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# Transparency is the New Opacity: Constructing Final Regulation After the Crisis

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## ARTICLES

# TRANSPARENCY IS THE NEW OPACITY: CONSTRUCTING FINANCIAL REGULATION AFTER THE CRISIS

CAROLINE BRADLEY†

Many of the main actors constructing financial regulation in the wake of the global financial crisis era have a stated commitment to transparency. However, transparency in financial regulation is undermined because the information disclosed is simultaneously limited and excessive. On one hand, the communications are limited: transnational standard-setters publish their documents in a small number of languages (or only in English). Some institutions publish the full text of responses to consultations whereas others collate and condense responses (sometimes in ways that the responders regard as inaccurate). The characteristics of the bodies which respond to consultations, and their relationships with those whose interests they claim to represent may be visible or hidden.

On the other hand, the communications are overwhelming. Even partial transparency is of limited usefulness to observers of financial regulation because it is characterized by multiple complexities: financial transactions and the rules which apply to them are complex. Responsibility for financial regulation is shared among public and private bodies, and among transnational, national and sub-national entities. As a result, proposals for new rules and standards multiply among these different entities, creating an information glut.

The inadequacy of transparency mechanisms can be remedied, for example, by translating proposals into more languages or by providing and requiring improved disclosure of responses and responders. But the opacity which results from complexity is much more difficult to remedy and more fundamental. If this problem cannot be solved, transparency

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alone cannot be relied on to legitimate the new financial order.

## INTRODUCTION

In this article I focus on the development of standards of financial regulation,<sup>1</sup> and argue that transparency in financial regulation is undermined because the information disclosed is simultaneously limited and excessive. Transparency is limited because policy-makers who develop the rules of financial regulation could do much more than they do to publicize their work. Transparency is excessive because financial regulation is complex, intersectional, multilayered, and transnational:<sup>2</sup> more disclosure to more people in more effective forms about more proposals for new rules and standards adds to an information glut and undermines the ability of citizens to understand what is happening.

Transparency, conceived of as a desirable feature of government, is not new.<sup>3</sup> Brandeis noted in 1914 that sunlight was the best disinfectant,<sup>4</sup> and Florida is the sunshine state not only as a matter of meteorology but also because of its commitment to shining light on the workings of government.<sup>5</sup> But although policies to promote transparency are not

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<sup>1</sup> Thus I am focusing essentially on transparency with respect to the process by which standards and rules are generated. This ignores other issues of transparency with respect to financial regulation, such as transparency with respect to compliance and enforcement, and to the costs of the regulatory system; transparency about what the rules require (legal certainty), and the idea that many rules of financial regulation involve requirements of transparency. *See, e.g.*, Christine Kaufmann & Rolf H. Weber, *The Role of Transparency in Financial Regulation*, 13 J. INT'L ECON. L. 779 (2010).

<sup>2</sup> *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-216, FINANCIAL REGULATION: A FRAMEWORK FOR CRAFTING AND ASSESSING PROPOSALS TO MODERNIZE THE OUTDATED U.S. FINANCIAL REGULATORY SYSTEM (2009) (noting the complexity of financial regulations). *Cf.* Sheila Jasanoff, *Transparency in Public Science: Purposes, Reasons, Limits*, 69 L. & CONTEMP. PROBS. 21, 24 (2006) (“[M]odern societies’ increasing dependence on science has proceeded hand in hand with developments that disable most citizens, even the most technically expert, from effectively addressing the larger set of questions: Is it good science; what is it good for; and is it good enough? Science has not only become infused with multiple social and political interests; it is also in danger of escaping effective critical control. Too often scientific knowledge seems to be ‘sequestered,’ concealed from those who could benefit from it or who could comment meaningfully on its quality and relevance.”).

<sup>3</sup> *See, e.g.*, Christopher Hood, *Accountability and Transparency: Siamese Twins, Matching Parts or Awkward Couple?* 33 W. EUR. POL. 989 (2010) (explaining the relationship between accountability and transparency).

<sup>4</sup> Louis D. Brandeis, *OTHER PEOPLES’ MONEY: AND HOW THE BANKERS USE IT*, 92 (1914) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

<sup>5</sup> *See, e.g.*, Mary K. Kraemer, *Exemptions to the Sunshine Law and the Public Records Law: Have They Impaired Open Government in Florida*, 8 FLA. ST. U. L. REV. 265, 266-7 (1980) (describing the enactment of the Sunshine Law in 1967). Florida has had a Public Records Law since 1909. *See, e.g.*, R.D. Woodson & Ricki Lewis Tannen,

entirely novel,<sup>6</sup> they are becoming more pervasive, more extensive, and even more controversial than in the past.<sup>7</sup> Technological development encourages new modes of transparency as governments make more information available online via databases,<sup>8</sup> web pages,<sup>9</sup> and blogs.<sup>10</sup> Governments promote transparency through commitments to access to information,<sup>11</sup> and to consultation about policy.<sup>12</sup> International organizations encourage states to adopt policies of transparency<sup>13</sup> as an

*Federal Constitutional Privacy and the Florida Public Records Law: Resolving the Conflict* 33 U. FLA. L. REV. 313, 328 (1981) (noting that the Florida statute of 1909 was one of the first in the country).

<sup>6</sup> See, e.g., Juliet Lodge, *Transparency and Democratic Legitimacy* 32 J. COMMON MKT. STUDS. 330 (1994) (discussing transparency and democracy in the EU).

<sup>7</sup> E.g., Jeannine E. Relly & Meghna Sabharwal, *Perceptions of Transparency of Government Policymaking: A Cross-national Study*, 26 GOV'T INFO. Q. 148, 149 (2009) (noting increasing adoption of access to information laws over the preceding decade); see, e.g., *EU Struggles with Being Open about Transparency*, EURACTIV, (Mar. 24, 2011) <http://www.euractiv.com/en/pa/eu-struggles-open-transparency-news-503484> (noting controversy); cf. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006).

<sup>8</sup>For examples of such databases see LEGISLATION.GOV.UK, <http://www.legislation.gov.uk> (last visited Aug. 21, 2011) and EUR-LEX, <http://eur-lex.europa.eu/en/index.htm> (last visited Aug. 21, 2011). See also, e.g., DATA.GOV.UK: OPENING UP GOVERNMENT, <http://data.gov.uk> (last visited Aug. 21, 2011); cf. CABINET OFFICE, *Government ICT Strategy*, 6 (Mar. 2011) available at [http://www.cabinetoffice.gov.uk/sites/default/files/resources/uk-government-government-ict-strategy\\_0.pdf](http://www.cabinetoffice.gov.uk/sites/default/files/resources/uk-government-government-ict-strategy_0.pdf) ("Information and communications technology (ICT) is critical for the effective operation of government and the delivery of the services it provides to citizens and businesses. It offers key benefits by enabling: access to online transactional services, which makes life simpler and more convenient for citizens and businesses; and channels to collaborate and share information with citizens and business, which in turn enable the innovation of new online tools and services.")

<sup>9</sup> Government departments and agencies have their own web pages. E.g., USA.GOV: THE U.S. GOVERNMENT'S OFFICIAL WEB PORTAL, <http://www.usa.gov/> (last visited Aug. 21, 2011); DIRECTGOV: PUBLIC SERVICES ALL IN ONE PLACE, <http://www.direct.gov.uk/en/index.htm> (last visited Aug. 21, 2011); REGIERUNONLINE, <http://www.bundesregierung.de/Webs/Breg/EN/Homepage/home.html> (last visited Aug. 21, 2011) (official website of the German Government).

<sup>10</sup> See, e.g., THE WHITE HOUSE BLOG, <http://www.whitehouse.gov/blog> (last visited Aug. 21, 2011).

<sup>11</sup> E.g., Ben Worthy, *More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government*, 23 GOVERNANCE 561, 564 (2010) (noting increasing transparency as part of the motivation for the UK's Freedom of Information Act).

<sup>12</sup> See, e.g., Caroline Bradley, *Consultation and Legitimacy in Transnational Standard-Setting*, 20 MINN. J. INTL. L. 480, 490-1 (2011) (describing consultation as a component of Governmental policy-making which combines ideas of transparency and citizen involvement).

<sup>13</sup> Whether the idea of transparency has any universal meaning is a complex question. Cf. Mark Bevir, *Public Administration as Storytelling*, 89 PUB. ADMIN. 183, 188 (2011) ("Our beliefs, concepts, actions, and practices are products of particular traditions or discourses. Social concepts (and social objects), such as 'bureaucracy' or 'democracy',

aspect of good government,<sup>14</sup> and adopt policies of transparency with respect to their own activities as a way of enhancing their own legitimacy.<sup>15</sup> Courts approve of administrative transparency.<sup>16</sup> Private sector organizations from Wikileaks to foundations<sup>17</sup> to newspapers<sup>18</sup> and individuals<sup>19</sup> also contribute to transparency of public sector actions.

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do not have intrinsic properties and objective boundaries. They are artificial inventions of particular languages and societies. Their content varies with the wider webs of belief in which they are situated.”).

<sup>14</sup> See, e.g., ORG. FOR ECON. CO-OPERATION AND DEV., RECOMMENDATION OF THE COUNCIL ON IMPROVING THE QUALITY OF GOVERNMENT REGULATION C(95)21/FINAL 9 (Mar. 9, 1995), available at <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=128&InstrumentPID=124&Lang=en&Book=False> (“These questions reflect principles of good decision-making that are used in OECD countries to improve the effectiveness and efficiency of government regulation by upgrading the legal and factual basis for regulations, clarifying options, assisting officials in reaching better decisions, establishing more orderly and predictable decision processes, identifying existing regulations that are outdated or unnecessary, and making government actions more transparent.”).

<sup>15</sup> See, e.g., IMF, TRANSPARENCY IS KEY TO ACCOUNTABILITY (Jan. 11, 2010), available at <http://www.imf.org/external/np/exr/cs/news/2010/cso110.htm> (“Greater transparency in the IMF’s policies and decisions makes it more accountable to the people and governments at the center of its work, the organization concluded after a policy review”); IMF, *Review of the Fund’s Transparency Policy—Background* (Oct. 27, 2009), available at <http://www.imf.org/external/np/pp/eng/2009/102609a.pdf> (reporting on the IMF’s outreach to external stakeholders and analyzing the IMF’s transparency policy); Interinstitutional Agreements: Agreement Between the European Parliament and the European Commission on the Establishment of a Transparency Register for Organisations and Self-employed Individuals Engaged in EU Policy-Making and Policy Implementation, 2011 OJ (L 191) 29-32 (Jul. 22, 2011) (establishing a Transparency Register for the registration and monitoring of organizations and individuals engaged in EU policy-making and implementation).

