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A Current Assessment of Some Extraterritorial Impacts of The Dodd-Frank Act with Special Focus on The Volcker Rule and Derivatives Regulation*

Lawrence G. Baxter **

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** Professor of the Practice of Law, Duke University School of Law.

Ⅰ. Extraterritoriality in Financial Regulation

Two decades ago commentators heralded the new era of financial globalization by declaring that we were witnessing the "end of geography."[1] The vision at the time was one wherein ever-greater harmonization of the global regulatory framework would emerge to match the growth of truly global financial institutions. Much less attention has been paid, however, to the possibility that various nations would not go along with the global aspirations of their financial institutions quite so willingly—at least when it comes to how the corresponding global rules might affect their direct domestic interests.

Sure enough, and despite well intentioned promises by The Group of Twenty (G20) of more closely coordinated global action to reform financial regulation,[2] we now see that unilateral or regionally exclusive measures are again being adopted by various nations, including the United States, in ways that affect the conduct and operations of financial institutions that had often assumed they would be governed by the rules of their home countries alone. The reforms being undertaken often diverge from, or directly conflict

1) E.g., RICHARD O'BRIEN, GLOBAL FINANCIAL INTEGRATION: THE END OF GEOGRAPHY (1992).

2) A declaration of determination to "work together" is the cornerstone of the "Seoul Action Plan," aimed at "comprehensive, cooperative and country-specific policy actions," including a commitment to "core elements of a new financial regulatory framework," which was announced in the midst of the Global Financial Crisis, and it has remained the aspiration through subsequent leaders' meetings of the G20 since then. Group of Twenty (G20), *G20 Seoul Summit Leaders' Declaration* (Nov. 11-12, 2010), http://www.g20.utoronto.ca/2010/g20seoul.pdf. *See also* Group of Twenty, *Cannes Summit Final Declaration–Building Our Common Future: Renewed Collective Action for the Benefit of All* (Nov. 3-4, 2011), http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html Group of Twenty, *Declaration of the Summit on Financial Markets and the World Economy* (Nov. 15, 2008), http://georgewbush-whitehouse.archives.gov/news/releases/2008/11/20081115-1.html Group of Twenty, *G20 Leaders Declaration* (June 18-19, 2012), *available at* http://g20.org/images/stories/docs/g20/conclu/ G20_Leaders_Declaration_2012_1.pdf Group of Twenty, *The G-20 Toronto Summit Declaration* (June 26-27, 2010), http://www.g8.utoronto.ca/g20/2010/g20_declaration_en.pdf.

with, those being adopted by other financial centers.[3] The result can be the application to specific financial institutions or activities of inconsistent or conflicting rules. This is what makes extraterritorial regulation so controversial.

Whenever a nation or region takes unilateral action affecting global banks, this action will have extraterritorial effect in one of two principal ways:

1. Rules imposed by Nation *A* on Global Bank *X*, headquartered in Nation *A*, constrain the operations of Global Bank *X* in other countries, irrespective of the rules of those other countries, unless Nation *A* explicitly states that its rules do not apply to actions by Global Bank *X* in other countries even if these actions have implications for the operations in Nation *A*.
2. Rules imposed by Nation *A* on Global Bank *Y*, headquartered in Nation *B*, will have extraterritorial effect even if they are stated to apply solely to the operations of Bank *Y* in Nation *A*, if the operations of Bank *Y* are actually integrated across borders.[4]

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3) Although the United States has led in reforming its financial regulation, other major financial centers includ ing Europe and the United Kingdom have also undertaken major reforms, or are in the process of doing so. There are substantial divergences between the various approaches adopted. In the United States, for example, the Volcker Rule would enforce a separation between traditional, deposit-taking banking organiz ations and those that engage in proprietary trading and private equity investment (*see infra* text accompan ying notes 46-53). In the United Kingdom, on the other hand, the government is preparing to apply the recommendations of the Vickers Report, which would not enforce complete separation but would rather "ring fence"the deposit-taking elements of a financial conglomerate from its more risky securities trading elements. *See, e.g.,* Indep. Comm'n on Banking, Final Report: Recommendations (2011) [hereinafter Vick ers Report], *available at* http://www.hm-treasury.gov.uk/d/ICB-Final-Report.pdf. *See also, e.g.,* HM Treas., Dep't for Bus. Innovation & Skills, Banking Reform: Delivering Stability and Supporting a Sustainable Econ omy (2012) (U.K.), *available at* http://www.hm-treasury.gov.uk/d/whitepaper_banking_ reform_140512.pdf (stating British Government proposals for implementation). In Europe, the Liikanen Commission has recent ly proposed a hybrid of the U.S. and U.K. models. *See* High-Level Expert Group on Reforming the Struct ure of the EU Banking Sector, Final Report (2012) (EU) [hereinafter Liikanen Report], *available at* http://ec. europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf.

