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Should there be a universal financial regulator in the United States?

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1. Introduction

"For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics…"[i]

The purpose of this Article is to provide both theoretical and empirical evidence tending to conclude that the existence of a universal financial regulator in the United States is not only feasible, but also necessary in terms of *efficiency*.

For such reason, the arguments that sustain the abovementioned statement rely on an economic analysis of the law, which is also known as the "law in action". Therefore, economic theory is used to support the economic rationale of the law, together with factual elements that assert the conclusions obtained.

It is important to establish that this Article assumes that regulation of the financial marketplace[ii] in the United States is a necessary element. The "invisible hand" of free market economic theory is not compatible with the social benefits that financial regulations are intended to achieve. Regulation is an efficient tool to correct any market failures which are not solely economical (ie. Fraud). The protection of every player in the financial arena cannot be left in the "invisible hand" of the market: intervention through regulation is necessary.

More specifically, this Article approaches the problems emerging from overlapping regulation and legal disputes between the Securities and Exchange Commission ("SEC") and the Commodities Futures Trading Commission ("CFTC"), which implies an efficiency analysis regarding the costs of regulation and disputes. By analogy, the fundamentals hereby provided apply to the banking and insurance industries; however, this Article will not cover specific aspects of the latter industries.

Finally, empirical evidence is provided in order to test the "efficiency arguments". The examples of the United Kingdom and Japan serve this purpose, as they are used as benchmarks to expose the United States' competitive actual system's inefficiencies.

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2. Past and present of the US Regulatory system.

a) Genesis of the conflict.

The financial services industry in the United States has undergone profound changes in the past seventy years, but the U.S. regulatory structure for this industry has failed to keep pace with these changes.[iii] Today, the financial marketplace is governed by a regulatory system that developed largely in response to particular historical needs.[iv] Increasingly, this system has failed to provide intelligent and uniform administration of the statutes that affect financial institutions and functions.[v]

The current regulatory structure in the United States governing the financial services industry is a "hodgepodge" of federal and state agencies with overlapping authority.[vi] This structure was cobbled together over the past two hundred years, primarily in response to one financial crisis after another.[vii] The forces that have created the current regulatory structure in the United States follow a Hegelian dialectic.[viii] A financial crisis would occur due to some market failure, which would prompt state or federal legislators to enact laws creating a new agency to regulate the aspect of the industry that gave rise to the market failure.[ix] The financial firms would respond by creating new entities, affiliations or products in order to avoid government regulations.[x] These new entities, affiliations or products would create new market failures, prompting new legislation or regulations on the part of federal or state lawmakers.[xi] In many cases, federal and state legislators chose to create new regulatory agencies to deal with financial crises in different segments of the financial services industry rather than expand the jurisdiction of existing regulators.[xii] As a result of these historical forces, both the federal government and the state governments ended up regulating securities, and the federal government attained primary responsibility for regulating futures.[xiii]

Nonetheless, economic events and the shifting demands for more and different financial services have prompted innovation among the various sectors of the financial services industry.[xiv] Innovation and adaptation have in turn encouraged cross-industry competition which has threatened the integrity of a regulatory structure initially based on the premise that each type of financial institution had distinct functions, operated in a distinct sector of the capital markets,

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and could best be served by a separate regulator.[xv] The validity of that premise was evanescent, and the structure which rested upon it has crumbled with the erosion of the foundation.[xvi]

Traditionally, financial institutions[xvii] have been treated on the assumption that each type of institution performed readily identifiable and separable functions.[xviii] In recent years, however, product lines have been blurred, institutional characterization has become less significant.[xix] Brokers and financial conglomerates have offered money market mutual funds and attracted billions of dollars in deposits from investors looking for higher interest rates than those banks could offer under federal law.[xx] Banks provide discount brokerage services, operate as futures commission merchants,[xxi] and have attempted to enter the insurance business.[xxii] Savings and loan associations and banks are used as retail outlets for sales of insurance contracts underwritten by independent insurers.[xxiii] Insurance companies have offered variable annuities and variable life insurance contracts having securities attributes as well as insurance attributes.[xxiv] Financial products and institutions that cross traditional industry lines have become commonplace.[xxv]

Clearly, all financial instruments are legal instruments in essence. Hence, the law that regulates them must keep up with them. Unfortunately, the US regulatory system has been unable to implement this “constant updating”. Due to the obsolete current structure, U.S. regulators are ill- equipped to handle the current challenges posed by the financial services industry.[xxvi] The U.S. Government Accountability Office ("GAO") issued a report in October 2004 noting that in almost none of the recent financial crises that it examined did a single existing regulator have the necessary resources, authority or jurisdiction to handle the crisis by itself.[xxvii] The GAO also noted that the regime of multiple regulatory authorities sometimes hindered the ability of the federal government to identify financial crises in their early stages and to monitor crises once they began.[xxviii] These crises include the financial aftermath of the September 11, 2001 destruction of the World Trade Center, and the 1998 insolvency of Long-Term Capital Management.[xxix]

b) Jurisdictional problems: SEC v. CFTC

During the first forty years of its existence, the SEC found little reason to compete with the Commodity Exchange Authority ("CEA"), as commodity futures and securities operated more or less independently.[xxx] Indeed, while considering the adoption of the Commodity Exchange Act

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of 1936, Congress found that some large speculators had transferred their manipulative activities from the stock markets to the grain exchanges in order to escape regulation under the Securities Exchange Act of 1934.[xxxi] SEC Chairman William O. Douglas, therefore, sought further regulation of grain speculators, especially those dealing in puts and calls.[xxxii] President Roosevelt responded by asking his Secretary of Agriculture, Henry Wallace, to take action against the commodity exchanges.[xxxiii] Wallace refused to do so, viewing the SEC's concern as mere pretense, cloaking a power grab by the very ambitious Douglas.[xxxiv] The regulatory structures governing securities and commodity futures were thus allowed to develop separately and distinctively.[xxxv]

However, the financial marketplace no longer operates in this manner.[xxxvi] Jurisdictional conflict exists between the SEC and the CFTC, primarily due to the language of the 1974 Commodity Futures Trading Commission Act (“CFTCA”).[xxxvii] Congress thought that all commodity options and futures trading should be subject to regulation, and thus the CFTCA created the CFTC[xxxviii] and brought all commodity futures and options trading under a "single regulatory umbrella."[xxxix] The CFTC was "patterned" after the SEC and was granted strengthened enforcement powers,[xl] including authority to seek injunctive relief,[xli] a favorite weapon employed by the SEC.[xlii] Self-regulation by the commodity exchanges was also strengthened.[xliii] The National Futures Association was later created to act as an analogue to the NASD.[xliv]

