Testimony of

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“The Dodd-Frank Act Five Years Later: Are We More Stable?”

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Good morning. Thank you very much, Mr. Chairman, Ranking Member Waters, and Members of the Committee, for inviting me to appear today at your hearing.

I am Paul Atkins, CEO of Patomak Global Partners. For six years ending in 2008, I served as a commissioner of the U.S. Securities and Exchange Commission (SEC), and from 2009 to 2010, I was a member of the Congressional Oversight Panel for TARP, where I had the pleasure of serving with the Chairman. I am testifying this morning on my own behalf.

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As you all know, the Dodd-Frank Act is now almost five years old. Given the breadth of the Act, which is 2,319 pages long and contains demands for more than 500 new rules and studies, one could write a book about the various problems with the statutory text and implementation. Given my background, I am going to focus my remarks mostly on the impact of the Dodd-Frank Act on the U.S. capital markets. I want to focus specifically on five aspects of the Act: (1) the FSOC and the SIFI designation process, (2) the standard of care for broker-dealers and investment advisers, (3) the Volcker Rule and the impact on bond market liquidity, (4) the lack of coordination in implementing Title VII, and (5) the grab-bag of public company disclosure provisions contained in Titles IX and XV.

Title I: Financial Stability

I want to begin by focusing on what I view as the single largest problem of the Act—Title I, which is entitled "Financial Stability." This is the leitmotif of the Dodd-Frank Act. To help achieve the goal of financial stability, the Act established the Financial Stability Oversight Council (FSOC), which is a non-transparent, not-well-known group consisting of the heads of nine financial services regulatory agencies plus one insurance regulatory expert appointed specifically for this task by the president, as well as five non-voting members.

This gaggle of regulators has substantial power to drive the regulatory agenda at its member agencies like the SEC. It has little accountability to Congress or to the American people. It has broad power to gather information and then is supposed to think deep thoughts, peer into its crystal ball, identify bubbles, and then prick them before they grow.

The conceit of the authors of the Dodd-Frank Act, which is carried on to this day, is that if you get enough smart people in a room with enough data, they can bring stability to the marketplace. But, just as human beings cannot be counted on to be predictable and stable, those of us who have spent a lifetime engaged with the capital markets know that they also are not always stable—because human beings ultimately make up markets. At its base, a market needs a willing buyer and a willing seller. But, we all know that people from time to time are motivated by all sorts of virtues, including enlightened self-interest as Adam Smith noted, as well as vices, such as anger, greed, envy, fear, pride, and just plain passion. To suggest that the government can control human action is naïve, egotistical, and simply wishful thinking.

In his last book, *The Fatal Conceit: The Errors of Socialism*, Friedrich Hayek, the Austrian-born economist, labels as the "fatal conceit" the idea that "man is able to shape the world around him according to his wishes."[1] Hayek argues: "To act on the belief that we possess the knowledge and the power which enable us to shape the processes of society entirely to our liking, knowledge which in fact we do not possess, is likely to make us do much harm."[2]

But the Financial Stability Oversight Council is embarking on this very mission. It has the authority to designate entities within the financial services industry as "systemically important financial institutions," abbreviated S-I-F-I. The FSOC may also recommend regulatory action to other federal agencies for "activities and practices" that the FSOC deems to be potentially risky to financial stability.[3] Should the federal agency decide not to follow the FSOC's recommendation, it must submit its reasons in writing to the FSOC.

About two years ago, the FSOC, the Federal Reserve, the Department of the Treasury, and foreign regulatory groups started focusing on asset management, beginning with money market mutual funds and now implicating activities beyond that. Even though the SEC possesses the subject-matter expertise to address asset management, the FSOC has stepped in to try to force the SEC's hand.

What is the consequence of this determination that entities, activities, or practices are systemically risky? The FSOC is authorized to subject the designated firms to enhanced prudential supervision by the Federal Reserve and to recommend additional regulation for systemically important activities and practices, in the interest of promoting the safety and soundness of the U.S. financial system.