4) One might break these examples into additional categories as more related institutions become involved. For example, even if the operations of Bank *Y* are not integrated across borders but cross-border transacti ons between Bank *X* and Bank *Y* fall foul of restrictions enacted in Nation *A* and therefore affect the resulting transaction as it operates in Nation *B*. But the two major examples described above will suffice for present purposes.

As we will see, the examples of Dodd-Frank's Volcker Rule and over the counter (OTC) derivatives rules demonstrate both forms of extraterritoriality.

Of course, the picture becomes much more complicated if Nations B, C, D, etc., also impose rules with extraterritorial effect.[5] A good example might well be developing as far as the structural approaches of the U.S., United Kingdom (U.K.) and Europe are concerned. Under reforms currently proposed or already being implemented, the United States would separate traditional banking from proprietary trading activities (Volcker Rule);[6] the U.K. would isolate retail banking from commercial and investment banking (Vickers Rule),[7] and Europe will likely be applying a variation of one or both of these models if it follows the recommendations of the Liikanen Committee.[8] If Global Bank X is headquartered in New York, Global Bank Y is headquartered in London, and Global Bank Z is headquartered in Frankfurt, yet all three banks compete directly with each other in the U.S., U.K. and Germany, which rules will apply? Without uniformity, very skillful harmonization, or consistent deference to home state rules, extraterritorial and arbitrary restrictions of one form or another will be almost inevitable.

Ⅱ. Recent United States Reforms

The audience will be familiar with the fact that the U.S. Congress enacted

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5) *See* Memorandum from the Inst. of Int'l Fin. to the Fin. Stability Bd.: Containing Extraterritoriality to Promote Financial Stability (Oct. 2, 2012) (on file with author), *available at* http://www.iif.com/ regulatory/article+1133.php.

6) *See generally infra* text accompanying notes 45-52.

7) *See* Vickers Report, *supra* note 3.

8) *See* Liikanen Report, *supra* note 3. *See also, e.g.,* Patrick Jenkins & Brooke Masters, *EU Banks Face Ringfence on Trading Assets,* Fin. Times (Sept. 9, 2012) (U.K.), http://www.ft.com/intl/cms/s/0/ be221adc-f91e-11e1-8d92-00144feabdc0.html#axzz27RsLQEV3.

and the U.S.President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[9] Throughout its passage, Presidential signature on July 21, 2010, and subsequent amplification via agency rulemaking, the Dodd-Frank Act has remained a major source of political controversy in the U.S.This is hardly surprising, not only because of the comprehensive nature of the reforms embraced in the 848-page statute,[10] —so far generating 8,483 pages of regulations in an anticipated 398 separate sets of regulations[11] —but also because Americans are deeply divided concerning the proper role of regulation in the financial markets.

The sweep of reforms encompassed by Dodd-Frank is enormous. These reforms range from addressing the macroprudential issues of financial stability and systemic risk to detailed rules on matters like mortgage lending and underwriting, market conduct and, of course, two of the most visible matters of concern for foreign bankers, namely the Volcker Rule, designed to force banks out of proprietary trading, hedge funds and private equity, and the creation of a new regulatory regime for domestic and global derivatives transactions. In nearly all areas, Congress delegated the responsibility of developing the details for implementing these requirements to the financial regulators themselves. This rulemaking process is unprecedented in its breadth and complexity and remains far from complete.[12]

Although not yet fully implemented, the reforms are nevertheless fairly well advanced. Important new regulatory entities have been created, most

9) Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) of 2010, Pub. L. No. 111-203, 124 Stat. 1376.

10) Much has been made of the length of the Dodd-Frank Act, but it should be remembered that it was neces sary for a good deal of the state to make cross reference and amendments to a very large and complex web of financial legislation already accumulated in the U.S. Code. Many critics of the apparently excessiv e length of the 2010 Act seemed unfamiliar with this pre-existing statutory morass.

11) *See Dodd-Frank Progress Report*, Davis Polk, 2-4 (July 18, 2012), http://www.davispolk.com/files/ Publication/15a76992-d82a-4d15-a2db-fcde9effc3d0/Presentation/PublicationAttachment/b82f9d23-0edc-49eb-af02-ff97ff34bd56/071812_Dodd.Frank.Progress.Report.pdf.

12) About one third of the rules have been finalized. *Id.* at 2. Another third have been proposed but not yet finalized. *Id.* The remaining third have not reached the proposal stage. *Id.*

notably the Financial Stability Oversight Council (FSOC),[13] Office of Financial Research (OFR)[14] and Consumer Financial Protection Board (CFPB).[15] Two regulatory agencies—Office of Thrift Supervision and Office of the Comptroller of the Currency (OCC)—have been merged into a single OCC that continues to enjoy independent status despite being located within the organizational structure of the Department of the Treasury (Treasury).[16] The Board of Governors of the Federal Reserve System (FED)[17] has acquired immense new powers over large U.S. and foreign financial conglomerates, including, potentially, those that are *financial* but not necessarily actual bank holding companies.[18] Finally, the Federal Deposit Insurance Corporation (FDIC), which has long been the regulator for state-chartered banks that are not members of the Federal Reserve System as well as the liquidator or "receiver" for failed banks,[19] has also acquired broad powers, under certain circumstances, to resolve and liquidate failing nonbank financial institutions in addition to banks.[20]

Beyond regulatory *restructuring,* the Dodd-Frank Act and other recent

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13) Dodd-Frank Act § 111.