The SEC was not new to regulatory competition when the CFTC arrived, and had just recently engaged in an extended quarrel with the banking regulators over which it should have been given authority to regulate securities clearing and settlement functions conducted by banks.[xlv] Competition between the CFTC and the SEC began almost immediately after the adoption of the CFTCA.[xlvi] The decision of the CFTC to approve commodity futures trading on Government National Mortgage Association ("GNMA") certificates set off an explosion at the SEC.[xlvii] The SEC contended that such contracts were the equivalent of "when issued" GNMAs that were already regulated by the SEC.[xlviii] This resulted in an exchange of acrimonious correspondence between the two agencies.[xlix] At the end of the day, the SEC lost the battle and GNMA futures continued to trade.[l] The SEC, however, had a long memory and, as will be seen, would retaliate against the CFTC.[li]

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In the meantime, the grant of exclusive jurisdiction to the CFTC over commodity options[lii] removed the regulatory controls established by the SEC and state securities administrators over commodity option dealers.[liii] The results were a quick return of flyby-night commodity option firms, numerous scandals, and widespread fraud.[liv] The situation was not alleviated until the CFTC suspended the trading of commodity options,[lv] but the SEC used the scandals as the basis for an unsuccessful attempt to wrest jurisdiction from the CFTC during the latter's reauthorization hearings in 1978, seeking regulatory authority on all instruments involving securities.[lvi]

Another threat to the SEC was the decision by the CFTC to approve futures trading on stock indexes.[lvii] These contracts were almost immediately popular and spread to other commodity exchanges.[lviii] The SEC retaliated by approving the trading of options on GNMA certificates on the CBOE.[lix] The commodity exchanges challenged this action in court and won before the Seventh Circuit.[lx] An agreement was hammered out between the Chairmen of the SEC and CFTC (the "Shad-Johnson Accords"), which allocated jurisdiction between their two agencies.[lxi] Thereafter, Congress enacted the Shad-Johnson Accords into law.[lxii] In brief, the CFTC was given exclusive jurisdiction over all commodity futures trading on any instrument, except that single stock futures were prohibited, joining onions as the only commodity on which futures trading was banned.[lxiii] The SEC was given what amounted to a veto over commodity futures contracts on indexes,[lxiv] and retained jurisdiction over options trading on the stock exchanges, including options on indexes.[lxv] The SEC and CFTC shared jurisdiction over options trading on foreign currency.[lxvi]

This cooperative allocation of jurisdiction did not mask the fact that there were two very distinct regulatory cultures at the CFTC and SEC.[lxvii] The CEA, the predecessor to the CFTC, was largely driven by economists; the agency had only one lawyer on staff.[lxviii] The CFTC inherited the CEA's personnel, and most of the former SEC staff members, who were recruited when the CFTC was first formed, quickly departed.[lxix] In contrast, the SEC maintained an activist culture driven by lawyers who believed fervently in regulation.[lxx] The SEC was intrusive in its regulation of the exchanges and broker-dealers, and was forever seeking to expand its jurisdiction.[lxxi]

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The stock and commodity markets experienced a near meltdown during the stock market crash that occurred in October 1987.[lxxii] A Presidential commission headed by later Secretary of the Treasury Nicholas Brady (the "Brady Commission") concluded that the securities and commodity futures markets had become intertwined and that a lack of coordinated regulation between the SEC and CFTC was endangering the markets.[lxxiii] The Brady Commission recommended a regulatory restructuring whereby a single agency would be authorized to regulate such matters as margin and credit and information systems.[lxxiv] The SEC again lost the battle,[lxxv] and the only substantive regulation to emerge from the stock market crash of 1987 was the introduction of circuit breakers that halted trading when large market moves occurred.[lxxvi]

Financial engineering had become an accepted science with the development of numerous new instruments having characteristics of both futures and options.[lxxvii] The swap contract was one such product.[lxxviii] The SEC brought a case claiming that certain of these instruments were securities,[lxxix] and the CFTC brought another case claiming that other instruments were futures that had to be traded on a contract market.[lxxx] A furor ensued, and both agencies' rulings were undercut by court decisions.[lxxxi] The SEC then proceeded to create a safe harbor from onerous regulation through so-called "Broker-Dealer Lite" registration.[lxxxii] In the end, Congress responded with legislation that stopped the CFTC.[lxxxiii]

c) Derivatives.

The CFTCA grants the CFTC exclusive jurisdiction to regulate certain financial instruments which, given the increasing complexity and "hybrid" nature of such instruments (that have attributes of both commodities and securities), might simultaneously be subject to SEC regulation.[lxxxiv]This is the origin of a problem that has been increasing aside with the creation of new and more complex financial instruments every day.[lxxxv]

The US regulatory system employs a bifurcated derivative securities regulatory system that allocates jurisdiction over derivative financial instruments to the SEC and the CFTC.[lxxxvi] The SEC has jurisdiction over securities,[lxxxvii] which, inter alia, can include stock and stock options, while the CFTC in general has jurisdiction over commodities futures.[lxxxviii] The enactment of the Commodities Futures Modernization Act (CFMA) granted overlapping jurisdiction to both agencies of hybrid financial instruments known as securities futures.[lxxxix]

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Both SEC and CFTC, as well as the securities and commodities exchanges, have been engaged in a vigorous turf battle over who will regulate various types of derivative investments.[xc] This, in turn, has resulted in continued proliferation of derivative investments.[xci]

Although there abovementioned number of jurisdictional disputes, the commodities futures markets generally are regulated by the CFTC pursuant to the Commodity Exchange Act.[xcii] Beginning in the 1970s and carrying through the 1980s and 90s, the futures and commodity options markets regulated by the CFTC and the options markets regulated by the SEC have become increasingly competitive with the increased trading in derivative financial instruments, including treasury bill, foreign currency and stock index futures (as compared, for example, with the trading of stock index and foreign currency options).[xciii] Options on securities are regulated by the SEC, while futures and commodity options (including options on futures) are not subject to SEC regulation, and instead are left to the CFTC.[xciv]

The Commodity Futures Modernization Act of 2000[xcv] ("CFMA") made significant changes in commodities and derivatives regulation by creating a three-tiered system of regulation consisting of exchanges, less regulated organized markets, and unregulated derivatives markets.[xcvi] Formerly, the rules of organized commodities markets ("contract markets") were subject to CFTC oversight and approval.[xcvii] This is no longer the case under the current regulatory regime ushered in at the start of the twenty-first century in the form of the Modernization Act.[xcviii]

3. Identifying the problem of "Dual Regulation".

Based on the scenario described throughout the previous paragraphs, the financial marketplace (regarding specifically securities, commodities futures, and derivatives) in the United States lacks of a solid statutory foundations, and therefore, clear regulatory objectives cannot be established among regulators and market players.