Once under the Federal Reserve's regulatory umbrella, systemically important firms can expect to be subjected to bank-like capital requirements. Where in the asset management industry would one impose capital requirements? On a fund or separate account? That's investor money. On the adviser? But, the adviser acts only as agent for its clients—imposing capital requirements on the adviser seems to imply that the adviser is somehow a guarantor of market investments. What if the FSOC instead designates asset management as a "systemically important" activity? If the activity is the issue, rather than an institution, then size does not matter. There is no limiting factor. Moreover, in what form would this capital requirement or other regulation take shape? Withdrawal fees? Redemption gates? The Federal Reserve having the ability to dictate what securities can be bought and sold in times of financial distress? These scenarios indicate that the science fiction aspect of SIFI treatment may be a 21st century reality.

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[1] Friedrich Hayek, The Fatal Conceit: The Errors of Socialism (W. W. Bartley III ed., 1988).
[2] *Id.*
[3] *See* 12 U.S.C. § 5330 (2010) (Dodd-Frank Wall Street Reform and Consumer Protection Act § 120).

Therein lies the problem: Dodd-Frank's—and thus the Federal Reserve's—regulatory toolkit is drawn from bank supervisory requirements and practices. One cannot simply assume, however, that an enhanced supervisory structure designed to stabilize very large banks is equally well suited to other areas of the financial services industry with radically different structures and risk profiles. Indeed, given the considerable differences in how these other businesses are structured and operate, one should expect that applying the same regulatory standards would yield at least some unexpected and undesirable outcomes. I want to stress that that fact is just as true if you are a proponent of the various initiatives taken in the Dodd-Frank Act as if—like me—you are not.

There is simply nothing in the Federal Reserve's 100-year history that even begins to suggest that applying prudential standards to capital market participants would be a benefit—or that the Federal Reserve would in any sense be an effective capital markets regulator. It is just not what the Federal Reserve does. Further, there is nothing in the 70-plus year history of asset management regulation that suggests that such Federal Reserve oversight is necessary or appropriate.

And what could the individual investor saving for retirement reap from this situation? First, higher costs and lower returns. Were the Federal Reserve to impose capital requirements on SIFI-designated funds or advisers, or were the FSOC to recommend additional regulation for investment activities that have been designated systemically risky, investors—ordinary individual investors who are saving for retirement through their 401(k) plan or for a down payment—would have to pony up. The same would be true as to any fees imposed, just as it would if funds were to seek to raise capital some other way. Likewise, if capital requirements were imposed on investment advisers, investors would ultimately pay in the form of higher fees or decreased choice. Further, if *any* systemically designated firm—including in industries not related to asset management—were to fail, designated asset management firms or their funds would be assessed the costs of that entity's rescue.[4] In other words, ordinary savers—Main Street investors—would pay to bail out failing banks. Was not that precisely what Dodd-Frank was designed to prevent?

Most worrisome to me is that the Federal Reserve could constrain investors' ability to redeem their investments upon request. For example, if the Federal Reserve deemed the redemption right in mutual funds that investors have had for over 70 years to somehow be systemically risky, it could impose a delay on the effectiveness of an investor's redemption decision or elect to require fund managers to remain in positions they would otherwise have elected to exit. It could instruct asset managers that they should not dispose of a particular kind of security, despite the judgment of the adviser that it is its fiduciary duty to sell, or despite the wishes of the client to sell.