14) *Id.* § 152.

15) *Id.* § 1011.

16) *Id.* § 312. Created in 1863, the OCC charters, regulates, and supervises all national banks, federal savings associations and the federal branches and agencies of foreign banks. To remain independent, the OCC generates funding through assessments on the banks supervised and investment income instead of relying on Congress.

17) Federal Reserve Act § 10, 12 U.S.C. § 241 (2006). Created in 1913, the Federal Reserve System operates as both the central bank of the United States but also as a national banking regulator and policy maker. The Board of Governors is a federal agency that shares responsibility for the entire system with twelve regional Federal Reserve Banks.

18) Dodd-Frank Act § 165.

19) In the United States insured depository institutions do not undergo the general bankruptcy process if they fail; instead, they are put through an administrative "receivership" in which the FDIC acts as the receiver. Banking Act of 1933, 12 U.S.C. § 1822 (2006). The FDIC is an independent federal agency that insures deposits, directly examines and supervises banks and savings institutions, and conducts compliance exams to maintain depositor protection.

20) Under Dodd-Frank, this receivership process is extended to bank holding companies themselves and, pote ntially, to financial companies designated by the FSOC as "systemically important." Dodd-Frank Act §§331-36.

U.S. statutes and regulations have also begun to effect major changes to the *substance* of banking regulation. Much of this change is not only controversial within the U.S. it is also having a direct impact on financial services around the world. Some of the extraterritorial effects of this reform are already well known abroad.

The most important were introduced by the Dodd-Frank Act and implementing regulations. These include capital adequacy requirements;[21] efforts to curb growing systemic risk to U.S. and global financial markets;[22] a broad system of "orderly resolution" or liquidation of failed or failing financial institutions;[23] and, perhaps of greatest interest to this audience, the Volcker Rule and the collateral requirements for swap derivatives.[24]

We should not, however, overlook some other important reforms that have had direct and immediate extraterritorial effect: most visible in recent months are the anti-money laundering (AML) requirements imposed on banks, measures designed to implement sanctions against Iran, and the FATCA provisions designed to assist U.S. authorities to trace tax avoidance.[25] It should also be borne in mind that most of these reforms, while generally conforming to the consensual framework of the G20,[26] Financial Stability Board (FSB)[27] and Basel Committee on Banking Supervision

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21) *Id.* § 171 (creating leverage and risk-based capital requirements and commonly known as the "Collins Amendment"); *id.* § 606 (creating requirements for financial holding companies to remain well capitalized and well managed); *id.* § 616 (creating additional regulations regarding capital levels); *id.* § 619 (creating prohibitions on proprietary trading and certain relationships with hedge funds and private equity funds and commonly known as the "Volcker Rule").

22) *Id.* §§101-76. Title I of the Dodd-Frank Act creates two new federal agencies within the U.S. Treasury Department, the Financial Stability Oversight Council and the Office of Financial Research, and grants new powers to the Board of Governors related to overseeing nonbank financial companies and bank holding companies. Together, the new agencies and authority are intended to aid the identification and supervision of a broader range of companies that could have significant impact on the financial system.

23) *See supra* notes 19-20.

24) For fuller discussion, *see infra* text accompanying notes 46-56.

25) *See infra* text accompanying notes 37-42.

26) Group of Twenty, *Communiqué* (Dec. 15-16, 1999), *available at* http://www.g20.utoronto.ca/1999/ 1999communique.pdf (introducing the outcome of the G20's inaugural meeting and agreement on the need for widespread implementation of financial policy).

(Basel Committee or BCBS)[28] were enacted and implemented ahead of reforms developed in most other countries. As a result, there is a significant and possibly growing divergence between the standards being enforced in the United States and those in place or being contemplated around the world. This in turn has generated a high degree of concern for regulators outside the U.S. and multinational financial companies, whether they be foreign or U.S.-based.[29]

Capital and liquidity requirements are still in the process of detailed finalization under the international framework known as Basel III, yet U.S. requirements are already coming into force and they apply to foreign banks operating in the United States as well as the consolidated operations of U.S. banks operating in many other countries. The Collins Amendment[30] in Dodd-Frank imposes a floor on consolidated capital adequacy standards, respecting both the types of eligible capital and minimum leverage ratios. These standards extend the minimum requirements imposed by bank regulators on the banks themselves to the holding company conglomerates that own banks.[31]

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27) *Mandate,* Fin. Stability Bd., http://www.financialstabilityboard.org/about/mandate.htm (U.K.) (last visited Oct. 10, 2012) (detailing the purpose and obligations of the FSB and its members).