<sup>16</sup> See, e.g., *Hazelhurst v. Solicitors Regulation Authority* [2011] EWHC (Admin) 462, [38] (“It is of note that the SDT has not published Indicative Sanctions Guidance. Such guidance identifies the purpose, parameters and range of sanctions. It permits those who appear before it to better understand the proceedings and the thinking of the SDT. It assists the transparency of the proceedings. Such guidance has been used by other regulatory bodies for some years and is a valuable reference point both for the tribunal and for those who appear in front of it, as practitioners or advocates.”).

<sup>17</sup> For an example of such a foundation, see SUNLIGHT FOUNDATION, <http://sunlightfoundation.com/> (last visited Aug. 18, 2011).

<sup>18</sup> Consider, for example the Guardian’s use of crowd-sourcing with respect to data on MP expense claims. E.g., Michael Andersen, *Four Crowdsourcing Lessons from the Guardian’s (Spectacular) Expenses-Scandal Experiment*, NIEMAN JOURNALISM LAB (Jun. 23, 2009), <http://www.niemanlab.org/2009/06/four-crowdsourcing-lessons-from-the-guardians-spectacular-expenses-scandal-experiment/print>; Simon Rogers, *How to Crowdfund MPs’ Expenses*, THE GUARDIAN (Jun. 18, 2009, 3:34 PM) <http://www.guardian.co.uk/news/datablog/2009/jun/18/mps-expenses-houseofcommons>.

<sup>19</sup> See, e.g., *About*, OPENREGS, <http://openregs.com/about> (last visited August 20, 2011) (“OpenRegs.com is an alternative to the federal government’s Regulations.gov regulatory dockets database. That site can be confusing and difficult to use for average citizens and experts alike. The goal of OpenRegs.com is to make the proposed and final

During the financial crisis market participants discovered that governmental decisions about whether or not to rescue financial institutions in trouble were unpredictable. For example, commentators have criticized decisions of the US Government in September 2008 as undermining confidence in the financial markets.<sup>20</sup> Whereas the US Government allowed Lehman Brothers to go into Chapter 11,<sup>21</sup> it rescued AIG.<sup>22</sup> Opaque financial transactions contributed to the market participants' lack of confidence in their ability to value assets.<sup>23</sup> Apparent transfers of risk

regulations published in the Federal Register easy to find and discuss, so that citizens can become better informed and more involved in the regulatory process.”).

<sup>20</sup> See, e.g., U.S. FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT, xxi (2011), available at <http://www.gpoaccess.gov/fcic/fcic.pdf> (“[T]he government’s inconsistent handling of major financial institutions during the crisis—the decision to rescue Bear Stearns and then to place Fannie Mae and Freddie Mac into conservatorship, followed by its decision not to save Lehman Brothers and then to save AIG—increased uncertainty and panic in the market.”); Fin. Stability Bd., *Consultative Document: Effective Resolution of Systemically Important Financial Institutions*, 7 (Jul. 19, 2011), available at [http://www.financialstabilityboard.org/publications/r\\_110719.pdf](http://www.financialstabilityboard.org/publications/r_110719.pdf) (“The disorderly collapse of Lehman Brothers in September 2008 provided a sharp and painful lesson of the costs to the financial system and the global economy of the absence of powers and tools for dealing with the failure of a SIFI. Lehman Brothers was the last SIFI allowed to fail during the last financial crisis. All other SIFIs at risk were supported by public capital injections, asset or liability guarantees, or exceptional liquidity measures undertaken by central banks. While this was necessary for economic and financial stability reasons, public bail-outs placed taxpayer funds at unacceptable risks and has increased moral hazard in a very significant way.”).

<sup>21</sup> See, e.g., David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 187 (2010) (“Treasury . . . issued death sentences against other financial institutions, including Lehman Brothers and Washington Mutual . . .”).

<sup>22</sup> See, e.g., CONG. OVERSIGHT PANEL, THE AIG RESCUE, ITS IMPACT ON MARKETS, AND THE GOVERNMENT’S EXIT STRATEGY, 195 (Jun. 10, 2010) (“By providing a complete bailout that called for no shared sacrifice among AIG and its creditors, FRBNY and Treasury fundamentally changed the rules of America’s financial marketplace.”).

<sup>23</sup> E.g., Int’l Monetary Fund, *Global Financial Stability Report: Sovereigns, Funding, and Systemic Liquidity*, at 59 (Oct. 2010), available at <http://www.imf.org/external/pubs/ft/gfsr/2010/02/pdf/text.pdf> (stating that the “complex and opaque nature of securitized products made valuation difficult”); see e.g., Fin. Stability Bd., *Thematic Review on Risk Disclosure Practices: Peer Review Report*, at 2 (Mar. 18, 2011), available at [http://www.financialstabilityboard.org/publications/r\\_110318.pdf](http://www.financialstabilityboard.org/publications/r_110318.pdf) (“The financial crisis highlighted that reliable and relevant valuations and disclosures of the risks to which financial institutions are exposed are important to maintain overall market confidence. High quality risk disclosures contribute to financial stability by providing investors and other market participants with a better understanding of firms’ risk exposures and risk management practices.”); cf. TREASURY COMMITTEE, FINANCIAL STABILITY AND TRANSPARENCY, 2007-8, H.C. 371, at 3 (U.K.) available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtreasy/371/371.pdf> (“It is clear that the search for yield and short-termism encouraged many investors to invest in high-yielding and increasingly complex products that it turns out they did not always fully understand.”).

turned out not to be real.<sup>24</sup>

As a result, many changes and proposed changes to rules of financial regulation in the wake of the crisis have sought to improve transparency.<sup>25</sup> For example, new rules require credit rating agencies to disclose characteristics of the models they use in developing ratings.<sup>26</sup> Policy-makers have focused on establishing banking regimes that will allow banks to fail, improving market discipline, and reducing moral hazard.<sup>27</sup>

Many of the main actors constructing financial regulation in the wake of the global financial crisis era have stated commitments to transparency. The members of the Financial Stability Board (FSB) agreed to subject themselves to peer reviews of their implementation of transnational standards of financial regulation,<sup>28</sup> and the FSB publishes the reviews.<sup>29</sup>

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<sup>24</sup> See, e.g. INT'L MONETARY FUND, *Global Financial Stability Report: Containing Systemic Risks and Restoring Financial Soundness*, at xii (April 2008), available at <http://www.imf.org/external/pubs/ft/gfsr/2008/01/pdf/text.pdf> (“[A] surprising amount of risk has returned to the banking system from where it was allegedly dispersed.”).

<sup>25</sup> See Donald C. Langevoort, *Global Securities Regulation after the Financial Crisis*, 13 J. INT'L ECON. L. 799, 805 (2010) (pointing out that whereas transparency may be critical for securities regulation it may not be so critical for risk regulation, stating “Separation between the domains of securities regulation and substantive risk regulation also has a second, more normative value. Put simply, those two domains are inherently at odds, and whenever combined under one roof, securities regulation tends to lose. Securities regulation is about truth-telling, and under stressful conditions, risk regulators almost always prefer concealing the truth to exposing it. To be sure, it is far from clear that truth-telling is always the right course, but preserving a regulatory capacity that favors transparency is generally preferable to folding it into the risk regulator’s task with some vague mandate to value disclosure.”).

<sup>26</sup> See, e.g., Council Regulation 1060/2009, art. 8, 2009 O.J. (L 302) 1, 12 (providing that a “credit rating agency shall disclose to the public the methodologies, models and key rating assumptions it uses in its credit rating activities”).

<sup>27</sup> See, e.g., *Commission Communication on An EU Framework for Crisis Management in the Financial Sector*, at 2, COM (2010) 579 final (Oct. 20, 2010) available at [http://ec.europa.eu/internal\\_market/bank/docs/crisis-management/framework/com2010\\_579\\_en.pdf](http://ec.europa.eu/internal_market/bank/docs/crisis-management/framework/com2010_579_en.pdf) (“Banks must be allowed to fail, like any other business. Authorities must be equipped with tools that enable them to prevent the systemic damage caused by disorderly failure of such institutions, without unnecessarily exposing taxpayer to risk of loss and causing wider economic damage. Alongside tougher regulation reducing the chances of a bank becoming distressed, a credible regime is needed to re-instill market discipline associated with the threat of failure and to reduce moral hazard—the implicit protection from failure that those in the banking sector currently enjoy.”).

<sup>28</sup> Fin. Stability Bd., *FSB Framework for Strengthening Adherence to International Standards*, at 1-2 (Jan. 9, 2010), available at [http://www.financialstabilityboard.org/publications/r\\_100109a.pdf](http://www.financialstabilityboard.org/publications/r_100109a.pdf) (stating the commitment of FSB Member States to undergo peer review “to evaluate their adherence to international standards in the regulatory and supervisory area”).

<sup>29</sup> For an example of a published peer review see Fin. Stability Bd., *Country Review of Mexico: Peer Review Report* (Sep. 23, 2010) available at [http://www.financialstabilityboard.org/publications/r\\_100927.pdf](http://www.financialstabilityboard.org/publications/r_100927.pdf) [hereinafter *Mexico Country Review*] and Fin. Stability Bd., *Peer Review of Italy: Review Report* (Jan. 27, 2011) available at [http://www.financialstabilityboard.org/publications/r\\_110207b.pdf](http://www.financialstabilityboard.org/publications/r_110207b.pdf)

The Basel Committee now publishes consultative documents online<sup>30</sup> and has even published some responses to consultation.<sup>31</sup> The White House has adopted a policy of transparency and open government.<sup>32</sup> Open government includes moves to make government datasets, including those relating to spending, more visible.<sup>33</sup> It also involves efforts to make the regulatory process more transparent.<sup>34</sup> Administrative agencies have invited the public to make comments about how they should go about making rules, rather than merely responding to specific regulatory proposals.<sup>35</sup> All of these initiatives are facilitated by developments in information technology.

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[hereinafter *Italy Peer Review*].

<sup>30</sup> See, e.g., Basel Committee on Banking Supervision, Press Release, *Pillar 3 Disclosure Requirements on Remuneration - Consultative Document* (Dec. 27, 2010), available at <http://www.bis.org/publ/bcbs191.htm> (“The Basel Committee welcomes comments on this consultative document. Comments should be submitted by Friday, 25 February 2011 by email to: [baselcommittee@bis.org](mailto:baselcommittee@bis.org). Alternatively, comments may be sent by post to the Secretariat of the Basel Committee on Banking Supervision, Bank for International Settlements, CH-4002 Basel, Switzerland. All comments may be published on the Bank for International Settlements’ website unless a commenter specifically requests confidential treatment.”).