The basic message is: Take one for the team. If you think that this is far-fetched, look at the TARP program, with which I am all too familiar, in which the government

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[4] *See* 12 U.S.C. § 5390 (2010) (Dodd-Frank Act § 210).

demanded that good banks take the TARP funds so as not to call out the bad banks and raise the prospect of a run. That, after all, is the bank regulator's prudential model of favoring safety and soundness of the banking system over investors' interests. It is also one reason the authors and supporters of Dodd-Frank created the Bureau of Consumer Financial Protection: because they believed that the safety and soundness mission of the bank regulators too often ignored consumers' interests. Whether or not that was the situation, in this case it would be the average American investor who is taking the hit: the pensioner hoping to have investments like a 401(k) plan supplement Social Security in a zero-interest rate environment (which has devastated savers and many investors in fixed income securities) and other investors putting hard-earned money aside for a rainy day, college tuition, or a new house. So, why should any of you—proponents or detractors of Dodd-Frank—support this latest initiative of the Federal Reserve and FSOC?

Moreover, regardless of fund or investor interests, SIFI-fund managers could be forced to finance banks or other counterparties, to remain exposed to particular markets, to avoid exposure to specified issuers, or to hold excess cash or cash equivalents. What would this do to risk management or even to liquidity in the market? How would market participants price this uncertainty regarding the potential disposition of securities? If anything, this uncertainty would make markets more unstable and much more unfair for the average investor in troublesome times. All of this would be novel and none of it would provide any advantage to the fund's investors. To the Federal Reserve's end game, however, it might at least stabilize the banking system.

To date, the FSOC has designated four non-bank financial companies and eight financial market utilities as SIFIs, subjecting them to the Federal Reserve's prudential supervision. Implicit in these designations, as well as in the statutory authority from which they stem, is a theory that large financial companies share characteristics that would make the Federal Reserve's prudential supervision and capital adequacy requirements a helpful and effective regulatory approach.

The trouble with that theory is that non-bank financial companies and banks are, in fact, fundamentally different from each other. Just listen to the pointed comments made by the FSOC's two insurance experts in dissenting from the FSOC's designation of MetLife as a SIFI.

The voting insurance expert, Roy Woodall, slammed the FSOC's basis for designating MetLife a SIFI, stating that the FSOC "relies on implausible, contrived scenarios as well as failures to appreciate fundamental aspects of insurance and annuity products," and, ultimately, "concludes that the origin of the company's systemic risk would stem from a sudden and unforeseen insolvency of unprecedented scale, of unexplained causation, and without effective regulatory responses or safeguards."[5]

[5] Roy Woodall, Views of the Council's Independent Member Having Insurance Expertise (Dec. 18, 2014), http://www.treasury.gov/initiatives/fsoc/designations/Documents/Dissenting%20and%20Minority%20Views.pdf.

The non-voting insurance expert, Adam Hamm, similarly criticized the FSOC's basis for designation. He said: "Identifying outer boundaries of exposures and claiming they could impact a nebulously defined market is not robust analysis; it simply means the [FSOC] has identified a very large company."[6] All in all, the two insurance experts call out the speculation and feeble analysis conducted by the FSOC in its designation process. It certainly seems as though the FSOC had a predetermined outcome in mind, before the matter was brought to a vote. As Mr. Hamm stated in his dissent: "Saying it does not make it so."[7]

Indeed, MetLife has sued the FSOC to contest its designation—the first SIFI to do so. If FSOC's cavalier treatment of the insurance industry is any precedent, we should all be extremely concerned that equally misguided and uninformed treatment of the asset management industry is soon to follow.

The FSOC is not the only actor in this space. An even less transparent, non-accountable group of regulators is the Financial Stability Board. A creature of no statute or treaty, it is a club of regulators that claims its remit from the meetings of the heads of state of the G-20. Through its meetings and policy pronouncements, it evidently drives policy decisions in the United States.

Contemporaneously with these events in the United States, the FSB has been studying the asset management industry. It issued a consultation on potentially systemically significant mutual funds,[8] and the only mutual funds that met the materiality threshold in the consultation were American—Europe's historic policy of favoring the banking sector over the capital markets means that it does not have such markets to the same scale as in the United States.