28) Basel Comm.on Banking Supervision, *History of the Basel Committee and Its Membership,* Bank for Int'l Settlement (Aug. 2009), http://www.bis.org/bcbs/history.pdf (explaining the BCBS's non-authoritative role of ensuring "that no foreign banking establishment should escape supervision").

29) This concern is somewhat mitigated by memoranda of understanding between the U.S. Treasury and other governments on how FATCA, for example, should be implemented. *See, e.g.,* U.S. Dep't of Treas., Joint Statement from the United States and Japan Regarding a Framework for Intergovernmental Cooperation to Facilitate the Implementation of FATCA and Improve International Tax Compliance (June 21, 2012), *avai lable at* http://www.treasury.gov/press-center/press-releases/Documents/FATCA%20Joint%20Statement% 20 US-Japan.pdf. A similar agreement has been reached with Switzerland. *See* Samuel Rubenfeld, *Treasury Gets Japanese and Swiss Banks to Agree on FATCA Compliance Method,* Wall St. J. Corruption Currents Blog (June 21, 2012, 5:54 PM), *available at* http://blogs.wsj.com/corruption-currents/2012/06/21/treasury-gets-japanese-and-swiss-banks-to-agree-on-fatca-compliance-method/.

30) Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 171, 12 U.S.C. § 5371 (Supp. 201 1).

31) The Collins Amendment sets the minimum leverage and risk-based capital requirements at the levels requir ed for insured depository institutions, which are primarily regulated by the FDIC, and applies them to bank holding companies and nonbank financial companies under Board supervision.

The new framework for regulating systemic risk permits the FSOC to identify foreign financial companies, under certain circumstances, as posing a threat to the stability of the U.S. financial system.[32] If such companies are so designated, then the components that operate in the United States will become subject to rigorous new regulatory standards applied by the FED,[33] irrespective of the regulatory framework to which the overall conglomerates are subject in their home jurisdictions.[34]

In an effort to mitigate the consequences if a financial institution fails, foreign banks operating in the U.S. are also subject to a new requirement that they develop orderly resolution plans, so-called "living wills,"indicating how they can be broken up for resolution if they fail.[35] These plans must be approved by U.S. regulators and may or may not accord with the bankruptcy requirements of their home countries.[36]

The first is the complex web of provisions in the USA PATRIOT Act's title on anti-money-laundering (AML),[37] implemented in the wake of the attack

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32) Dodd-Frank Act § 113(b). Such companies need not necessarily be bank holding companies. For example, in the U.S.,AIG, GE Capital and General Electric Co. are almost certainly going to be designated as systemically important. *See* Cheyenne Hopkins & Ian Katz, *U.S. Said Set to Target First Non-Bank Firms for Scrutiny,* Bloomberg (Sept. 12, 2012, 12:00 AM), http://www.bloomberg.com/news/2012-09-11/ u-s-said-set-to-target-first-non-bank-firms-for-scrutiny.html.

33) Dodd-Frank Act § 165.

34) Under Dodd-Frank, bank holding companies that own a total of $50 billion in consolidated assets, whether they be U.S.-based or foreign bank holding companies with U.S. operations, are defined as "systemically important" (SI) and, as a result, are subject to "enhanced supervision" by the FED and other potential systemic oversight provisions specifically related to SIs. *Id* Foreign nonbank financial companies with U.S. operations are also subject to these provisions if designated by the FSOC as SIs. *Id.* § 115.

35) *Id.* § 165(d). *See also* Title I and IDI Resolution Plans, Fed. Deposit Ins. Corp., http://www.fdic.gov/ regulations/reform/resplans/index.html (last updated Oct. 2, 2012).

36) Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Resolution of Insured Depository Institutions with Cross-Border Operations in the United States and the United Kingdom (Jan. 22, 2010), *available at* http://www.fdic.gov/news/news/press/ 2010/pr10013a.pdf.

37) Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §§ 301-77, 115 Stat. 272, 296-342. *See also Patriot Act,* Wikipedia, http://en.wikipedia.org/wiki/Patriot Act#Title III: Anti-money-laundering to prevent terrorism (last updated Oct. 10, 2012) (providing a summary of Title III of the USA PATRIOT Act).

on the World Trade Center Towers in New York on September 11, 2001,and the laws of New York State that together seek to prevent money laundering by criminal organizations—terrorist ones in particular—through the banking system.[38] Certain countries, such as Iran, have been designated as barred from using financial networks in the United States.[39] Because such a large volume of international wire transfers take place through the clearing system in New York, this means that foreign banks, even though they might be conducting business entirely outside of the U.S., have found that they must comply with these AML provisions (including disclosure of the origin of funds) if they wish to make use of the New York clearing network. As we have seen with the recent fines levied on HSBC and Standard Chartered, and in the continuing investigation of a number of other foreign banks, foreign financial organizations have found themselves to be in violation of U.S. law when they have conducted so-called "U-turn"transactions in which the data of origin has been stripped out of the funds transfers.[40] In the case of Standard Chartered, there was loud protest to the effect that the U.S.was imposing its will on foreign countries in determining with which the banking organizations for those countries could do business.[41]

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38) 31 C.F.R. § 560.516 (2012); N.Y. Banking Law §§ 200-c, 672.1 (Mc Kinney 2012); N.Y. Penal Law §§ 175.10, 175.35, 195.05 (Mc Kinney 2012); N.Y. Comp. Codes R. & Regs. tit. 3, § 300.1 (2012).