The main problems that can be easily distinguished are (among others):[xcix]

(i) *Existing Regulators fail to communicate and cooperate with one another effectively*: The United States lacks a single forum in which all of the state and

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federal financial services regulators can meet to share information, assess risks that cross traditional regulatory sectors, and develop and coordinate regulations to address such risks. While forums exist for federal and state regulators operating within the same industry segment to coordinate activities, coordination and information sharing between regulators for different sectors currently occurs only on an ad hoc basis;[c]

(ii) *Current system contains inconsistent regulations:* These inconsistent regulations mean that companies competing with one another face an uneven playing field because they are governed by different regulators and different rules.[ci] Thus, these regulations decrease competition and distort the markets for financial products;[cii]

(iii) *Current system contains duplicative regulations:* In this case, companies get regulated on the same issues by two different regulators, duplicating the costs of compliance and of regulation;

(iv) *Current system contains regulatory gaps;*

(v) *Current system does not respond to the globalization of the financial market;*

(vi) *Current specialized Agencies are prone to capture:* Agency capture occurs more frequently in agencies that regulate only one special interest group.[ciii] In the financial services industry, specialized agencies, such as the SEC or the CFTC, are more likely to be captured by the businesses that they regulate than regulators with a broader scope;[civ]

(vii) *Consumers find that the current regulatory structure is confusing:* Consumers find the multiple financial regulators confusing.[cv] It is not immediately obvious to a consumer which regulator they ought to contact when they have a complaint about a financial service provider;[cvi]

(viii) *The US Financial Regulatory system is cost inefficient:* The US pays considerably more than any other developed country to regulate its financial services industry.[cvii]

(ix) *Inter-Agency turf wars in the United States Waste Funds:* U.S. regulatory costs are higher than those in other countries not only because of regulatory overlap and duplication, but because of the turf wars in which the agencies frequently engage.[cviii] Turf wars amongst the federal financial regulators, such as the long-

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standing battle between the SEC and the CFTC over securities futures, and between the federal regulators and the states have been well documented.[cix] Most of these battles are fought primarily over who should have the authority to regulate a particular type of instrument or entity rather than over whether regulation of the instrument or entity is desirable and, if so, what is the most appropriate form of regulation.[cx] Once the decision as to which agency is going to regulate a particular instrument or entity is made, the regulatory biases of that agency usually determine the scope and form that the final regulation takes;[cxi]

(x) *Compliance costs incurred by the Financial Services Industry exacerbate the problem.*

4. Understanding the concept of efficiency applied to regulation: Law & Economics approach.

Economics provide a useful normative standard for evaluating law and policy. Laws are not just arcane technical arguments; they are instruments for achieving important social goals.[cxii] Efficiency is always relevant to policymaking, because it is always better to achieve any given policy at lower cost than at higher cost.[cxiii]

Efficiency means that "society [this is, the financial marketplace] is getting the most it can from its scarce resources."[cxiv]

a) The Goals of Regulation

There are numerous different goals or objectives that have been identified with securities and commodity futures regulation.[cxv] The principal goals are:

(i) Investor protection;

(ii) Efficiency: Efficiency of regulation is achieved when financial regulators and regulations distort the behavior of market participants only to the extent required to achieve valid public policy goals.[cxvi] Inconsistent, duplicative rules affecting identical financial functions and imposed by different government agencies cause private sector marketing efforts, and therefore capital flows, to be affected by differences in

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regulatory philosophy rather than by considerations of economic efficiency and equality.[cxvii] Quintessential example of such inefficiency are the differences in regulation of stock index options and stock index futures, which fall under the respective jurisdictions of the SEC and the CFTC.[cxviii]

When a system is based upon inconsistent rules, the mix between regulation and free market activity is sub-optimal.[cxix] To the extent that the problem is due to overlapping regulatory jurisdiction, as is often the case in the financial marketplace, greater efficiency would be achieved through consolidation of functionally similar regulatory responsibilities.[cxx]

(iii) *Complete the organization of the market 'firm':* this is, to adjust regulation in order to attract or keep business from each jurisdiction;

(iv) *Avoiding concentration of power…* in the market (not in the regulator).

The mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.[cxxi]

On the other hand (or better said, "on the same hand"), the CFTC "*assures the economic utility of the futures markets by encouraging their competitiveness and efficiency, protecting market participants against fraud, manipulation, and abusive trading practices, and by ensuring the financial integrity of the clearing process. Through effective oversight, the CFTC enables the futures markets to serve the important function of providing a means for price discovery and offsetting price risk*".[cxxii] The CFTC's mission is to protect market users and the public from fraud, manipulation, and abusive practices related to the sale of commodity and financial futures and options, and to foster open, competitive, and financially sound futures and option markets.[cxxiii]

Basically, the goals of regulations remain the same between both regulators. Of course, the "products" to which they refer might vary, but in essence, it turns into a matter of mere semantics: each product (securities, commodity futures, indexes, derivatives, etc.) is part of the same financial marketplace. Hence, uniform regulator leads to uniform regulation (despite the number of "products"); and uniform regulation leads to efficient allocation of resources.

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b) The Costs of Regulation

Normative theories of regulation make a cost-benefit analysis of various regulatory instruments.[cxxiv] The following costs can be distinguished in this:

(i) The costs of formulating and implementing regulation;
(ii) The costs of maintaining regulation;
(iii) The cost of compliance with the rules for industry;
(iv) The dead weight costs resulting from distortive changes in connection with (i)-(iii).[cxxv]

The benefits consist of improvements in the static and dynamic efficiency in the application of scarce resources.[cxxvi] The static efficiency comprises productive and allocative efficiency.in productive efficiency, production takes place at minimum cost, whereas allocative efficiency means that the correct range of goods is produced.[cxxvii] Dynamic efficiency refers to future improvements in the application of scarce resources.[cxxviii] Through such means as organizational or technological innovations, fewer resources are necessary in the production of certain goods.[cxxix] New products and product varieties can also be developed that better serve the preferences.[cxxx] Finally, dynamic efficiency refers to the speed at which markets clear and economies stabilize.[cxxxi]

For the abovementioned reasons, dual regulation by SEC and CFTC means inefficient duplication of the costs of regulation. In other words, the US Regulatory system incurs in all the costs described in (i)-(iv), allocating scarce resources (according to basic economic principles) in a clearly inefficient way.