There is no transparency or accountability with respect to official American participation in the FSB process—these meetings and activities are closed. In fact, an American governor of the Federal Reserve sits on the FSB and even chairs its working group that is focused on the asset management industry. From my experience with bodies of international regulators and their inherent emphasis on achieving "consensus," there is no way that the FSB would be doing any of this activity—especially calling out American firms and practices—without the acquiescence of the Federal Reserve, especially of the chief American representative to the FSB.

Thus, the widespread suspicion is that the Federal Reserve is using the FSB as a bootstrap to build a framework and momentum to accomplish through opaque, back-room processes what it may not be able to do alone in the United States. That pattern

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[6] Adam Hamm, View of Adam Hamm, the State Insurance Commissioner Representative (Dec. 18, 2014), http://www.treasury.gov/initiatives/fsoc/designations/Documents/Dissenting%20and%20Minority%20Views.pdf.
[7] *Id.*
[8] *See* Financial Stability Board & International Organization of Securities Commissions, Consultative Document: Assessment Methodologies for Identifying Non-Bank Non-Insurer Global Systemically Important Financial Institutions (Jan. 8, 2014), http://www.financialstabilityboard.org/wp-content/uploads/r_140108.pdf.

unfolded in the insurance area, with the FSB designating Prudential and MetLife as globally significant and the FSOC then pointing to that designation to justify in part its own designation process.

Last summer, in the face of bipartisan criticism from Congress, the FSOC announced that it was not looking to designate specific asset managers as systemically important, but rather looking at activities and products. But the FSB is still plowing ahead, and it recently took a big leap forward (or backward, depending on how you look at it) when it put out a new consultation that contemplated the potential SIFI designation of not just individual funds but also asset managers—and again, the only asset managers that met the materiality threshold were four American managers.[9] This, of course, raises serious competitive implications for the United States, just as the EU embarks on an initiative to try to encourage the growth of pan-European capital markets.

Yet, the FSB appears to continue on its mission single-mindedly, even though its consultation partner, the International Organization of Securities Commissions (IOSCO), has stated that it is moving away from designating asset managers as systemically important and that it hopes to exercise more influence over FSB policies on shadow banking and global asset managers.[10] The IOSCO Chairman has announced that he plans to conduct a comprehensive review of risks posed by asset managers' activities and products to assess whether they are systemic at all.[11] He also has stated explicitly, "[w]e don't regulate funds the way we regulate banks."[12]

The story of the attempted prudentialization of capital markets is not going away. Whether it be through designation of firms or activities or practices, the Dodd-Frank Act has set in motion a very dangerous train that is the search for financial stability. I fear that the U.S. capital markets, which have been the driver of economic growth and job creation in this country for decades, will be the collateral damage in the quest for "stability über alles."

Section 913 – Standard of Care for Broker-Dealers

Section 913 of the Dodd-Frank Act gave the SEC the authority to require a uniform fiduciary duty for investment advisers and broker-dealers and directed the SEC to study whether such a standard was needed.

Unsurprisingly, the resultant SEC study did indeed recommend the adoption of a new uniform standard of care. Then-SEC Commissioners Kathleen Casey and Troy Paredes correctly criticized the study for recommending "the adoption of a new uniform fiduciary duty standard . . . without adequate articulation or substantiation of the

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[9] *See* Financial Stability Board & International Organization of Securities Commissions, Second Consultative Document: Assessment Methodologies for Identifying Non-Bank Non-Insurer Global Systemically Important Financial Institutions (Mar. 4, 2015), http://www.financialstabilityboard.org/wp-content/uploads/2nd-Con-Doc-on-NBNI-G-SIFI-methodologies.pdf.
[10] *See* Huw Jones, UPDATE 2-Global Regulators Throw Spanner Into Planned Asset Manager Rules (June 17, 2015), http://www.reuters.com/article/2015/06/17/iosco-markets-review-idINL5N0Z32P620150617.
[11] *See id.*
[12] *Id.*

problems that would purportedly be addressed via that regulation."[13] They went on to state that the study did not "adequately recognize the risk that its recommendations could adversely impact investors."[14]