<sup>31</sup> See, e.g., Basel Committee on Banking Supervision, *Comments Received on the Consultative Documents “Strengthening the Resilience of the Banking Sector” and “International Framework for Liquidity Risk Measurement, Standards and Monitoring,”* available at <http://www.bis.org/publ/bcbs165/cacomment.htm> (last visited Aug. 24, 2011) (listing and linking to comments received on consultation documents).

<sup>32</sup> See, e.g., Memorandum for the Heads of Executive Departments and Agencies, Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009) (announcing a new policy of transparency and open government); OFFICE OF MGMT. & BUDGET, EXEC. Office of the President, Memorandum for the Heads of Executive Departments and Agencies, Open Government Directive (Dec. 8, 2009), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf) (discussing how a move towards e-government, which is a component of open government, antedated the Obama Administration); see also, The E-Government Act of 2002, Pub. L. 107-347, 116 Stat. 2899 (2002) (codified at 44 U.S.C. § 3601 (2002)) (promoting the use of electronic government services). But see, Daniel Schuman, *Budget Technocalypse: Proposed Congressional Budgets Slash Funding for Data Transparency*, SUNLIGHT FOUNDATION BLOG (Mar. 23, 2011), <http://sunlightfoundation.com/blog/2011/03/23/transparency-technocalypse-proposed-congressional-budgets-slash-funding-for-data-transparency/> (noting that as of March 2011 future funding for these programs is uncertain).

<sup>33</sup> See, e.g., DATA.GOV, <http://www.data.gov/> (last visited Sept. 9, 2011); FOIA.GOV, <http://www.foia.gov> (last visited Sept. 9, 2011) (providing information about how to acquire more information from the government).

<sup>34</sup> E.g., REGULATIONS.GOV, <http://www.regulations.gov/> (last visited Sept. 9, 2011) (facilitating access to and participation in the federal regulatory process).

<sup>35</sup> See, e.g., Press Release, SEC, SEC Chairman Schapiro Announces Open Process for Regulatory Reform Rulemaking (Jul. 27, 2010) <http://www.sec.gov/news/press/2010/2010-135.htm> (“Under a new process, the public will be able to comment before the agency even proposes its regulatory reform rules and amendments. . . . The new process goes well beyond what is legally required and will provide expanded opportunity for public comment and greater transparency and accountability. The SEC also expects to hold public hearings on selected topics.”).



This is a very brief and incomplete description of the ways in which governments and supranational organizations have worked towards transparency. However, it illustrates that transparency is an important element of the way in which policy-making bodies conceive of and describe their roles. Nevertheless, transparency may not achieve effective communication.<sup>36</sup>

#### FINANCIAL REGULATION AND TRANSPARENCY

In many ways domestic initiatives to reform or adjust financial regulation are transparent in the same way as any other domestic changes in the law. The activities of legislative bodies are visible via the internet<sup>37</sup> and television,<sup>38</sup> and sometimes by video over the internet,<sup>39</sup> and are also reported on by the news media. Regulators publish proposed regulations for public comment.<sup>40</sup> But despite policy-makers' efforts to make information

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<sup>36</sup> See, e.g., Onora O'Neill, *Ethics for Communication?* 17 EUR. J. PHIL.167, 170 (2009) ("It is all too common for material that is publicly *disclosed* or *disseminated*, thereby achieving transparency, not to be read, heard or seen by any or many audiences; even where it is read, heard or seen, it may not be grasped or understood by those audiences. Transparency counters secrecy, but it does not ensure communication . . . Sometimes it is even used to maintain secrecy: one effective way to ensure that information is not communicated is not to keep it secret, but to 'release' it with no fanfare.").

<sup>37</sup> E.g., U.S. HOUSE OF REPRESENTATIVES, <http://www.house.gov/> (last visited Sept. 9, 2011) (providing access to information about proceedings in the US House of Representatives); U.S. SENATE, <http://www.senate.gov/> (last visited Sept. 9, 2011) (providing access to information about proceedings in the US Senate); *State Legislative Websites Directory*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/?tabid=17173> (last visited Sept. 9, 2011) (providing links to websites of state legislatures in the US); ASSEMBLEE NATIONALE, <http://www.assemblee-nationale.fr/index.asp> (last visited Sept. 9, 2011) (providing access to information about proceedings in the French Assemblée Nationale); U.K. PARLIAMENT, <http://www.parliament.uk/> (last visited Sept. 9, 2011) (providing access to information about proceedings in the UK Parliament).

<sup>38</sup> See, e.g., Timothy E. Cook, *House Members as Newsmakers: The Effects of Televising Congress*, 11 LEGIS. STUD. Q. 203 (1986) (discussing the impact of televising Congress).

<sup>39</sup> E.g., *Parliamentary Television of the German Bundestag*, GERMAN BUNDESTAG, [http://www.bundestag.de/htdocs\\_e/press/tv/index.html](http://www.bundestag.de/htdocs_e/press/tv/index.html) (last visited Sept. 9, 2011) (providing access to live and recorded video of proceedings in the German Bundestag); see legislative websites cited *supra* note 37 (providing access to live and recorded video of legislative proceedings).

<sup>40</sup> E.g., REGULATIONS.GOV, <http://www.regulations.gov/#!aboutProgram> (last visited Sept. 9, 2011) (noting that "Federal regulations have been available for public comment for many years, but people used to have to visit a government reading room to provide comments. Today, the public can share opinions from anywhere on Regulations.gov."); see also, e.g., Harold C. Relyea, *The Federal Register: Origins, Formulation, Realization, and Heritage*, 28 GOV'T INFO. Q. 295 (2011) (describing the introduction of the Federal Register); cf. Erwin N. Griswold, *Government in Ignorance of the Law – A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 208 (1934) ("[A]part from the United States, it would be very difficult to find a

about what they are doing available to the public, the public is often not well-informed about the law or proposals for its reform.<sup>41</sup>

One reason citizens may be under-informed about law and policy is that some policy issues seem, as a general matter, less salient to them than others. Scandals and crises can increase salience,<sup>42</sup> but many areas of financial regulation are less salient for citizens, even at times of financial scandal or crisis.<sup>43</sup> Policy networks and entrepreneurs influence the development of regulation by taking advantage of opportunities to promote their own preferred policy ideas.<sup>44</sup>

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nation of importance which does not use some method to make available and accessible a record of the acts of its executive authorities.”).

<sup>41</sup> See, e.g., Howard Schuman & Stanley Presser, *Public Opinion and Public Ignorance: The Fine Line Between Attitudes and Nonattitudes*, 85 AM. J. SOC. 1214 (1980) (analyzing people’s willingness to express views on issues they do not know about).

<sup>42</sup> Cf. Michael D. Jones & Hank C. Jenkins-Smith, *Trans-Subsystem Dynamics: Policy Topography, Mass Opinion, and Policy Change*, 37 POLICY STUD. J. 37, 42 (2009) (“Salience disruption is initiated by large-scale events that focus public attention on specific subsystems (or groups of them) and thereby generates enormous effort, resources, and change in those subsystems, while simultaneously drawing attention and resources away from others.”).

<sup>43</sup> For example, in 2010 the Securities and Exchange Commission published proposed rules on an end-user exception to the mandatory clearing of security-based swaps. See *End-User Exception to Mandatory Clearing of Security Based Swaps*, 75 Fed. Reg. 79,992 (proposed Dec. 21, 2010) (to be codified at 17 C.F.R. pt. 240). The SEC received sixteen comments on this proposal. See *Comments on Proposed Rule: End-User Exception to Mandatory Clearing of Security-Based Swaps*, SEC, <http://www.sec.gov/comments/s7-43-10/s74310.shtml> (last visited Sept. 20, 2011). But see *Debit Interchange Rule Delayed*, WOLTERS KLUWER FIN. REFORM NEWS CTR. (Mar. 31, 2011, 4:11 PM), <http://financialreform.wolterskluwerlb.com/2011/03/debit-interchange-rule-delayed.html> (noting more than 11,000 comments on a proposed rule).

<sup>44</sup> The corporate governance community promotes changes in governance as a solution to a range of issues. For example, proposals to change banking regulation now include changes to corporate governance requirements for banks. See, e.g., European Commission, *Proposal for a Directive of the Access to the Activity of Credit Institutions and the Prudential Supervision of Credit Institutions and Investment Firms and Amending Directive 2002/87/EC of the European Parliament and of the Council on the Supplementary Supervision of Credit Institutions, Insurance Undertakings and Investment Firms in a Financial Conglomerate*, at 3, COM (2011) 453 final (Jul. 20, 2011) (“The collapse of financial markets in autumn 2008 and the credit crunch that followed can be attributed to multiple, often inter-related, factors at both macro- and micro-economic levels, as identified in the Report of the High-Level Group on Financial Supervision in the EU published on 25 February 2009, and in particular to the accumulation of excessive risk in the financial system. This excessive accumulation of risk was in part due to the weaknesses in corporate governance of financial institutions, especially in banks. Whilst not all banks suffered from systemic weaknesses of governance arrangements, the Basel Committee on Banking Supervision (BCBS) referred to ‘a number of corporate governance failures and lapses.’”). Cf. Diane Stone, *Private Philanthropy or Policy Transfer? The Transnational Norms of the Open Society Institute*, 38 POL’Y AND POL. 269, 272 (2010) (“[E]lite forms of associational life. . . professional bodies with substantial financial resources or patronage (and sometimes interlock). . . are aimed at influencing policy and engaged in transferring

How policy issues are characterized may affect how salient those issues are: issue characterization is key. Policy-makers who characterize issues relating to sub-prime lending as “predatory lending” may engage more citizens in discussions about proposals to change the law than if they used some other more neutral characterization.<sup>45</sup> Narratives help with characterization: different versions of sub-prime lending narratives would suggest different regulatory responses. If the sub-prime lending problems were caused by inadequate risk management at financial firms, the appropriate regulatory solution would focus on encouraging or requiring financial firms to adopt improved risk management strategies and to engage in responsible lending. If the problems were caused by borrowers who enthusiastically took on “liar loans” they could not afford, the appropriate solution would encourage responsible borrowing.<sup>46</sup>

Statutes and regulations are frequently written in very technical language and one way of improving the transparency of law is to write the law, and proposals to change the law, in language citizens are able to understand.<sup>47</sup> Policy-makers may draft plain language regulations and explanatory documents in simple language to improve communication with citizens. But moving from complex technical language to plainer language takes time,<sup>48</sup> and even where explanations of financial rules are expressed in plain language the rules are often complex,<sup>49</sup> and the activities they would

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experts and policy ideas between countries and professional communities.”).