5. The debate: should the US have a universal financial regulator?

Supporters of the current dual regulatory system argue that the presence of two agencies supports a favorable competitive environment, results in less costly and imposing regulation, and encourages financial innovation.[cxxxii] According to Professor Coffee, the theory of regulatory competition[cxxxiii] rests on three pillars: (1) under certain assumptions, interjurisdictional

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competition produces a Pareto-optimal outcome;[cxxxiv] (2) regulators, like corporate managers, seek to maximize the "value" of their agencies;[cxxxv] and (3) regulators represent their market clientele.[cxxxvi] However, as Professor Coffee notes, the regulatory competition theory breaks down when used to support the SEC-CFTC dual regulatory system.[cxxxvii]

Among the several theoretical problems with the current dual regulatory system are that it undermines public confidence in our system of financial regulation,[cxxxviii] subjects the CFTC to agency capture,[cxxxix] results in collusive, oligopolistic conditions,[cxl] and produces a "race-to-the-bottom," or "forum shopping" for the markets subject to the least stringent regulation.[cxli]

First, the dual regulatory system has a negative impact on the public's perception of market regulation. [cxlii] Thus, the existence of two regulatory agencies overseeing essentially a single market may undermine public confidence in market safety and increase the possibility of certain financial instruments slipping between the cracks and avoiding regulation.[cxliii]

Second, while the public perception argument really only supports a transformation, or "tightening," of regulatory oversight, the agency capture argument lends stronger support to the idea of merging the SEC and the CFTC.[cxliv]

The theory of regulatory competition also fails to recognize that the existence of two regulatory agencies may result not in a competitive market but rather in an environment more closely resembling an oligopolistic market where the two agencies can easily collude and "cooperate" to achieve "the quiet life."[cxlv]

This state of oligopolistic "competition," which really produces no competition at all, compounds the negative impact of a dual regulatory system, because markets and consumers are subjected to the increased costs associated with the SEC-CFTC jurisdictional disputes and then further burdened by the accommodating solutions achieved between the two agencies.[cxlvi] A competitive environment cannot be achieved in a regulatory system comprised of only two agencies.[cxlvii] Merger of the agencies into a single regulatory body, while effectively creating a monopoly over financial regulation, would not produce the negative impact and deadweight losses associated with monopolies in the private sector, because the benefits of a single regulatory monopoly accrues to the public.[cxlviii] The benefits may include the elimination of costly court battles attempting to define interagency jurisdictional boundaries, a corresponding

increase in financial innovation as new instruments either are permitted to enter or are banned from the market more rapidly, and a single regulatory voice representing American markets in the global environment.[cxlix]

Finally, another problem of a dual regulatory environment is the "race-to-the-bottom" scenario, in which interagency competition, to the extent that it does exist, results in sub-optimal regulation as agencies seek to attract clients by lowering regulatory standards.[cl]

a) More arguments for consolidation of SEC and CFTC.

The easiest solution would be for the CFTC to merge into the SEC, and give final unification over stocks, stock options, and stock futures.[cli] The split between jurisdiction over securities and securities futures markets in the U.S. is anomalous because normally only one regulatory agency takes the responsibility for all equity markets.[clii] In consequence, the most solid arguments sustaining a merger are:

(i) *Efficiency:* A firm that can double the output for less than twice the cost has taken advantage of what economists call "economies of scale."[cliii] A merger between the two agencies will do just that, even though initially it would "entail a substantial commitment of time, money, and resources, both for Congress and the two agencies."[cliv] Probably the most important advantage would be the transfer of functions between the CFTC and the SEC, and a more streamlined regulatory oversight as well as reduced administrative costs.[clv] Rather than the current system of joint resolutions for poorly defined securities, a system that provides a uniform manner to settle and clear securities and options would be used once the agencies were consolidated;[clvi]

(ii) *No more problems with Statutory ambiguities:* Comparing the enforcement programs of the CFTC and SEC has proven to be difficult due to differences in the regulations and markets that the two agencies enforce.[clvii] However, if both agencies were consolidated, problems arising from statutory ambiguities would be reduced -at least as far as those definitions causing the agencies to argue over jurisdiction;[clviii]

(iii) *Markets are linked:* Especially due to the various types of financial instruments available today, the markets are essentially interconnected, and Wall Street firms would rather

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account to just one regulator rather than both the CFTC and SEC;[clix]

(iv) *SEC Disclosure Requirements have been traditionally more tightly regulated:* One of the main criticisms of the CFTC in the 1980's was that it was unable to police its markets effectively because its disclosure requirements were less than that of the more stringent SEC requirements.[clx] In fact, as of 2000, the CEA did not expressly prohibit insider trading.[clxi] The argument is that two regulatory agencies, the CFTC with less rigorous standards than SEC, would thwart SEC attempts to monitor and control insider trading because insiders could flee to the futures markets.[clxii] The SEC has often pointed out that it was created for the protection of the investor.[clxiii] The SEC has stated that, without a suitability rule imposed on brokers requiring them to recommend only those securities suitable to their customers, the customer may be subject to unlimited loss as a result of a future contract adverse price change;[clxiv]

(v) *Better training:* A merger would provide CFTC enforcement staff with better training under the guidance of the SEC.[clxv] In an internal review conducted by the CFTC chairman in 1994, serious problems of the CFTC were exposed such as a lack of skills and training in the enforcement staff, no clear goals, and an environment that did not encourage communication among the staff.[clxvi] If the agencies were combined, synergies in training may even result such as improving enforcement procedures for taking depositions and developing testimony.[clxvii]

b) Arguments against consolidation of SEC and CFTC.