Now, more than four years after the Section 913 study was published, the SEC appears to be turning to a rulemaking in this area. As it does so, it should be mindful of the different needs of different investors. It is important to remember that not all investors are the same. Some investors want and perhaps need a fiduciary who possesses intimate knowledge of their financial condition and can advise accordingly. On the other hand, some investors would prefer to have a true broker who is engaged on a transaction basis and is compensated accordingly. These two kinds of activities logically should have different standards of care—and costs—attached to them.

While we do not know for certain when the SEC will act or what the regulations will entail, the Department of Labor (DOL) has already re-published a proposed rule that aims to increase the ambit of fiduciary duty within the context of ERISA plans. Unfortunately, despite claims to the contrary from the Secretary of Labor, the rulemaking does not seem to be coordinated with the SEC and it would have profound effects for the retirement plan market and the availability of product offerings. One need only look at what has happened in the United Kingdom to see the dangers of the DOL's rulemaking.

Since 2013, the United Kingdom's Financial Conduct Authority (FCA) has enforced rules to prohibit broker-dealers from receiving commission payments, thereby forcing all brokers to adopt fee-based compensation models.[15] According to a report commissioned by the FCA, from April 2013 until March 2014, 310,000 customers stopped being served by their brokers because their wealth was too small for the broker to advise profitably.[16] During the same period, brokers turned down an additional 60,000 applicant investors due to their low-balance accounts. The report found that some brokers have started accepting only customers with more than £50,000 (about $78,000) in savings, shutting out large numbers of lower- and middle-class investors.[17]

Supporters of the DOL's fiduciary rulemaking argue that the U.S. proposal will not suffer from the same pitfalls as the U.K rule due to the "best interest contract exemption," which theoretically allows brokers to continue receiving commissions if certain conditions are met. The compliance burdens required to qualify for the exemption, however, are almost prohibitively costly. Realistically, very few brokers will be able to receive commissions under the DOL's proposal. This would be a tragic outcome for millions of small savers. Under the fee-based model—in which advisers charge a fixed rate (say 1 percent) of a client's total assets—advisers often have little incentive to serve lower- and middle-income investors, as evidenced by the U.K.'s experience.

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[13] Kathleen L. Casey & Troy A. Paredes, Statement Regarding Study on Investment Advisers and Broker-Dealers (Jan. 21, 2011), https://www.sec.gov/news/speech/2011/spch012211klctap.htm.
[14] *Id.*
[15] *See* Eur. Econ., *Retail Distribution Review Post-Implementation Review* (Dec. 16, 2014), http://www.fca.org.uk/static/documents/research/rdr-post-implementation-review-europe-economics.pdf.
[16] *See id.*
[17] *See id.*

Unfortunately, the DOL and the Obama Administration seem intent on moving forward with a rulemaking regardless of the real potential for negative impacts on small investors. If, however, their goal is truly to serve lower- and middle-class investors, they should go back to the drawing board to develop a proposal that accomplishes their goal of protecting investors without preventing them from accessing the advice and products they need to save for retirement.

Section 619 – The Volcker Rule

At its core, the Volcker Rule is aimed at banning proprietary trading in commercial banks. And because it is easier to blame Wall Street and excessive risk-taking for the financial crisis than the federal government's housing policies, many have trumpeted the Volcker Rule as one of the most meaningful and significant reforms in the Dodd-Frank Act. That view, however, is contradicted by both former Treasury Secretary Tim Geithner as well as the provision's namesake, former Federal Reserve Chairman Paul Volcker. Then-Secretary Geithner stated that "most of the losses [in the crisis] did not come from [proprietary trading] activities [but from] classic extensions of credit."[18] Similarly, Chairman Volcker has stated that "proprietary trading in commercial banks was . . . not central" to the crisis.[19] Despite this, the Dodd-Frank Act gave us the Volcker Rule and consequently, 950 pages of additional regulations. Indeed, the Volcker Rule was sprung on the drafters of what became Dodd-Frank and, as with so many other provisions of Dodd-Frank, hardly any sort of substantive hearing was held to consider the specific language, the potential effects, or unintended consequences of the provision.