<sup>45</sup> Cf. Anne Schneider & Mara Sidney, *What Is Next for Policy Design and Social Construction Theory?*, 37 POL’Y STUD. J. 103, 106 (2009) (“The policy design approach directs scholars to examine who constructs policy issues, and how they do so, such that policy actors and the public accept particular understandings as ‘real,’ and how constructions of groups, problems and knowledge then manifest themselves and become institutionalized into policy designs, which subsequently reinforce and disseminate these constructions.”).

<sup>46</sup> The EU has attempted to compromise with proposals which focus on “irresponsible lending and borrowing.” See *Commission Proposal for a Directive on Credit Agreements Relating to Residential Property*, at 2 COM (2011) 142 final (Mar. 31, 2011).

<sup>47</sup> E.g., Plain Writing Act of 2010, 5 U.S.C. § 301 (2006 & Supp. IV 2011); see, e.g., Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011) (“Our regulatory system must . . . ensure that regulations are accessible, consistent, written in plain language, and easy to understand.”).

<sup>48</sup> See FED. DEPOSIT INS. CORP., PLAIN WRITING IMPLEMENTATION PLAN – JUNE 2011 (2011), <http://www.fdic.gov/plainlanguage/implementationplan.html> (pointing out that the FDIC published its implementation plan in June 2011).

<sup>49</sup> See Andrew G. Haldane, Exec. Dir., Fin. Stability, Bank of England, Speech at the American Economic Association, Denver, Colo.: Capital Discipline (Jan. 9, 2011), *available at* <http://www.bankofengland.co.uk/publications/speeches/2011/speech484.pdf> (suggesting that simple rules might be appropriate for complex activities, stating “As a thought experiment, imagine instead we were designing a regulatory framework from scratch. Finance is a classic complex, adaptive system. What properties would a

control are also complex. This layering of complexities produces and intensifies opacity.

Financial regulation is increasingly a transnational, rather than a merely domestic, phenomenon. For many years, regulators have worked with their counterparts in other jurisdictions to develop standards for financial regulation.<sup>50</sup> Securities regulators have worked together in the International Organisation of Securities Commissions (IOSCO),<sup>51</sup> insurance supervisors work through the International Association of Insurance Supervisors (IAIS),<sup>52</sup> and central banks and bank regulators form the Basel Committee on Banking Supervision.<sup>53</sup> These groups are essentially collaborative, technocratic networks of regulators with the power to develop recommendations, principles and standards which are not, as a formal matter, legally binding. However, although the principles and standards are not legally binding as such, states whose regulators participate in their articulation may feel obliged to implement them domestically. And states which depend on the IMF's<sup>54</sup> financial resources will be subject to the IMF's examination of their economies, including their bank regulatory systems.<sup>55</sup> The global financial crisis has increased demand for funds from the IMF.<sup>56</sup> The IMF's interest in monitoring the financial soundness of its

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complex, adaptive system such as finance ideally exhibit to best insure about future crises? Simplicity is one. There is a key lesson, here, from the literature on complex systems. Faced with complexity, the temptation is to seek complex control devices. In fact, complex systems typically call for simple control rules. To do otherwise simply compounds system complexity with control complexity.”)

<sup>50</sup> See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER*, 36 (2004) (describing regulators as “the new diplomats.”).

<sup>51</sup> *The International Organization of Securities Commissions*, OICU-IOSCO, <http://www.iosco.org/> (last visited Sept. 9, 2011).

<sup>52</sup> *International Association of Insurance Supervisors*, IAIS, <http://www.iaisweb.org> (last visited Oct. 28, 2011).

<sup>53</sup> *About BIS*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/bcbis/index.htm> (last visited Sept. 9, 2011).

<sup>54</sup> See generally, IMF, *Articles of Agreement of the International Monetary Fund*, <http://www.imf.org/external/pubs/ft/aa/index.htm> (last visited Sept. 9, 2011) (explaining that the IMF is a treaty-based international organization which was founded in 1944 to govern the international monetary system to assure exchange rate stability and encourage IMF members to do away with exchange restrictions).

<sup>55</sup> See, e.g., Int'l Monetary Fund, *Iceland: Financial System Stability Assessment Update*, IMF Country Report No. 08/368 (Aug. 19, 2008), available at <http://www.imf.org/external/pubs/ft/scr/2008/cr08368.pdf> (evaluating Iceland's financial system including financial supervision and regulation).

<sup>56</sup> See, e.g., Christine Lagarde, Managing Dir., IMF, Speech at the Council on Foreign Relations: Challenges and Opportunities for the World Economy and the IMF (Jul. 26, 2011), available at <http://www.imf.org/external/np/speeches/2011/072611.htm> (“Over the last few years, the IMF's role has grown tremendously. It was an intellectual leader during the crisis, with its early call for coordinated policy stimulus. It has been a flexible financial partner, reforming its lending instruments and making available a record amount of support, totaling about \$330 billion. And it is helping build a stronger

members, especially of its borrowers, gives it an interest in regulation as a mechanism for promoting financial stability.<sup>57</sup> In response to criticism, the IMF has recently been working to address some of the concerns about its role by emphasizing transparency as an accountability mechanism.<sup>58</sup>

Transnational standard-setters have incentives to be transparent about their work partly because regulated firms wish to express their views on proposed standards, and partly in order to legitimize their work to critics. Although the Basel Committee has not clearly articulated its views about transparency and consultation, IOSCO has done so. In 2005 IOSCO published a document describing its policies with respect to public consultation.<sup>59</sup> The document described IOSCO's objectives in carrying out public consultations as including benefiting from "the expertise of the international financial community," promoting "understanding of IOSCO's mission as the international standard setter for securities markets" and continuing to increase transparency about IOSCO's work.<sup>60</sup>

The Basel Committee and IOSCO, as networks of regulators, co-operate across territorial boundaries to address systemic problems and to be more effective domestically. But their activities have an impact on the competitiveness of financial firms. Financial firms which are subject to relaxed regulation in their home state may benefit from a competitive advantage with respect to firms based in jurisdictions with more demanding regulatory regimes. Governmental support for financial firms may function as a subsidy. The original Basel Accord which was introduced in 1988 provided for states to impose capital adequacy requirements on international banks, even if those states addressed risks to financial stability in other ways (such as through governmental guarantees). The Accord was agreed to after the US and the UK announced they would apply stringent capital adequacy requirements to foreign banks doing business in their

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global economy, through its policy advice and technical assistance efforts."). *But cf.* Harold James, *International Order After the Financial Crisis*, 87 INT'L AFFAIRS 525, 535 (2011) ("The China–America dispute has shown the essential helplessness of the IMF, an institution which had been trying desperately to reassert its usefulness in the course of the global financial crisis.").

<sup>57</sup> See, e.g., JOSÉ VIÑALS ET AL., IMF STAFF POSITION NOTE: SHAPING THE NEW FINANCIAL SYSTEM, 6 (2010) available at <http://www.imf.org/external/pubs/ft/spn/2010/spn1015.pdf> ("The IMF, for its part, also has a unique role to play, given its universal membership, its macro-financial mandate, and its well-established roles in the area of bilateral and multilateral surveillance and technical assistance.").

<sup>58</sup> See, e.g., IMF, TRANSPARENCY IS KEY TO ACCOUNTABILITY, *supra* note 15.

<sup>59</sup> Exec. Comm. of the Int'l Org. of Sec. Comm'ns, *IOSCO Consultation Policy and Procedure*, at 2, (2005), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD197.pdf>.

<sup>60</sup> *Id.*

jurisdictions.<sup>61</sup>

The story of the genesis of the original Basel Accord illustrates that the interests of private firms have an impact on regulation at the transnational level as well as at the domestic level. The multi-level governance model of regulation focuses on the idea of levels of regulation, but financial regulation involves not just levels of regulation but multiple intersections between different spheres of regulation: intersections between governmental and non-governmental or private spheres; between the spheres of expertise and of politics; and between the domestic and foreign or international spheres. These spheres are interconnected. Governmental authorities work together across territorial borders. There is some overlap between the private sphere and the sphere of expertise, and the market-based sphere of expertise is transnational, rather than being entirely domestic. The intricacies of the interconnections between the different spheres of financial regulation form an additional layer of opacity over the complexities of the markets and transactions which occur on those markets. Thus financial regulation involves complex activities and markets, intricate and diffuse processes for assessing and deciding on rules and standards, and many complicated rules.

Before the crisis, financial firms had considerable success in persuading governments and the networks of regulators to defer to a large extent to the expertise of the private sector. IOSCO said that the “regulatory regime should make appropriate use of Self-Regulatory Organizations.”<sup>62</sup> When the crisis hit, the idea of self-regulation seemed suddenly less attractive. For example, in late 2008 Christopher Cox, then Chairman of the SEC, said that it had become “abundantly clear that voluntary regulation does not work.”<sup>63</sup> The language of the IOSCO Objectives and Principles was

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<sup>61</sup> See e.g., Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 HARV. INT’L L. J. 447, 500-503 (2008) (describing the background to the adoption of the 1988 Basel Accord).

<sup>62</sup> Int’l Org. of Sec. Comm’ns, *Objectives and Principles of Securities Regulation*, at 12, (Feb. 2008), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD265.pdf>.