Despite the overwhelming theoretical evidence in favor of a merger between SEC and CFTC, there are certain valid arguments against such unification. Those are:

(i) Farmers' interests may be secondary: The opposition to a merger has expressed that the issues pertaining to farmers and ranchers, who often use the futures exchanges in order to hedge their risk, will become second under a merged agency to those of Wall Street.[clxviii] The fear is that this interest group will not receive adequate consideration in an "agency dominated by the securities folks."[clxix];

(ii) Joint regulation may be succeeding: Despite some early growing pains, some CFTC members appear to be optimistic in the mutual framework created by both

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agencies.[clxx] James Newsome, the CFTC Chairman, stated that it is possible for two agencies to write rules conjointly with respect to their shared jurisdictions[clxxi] as evidenced by the CFTC and SEC's cooperation over the last three years;

(iii) *Inertia:* Like any large and heavy mass at rest, governments are difficult to move. The larger and more complex they are, the harder it is to get them to move;[clxxii]

(iv) *Standardization:* The universal financial regulator's rule is universal, applies to everyone, and is fair, in at least one sense, but it is also diseconomic;[clxxiii]

(v) Any regulatory consolidation may reduce regulatory competition and experimentation;[clxxiv]

(vi) A single regulator would be very large and could prove unwieldy and costly;[clxxv]

(vii) A single regulator may have difficulty prioritizing issues;

(viii) A single regulator may have difficulty responding to smaller firms and, thus, may undermine the diversity of institutions that currently comprise the U.S. financial industry;[clxxvi]

(ix) A single regulator may lose or fail to develop staff with specialized knowledge related to large companies, small companies and industry sectors;[clxxvii]

(x) A single regulator may lack accountability to both consumers and market participants;[clxxviii]

(xi) A single regulator will face logistical problems when it merges the existing regulators to form a single agency;[clxxix]

(xii) As stated before, supporters of the current dual regulatory system argue that the presence of two agencies supports a favorable competitive environment, results in less costly and imposing regulation, and encourages financial innovation.

6. The empirical approach.

In order to put the Law & Economics theory to a test, empirical evidence is vital. Therefore, real situations where a single universal financial regulator is established are hereby provided: the cases of the United Kingdom and Japan.

a) United Kingdom[clxxx]

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In 1986, the Financial Services Act was enacted, which implemented what became known as the "Big Bang" in that year.[clxxxi] The legislation drew heavily from the SEC regulatory model in the U.S., and, among other things, eliminated fixed commissions.[clxxxii] Furthermore, the separation of "stock jobbers," (i.e., dealers and brokers), was removed in favor of competing market makers.[clxxxiii]

The Big Bang legislation also created a Securities and Investment Board ("SIB") that reported to the Department of Trade and Industry.[clxxxiv] The SIB proved to be a reluctant and ineffective regulator, and another series of scandals led to calls for further reform.[clxxxv] The crisis at Barings plc. precipitated more legislation, which created the Financial Supervisory Agency of the United Kingdom ("FSA-UK") in 1997.[clxxxvi] The FSA-UK is an "independent non-governmental body which exercises statutory powers . . . .".[clxxxvii] The agency was to assume the duties of nine regulatory entities,[clxxxviii] abandoning the clubby use of SROs.[clxxxix] In 1998, the FSA-UK was even given the authority to oversee the banks, taking that power away from the Bank of England.[cxc]

The FSA-UK became a monolithic super regulator that was firmly in the hands of the government, and was to be "the single governing entity of the entire financial services spectrum, from securities and futures trading to funeral planning."[cxci] The agency was given responsibility to regulate virtually every aspect of finance, assuming the same roles played in the U.S. by the SEC, the CFTC, federal bank regulators, and state banking, insurance and securities commissions, as well as the SROs.[cxcii] It was also provided with expanded enforcement powers that included the right to bring actions against violators and impose sanctions.[cxciii] The FSA-UK, however, started with only 2,000 employees for the regulation of 10,000 companies.[cxciv] Even so, immediate concern was raised that the new agency would become bureaucratic and intrusive, and seek to implement a rule-based regulatory system like the one in the U.S.[cxcv]

The FSA-UK took several steps to unify regulation.[cxcvi] First, a single ombudsman was to be created by the agency to handle complaints by customers in all sectors of public finance, as opposed to the various hotlines for federal and state agencies in the U.S., the numerous arbitration tribunals of the SROs, and the singular reparations procedure at the CFTC in the U.S.[cxcvii] The FSA-UK further replaced the six separate insurance funds with a single Financial Services Compensation Scheme ("FSCS"), which provided customers with compensation in the

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event of the insolvency of a financial service firm.[cxcviii] This sharply contrasts with the U.S. system that spreads responsibility among the FDIC, the Bank Insurance Fund, the Savings Association Insurance Fund, the SIPA Corporation ("SIPC"), the Pension Benefit Guaranty Corporation, and the funds created by states for insurance companies.[cxcix]

The FSA-UK is also seeking publication of comparative information disclosures for a range of financial instruments that would allow more informed investment decisions.[cc] The FSA-UK assigned one office to develop policy on prudential issues across all financial sectors, so as to develop a common approach to risk and capital requirements.[cci] There has been no comparable effort in the U.S., where there are separate capital requirements for insurance companies, banks, broker-dealers, and futures commission merchants.[ccii] The agency also announced that it was streamlining the existing fourteen rulebooks for financial services into one.[cciii]

Like markets in the U.S., the London markets were affected by the new competition. The London Stock Exchange ("LSE"), Europe's largest, was also dealing with this new competition.[cciv] The LSE's listing authority was transferred to the FSA-UK.[ccv]

b) Japan.

After World War II, General Douglas MacArthur's Supreme Command required the adoption of provisions from U.S. laws regulating finance, including the securities laws and the Glass-Steagall Act.[ccvi] This new legislation established a Securities Commission for the Supervision of Securities Business based on the American SEC.[ccvii] The Bank of Japan acted as the country's central bank, setting monetary policy, while the Ministry of Finance ("MoF") was responsible for financial policy.[ccviii]

The MoF became a monolithic component of Japanese finance and managed the economy on both a micro and macro level, leaving only a limited central banking role to the Bank of Japan.[ccix] To secure its position, the MoF abolished the Securities Commission for the Supervision of Securities Business in 1952 and replaced it with its own Securities Bureau.[ccx] Other aspects of the U.S.-style regulatory system were also abandoned in later years.[ccxi] The MoF then assumed a dual role of regulator and business promoter.[ccxii] Though it was the sole governmental financial regulator, SROs, including the exchanges and the Japanese Securities Dealers Association, also provided some minimal regulatory functions.[ccxiii]

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The Japanese economy prospered, experiencing growth rates of 10% a year between 1950 and 1970.[ccxiv] The period of growth continued into the 1980s, when a "bubble economy" developed in Japan.[ccxv] The stock market boomed, and real estate prices more than doubled between 1986 and 1990.[ccxvi] Scandals soon unfolded.[ccxvii]