39) Note the extensive impact on financial institutions of the new Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214. *See* Davis Polk, *United States Enacts Further Sanctions on Iran and Syria: The Iran Threat Reduction and Syria Human Rights Act of 2012,* Davis Polk (Sept. 12, 2012), http://www.davispolk.com/files/Publication/3f518309-4693-4d18-b249-0071670c47df/ Presentation /PublicationAttachment/909ac3e2-d352-402b-b3a5-00dac7c63bd5/091212_Sanctions_Iran_and_Syria.pdf.

40) *See* Irene Chapple & Ben Rooney, *Standard Chartered Pays $340M to Settle Money Laundering Charges,* CNN (Aug. 15, 2012, 9:57 PM), http://edition.cnn.com/2012/08/07/business/standard-chartered-iran- allegations/index.html Tiffany Kary & Greg Farrell, *HSBC in Settlement Talks with U.S. Over Money Laundering,* Bloomberg (Aug. 24, 2012, 9:37 PM), http://www.bloomberg.com/news/2012-08-24/hsbc-in- settlement-talks-with-u-s-over-money-laundering.html.

41) Most notable was the quote extracted by regulators from interactions within one bank holding company: "You f---ing Americans. Who are you to tell us, the rest of the world, that we're not going to deal with Iranians." Standard Chartered Bank, N.Y. Dep't of Fin. Serv. 4 (Aug. 7, 2012) (order) (quoting a Group Director from Standard Charter Bank in response to the order), *available at* http://online.wsj.com/public/resources/documents/SCBorder0806.pdf.

The second example is the compliance regime created by the Foreign Account Tax Compliance Act (FATCA) provisions of the Hiring Incentives Act of 2010. FATCA requires the U.S. Treasury and Internal Revenue Service to develop complicated rules that apply to foreign financial institutions[42] and govern transactional reporting and tax withholding on investments and pass through payments made by foreign financial institutions to certain non-financial institutions. These provisions have created difficulties in tracing and reporting on such "passthru" payments when they filter through many tiers of intermediaries. They impose extensive due diligence burdens in identifying the U.S. or foreign status of the recipient entities. And the reporting requirements conflict with some data privacy laws abroad.[43]

Ⅲ. The Volcker Rule and New Derivatives Margin Requirements

The most visible of the "extraterritorial" rules to come out of the Dodd-Frank process so far are those contained in the proposed regulations under the Volcker Rule and the margin requirements for OTC derivatives. Under U.S. law, there is a general presumption against extraterritorial application of U.S. law, and the U.S. Supreme Court applied this

42) *See Foreign Account Tax Compliance Act (FATCA),* Internal Revenue Service, http://www.irs.gov/ Businesses/Corporations/Foreign-Account-Tax-Compliance-Act-(FATCA) (last updated Sept. 25, 2012).

43) The U.S., France, Germany and U.K., together with several other countries, have reached a new Model Intergovernmental Agreement to support the implementation of FATCA. *See Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA,* U.S. Dep't of Treas. (July 25, 2012), http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-1A-Agreement-to-Implement-Reciprocal-7-25-2012.pdf. See also Karen M. Kroll, *New Intergovernmental Agreement to Support FATCA,* Bus. Fin. (Aug. 16, 2012), http://businessfinancemag.com/article/new-intergovernmental-agreement -support-fatca-0816.

presumption as recently as 2010, in *Morrison v. National Australia Bank Ltd.*[44] Congress, however, responded in the Dodd-Frank Act by specifically anticipating that the restrictions of the Volcker and OTC/swaps rules could have extraterritorial application on banks doing business outside of the United States if the activities in question have direct and significant connection with activities in the U.S., or in the discretion of the enforcing agencies extraterritorial application is necessary in order to prevent evasion of regulations developed under Dodd-Frank.[45]

1. Volcker Rule[46]

The Volcker Rule is sometimes described as an effort to reintroduce the old Glass-Steagall framework[47] into banking regulation in the U.S.—in effect to recreate a strict separation of the banking and the securities industry. In fact the Rule is rather narrower and seeks to prohibit banking conglomerates that own insured depository institutions from engaging in proprietary trading of securities (i.e.,trading for their own account and not merely on behalf of customers) and from investing in private equity firms or hedge funds. The idea is to keep banks out of what are perceived to be highly speculative—and therefore excessively risky—financial activities.

From the moment it was announced,[48] the Volcker Rule has been highly

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44) Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869 (2010). The Supreme Court refused to interpret section 10(b) of the Securities & Exchange Act of 1934 to have extraterritorial effect.

45) Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, §§ 722(d), 772(b), 124 Stat. 1376, 1673, 1802. The Act also called for further study of the problem of extraterritorialit y, so it is clear that Congress was well aware of the impact such regulation might have on foreign banks in their foreign operations. *Id.* §§ 752(a), 719(c).

46) *Id.* § 619.

47) Banking Act of 1933, Pub. L. No. 73-66, §§ 20, 32 (1933) (repealed 1999); *id.* §§ 16, 21 (amended 1999). These four sections are collectively referred to as the Glass-Steagall framework and often analogized to the Volcker Rule. The framework restricted banks from dealing in, underwriting, and distributing certain securities but did not restrict proprietary trading, which is a focus of the Volcker Rule. The Volcker Rule also permits dealing in certain securities that were otherwise restricted by the Glass-Steagall framework.

controversial for a number of reasons. First, it is by no means clear that proprietary trading or hedge fund activities had anything to do with the financial collapse of 2008. Second, proprietary trading is a necessary component of risk management as banks trade securities continually in order to hedge the risks in their portfolios, so drawing a distinction between trading that properly hedges risks and trading that is purely speculative or designed to reap profits is a difficult—some might even say impossible—task. Third, to the extent that the Volcker Rule recognizes this risk management activity, the proposed implementing regulations have created exceptions that have become so convoluted that many bankers believe them to be unmanageable. Fourth, in order to police securities trading activities, the proposed rules implementing Volcker would impose compliance requirements that many consider to be unnecessarily expensive, distracting, ineffective and perhaps truly nightmarish. Finally, while it is recognized that banks should be able to engage in so-called "seed funding"in order to promote new business ventures, the *"de minimus"* exception[49] provided in the act to investment in hedge and private equity funds is very large in practice when it is applied to very big banks (three percent of total capital), so the Volcker Rule actually favors larger financial institutions at precisely the moment when banking scale has become very polemical.

In addition to these implementation problems, the Volcker Rule also

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48) Press Release, White House, President Obama Calls for New Restrictions on Size and Scope of Financial Institutions to Rein in Excesses and Protect Taxpayers (Jan. 21, 2010), *available at* http://www.whitehouse.gov/the-press-office/president-obama-calls-new-restrictions-size-and-scope-financial-institutions-rein-e Edward Luce & Tom Braithwaite, *"Volcker Rule" Takes Bankers by Surprise,* Fin. Times (Jan. 21, 2010, 6:44 PM) (U.K.), http://www.ft.com/intl/cms/s/0/0af8ad12-06ba-11df-b426- 00144feabdc0.html#axzz283vyLDRs. The Volcker Rule can be traced to a report written by The Group of Thirty in January 2009. Group of Thirty, Financial Reform: A Framework for Financial Stability(Jan. 2009), *available at* http://www.group30.org/images/PDF/Financial Reform-A Framework for Financial Stability.pdf. Paul Volcker was Chairman of the Trustees for the Group and, soon after, led President Obama's Economic Recovery Advisory Board. As Luce and Braithwaite state, Volcker pushed for far-reaching reform and even criticized Obama's proposals during the year between the report's release and Obama's announcement.

49) Dodd-Frank Act § 619.

wreaks havoc with the activities of foreign banks if they have any presence in the United States.[50] This is because they will only be exempt from the Rule's prohibitions if the activities in question have no connection with the U.S.—either territorial or corporate. Furthermore, the Volcker Rule exempts United States securities, but not the sovereign debt of any other country or even other U.S. political subdivisions or governmental agencies, from its proprietary trading restrictions.[51] This is seen both as a threat to the ability of foreign governments to be able to place debt and a preferential favoring of U.S. government debt.[52]

It is therefore no surprise that every foreign bank with any kind of significant presence in the U.S. is concerned about the Rule's impact on its operations. Indeed, some global banks, including most notably Deutsche Bank, have already restructured and moved certain activities away from the U.S.in order to avoid the full impact of the Rule.[53]

2. OTC Derivatives

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50) For a thorough analysis of the extraterritorial impacts of the Volcker Rule, *see, e.g.*, Edward F. Greene & Ilona Potiha, *Examining the Extraterritorial Reach of Dodd-Frank's Volcker Rule and Margin Rules for Uncleared Swaps—a Call for Regulatory Coordination and Cooperation,* 7 Cap. Mkts. L.J. 271, 283-92 (2012).

51) Dodd-Frank Act § 619.

52) *See* Zachary A. Goldfarb & Howard Schneider, *Local, Foreign Governments Slam Volcker Rule,* Wash. Post, Feb. 29, 2012, at A12; *Volcker Rule Threatens Sovereign Debt Liquidity-BoJ,* Reuters (Mar. 5, 2012, 10:58 AM), http://www.reuters.com/article/2012/03/05/usa-financial-regulation-idUSL2E8E55E120120305 Daniel Flynn & Elinor Comlay, *Volcker Rule Should Exclude All Sovereign Debt-Citigroup,* Reuters (Feb. 25, 2012, 5:26 PM), http://www.reuters.com/article/2012/02/25/us-g20-volcker-idUSTRE81O0P120120225.