<sup>63</sup> Press Release, Christopher Cox, Chairman, SEC, Chairman Cox Announces End of Consolidated Supervised Entities Program (Sept. 26, 2008) <http://www.sec.gov/news/press/2008/2008-230.htm>. Compare Commission Guidance and Amendment to the Rules Relating to Organization and Program Management Concerning Proposed Rule Changes Filed by Self-Regulatory Organizations, Release No. 34-58092, 73 Fed. Reg. 40144, 40144 (Jul. 11, 2008) (reflecting the SEC’s reliance on self-regulation, expanding the range of SRO rule changes which would become immediately effective and stating that “Self-regulation, with oversight by the Commission, is a basic premise of the Exchange Act.”), with SEC, OFFICE OF INSPECTOR GEN., OFFICE OF AUDITS, SEC’S OVERSIGHT OF BEAR STEARNS AND RELATED ENTITIES: THE CONSOLIDATED-SUPERVISED ENTITY PROGRAM 81 (2008), available at <http://www.sec.gov/about/oig/audit/2008/446-a.pdf> (noting defects in the SEC’s voluntary Consolidated Supervised Entity program).

amended to reflect this new nervousness about self-regulation—the 2010 version backtracks from the earlier exhortation to make appropriate use of self-regulation and merely refers to the possibility that the regulatory system will involve self-regulation.<sup>64</sup>

In another example of public reliance on private regulation, Basel II allowed regulators to permit sophisticated banks to use their own models for credit risk. Adair Turner has argued forcefully since the crisis began that everyone put too much faith in these models: “Mathematical sophistication ended up not containing risk, but providing false assurance that other prima facie indicators of increasing risk (e.g. rapid credit extension and balance sheet growth) could be safely ignored.”<sup>65</sup>

The crisis disturbed the complacency with which policy-makers viewed self-regulation in the financial markets. But the private sector reacted by developing new self-regulatory principles and practices. Industry groups have focused on the securitization process, for example by developing guidelines for limiting reliance on credit ratings,<sup>66</sup> and addressing issues of transparency.<sup>67</sup> The International Swaps and Derivatives Association (ISDA), has developed protocols for novations of credit derivatives and interest rate transactions to address backlogs.<sup>68</sup>

Industry groups have actively negotiated and lobbied over changes to the financial regulatory structure and rules. They have done so with the knowledge that circumstances have changed, and earlier habits of deference to industry views have been disrupted.<sup>69</sup> For example, the

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<sup>64</sup> Int’l Org. of Sec. Comm’ns, *Objectives and Principles of Securities Regulation* (June 2010), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf>.

<sup>65</sup> FIN. SERV. AUTH., THE TURNER REVIEW: A REGULATORY RESPONSE TO THE GLOBAL BANKING CRISIS 22 (Mar. 2009), available at [http://www.fsa.gov.uk/pubs/other/turner\\_review.pdf](http://www.fsa.gov.uk/pubs/other/turner_review.pdf) [hereinafter *Turner Review*].

<sup>66</sup> EUROPEAN FUND & ASSET MGMT. ASS’N, EUROPEAN SECURITISATION FORUM & INV. MGMT. ASS’N, ASSET MANAGEMENT INDUSTRY GUIDELINES TO ADDRESS OVER-RELIANCE UPON RATINGS 4 (Dec. 11, 2008).

<sup>67</sup> E.g., EUROPEAN SECURITISATION FORUM & INT’L CAPITAL MKT. ASS’N, *INDUSTRY INITIATIVES TO INCREASE TRANSPARENCY: ISSUER AND INVESTOR TRANSPARENCY INITIATIVES* (June 2008), available at <http://www.europeansecuritisation.com/Communications/Archive/Current/Issuer%20and%20Investor%20Transparency%20Initiatives.pdf> (describing industry initiatives to promote transparency in securitization transactions).

<sup>68</sup> ISDA NOVATION PROTOCOL, INT’L SWAPS AND DERIVATIVE ASS’N, <http://www.isda.org/isdanovationprotII/isdanovationprotII.html> (last visited October 17, 2011).

<sup>69</sup> Cf. Nout Wellink, Chairman, Basel Comm. on Banking Supervision, President, De Nederlandsche Bank, Remarks at the FSI High-Level Meeting on the New Framework to Strengthen Financial Stability and Regulatory Priorities: Basel III: a Roadmap to Better Banking Regulation and Supervision, 3, (May 24, 2011), <http://www.bis.org/speeches/sp110524.pdf> (“We have come a long way from light touch regulation to what some like to call ‘intrusive’ supervision. And this means that

Securities Industry and Financial Markets Association (SIFMA), a trade group formed after the merger of the Securities Industry Association and the Bond Market Association, submitted a 71-page response to the SEC's proposals for new regulations on issues of asset backed securities.<sup>70</sup> The response included this passage: "SIFMA's members have directly experienced the pain of the recent financial crisis and the collapse of the structured finance markets, and are acutely sensitive to what is at stake as both government and the private sector work to rebuild these vital markets. There is a long way to go."<sup>71</sup>

The development of financial regulation involves conversations and negotiations between market participants and the networks of regulators which develop standards for their behavior. These processes of conversation and negotiation take place across territorial borders,<sup>72</sup> and are reasonably transparent to regulators and market participants, but they are much less transparent to citizens. Many believe that it is entirely appropriate for business regulation to be constructed within expert policy networks,<sup>73</sup> and it is difficult to imagine how financial regulation (complex as it is) could be made entirely transparent to non-expert citizens. But politicians and regulators do make grand claims to be transparent, and these grand claims make deficits in transparency problematic.<sup>74</sup> Politicians and regulators do not tend to make fine distinctions in their discussions of the role and modalities of transparency in different policy contexts. Perhaps they should.<sup>75</sup>

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supervisors sometimes need to take actions that are unpopular with individual banks or with prevailing public opinions.").

<sup>70</sup> Letter from Richard A. Dorfman & Timothy W. Cameron, Esq., Managing Dir.s., Sec. Indus. & Fin. Mkts. Ass'n, to SEC (Aug. 2, 2010), <http://www.sifma.org/issues/item.aspx?id=914>.

<sup>71</sup> *Id.* at 1.

<sup>72</sup> See, e.g., Eric Helleiner & Stefano Pagliari, *The End of an Era in International Financial Regulation? A Postcrisis Research Agenda*, 65 INT'L ORG. 169, 169-70 (2011) (discussing how transnational financial regulation is constructed).

<sup>73</sup> E.g., Walter Mattli & Tim Büthe, *Global Private Governance: Lessons From a National Model of Setting Standards in Accounting*, 68 L. & CONTEMP. PROBS. 225, 230-31 (2005) (discussing the benefits of taking advantage of and maintaining expertise, and of avoiding blame as reasons for delegating to private actors); *id.* at 235-36 (noting that accounting standards are often delegated to private entities). *Contra* Geoffrey R. D. Underhill & Xiaoke Zhang, *Setting the Rules: Private Power, Political Underpinnings, and Legitimacy in Global Monetary and Financial Governance*, 84 INT'L AFF. 535, 536 (2008) ("The prevalence of private interests in rule-making processes undermines the establishment of an accountable and legitimate financial order.").

<sup>74</sup> Cf. Fenster, *supra* note 7, at 889 ("[T]ransparency is not merely a political norm; candidates, partisans, and activists utilize it as a rhetorical weapon to promise full-scale political and social redemption.").

<sup>75</sup> Cf. Robert Hoppe, *Institutional Constraints and Practical Problems in*



The financial markets and the regulations that apply to them are impenetrable for most citizens who are not involved in activities related to the financial markets. Citizens' lack of understanding of financial matters leads governments and international organizations to work to improve financial literacy.<sup>76</sup> Although citizens may need to make decisions about their own mortgages and investment for retirement they do not need to participate in developing rules of financial regulation. This activity remains in the hands of the experts. But the experts are not always right about what needs to be done, and when they are wrong it is others, including the taxpaying citizens, who pick up the pieces.<sup>77</sup>

The following sections of the article examine ways in which the processes for development of transnational standards of financial regulation are both insufficiently and excessively transparent.

#### CRITIQUE PART 1: INSUFFICIENT TRANSPARENCY

The Basel Committee and IOSCO both publish documents denominated consultation documents.<sup>78</sup> But such publication is an example of formal rather than real transparency (or of transparency as opposed to communication). Publication of a document on the standard-setter's web pages does not ensure that anyone reads it.<sup>79</sup> Financial crises may be front

*Deliberative and Participatory Policy Making*, 39 POL'Y & POL. 163, 172 (2011) (discussing "four broad categories of participatory-cum-deliberative projects").

<sup>76</sup> E.g., ORG. FOR ECON. CO-OPERATION AND DEV., IMPROVING FIN. LITERACY: ANALYSIS OF ISSUES AND POL'YS (2005) (analyzing methods for improving financial literacy).

<sup>77</sup> E.g., Toby Helm & Daniel Boffey, *Ministers Admit Family Debt Burden Is Set to Soar*, THE GUARDIAN (Apr. 2, 2011), <http://www.guardian.co.uk/politics/2011/apr/02/family-debt-burden-government-figures/print/>. The effects of financial crises may be felt far away from the markets where they occur. See, e.g., Sophie Chauvin & André Geis, *Who Has Been Affected, How and Why? The Spillover of The Global Financial Crisis To Sub-Saharan Africa And Ways to Recovery*, Eur. Central Bank Occasional Paper Ser. No. 124, 8 (Mar. 2011) <http://www.ecb.int/pub/pdf/scpops/ecbocp124.pdf> ("the first wave of the crisis, characterised by the rapid spread of financial turmoil in the United States to other developed economies and some emerging markets via their closely interconnected financial systems, left Sub-Saharan Africa, with the exception of South Africa, comparatively unscathed. . . . However, the second wave of the turmoil, when the disorder in the financial sector began to have an impact on the real economy, had profound consequences for the continent.").

<sup>78</sup> E.g., BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, CONSULTATIVE DOCUMENT: CAPITALISATION OF BANK EXPOSURES TO CENT. COUNTERPARTIES, (Dec. 2010), <http://www.bis.org/publ/bcbs190.pdf>; TECHNICAL COMM. OF THE INT'L ORG. OF SEC. COMM'N, ISSUES RAISED BY DARK LIQUIDITY, CONSULTATION DOCUMENT (Oct. 2010), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD336.pdf>.

<sup>79</sup> Cf. Onora O'Neill, *supra* note 36, at 173 ("The activity by which information is made transparent places it in the public domain, but does not guarantee that anybody will find it, understand it or grasp its relevance.").

page news, but the technical details of rules and standards are not. Online newspapers do not consistently provide links to government reports and consultation documents on transnational standards. Individuals, firms, and organizations of firms do respond to the consultation documents, although the responses of firms and organizations are more numerous than those of individuals.<sup>80</sup> Trade associations draw their members' attention to consultations on issues about which those members might have views.<sup>81</sup> When trade associations publicize consultations to their members they draw attention to the consultations and they also show that they are working on behalf of their members. Such publicity does help to increase the number of people who are aware of the proposals in consultation documents, but the people who learn about consultations from trade associations are within the zone of expertise. Those who do are not members of trade associations or who do not subscribe to newsletters which track proposed new standards are less likely to find out about the proposals. The proposals may be transparent in the sense that they are available, but this transparency has limited impact in terms of informing non-expert citizens about standards which may affect them.