The bursting of the Japanese economic bubble at the beginning of the 1990s sent the economy into a deep recession that the country is still struggling with today.[ccxviii] The Japanese government took several steps to deal with this deteriorating situation.[ccxix] The Japanese Diet passed the Financial Reform Act of 1992, which allowed the MoF to establish capital requirements for banks and allowed banks to own securities affiliates.[ccxx] The act also aimed to further competition among financial institutions.[ccxxi] Furthermore, a Securities Exchange and Surveillance Commission ("SESC") was created in 1992 to police the securities markets.[ccxxii] This legislation ostensibly reduced the MoF's role as the director agency for the placement of financial resources.[ccxxiii] In application, however, the MoF remained firmly in control of financial services firms and the SESC.[ccxxiv] Greater reform was attempted in 1996 by means of a "Japanese Big Bang" that sought to emulate the one in the U.K. and deregulate Japan's financial services.[ccxxv] The Japanese Big Bang tried to ease market entry and remove noncompetitive practices.[ccxxvi] Commissions were unfixed.[ccxxvii]

The SESC was transferred out of the MoF in 1998, along with an independent Financial Supervisory Agency, which was succeeded by the Financial Services Agency ("FSA-Japan") in 2000.[ccxxviii] The FSA-Japan was also given the power, previously held by the MoF, to set securities policy and to regulate securities and banking.[ccxxix] The SESC continued its operations under authority from the FSA-Japan, which in turn was supervised by the Financial Reconstruction Commission.[ccxxx] More reform legislation was adopted: the ban on holding companies was removed, and consumer protection was enhanced through the Law Concerning the Sale of Financial Products.[ccxxxi]

Among several scandals, FSA-Japan was accused of trying to manipulate the Nikkei 225 index through short sale restrictions, which were modeled after those of the SEC in the U.S.[ccxxxii] Like the MoF, FSA-Japan has often been lenient, at least on Japanese banks.

c) Analysis of both cases.

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Regarding the UK example, it is quite clear that universal financial regulator is a complete success. In the most pessimist scenario, FSA-UK provides the same services as the many regulators in the US do, but with less costs of regulation (referred to *ut supra*). Of course, that would be a grotesque underestimation of the benefits of a centralized regulatory agency.

Even though it may appear as evidence of clear failure, the case of FSA-Japan cannot be judged without thorough analysis. For almost forty years (post World War II era until early 1980's), the system worked: the MoF managed the economy with some success in those early stages, and Japan even threatened US competitivity[ccxxxiii]. However, when the crisis emerged, Japan's regulatory culture of intervention and economic management[ccxxxiv] manifested in its most pure state. When Japan's economy became more complex, its bureaucratic *management* became unfeasible.[ccxxxv]

Notwithstanding the foregoing, "failure" of the Japanese universal financial regulator system was due to strategic mistakes (this is, try to *manage* a complex economy rather than to regulate it from a "FSA-UK approach"). The notion of a super regulator remains conceptually unharmed.

The fact is that the super regulator is becoming an increasingly popular model[ccxxxvi]: Germany only recently created a single regulator -the Federal Agency for Financial Services Supervision[ccxxxvii]; and South Korea also created a Financial Supervisory System as a unified regulator[ccxxxviii]. Most certainly, this is another empirical evidence that complex economies (such as those of Germany and South Korea) are moving towards the universal financial regulator.

Conclusion

The existence of a universal financial regulator in the United States would:

(i) Create a permanent system for coordination and cooperation concerning regulatory goals for the entire financial services industry;[ccxxxix]

(ii) Harmonize regulations across sectors and eliminate duplicative regulations;[ccxl]

(iii) Respond more effectively to the globalization of financial market;[ccxli]

(iv) Be less prone to agency capture;[ccxlii]

(v) Improve customer protections;[ccxliii]

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(vi) End the regulatory “Race-to-the-bottom”;

(vii) Encourage innovations that would benefit consumers;[ccxliv]

(viii) Provide consumers with a “one-stop shop” for information about, and protection from, the financial services industry;[ccxlv]

(ix) Provide more cost efficiently regulation.[ccxlvi]

The proliferation of new products, derivative of securities, is likely to continue.[ccxlvii] With it should come growing demand for consolidation of the nearly identical functions performed by the SEC and the CFTC concerning those products. The only lasting and efficient solution is to consolidate.[ccxlviii]

As Howard Davies, the Chairman of the FSA-UK, noted in answering his own rhetorical question of why his country should move to a super regulator[ccxlix]: *“Because financial markets move on, the sectoral system put in place in the late 1980s is no longer fit for the purpose at the beginning of the 21st century. The old divisions between banks, insurance companies, securities firms, investment managers, and the rest, do not reflect the way the financial sector is now organized. Banks own insurance companies, and vice versa. Insurance companies own fund managers. The most rapidly growing mortgage bank is owned by a mutual life insurer. Lloyds TSB now incorporates Scottish Widows. What do you call Citigroup, which includes Citibank, Travellers, Salomon Smith Barney and, now, Schroders?”*[ccl]

The United States’ authorities should evaluate the benefits (or costs) of its “aggressively competitive” regulatory system, and compare them to the notion of “cooperation”, which can be *optimized* by the establishment of a universal financial regulator.

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[i] Oliver Wendell Holmes, The Path of the Law, 10 Harvard Law Review 457, 469 (1897), quoted in Robert Cooter and Thomas Ulen, Law and Economics, 3rd edition, Chapter 1, page 1, Addison Wesley Longman Inc. (2000).
[ii] In using the term "financial marketplace," we refer to the mechanisms for accumulating and allocating savings in the capital markets, the stock and commodities exchanges, commercial banks, savings and loan associations, savings banks, credit unions, investment companies, securities firms, and insurance companies. *See 43 Md. L. Rev. 413*, n2.
[iii] Elizabeth F. Brown, Article: E PLURIBUS UNUM-OUT Of Many, One: Why The United States Needs A Single Financial Services Agency, *14 U. Miami Bus. L. Rev.1*, 2 (2005).
[iv] Stephen J. Friedman and Connie M. Friesen, Article: A New Paradigm For Financial Regulation: Getting From Here to There, *43 Md. L. Rev. 413*, 2 (1984).
[v] *43 Md. L. Rev. 413*, 2 (1984).
[vi] *14 U. Miami Bus. L. Rev.1*, 4 (2005).