Unfortunately, not only did the Volcker provisions of Dodd-Frank fail to address a key part of the financial crisis, but the rule as implemented may have serious negative consequences for investors, job creators, and the U.S. economy. In fact, Mark Carney, the Governor of the Bank of England and the Chairman of the Financial Stability Board, warned that the Volcker Rule "could reduce global financial resilience rather than increase it."

One undisputed effect of the Volcker Rule has been a reduction in the corporate bond inventories of primary dealers. This reduction is the result of both a flawed statutory mandate and flawed implementation of that mandate, including a vague and unclear definition of "market making" that makes it more difficult for banks to act as market makers. The statute and implementing regulations turn regulators into amateur psychologists – a "Oui-Ja" board might prove most effective for bank examiners in determining intent under the rule. Since 2007, primary dealer inventories of corporate bonds have decreased 77 percent (from $235 billion to $53 billion),[20] even as the U.S.

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[18] Comm'r Daniel M. Gallagher, Remarks Before the U.S. Chamber Center for Capital Markets Competitiveness (Jan. 16, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1365171492034.
[19] Kim Dixon & Karey Wutowski, *Volcker: Proprietary trading not central to crisis*, Reuters, Mar. 30, 2010, http://www.reuters.com/article/2010/03/30/us-financial-regulation-volcker-idUSTRE62T56420100330.
[20] MarketAxess, *Primary Dealer Corporate Bond Inventory*, http://www.marketaxess.com/research/market-insights (last visited July 7, 2015).

market has increased 50 percent (from $5.3 trillion to nearly $8 trillion in outstanding debt) during the same time period.[21] These statistics have caused some to raise legitimate questions about bond market liquidity and volatility. Others, however, seem to be rushing to reach conclusions without actually identifying a problem.

Policymakers need to have some perspective on these issues. A rush to judgment is, after all, what led to many of the harmful provisions in the Dodd-Frank Act. For example, some people seem to be equating primary dealer inventories with lower liquidity. While those statistics may in fact be related, they are not the same thing. We simply do not know how the primary dealers will respond under this new regime in a time of stress. Thus, before embarking on the discussion of how to solve the coming "liquidity crisis," regulators and policymakers need to first establish the actual likelihood of a "liquidity crisis," and then if one exists, study the issue, define the problem, and tailor a solution for the fixed income markets as a whole.

One focus of the hand-wringing underway concerning bond markets seems to be the role that asset managers play in the markets. Aside from creating a narrative to allow the FSOC to focus on this aspect of the capital markets, this concern seems misplaced and misguided. Mutual funds and exchange-traded funds are both buyers and sellers of securities. They currently hold approximately 10 percent of the securities of the U.S. bond market and 17 percent of the U.S. corporate bond market.[22] To focus solely on the role of asset managers is to ignore 80 to 90 percent of the market. That is why a broader review of fixed income market structure is the more appropriate path forward.

The relentless drumbeat of liquidity angst has not been lost on the managers of these funds. As they do in times of impending market volatility, asset managers have been preparing on numerous fronts: holding additional cash and cash equivalents, reviewing intra-fund lending agreements and lines of credit for adequacy, and educating their investors on the bond markets. Because of efforts like these, long-term mutual funds simply have never had the large-scale pressures on liquidity that doomsayers predict.