53) Generally, a foreign-based global bank has a bank holding company registered in the host country. To avoid the new capital requirements, the global bank moves the banking activities that trigger compliance from under the holding company to another entity that is a direct subsidiary of the foreign-based parent company. The holding company is no longer a bank holding company subject to the new capital levels. See David Enrich & Laura Stevens, *Deutsche Avoids Dodd-Frank Rule --- German Bank Restructures U.S. Unit to Avoid New Capital Requirements; Regulators Don't Object,* Wall St. J., Mar. 22, 2012, at C1 David Enrich, *Banks Find Loophole on Capital Rule --- Foreign Lenders Weigh Restructuring to Free Up Cash; a Footnote in Barclays's Finance Statement,* Wall St. J. Feb. 18, 2011, at C1.

Dodd-Frank's rules for derivatives have also raised substantial controversy. The Commodity Futures Trading Commission (CFTC) and Securities & Exchange Commission (SEC) share responsibility for the regulation of derivatives. The CFTC is the primary regulator for swaps, the SEC is primary for securities-based swaps, and both agencies jointly regulate so-called "mixed swaps." Dodd-Frank requires the CFTC and the SEC to develop an extensive system of OTC derivatives regulation, including centralized clearing systems, the registration of swap dealers and market participants, capital and margin requirements, and the public reporting of transactions and pricing for both cleared and uncleared swaps. Essentially, two types of restraints have been introduced:

- entity-based restrictions (registration of swap dealers and major swap participants); and
- transactions-based rules (capital, liquidity, margin, risk management, margin segregation, clearing and trading).[54]

To illustrate the potential extraterritorial effects of this regulatory regime, we will focus on the margin and collateral requirements being developed by the CFTC.[55] The CFTC's proposed rules will impose significant margin requirements on collateral for uncleared swaps. This will in turn likely transform the business because posting greater quality collateral than is presently the practice will raise the cost of conducting the derivatives business.[56] Importantly for the present audience, these proposed

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54) For a helpful comparative review of the new U.S.and European Union derivatives regulation regimes, *see* David Felsenthal, *Regulation of OTC Derivatives Markets—EU vs US Initiatives,* Harv. L. Sch. Forum on Corp. Gov. & Fin. Reg. (Sept. 23, 2012, 10:32 AM), https://blogs.law.harvard.edu/corpgov/2012/09/23/ regulation-of-otc-derivatives-markets-eu-vs-us-initiatives/.

55) For a recent review of the status of these rules, *see, e.g.,* Ben Protess, *In New Rules to Shine Light on Derivatives, Regulators Also Allow Exemptions,* N.Y. Times, Jul. 11, 2012, at B1.

56) Indeed, these new requirements have already spawned a whole new "collateral transformation"market, in terms of which banks will loan derivatives users the kind of quality collateral they need to conform to the new requirements, holding the inadequate collateral in exchange and charging a fee for the "transformation." *See* Bradley Keoun, *Big Banks Hide Risk Transforming Collateral for Traders,* Bloomberg News (Sept. 11, 2012, 8:43 AM), http://www.bloomberg.com/news/2012-09-10/big-banks-hide-risk- transforming-coll

requirements would have direct extraterritorial effect in all cases except where the swap transaction is between two entities neither of which is controlled in any way by a U.S. entity and only when the transaction takes place outside of the U.S. Such a requirement would effectively require all the global banks with any kind of U.S. presence to comply with the proposed rules. If the entity in question is organized via a global branch network,[57] and one of its branches is in the U.S., the entire global network becomes subject to the restrictions even if the transaction takes place entirely beyond the shores of the U.S.

Ⅳ. Political Winds in the United States

Because reform of financial regulation is one of the centerpieces of the current presidential and congressional election campaigns in the United States, it is important to take these political winds into account. The elections will take place soon—on November 6, 2012.

The Republican candidates for president and vice president, Mitt Romney and Paul Ryan, have regularly stated their opposition to the Dodd-Frank framework[58] and the House Republicans on the Financial Services Committee have repeatedly attempted to repeal the Act.[59] A general picture

ateral-for-traders.html.

57) Branch networks, as opposed to separate corporate subsidiaries, are a much favored organizational structure because it facilitates the efficient deployment of capital.