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[vii] For further review, see Alan Gart, Regulation, Deregulation, Reregulation: The Future of the Banking, Insurance, and Securities Industries (John Wiley & Sons, Inc. 1994); and The Financial Services Revolution (Clifford E. Kirsch, ed., Irwin Professional Publishing 1997), both quoted in *14 U. Miami Bus. L. Rev.1*, 4 (2005). Also see *43 Md. L. Rev. 413,* 2-6 (1984).
[viii] *14 U. Miami Bus. L. Rev.1*, 4 (2005).
[ix] *Idem.*
[x] *Idem.*
[xi] *Idem.*
[xii] *Idem.*
[xiii] *Idem.*
[xiv] *43 Md. L. Rev. 413*, 6 (1984).
[xv] *Idem.*
[xvi] *See, e.g.,* Ad Hoc Committee on Developments in Investment Services, *Homogenization of Financial Institutions: The Legislative and Regulatory Response, 38 BUS. LAW. 241 (1982);* Clark, *The Soundness of Financial Intermediaries, 86 YALE L.J. 1 (1976);* Wallison, *Banking Regulatory System Badly in Need of Reform,* Legal Times, June 27, 1983, at 27, quoted in *43 Md. L. Rev. 413*, 6 (1984).
[xvii] For purposes of this Article, the term "financial institutions" refer to banks, broker-dealers, FCM's, insurance firms, and any other institution that buys or sells financial products and/or provides financial services.
[xviii] Wallison, *Banking Regulatory System Badly in Need of Reform,* Legal Times, June 27, 1983, at 27, quoted in *43 Md. L. Rev. 413*, 7 (1984).
[xix] *43 Md. L. Rev. 413*, 7 (1984).
[xx] *Idem.*
[xxi] See Wallison, *Banking Regulatory System Badly in Need of Reform,* Legal Times, June 27, 1983, at 27 ("in April 1982 the Comptroller gave preliminary approval to an application by North Carolina National Bank to establish a futures commission merchant subsidiary, which would broker financial futures purchased or sold for hedging by commercial clients"); *Norwest Bank Setting Up Financial Futures Trading Division in Chicago,* Am. Banker, June 13, 1983, at 3 (in June 1983, Norwest Bank of Minneapolis set up a financial futures division based in Chicago), quoted in *43 Md. L. Rev. 413*, 7 (1984).
[xxii] *43 Md. L. Rev. 413*, 7 (1984).
[xxiii] *Idem.*
[xxiv] *See, e.g.,* Dorsett, *Universal Life Emerges from "Product Revolution,"* 122 TR. & EST., July 1983, at 22, quoted in *43 Md. L. Rev. 413*, 7 (1984).
[xxv] *43 Md. L. Rev. 413*, 7 (1984).
[xxvi] *14 U. Miami Bus. L. Rev.1*, 2 (2005).
[xxvii] U.S. Government Accountability Office, Report to the Chairman, Comm. on Banking, Housing, and Urban Affairs, U.S. Senate, Financial Regulation - Industry Changes Prompt Need to Reconsider U.S. Regulatory Structure 110 (October 2004), quoted in *14 U. Miami Bus. L. Rev.1*, 2 (2005).
[xxviii] *Idem.*
[xxix] *Idem.*
[xxx] Jerry W. Markham , PANEL I (PART 2): A Comparative Analysis Of Consolidated And Functional Regulation: Super Regulator: A Comparative Analysis Of Securities And Derivatives Regulation In The United States, The United Kingdom, And Japan, *28 Brooklyn J. Int'l L. 319*, 6 (2003).
[xxxi] Jerry W. Markham, The History of Commodity Futures Trading and its Regulation 25 (1987), quoted in *28 Brooklyn J. Int'l L. 319*, 6 (2003).
[xxxii] 2 Jerry W. Markham, A Financial History of the United States: from J.P. Morgan to the Institutional Investor (1900-1970), at 143 (2002), quoted in *28 Brooklyn J. Int'l L. 319*, 6 (2003).
[xxxiii] *Idem.*
[xxxiv] 2 Jerry W. Markham, A Financial History of the United States: from J.P. Morgan to the Institutional Investor (1900-1970), at 225 (2002), quoted by *28 Brooklyn J. Int'l L. 319*, 6 (2003).
[xxxv] *28 Brooklyn J. Int'l L. 319*, 6 (2003).
[xxxvi] *14 U. Miami Bus. L. Rev.1*, 2 (2005).
[xxxvii] Mark F. Hoffman, Note: Decreasing The Costs Of Jurisdictional Gridlock: Merger Of The Securities And Exchange Commission And The Commodity Futures Trading Commission, *28 U. Mich. J.L. Reform 681*, 1 (1995).

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[xxxviii] Commodity Futures Trading Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (amending *7 U.S.C. § § 2,* 4), quoted in *28 Brooklyn J. Int'l L. 319*, 8 (2003).
[xxxix] H.R. Rep. No. 93-975 at 42 (1974), quoted in *28 Brooklyn J. Int'l L. 319*, 8 (2003).
[xl] 120 Cong. Rec. 30467 (1974) (remarks of Sen. Taft), quoted in *28 Brooklyn J. Int'l L. 319*, 8 (2003).
[xli] Commodity Exchange Act, *7 U.S.C. § 13a-1* (2000), quoted in *28 Brooklyn J. Int'l L. 319*, 8 (2003).
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[xliii] Jerry W. Markham & John M. Schobel, SelfRegulation Under the Commodity Exchange Act -- Can the CFTC Make It Work?, Sec. Reg. & L. Rep. (BNA) No. 368 (Special Supp. Sept. 1, 1976), quoted in *28 Brooklyn J. Int'l L. 319*, 8 (2003).
[xliv] *28 Brooklyn J. Int'l L. 319*, 8 (2003).
[xlv] See generally 23A Jerry W. Markham & Thomas Lee Hazen, BrokerDealer Operations Under Securities and Commodities Law § 8.02 (2001), quoted in *28 Brooklyn J. Int'l L. 319*, 10 (2003).
[xlvi] *28 Brooklyn J. Int'l L. 319*, 10 (2003).
[xlvii] *Idem.*
[xlviii] *Idem.*
[xlix] *Idem.*
[l] *Idem.*
[li] *Idem.*
[lii] Commodity Exchange Act, *7 U.S.C. § 2a*(ii) (2000), quoted in *28 Brooklyn J. Int'l L. 319*, 10 (2003).
[liii] See John M. Schobel, Jr. & Jerry W. Markham, Commodity Options -- A New Industry or Another Debacle?, Sec. Reg. & L. Rep. (BNA) 1-20 (Special Supp. Apr. 7, 1976) (describing return of fly-by-night commodity options firms), quoted in *28 Brooklyn J. Int'l L. 319*, 10 (2003).
[liv] *Idem.*
[lv] *17 C.F.R. § 32.11 (1978)*, quoted in *28 Brooklyn J. Int'l L. 319*, 10 (2003).
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[lvii] *Idem.*
[lviii] *Idem*, at 11.
[lix] *Idem.*
[lx] *Chicago Board Options Exchange, Inc. v. Board of Trade, 459 U.S. 1026 (1982); Board of Trade v. SEC, 677 F.2d 1137* (7th Cir.), vacated as moot sub. nom.
[lxi] CFTC and SEC Jurisdictional Agreement: Proposed Legislation, Comm. Fut. L. Rep. (CCH) <para> 21,332 (Feb. 2, 1982), quoted in *28 Brooklyn J. Int'l L. 319*, 11 (2003).
[lxii] Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (codified in scattered sections of 7 U.S.C.).
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[lxv] Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (codified in scattered sections of 7 U.S.C.), quoted in *28 Brooklyn J. Int'l L. 319*, 11 (2003).
[lxvi] *28 Brooklyn J. Int'l L. 319*, 11 (2003).
[lxvii] *Idem.*
[lxviii] *Idem.*
[lxix] *Idem.*
[lxx] *Idem.*
[lxxi] *Idem.*
[lxxii] *Idem.*, at 12.
[lxxiii] Report of the Presidential Task Force on Market Mechanisms, reprinted in Fed. Sec. L. Rep. (CCH) Special Report No. 1267 (Jan. 12, 1988) (report by the Brady Commission), quoted in *28 Brooklyn J. Int'l L. 319*, 12 (2003).
[lxxiv] *28 Brooklyn J. Int'l L. 319*, 12 (2003).
[lxxv] *Idem.*