Transnational consultations on proposed standards suffer from a further lack of effective transparency in that they are usually conducted in a limited number of languages, and sometimes only in English. In contrast to the EU's commitment to multilingualism, international organizations and standard-setters which focus on financial regulation have not been committed from the outset to publicizing their work in multiple language versions. This fact suggests some limits to those organizations' commitment to effective, rather than to formal, transparency. Successful trade associations can operate across borders and communicate in many languages, but processes for the development of transnational standards which are carried out solely in English, or in a limited number of other languages, have the effect of excluding some people from participation. This issue is being identified, if not resolved: for example, commentators on the IMF's transparency policy suggested that the IMF should translate more of its documents into languages other than English.<sup>82</sup> The Bank for

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<sup>80</sup> See *Comments Received on the Consultative Document "Capitalisation of Bank Exposures to Central Counterparties"*, BANK FOR INT'L SETTLEMENTS, (Dec. 2010), <http://www.bis.org/publ/bcbs190/cacommments.htm> (showing that the Basel Committee's listing of responses to its consultative document includes responses from two individuals, both knowledgeable about finance and the financial markets).

<sup>81</sup> See, e.g., *Global Weekly Update March 28 – April 1, 2011*, SEC. INDUS. AND FIN. MKTS. ASS'N, [http://www.sifma.org/blastemails/Global Weekly Update/Global Weekly Update-04-01-11.html](http://www.sifma.org/blastemails/Global%20Weekly%20Update/Global%20Weekly%20Update-04-01-11.html) (last visited Aug. 16, 2011) (noting, for example, the 14 April deadline for comment on HMT consultation on financial reform).

<sup>82</sup> *Consultation Roundtable on IMF Transparency: Summary of Comments from Civil*

International Settlements (BIS) publishes all of its documents in English and some in German, Spanish, French, and Italian.<sup>83</sup> IOSCO relies more on publication in English. At the same time, some trade associations communicate with domestic regulators in the regulators' own languages. ISDA has written comment letters in a range of languages from Romanian<sup>84</sup> to Japanese.<sup>85</sup>

Trade associations are frequent commentators on proposed standards of financial regulation, but, unsurprisingly their comments are designed more to further their own institutional interests and those of their members than to divine truth. They seek to shape the standards, even if their comments do not promote much in the way of public debate about the standards. Frequently trade associations submit comments at the last minute, limiting the ability of others to respond to assertions in their comment letters. Trade associations may submit their comments on proposed rules and standards late because of the pressure of work and the need to solicit and incorporate feedback from their members rather than to make it difficult for others to counter the content of their submissions. But late submission of comments by influential trade associations effectively limits public discussion. Trade associations co-ordinate their responses with each other<sup>86</sup> and with their members,<sup>87</sup> but the behavior of trade associations is often not fully transparent to outside observers.

The relationships between trade associations and those they represent or

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*Society Organizations*, INT'L MONETARY FUND (Sept. 30, 2011), <http://www.imf.org/external/np/pdr/trans/2009/052809.htm>.

<sup>83</sup> *Frequently Asked Questions: BIS Publications*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/about/faq.htm> (last visited Oct. 17, 2011).

<sup>84</sup> *See, e.g.*, Letter from Peter M. Werner, Senior Dir. Int'l Swaps and Derivatives Ass'n, to Ion Dragulin, Dir., Nat'l Bank of Romania, Fin. Stability Dep't (Mar. 28, 2011), [http://www.isda.org/speeches/pdf/ISDALetter\\_NBR\\_25march2011\\_EnglishRomanian.FINAL.pdf](http://www.isda.org/speeches/pdf/ISDALetter_NBR_25march2011_EnglishRomanian.FINAL.pdf) (commenting on Draft Amendments to Romanian Implementation of EU Collateral Directive in both English and Romanian).

<sup>85</sup> *See, e.g.*, Letter from Int'l Swaps and Derivatives Ass'n, to Japanese Fin. Servs. Agency (Oct. 11, 2011), [http://www2.isda.org/attachment/MzYzNQ==/2011.9.6\\_Comment\\_Letter\\_to\\_FSA\\_2011.10.6.pdf](http://www2.isda.org/attachment/MzYzNQ==/2011.9.6_Comment_Letter_to_FSA_2011.10.6.pdf) (commenting on notice of transactions excluded from the scope of the license for the Financial Instruments Obligation Assumption Service).

<sup>86</sup> For example, the Global Financial Markets Association is an organization with three trade associations as members: the Association for Financial Markets in Europe (AFME), the Asia Securities Industry & Financial Markets Association (ASIFMA), and the Securities Industry and Financial Markets Association (SIFMA). *See WHO IS GFMA? GLOBAL FIN. MKTS. ASS'N*, <http://www.gfma.org> (last visited Oct. 17, 2011).

<sup>87</sup> For example, trade associations establish committees to focus on particular regulatory issues. *E.g.*, *Committees*, SEC. INDUS. AND FIN. MKT. ASS'N, <http://www.sifma.org/about/committees/> (last visited Oct. 17, 2011) (listing committees).

claim to represent are not always transparent. Other sophisticated organizations such as law firms may also offer expert comment on regulatory proposals without explaining to what extent their comments are designed to further their clients' interests.<sup>88</sup> Policy-makers have begun to focus on this issue and ask organizations that respond to consultations to explain how they decided to adopt the positions they take in their responses.<sup>89</sup>

Another aspect of transparency with respect to the development of standards involves the publication of responses to consultations. Different organizations have adopted different approaches to this issue. Until recently the Basel Committee did not publish individual comment letters on its website.<sup>90</sup> IOSCO tends to characterize rather than to publish the full text of comments it receives,<sup>91</sup> although it does sometimes refer to commentators by name<sup>92</sup> (which means that those who are interested may

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<sup>88</sup> For example, Jennifer Marshall et al., *Technical details of a possible EU framework for bank recovery and resolution: Response to the European Commission's January 2011 consultation*, ALLEN AND OVERY, (Mar. 3, 2011), <http://elink.allenoverly.com/getFile.aspx?ItemType=Bulletin&id=f9ca8a1f-2199-4e27-8cee-57e0d3b02370> is one such document. It also includes comments on the economic cost of the proposals. *Id.* at 6.

<sup>89</sup> See, e.g., *Call for Evidence: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft 4 (U.K.)*, DEP'T FOR BUS. INNOVATION AND SKILLS, (July 2010), <http://www.bis.gov.uk/assets/biscore/corporate/docs/c/10-1032-call-for-evidence-mobile-aircraft-equipment.pdf> ("When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents, and how the views of your members were assembled. It would also be useful to know whether you are a small, medium or large size enterprise.").

<sup>90</sup> See, e.g., *Comments Received on the Consultative Documents "Strengthening the Resilience of the Banking Sector" and "International Framework for Liquidity Risk Measurement, Standards and Monitoring"*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/publ/bcbs165/cacomments.htm> (last visited Oct. 17, 2011).

<sup>91</sup> See, e.g., TECHNICAL COMM. OF THE INT'L ORG. OF SEC. COMM'N, HEDGE FUNDS OVERSIGHT FINAL REPORT, 8 (Jun. 2009), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD293.pdf> ("Having considered the public comments received on the Consultation Report, the IOSCO Technical Committee has developed the six high level principles below which should be applied to the regulation of hedge funds."). In addition, the document has an annex reporting on the results of the consultation and conclusions in light of responses. *Id.* at 17-23. In some cases the Report refers to the responses of specific entities with attribution. See, e.g., *id.* at 19 ("Considering the international dimension of the hedge funds activities, all respondents supported the need for more convergence on the regulation of hedge fund managers in order to minimise the risk of regulatory arbitrage and ensure better level playing field.") (citing *Intl. Council of Sec. Assn's' Pub. Response to the IOSCO Consultation Report on Hedge Funds Oversight*). But see, e.g., *id.* at 20 ("One respondent challenged that the wider publication of details on business plan and fees charged could create commercial problems for the managers.") (showing that comments are not always attributed to particular respondents).

<sup>92</sup> See, e.g., TECHNICAL COMM. OF THE INT'L ORG. OF SEC. COMMISSIONS, HEDGE

be able to read the comments on the commentators' own web pages). Collation and condensation of responses may make the results of a consultation more accessible than making the full text of all responses available, but it also risks eliding some of the subtleties in individual responses.

In domestic regulatory regimes, the choices agencies make about how to characterize public comments on proposed rule-makings and about what facts revealed in comments justify regulatory action are subject to review by courts.<sup>93</sup> Transparency in the domestic context facilitates judicial review. Courts may police the requirement that reasons be given for administrative or legislative action in order to ensure effective judicial review.<sup>94</sup> Transparency of domestic governmental activity may not be perfect,<sup>95</sup> but it is supported by binding legal rules enforced by courts. Transnational standard-setters such as the Basel Committee and IOSCO are subject to no such rules. They are as transparent as they choose to be, and there is no reliable coercive mechanism to force greater transparency upon them.<sup>96</sup> For example, whereas citizens can force governmental agencies to disclose some information under freedom of information laws,<sup>97</sup> the Basel Committee and IOSCO are subject to no such laws. When the Basel Committee publishes standards documents following consultations, the documents do not clearly demonstrate reasoned connections between the consultation process and the resulting standards.<sup>98</sup> The transnational

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FUNDS OVERSIGHT FINAL REP., *supra*, note 91, at 19 (citing *Intl. Council of Sec. Assn's Pub. Response to the IOSCO Consultation Report on Hedge Funds Oversight*).

<sup>93</sup> See, e.g., Cass Sunstein, *Factions, Self-Interest, and the APA: Four Lessons since 1946*, 72 VA. L. REV. 271, 281-82 (1986) ("Of central importance here is the task of ensuring that the relevant considerations, including the actual value judgments by the agency, are disclosed to the public and subjected to general scrutiny and review. Administrative and judicial efforts to solve this problem have come in the form of a deliberative conception of administration, a conception that amounts to a significant reformulation of previous understandings.").

<sup>94</sup> See, e.g., P.P. Craig, *The Common Law, Reasons and Administrative Justice*, 53 CAMBRIDGE L. J. 282, 283 (1994) (discussing the common law's requirement that agencies give reasons for their decisions).

<sup>95</sup> E.g., Fenster, *supra* note 7, at 889-91 (noting Governmental invocations of exceptions to transparency).

<sup>96</sup> Cf. Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15, 17 (2006) ("[T]he Basel process . . . demonstrates the possibility for enhanced accountability and legitimacy in international regulation.").

<sup>97</sup> But see Fenster, *supra* note 7 (noting some of the deficiencies of such laws).

