Goff and Elaine Moore (2011), “Banks prepare for deluge of PPI complaints”, *Financial Times*, London, 21 April 2011, p. 18.

²⁹ TIAA-CREF stands for “Teachers Insurance and Annuity Association-College Retirement Equities Fund”. It is a leading provider of retirement benefits to the academic, research, medical and cultural community and has some 3.7 million active and retired employees among its members.

³⁰ CalPERS stands for “California Public Employees’ Retirement System” and is a leading “activist” institutional investor.

³¹ See “Is TIAA-CREF safe?”, *The Chronicle of Higher Education*, 13 April 2009: “ ‘Since many professors have TIAA-CREF as the core of their retirement plan,’ writes a reader in response to Pennywise’s depiction of the financial crisis (The Chronicle, December 19, 2008), ‘please do an in-depth report on its financial health and how solid its accounts are.’ In analogous spirit, Laurie Fendrich, professor of fine arts at Hofstra University, posted a brilliant mock-populist rant on The Chronicle’s Brainstorm blog under the title ‘Someone’s Gotta Pay.’ Fendrich recounts an evening when, sipping a glass of merlot, she fantasized over who to sue for ‘the decline in value in my TIAA-CREF retirement portfolio.’ Eventually she settles on her campus TIAA-CREF rep for defrauding her ‘by giving me several pamphlets written in Aquitanian, and insisting on speaking only Aquitanian whenever we would meet — even though he knew full well I could barely speak a word of it.’ ” Available at <http://chronicle.com/article/Is-TIAA-CREF-Safe-/44807> (last consulted 29 November 2011).

³² FINRA is the acronym for the Financial Industry Regulatory Authority, a self-regulatory organisation and “the largest independent regulator for all securities firms doing business in the United States [overseeing] nearly 4,495 brokerage firms, 163,450 branch offices and 635,515 registered securities representatives. [The] chief role is to protect investors by maintaining the fairness of the U.S. capital markets.” See <<http://www.finra.org/>> [accessed 15 November 2011].

³³ Eilis Ferran (2010), “The break-up of the financial services authority”, University of Cambridge Faculty of Law Research Paper Series, Research Paper 10/04, pp. 1-127, 1.

³⁴ For more on the FSF, see Cally Jordan (2009), “Does ‘F’ stand for failure: the legacy of the Financial Stability Forum”, *Legal Studies Research Papers*, Melbourne Law School Research Paper No. 429, pp. 1-28.

³⁵ “The FSB has been established to coordinate at the international level the work of national financial authorities and international standard setting bodies and to develop and promote the implementation of effective regulatory, supervisory and other financial sector policies in the interest of financial stability. It brings together national authorities responsible for financial stability in 24 countries and jurisdictions, international financial institutions, sector-specific international groupings of regulators and supervisors, and committees of central bank experts.” Financial Stability Board, available at <<http://www.financialstabilityboard.org/about/overview.htm>> [accessed 10 November 2011].

³⁶ CESR was replaced as of 1 January 2011 by a full-fledged pan-European capital markets regulator, the European Securities and Markets Authority, or ESMA. ESMA is one of three newly created pan-European regulators (the

other two being the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA)) which have replaced the so-called 3L3 committees of the European Union.