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[lxxvi] *Idem.*
[lxxvii] See *Chicago Mercantile Exchange v. SEC, 883 F.2d 537 (7th Cir. 1989),* cert. denied sub nom., *Investment Company Institute v. SEC, 496 U.S. 936 (1990)*, quoted in *28 Brooklyn J. Int'l L. 319*, 13 (2003).
[lxxviii] *28 Brooklyn J. Int'l L. 319*, 13 (2003).
[lxxix] *In re BT Securities, 52 S.E.C. 109, 113-15 (1994)* (consent order), quoted in *28 Brooklyn J. Int'l L. 319*, 13 (2003).
[lxxx] In re BT Securities, CFTC Doc. No. 95-3, at 95-4 (C.F.T.C. 1994) (consent order). See also In re M.G. Refining & Marketing, Inc., CFTC Doc. No. 95-14 (C.F.T.C. 1995) (illegal over-the-counter trading in a futures product). Both quoted in *28 Brooklyn J. Int'l L. 319*, 13 (2003).
[lxxxi] *28 Brooklyn J. Int'l L. 319*, 13 (2003).
[lxxxii] *17 C.F.R. § 240.3b-13 (2002)*, quoted in *28 Brooklyn J. Int'l L. 319*, 13 (2003).
[lxxxiii] *28 Brooklyn J. Int'l L. 319*, 13 (2003).
[lxxxiv] *28 U. Mich. J.L. Reform 681*, 1 (1995).
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[lxxxvi] See Erika W. Nijenhuis, Taxation of Securities Futures Contracts, 553 Prac. L. Inst. 1097, 1104 (noting that many other countries structure their regulatory systems in a different way, presumably under one agency), quoted in Kai Kramer, Aren't We Still In The "Garden Of The Forking Paths"? A Comment On Consolidation Of The SEC And CFTC, *4 Hous. Bus. & Tax. L.J. 410*, 2 (2004).
[lxxxvii] *4 Hous. Bus. & Tax. L.J. 410*, 2 (2004) (See FN2: "The Securities Exchange Act of 1934 § 27 sets forth the jurisdiction over those that violate securities' regulations").
[lxxxviii] See U.S. General Accounting Office (GAO), Issues Related to the Shad-Johnson Jurisdictional Accord, GAO/GGD-00-89, at 5 (2000), quoted in *4 Hous. Bus. & Tax. L.J. 410*, 2 (2004).
[lxxxix] *4 Hous. Bus. & Tax. L.J. 410*, 2 (2004).
[xc] *See, e.g.,* U.S. GENERAL ACCOUNTING OFFICE, REPORT ON SECURITIES AND FUTURES MARKETS, [1990-1991 Transfer Binder] *Fed. Sec. L. Rep. (CCH) P84,612* (Aug. 1, 1990) (noting that the CFTC and SEC have been giving differing interpretations of the causes of various market disruptions), quoted in Thomas Lee Hazen, Article: The Short-Term/Long-Term Dichotomy and Investment Theory: Implications For Securities Market Regulation And For Corporate Law, *70 N.C.L. Rev. 137*, 14 (1991).
[xci] *70 N.C.L. Rev. 137*, 14 (1991).
[xcii] *7 U.S.C. § 1*-24 (2000), quoted in Thomas Lee Hazen, Article: Disparate Regulatory Schemes for Parallel Activities: Securities Regulation, Derivatives Regulation, Gambling, and Insurance, *24 Ann. Rev. Banking & Fin. L. 375*, 6 (2005).
[xciii] *24 Ann. Rev. Banking & Fin. L. 375*, 6 (2005).
[xciv] *Idem.*
[xcv] Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (codified as amended at *7 U.S.C. §§ 1*-27f).
[xcvi] *24 Ann. Rev. Banking & Fin. L. 375*, 6 (2005).
[xcvii] *Idem.*
[xcviii] *Idem.*
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[cii] *14 U. Miami Bus. L. Rev.1*, 13 (2005).
[ciii] *14 U. Miami Bus. L. Rev.1*, 22 (2005).
[civ] *Idem.*
[cv] *Idem,* at 26.
[cvi] *Idem.*
[cvii] *Idem*, at 27.
[cviii] *Idem*, at 28.

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[cix] See *28 Brook. J. Int'l L. 319 (2003).*
[cx] *14 U. Miami Bus. L. Rev.1*, 28 (2005).
[cxi] *Idem.*
[cxii] Robert Cooter and Thomas Ulen, Law and Economics, 3rd edition, Chapter 1, page 3, Addison Wesley Longman Inc. (2000)
[cxiii] Robert Cooter and Thomas Ulen, Law and Economics, 3rd edition, Chapter 1, page 4, Addison Wesley Longman Inc. (2000)
[cxiv] Mankiw, Principles of Economics, page 5 (2003).
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[cxvii] *Idem.*
[cxviii] *Idem.*
[cxix] *Idem.*
[cxx] *Idem.*
[cxxi] Securities and Exchange Commission's website (http://www.sec.gov/about/whatwedo.shtml): "What we do".
[cxxii] CFTC's website (http://www.cftc.gov/aboutthecftc/index.htm): "About the CFTC".
[cxxiii] *Idem.*
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