<sup>98</sup> See, e.g., BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, CONSULTATIVE DOCUMENT: SOUND PRACTICES FOR THE MANAGEMENT AND SUPERVISION OF OPERATIONAL RISK (Dec. 2010), <http://www.bis.org/publ/bcbs183.pdf>. In 2011, the Committee published a final document and made comments available online. BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, PRACTICES FOR THE SOUND MANAGEMENT AND SUPERVISION OF OPERATIONAL RISK (Jun. 2011), <http://www.bis.org/publ/bcbs195.pdf>. However the final document does

standards process may be formally transparent in some ways, but in important ways it is neither reliably nor effectively transparent.

## CRITIQUE PART 2: EXCESSIVE TRANSPARENCY

Although in some ways citizens may find it difficult to know when standard setters are proposing new standards and what those standards and their implications are, at the same time, the volume of information about standard setting published by different organizations is overwhelming. Consumer advocates recognize that consumers' ability to make good financial choices may be hampered by information overload,<sup>99</sup> and consumers are far more likely to feel they need to make personal financial choices than that they need to wrestle with the details of financial regulation. Information overload tends to impede real communication about standards.

The previous section of this article focused on transparency deficits in transnational standard-setters, but, as noted earlier, financial regulation is developed in multiple fora: responsibility for financial regulation is shared among public and private bodies, and among transnational, national and sub-national entities. Proposals for new rules and standards multiply among these different entities, together with the responses of trade associations and their members, creating an information glut. The financial crisis has increased this glut, by prompting the development of new complex standards at the transnational level as well as legislative and regulatory action around the globe. Even organizations which represent consumer interests have noted the volume of work caused by financial regulatory reform.<sup>100</sup>

Since the middle of 2010, in addition to publishing peer reviews of regulation,<sup>101</sup> the Financial Stability Board has published short background

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not refer to the comments. *Comments Received on the Consultative Document "Sound Practices for the Management and Supervision of Operational Risk"*, BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/publ/bcbs183/cacomments.htm> (last visited Sept. 16, 2011).

<sup>99</sup> See, e.g., FIN. SERVS. CONSUMER PANEL, RESPONSE TO INTERIM REP. AND CONSULTATION ON REFORM OPTIONS, 5 (Jul. 4, 2011), [http://www.fs-cp.org.uk/publications/pdf/response\\_icb\\_report.pdf](http://www.fs-cp.org.uk/publications/pdf/response_icb_report.pdf) ("Transparency in charging and costs is essential in providing customers with a basis on which to make a choice, but this transparency will simply result in information overload if the complexity of charging, costs and contingent fees continue to prevail.").

<sup>100</sup> See, e.g., Adam Phillips, *Foreword to* FIN. SERV. CONSUMER PANEL ANNUAL REPORT 2010/2011, at 4 (2011) available at [http://www.fs-cp.org.uk/publications/pdf/annual\\_report11.pdf](http://www.fs-cp.org.uk/publications/pdf/annual_report11.pdf) (last visited Oct. 18, 2011) ("Given the scope and size of the reforms to UK regulation it has been an arduous process to ensure that the FCA will be an effective body that has the consumer interest at heart.").

<sup>101</sup> See, e.g., FIN. STABILITY BD. *supra* note 28, at 2.

notes on shadow banking<sup>102</sup> and exchange traded funds,<sup>103</sup> four progress reports on the development of financial regulation since the crisis,<sup>104</sup> and a consultation document on systemically important financial institutions.<sup>105</sup> In the same period the Basel Committee published consultation papers on a countercyclical capital buffer,<sup>106</sup> on loss absorbency of regulatory capital,<sup>107</sup> on the alignment of risk and remuneration,<sup>108</sup> on deposit insurance,<sup>109</sup> on operational risk,<sup>110</sup> on capitalization of bank exposures to

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<sup>102</sup> FIN. STABILITY BD., SHADOW BANKING: SCOPING THE ISSUES (Apr. 12, 2011), [http://www.financialstabilityboard.org/publications/r\\_110412a.pdf](http://www.financialstabilityboard.org/publications/r_110412a.pdf).

<sup>103</sup> FIN. STABILITY BD., POTENTIAL FIN. STABILITY ISSUES ARISING FROM RECENT TRENDS IN EXCHANGE-TRADED FUNDS (ETFs) (Apr. 12, 2011), [http://www.financialstabilityboard.org/publications/r\\_110412b.pdf](http://www.financialstabilityboard.org/publications/r_110412b.pdf).

<sup>104</sup> FIN. STABILITY BD., OTC DERIVATIVES MKT. REFORMS: PROGRESS REP. ON IMPLEMENTATION (Apr. 15, 2011), [http://www.financialstabilityboard.org/publications/r\\_110415b.pdf](http://www.financialstabilityboard.org/publications/r_110415b.pdf); FIN. STABILITY BD., PROGRESS IN THE IMPLEMENTATION OF THE G20 RECOMMENDATIONS FOR STRENGTHENING FIN. STABILITY (Apr. 10, 2011), <http://www.financialstabilityboard.org/publications/r110415a.pdf>; FIN. STABILITY BD., PROMOTING GLOBAL ADHERENCE TO REG. AND SUPERVISORY STANDARDS ON INT'L COOPERATION AND INFO. EXCH.: PROGRESS REP. (Apr. 29, 2011), [http://www.financialstabilityboard.org/publications/r\\_110429.pdf](http://www.financialstabilityboard.org/publications/r_110429.pdf); FIN. STABILITY BD. & IMF, THE FIN. CRISIS AND INFO. GAPS, IMPLEMENTATION PROGRESS REP. (Jun. 2011), [http://www.financialstabilityboard.org/publications/r\\_110715.pdf](http://www.financialstabilityboard.org/publications/r_110715.pdf).

<sup>105</sup> FIN. STABILITY BD., CONSULTATIVE DOCUMENT, EFFECTIVE RESOLUTION OF SYSTEMICALLY IMPORTANT FIN. INST., RECOMMENDATIONS AND TIMELINES (Jul. 19, 2011), [http://www.financialstabilityboard.org/publications/r\\_110719.pdf](http://www.financialstabilityboard.org/publications/r_110719.pdf). The Basel Committee published a related consultation document at the same time. BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, CONSULTATIVE DOCUMENT, GLOBAL SYSTEMICALLY IMPORTANT BANKS: ASSESSMENT METHODOLOGY AND THE ADDITIONAL LOSS ABSORBENCY REQUIREMENT (Jul. 2011), <http://www.bis.org/publ/bcbs201.pdf>.

<sup>106</sup> BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, CONSULTATIVE DOCUMENT: COUNTERCYCLICAL CAPITAL BUFFER PROPOSAL (Jul. 2010), <http://www.bis.org/publ/bcbs172.pdf>.

<sup>107</sup> BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, CONSULTATIVE DOCUMENT, PROPOSAL TO ENSURE THE LOSS ABSORBENCY OF REG. CAPITAL AT THE POINT OF NON-VIABILITY (Aug. 2010), <http://www.bis.org/publ/bcbs174.pdf>.

<sup>108</sup> BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, CONSULTATIVE DOCUMENT: RANGE OF METHODOLOGIES FOR RISK AND PERFORMANCE ALIGNMENT OF REMUNERATION (Oct. 2010), <http://www.bis.org/publ/bcbs178.pdf>; BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, CONSULTATIVE DOCUMENT, PILLAR 3 DISCLOSURE REQUIREMENTS FOR REMUNERATION (Dec. 2010), <http://www.bis.org/publ/bcbs191.pdf>.

<sup>109</sup> BASEL COMM. ON BANKING SUPERVISION & INT'L ASS'N OF DEPOSIT INSURERS, BANK FOR INT'L SETTLEMENTS, CONSULTATIVE DOCUMENT, CORE PRINCIPLES FOR EFFECTIVE DEPOSIT INS. SYS., A PROPOSED METHODOLOGY FOR COMPLIANCE ASSESSMENT (Nov. 2010), <http://www.bis.org/publ/bcbs182.pdf>.

<sup>110</sup> BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, CONSULTATIVE DOCUMENT: SOUND PRACTICES FOR THE MGMT. AND SUPERVISION OF OPERATIONAL RISK (Dec. 2010), <http://www.bis.org/publ/bcbs183.pdf>; BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, CONSULTATIVE DOCUMENT,

central counterparties,<sup>111</sup> and on systemically important banks.<sup>112</sup> During the same period, IOSCO issued a number of publications that included documents relating to credit rating agencies,<sup>113</sup> securitization,<sup>114</sup> and systemic risk and securities regulation.<sup>115</sup> The EU has been busy generating new rules and proposed rules on these topics, as have domestic legislators and regulators. The US Congress enacted the Dodd-Frank Act, which was more voluminous than the statutes which preceded it,<sup>116</sup> and mandated a number of different regulatory agencies to develop many complex sets of new rules.<sup>117</sup> In the EU and the US policy-makers have focused on issues identified by transnational bodies, such as remuneration of financial services employees,<sup>118</sup> and problems of crisis management in financial firms.<sup>119</sup> Trade associations have argued that rules in force in different jurisdictions should be consistent in order to ensure a level playing field

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OPERATIONAL RISK – SUPERVISORY GUIDELINES FOR THE ADVANCED MEASUREMENT APPROACHES (Dec. 2010), <http://www.bis.org/publ/bcbs184.pdf>.

<sup>111</sup> BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, CONSULTATIVE DOCUMENT, CAPITALISATION OF BANK EXPOSURES TO CENT. COUNTERPARTIES (Dec. 2010), <http://www.bis.org/publ/bcbs190.pdf>.

<sup>112</sup> BASEL COMM. ON BANKING SUPERVISION, *supra* note 105.

<sup>113</sup> *E.g.*, TECHNICAL COMM. OF THE INT'L ORG. OF SEC. COMM'N, REG. IMPLEMENTATION OF THE STATEMENT OF PRINCIPLES REGARDING THE ACTIVITIES OF CREDIT RATING AGENCIES, FINAL REP. (Feb. 2011), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD346.pdf>.

<sup>114</sup> *E.g.*, TECHNICAL COMM., INT'L ORG. OF SEC. COMM'NS, REG. IMPLEMENTATION OF THE STATEMENT OF PRINCIPLES REGARDING THE ACTIVITIES OF CREDIT RATING AGENCIES, FINAL REP. (Feb. 2011), <http://www.iosco.org/library/pubdocs/pdf/ioscopd346.pdf>.

<sup>115</sup> TECHNICAL COMM. OF THE INT'L ORG. OF SEC. COMM'NS, MITIGATING SYSTEMIC RISK: A ROLE FOR SECURITIES REGULATORS, DISCUSSION PAPER, (Feb. 2011), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD347.pdf>.