Moreover, over the last couple of decades, several of us former and current SEC commissioners have voiced concerns about various aspects of fixed income market structure. In light of changes in the marketplace, new regulations, initiatives of market regulators, and the effect of prolonged zero interest rates and aggressive open market operations of the Federal Reserve, it is long overdue for the SEC to address the issues. Fortunately, the SEC and its staff recently have been focusing on fixed income fund liquidity risk. For example, in January 2014, the Division of Investment Management issued guidelines on risk management in changing fixed income market conditions, and the Office of Compliance Inspections and Examinations ("OCIE") has been examining fixed income funds, with an emphasis on their liquidity and liquidity risk management. The SEC also is considering proposing new requirements for mutual funds relating to

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[21] Sec. Indus. & Fin. Mkts. Ass'n, *U.S. Bond Market Issuance and Outstanding*, http://www.sifma.org/research/statistics.aspx (last updated July 6, 2015).
[22] Inv. Co. Inst., *2015 Investment Company Fact Book* (55th ed. 2015).

their management of liquidity risk. These inquiries are appropriate actions by the capital markets regulator and other regulatory bodies should appropriately defer to the SEC's expertise.

Title VII – Derivatives Regulation

Despite a once-in-a-lifetime opportunity to streamline our crazy quilt of financial services regulators, the Dodd-Frank authors blew it. They created, depending on how you count, at least 15 new offices and agencies, eliminating only one, the hapless Office of Thrift Supervision, which had no one left to regulate, anyway. Most notably, they failed to merge the SEC and CFTC to create one markets regulator,[23] and instead provided the SEC and CFTC with joint responsibility to implement the new derivatives regulations contained in Title VII. Unfortunately, the implementation of Title VII has been plagued by a lack of regulatory coordination.

Title VII split the regulation of the over-the-counter derivatives markets between the SEC and the CFTC, depending on whether the instrument in question is a "swap" or a "security-based swap." As a result, coordination among those agencies in adopting the myriad rules implementing Title VII is critical. Further, these instruments are traded globally, and coordination with global regulators also is of paramount importance. Sadly, this necessary cooperation quickly devolved into turf battles and unworkable regulations for market participants, particularly on the part of the CFTC and its former leadership.

The lack of coordination is two-fold, as there has been a lack of coordination both between the SEC and CFTC as well as between U.S. regulators and foreign regulators. A lack of global coordination results in non-U.S. counterparties becoming increasingly reluctant to transact with U.S.-based entities, so that the global swaps markets are fragmenting into separate trading and liquidity pools for U.S. and non-U.S. persons, resulting in less liquidity and more volatile pricing. According to the International Swaps and Derivatives Association, volumes between European and U.S. dealers have already declined 77 percent since the introduction of the CFTC's rules implementing the "swap execution facility" regime.[24]

The rules for swaps dealers and major swap participants concerning their capital, margin, and segregation requirements also differ meaningfully depending on whether one looks to the SEC's current proposal (dating from 2012) or to other regulatory bodies. Working together, the Basel Committee and IOSCO developed a framework for margin requirements for non-centrally-cleared derivatives[25] that is designed to achieve the goals of the Dodd-Frank Act and G-20 countries in reforming the derivatives markets. Following agreement, the CFTC, U.S. banking regulators, and European regulators

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[23] If only Barney Frank had not waited until two and half years after the passage of the Dodd-Frank Act and mere weeks before he retired to introduce a bill to merge the CFTC and the SEC.

[24] Int'l Swaps & Derivatives Ass'n, *Revisiting Cross-Border Fragmentation of Global OTC Derivatives: Mid-Year 2014 Update* (July 24, 2014), http://www2.isda.org/functional-areas/research/research-notes.

[25] Basel Comm. on Banking Supervision & Bd. of Int'l Org. of Sec. Comm'ns, *Margin Requirements for Non-Centrally-Cleared Derivatives* (Sept. 2013), http://www.iosco.org/library/pubdocs/pdf/IOSCOPD423.pdf.

proposed changes to their rules to conform to the framework. The SEC, however, has remained strangely silent on its intentions, and its margin framework is inconsistent with those of other regulators. Failure to coordinate in this critical area would lead to regulatory arbitrage in the swaps markets and undermine the goals of this reform effort.

Titles IX and XV – Public Company Disclosures

One major negative impact of Dodd-Frank has been the increased politicization of regulatory agencies, especially the SEC. Of course, what else would one expect from a huge bill with so many flaws that was pushed through Congress on essentially a party-line vote? Believe it or not, there were no 3-2 votes along partisan lines on rulemakings from 2000 to 2008 at the SEC. There were 3-2 votes on rulemakings, but commissioners were split by other than party lines. Since 2009, the beginning of this Administration, there have been more than 20 3-2, party-line votes.

Rulemakings from the Dodd-Frank Act are the culprit, as rather than addressing the causes of the financial crisis, such as government housing policy, the Act instead includes numerous provisions that are neither related to the last crisis nor likely to prevent a future crisis, and that are merely political sops to special interests.

For example, the ink was barely dry on the Dodd-Frank Act when former SEC Chairman Mary Schapiro pushed through an ill-fated shareholder proxy access rule, which was later vacated by the DC Circuit. Rather than leaving this corporate governance issue to private ordering, to be worked out by shareholders at individual issuers as has happened in the past couple of years, that rule was completely political and not tied in any way to fixing anything alleged to have caused the financial crisis. That rulemaking was followed quickly by other rules that had nothing to do with the root causes of the financial crisis, such as conflict minerals certification, mineral extraction disclosure, and so forth. Unfortunately, there are still more to come, such as required disclosure of the ratio of a CEO's pay to the median pay of the company's employees.

While these provisions may seem minor, they place real burdens on public companies and their shareholders who ultimately pay the costs of making these immaterial disclosures that provide no benefit to economically-driven investors. As the Securities Exchange Act of 1934 requires of the SEC, Congress should adhere to that statute's philosophy and require companies disclose *material information*, instead of attempting social engineering through the federal securities laws. Otherwise, there is no limiting principle as to disclosure, as the Supreme Court has repeatedly held.[26]

Unfortunately, the same groups that pushed for many of the harmful corporate governance provisions contained in the Dodd-Frank Act are at it again in their push to try to pressure the SEC into adopting a rule requiring corporations to disclose their so-called

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[26] In *TSC Industries v. Northway*, 426 U.S. 438, 449 (1976), Justice Thurgood Marshall wrote for the Court: "[s]ome information is of such dubious significance that insistence on its disclosure may accomplish more harm than good."

"political" expenditures on trade associations and lobbying. Federal and state elections laws already cover these disclosures with respect to political giving, but the groups continue to pressure the SEC to require companies to disclose such non-material information because they have failed in Congress, at the Federal Election Commission, and everywhere else. Shareholders vote down proposals regarding this sort of disclosure by overwhelming margins at annual shareholder meetings. The groups have even put up advertisements in Union Station and handed out flyers with commissioners' pictures on them. The SEC has properly resisted this campaign, but it is indicative of a perception by some that the process can be manipulated by political agitation.

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After the bill that was to become Dodd-Frank was reported out of the Conference Committee, Chris Dodd famously said, "No one will know until this is actually in place how it works."[27] Five years later we still do not know the full effects the Dodd-Frank Act will have on U.S. capital markets. We do know, however, that the costs of Dodd-Frank have been borne not just by Wall Street, but by ordinary investors and businesses of all shapes and sizes. Moreover, until Congress reclaims some of the authority it gave regulators in the Dodd-Frank Act, most notably the authorities given to the FSOC and Federal Reserve under Titles I and II, the greatest risk to the U.S. capital markets remains—that government, and not the markets, will ultimately choose winners and losers.

[27] David Cho, Jia Lynn Yang & Brady Dennis, *Lawmakers guide Dodd-Frank bill for Wall Street reform into homestretch*, Wash. Post, June 26, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/06/25/AR2010062500675.html.