<sup>116</sup> *E.g.*, J.C. Boggs, Melissa Foxman & Kathleen Nahill, *Dodd-Frank at One Year: Growing Pains*, 2 HARV. BUS. L. REV. ONLINE 52 (July 28, 2011), <http://www.hblr.org/?p=1614>.

<sup>117</sup> *See id.* at 52-54 (describing the enlarging financial regulatory structure under Dodd-Frank).

<sup>118</sup> *E.g.*, Incentive-Based Compensation Arrangements, 76 Fed. Reg. 21,170 (proposed Apr. 14, 2011) (to be codified at 12 C.F.R. pt. 42, 12 C.F.R. pt. 236, 12 C.F.R. pt. 372, 12 C.F.R. pt. 563h, 12 C.F.R. pts. 741 and 751, 17 C.F.R. pt. 248, and 12 C.F.R. pt. 1232); *Comm'n of the Eur. Cmty., Recommendation on Remuneration Policies in the Financial Services Sector*, SEC (2009) 580, 581 (Apr. 30, 2009), [http://ec.europa.eu/internal\\_market/company/docs/directors-remun/financialsector\\_290409\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/directors-remun/financialsector_290409_en.pdf); FIN. SERVS. AUTH., CONSULTATION PAPER, REFORMING REMUNERATION PRACTICES IN FIN. SERVS., (Mar. 2009), [http://www.fsa.gov.uk/pubs/cp/cp09\\_10.pdf](http://www.fsa.gov.uk/pubs/cp/cp09_10.pdf).

<sup>119</sup> *E.g.*, Certain Orderly Liquidation Auth. Provisions Under Title II of the Dodd-Frank Wall Street Reform and Consumer Prot. Act, 76 Fed. Reg. 41,626 (July 15, 2011) (to be codified at 12 C.F.R. pt. 380); *Commission Communication on An EU Framework for Crisis Management in the Financial Sector*, *supra* note 27.



and/or limit regulatory arbitrage.<sup>120</sup> But private sector initiatives add to the information overload.<sup>121</sup>

Added to the difficulties associated with multiple differing proposals emanating from different organizations is the underlying complexity of the financial activity and of existing regulation.<sup>122</sup> Complex transactions lead to complex rules and standards and this complexity impedes transparency. But efforts to make transnational standard-setting processes more transparent risk making the information overload problem worse rather than better.

Some of the participants in transnational standard-setting may have an interest in opacity similar to the interest of lawyers who engage in discovery abuse, but part of the excessive transparency problem derives from the reality of different institutional actors carrying out their own institutional missions without considering that better coordination might improve the transparency of the process as a whole. Conceptualizing the transparency issue as the need to make everything visible to those who choose to look can lead to practices which are counter-productive viewed from the perspective that useful transparency enables citizens to understand, and not merely to find when they look.<sup>123</sup>

#### FINAL THOUGHTS: RESOLVING TRANSPARENCY

Transparency in standard-setting suffers from two weaknesses: at the

<sup>120</sup> See, e.g., EUR. COMM'N, OVERVIEW OF THE RESULTS OF THE PUBLIC CONSULTATION ON TECHNICAL DETAILS OF A POSSIBLE EU FRAMEWORK FOR BANK RESOLUTION AND RECOVERY 20 (May 5, 2011), [http://ec.europa.eu/internal\\_market/consultations/docs/2011/crisis\\_management/consultation\\_overview\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2011/crisis_management/consultation_overview_en.pdf) (“Respondents have a range of ideas on how to avoid regulatory arbitrage and restructuring of debt: the power and circumstances under which authorities could write down debt and the classes of bail-inable debt should be clearly defined to prevent regulatory arbitrage; the consistency at global level to avoid geographical relocation of debt; the interaction with the new capital rules, buffers and capital surcharges for SIFIs should be further considered.”).

<sup>121</sup> E.g. The Conference Bd., Conference Board Task Force on Executive Compensation 26-27 (2009), [http://www.conference-board.org/pdf\\_free/ExecCompensation2009.pdf](http://www.conference-board.org/pdf_free/ExecCompensation2009.pdf) (describing a private sector initiative which was developed while regulators were discussing domestic regulatory measures, rather than a citation to a place where someone else says that private sector initiatives add to the information overload).

<sup>122</sup> See, e.g., Steven L. Schwarcz, *Regulating Complexity in Financial Markets*, 87 WASH. U. L. REV. 211, 212-13 (2009) (arguing that complexity in financial markets is “the greatest financial-market challenge of the future.”).

<sup>123</sup> Cf. Schneider & Sidney, *supra* note 45, at 111 (“Policy designs need to be transparent rather than opaque, straightforward rather than deceptive, contain positive constructions of all social groups and points of view even of those who are ‘losing,’ logical connections between means and ends, implementation processes that grant equal access to information and subsequent points of contestation, and arenas for discourse that engage multiple ‘ways of knowing’ the issue.”).

same time there is insufficient transparency and too much. A radical (perhaps even an essential) solution would be to focus on eliminating some unnecessary complexities from standards of financial regulation.<sup>124</sup> Complexity in standards and in regulation promotes opacity, and privileges those who have the time and resources to build expertise with respect to the complexities.<sup>125</sup> But fixing the complexity of financial regulation is not at the top of the agenda. If anything, recent initiatives in standards and regulation only increase complexity.

Complexity is one aspect of the information overload problem. Smart uses of technology could ameliorate other aspects of this problem.<sup>126</sup> The US government has worked to improve the accessibility and manageability of the data in the federal register system, and transnational standard-setters (whose members are after all based in domestic systems of governance) could learn from this and similar work. At the same time the standard-setters should recognize this problem of excessive transparency and try to co-ordinate with other standard-setters working on similar issues. A third possible solution may be to try to tap into the wisdom of the crowd.<sup>127</sup> Crowd-sourcing has been used to track radiation levels in Japan after the earthquake and tsunami,<sup>128</sup> and to pore over the details of expense claims by Members of Parliament in the UK,<sup>129</sup> and academics propose crowd-sourcing to improve machine translation.<sup>130</sup> It is one thing to note that

<sup>124</sup> Cf. Haldane, *supra* note 49, at 3.

<sup>125</sup> Cf. Underhill & Zhang, *supra* note 73, at 553 (“[T]he influence of private actors on the input side has not only rendered public authorities dependent on the information and expertise provided by these actors but also consistently aligned public policy objectives with private sector preferences. This has raised fears that the enhanced rule-setting power of private interests may have severely undermined the authority of public actors to formulate financial and regulatory policies in line with the broader public interest, a situation approximating policy capture.”).

<sup>126</sup> *But cf.* Robin Gauld, Shaun Goldfinch & Simon Horsburgh, *Do they want it? Do they use it? The ‘Demand-Side’ of e-Government in Australia and New Zealand*, 27 GOV’T INFO. Q. 177, 184 (2010) (“Much of the literature on e-government suffers from an overly technological focus. It is assumed that once the correct technology is developed and in place, and citizens given access, benefits will be delivered in terms of reduced costs and technical efficiency, greater access and greater accountability and transparency, the transformation of government operations, and even greater ‘e-participation’ and ‘e-democracy’. . . The downsides and limitations of e-government are often downplayed or ignored altogether.”).

<sup>127</sup> *But see, e.g.*, Dan Woods, *The Myth of Crowdsourcing*, FORBES.COM, (Sept. 29, 2009), <http://www.forbes.com/2009/09/28/crowdsourcing-enterprise-innovation-technology-cio-network-jargonspy.html> (critiquing crowdsourcing).

<sup>128</sup> *E.g.*, Steve Lohr, *Online Mapping Shows Potential to Transform Relief Efforts*, N.Y. TIMES (Mar. 28, 2011) at B3.

<sup>129</sup> *E.g.*, Andersen *supra* note 18.

<sup>130</sup> Vamshi Ambati, et al., *Active Learning and Crowd-Sourcing for Machine Translation*, INT’L CONF. ON LANGUAGE RESOURCES AND EVALUATION 2010 PROCEEDINGS (2010), <http://www.lrec->

crowd-sourcing can effectively address some collective action issues and another to conclude that we can rely on crowd-sourcing to manage excess information about proposed financial standards. Making crowd-sourcing work requires some effort to motivate and manage the crowds.<sup>131</sup>

There are some possible remedies for the insufficiencies in transparency identified above, although they would be expensive. The article focuses on three aspects of transparency insufficiency: limited translation of consultation documents; limited information about the identity and agendas of participants in the process; and limited information about the results of consultations.

With respect to the first issue, the EU has half a century of experience in managing the costs and benefits of multilingualism, although in a space where the number of relevant languages is limited. The United Nations, which has six official languages—Arabic, Chinese, English, French, Russian, and Spanish<sup>132</sup>—has recently been discussing multilingualism as an aspect of its work.<sup>133</sup> Resolving the tensions between allowing for full participation by the world's citizens through multilingualism and making decision-making affordable and efficient by limiting the number of languages of decision is one of the critical problems of global governance, and is an issue which implicates all areas of policy, not merely the setting of standards of financial regulation.

The second and third sets of limitations to transparency could be resolved by requiring improved disclosure about those who respond to consultations and what they say. But the opacity which results from complexity is much more difficult to remedy and more fundamental. All of the methods this article suggests to address the insufficiencies of transparency exacerbate problems of excessive transparency. Making more information available to more people worsens problems of information glut. If this problem cannot be solved, transparency alone cannot be relied on to legitimate the new financial order.

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conf.org/proceedings/lrec2010/pdf/244\_Paper.pdf.

<sup>131</sup> HARVARD HUMANITARIAN INITIATIVE, DISASTER RELIEF 2.0: THE FUTURE OF INFORMATION SHARING IN HUMANITARIAN EMERGENCIES 8-9 (2011), [http://www.globalproblems-globalsolutions-files.org/gpgs\\_files/pdf/2011/DisasterResponse.pdf](http://www.globalproblems-globalsolutions-files.org/gpgs_files/pdf/2011/DisasterResponse.pdf).

<sup>132</sup> Not all aspects of the UN's work involve all of these languages. *E.g.*, U.N. Secretary-General, Multilingualism: Rep. of the Secretary-General, UN Doc. A/65/488 (Oct. 4, 2010), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/566/15/PDF/N1056615.pdf?OpenElement>.

<sup>133</sup> *E.g.*, G.A Res. 61/266, U.N. Doc. a/RES/61/266 (Jun. 8, 2007) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/510/33/PDF/N0651033.pdf?OpenElement>.