58) Suzy Khimm, *Romney Vows to Repeal Dodd-Frank. The Law's Biggest Critics Doubt That Will Happen.*, Wash. Post Ezra Klein's Wonkblog (Aug. 10, 2012, 1:39 PM), http://www.washingtonpost.com/blogs/ ezra-klein/wp/2012/08/10/romney-vows-to-repeal-dodd-frank-the-laws-biggest-critics-doubt-that-will-happen/ Phil Mattingly, *Romney's Dodd-Frank Kill Pledge Collides with Wall Street Agenda,* Bloomberg (Aug. 29, 2012, 10:52 PM), http://www.bloomberg.com/news/2012-08-30/romney-s-dodd-frank-kill-pledge-collides- with-wall-street-agenda.html Andrew Ross Sorkin, *Everything Wall St. Should Know About Ryan,* N.Y. Times Deal Book (Aug. 13, 2012, 10:26 PM), http://dealbook.nytimes.com/2012/08/13/paul-ryan-and-what- wall-street-should-know/.

of the alternative framework they envision is emerging. Like many other public policy issues, this vision, though not always coherent, stands in stark contrast to that of the incumbent President, Barak Obama, the Congressional Democrats, and the system created by Dodd-Frank.

The prevailing concept of financial regulation enshrined in the Dodd-Frank framework and defended by the Democrats, is essentially this: The stability of the domestic and global financial systems can be maintained by smarter "systemic risk"regulation involving more proactive financial monitoring through the new OFR and a collective consideration by the large FSOC of emerging risks to stability. Enhanced capital adequacy and liquidity provisions, orderly resolution planning, the separation of proprietary trading from banking by deposit-taking institutions, and greater posting of collateral for derivatives, as many as possible traded through exchanges, is thought to minimize the danger of failure by financial institutions no matter how large, and to minimize the risk of collateral damage to other financial institutions and the financial system when a failure doesoccur. The comprehensive oversight of both the bank subsidiaries and corporate conglomerates of such institutions, by the OCC, through greatly enhanced powers, and the FED, is hoped to ensure greater proactivity and more sophisticated supervision and regulation than was proved to be the case before the Crisis. Greater consumer and investor protections and stricter standards for mortgage underwriting also add to the framework. The creation of the new CFPB was seen as a necessary way to focus on government protection of consumers. Finally, numerous other, less visible regulations were authorized as well; most of these fall within the overall vision of intensified regulation without

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59) "The Committee reported 18 bills to the House that would repeal, reform or fix Dodd-Frank provisions that harm the economy. The House passed 7 bills that would reverse Dodd-Frank regulations . . . ." *Over sight of Dodd-Frank Act Implementation,* House Fin. Serv. Comm., http://financialservices.house.gov/ dod d-frank/ (last visited Oct. 10, 2012). *See also* Dave Clarke, *Republicans Target Dodd-Frank for Deficit Savi ngs,* Reuters (Apr. 18, 2012, 7:48 PM), http://www.reuters.com/article/2012/04/18/us-financial- regulation-li quidation-idUSBRE83H1H820120418.

significant scale restrictions on the financial industry.

While the approach just described is that adopted by the Democratic Party mainstream, including most Democrats in Congress, it should also be noted that there is a strong, more radical movement, "Occupy Wall Street" (OWS),[60] which appears to take the position, along with some Democratic Party lawmakers,[61] that effective financial reform would likely require the breakup of very large financial institutions as well.[62]

The Republican vision is in some important respects quite different.[63] Both Congressional Republicans and the Republican presidential and vice presidential candidates have spoken frequently against the general approach taken by Dodd-Frank. There is, however, a bifurcation in the views held among the Republicans. The Tea Party wing and, until recently, the vice presidential candidate Paul Ryan have vehemently opposed the bailouts extended to large financial institutions.[64] Like the liberal wing of the

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60) *About*, Occupy Wall St., http://occupywallst.org(last visited Oct. 10, 2012). OWS is not officially aligned with the Democratic Party, but its members tend to lean toward the Left.

61) In November 2009 Senator Bernie Sanders (I-VT) introduced a bill entitled the Too Big to Fail, Too Big to Exist Act, which would have required the Treasury Secretary to compile a list of financial institutions, including banks that should be broken up. S. 2746, 111th Cong. (2009). In April 2010, Senators Sherrod Brown (D-OH) and Ted Kaufmann (D-DE) lead the introduction of an amendment to the Dodd-Frank Bill that would have imposed strict leverage and nondeposit liabilities caps on large banks, effectively forcing the breakup of America's largest banks (JP Morgan Chase, Citigroup and Bank of America). S. 3241, 111th Cong. (2010). *See also* Tim Fernholz, *TAP Talks with Sen. Kaufmann,* Am. Prospect (Apr. 29, 2010), http://prospect.org/article/tap-talks-sen-kaufman. The amendment was defeated. *See* Audie Cornish, *Senate Kills Bid to Limit Size of Banks,* Nat'l Pub. Radio (May 6, 2010), http://www.npr.org/templates/ story/story.php?storyId=126581763.

62) *See, e.g.,* Gary Rivlin, *Which Bank Is the Worst?,* Daily Beast (Oct. 25, 2011, 6:48 PM), http://www.thedailybeast.com/articles/2011/10/25/why-occupy-wall-street-hates-the-big-banks.html.

63) From its enactment, senior Republican Representatives in the House have declared their intention to repeal Dodd-Frank and prevent the necessary funding, and the House itself has actually voted to pass such legislation. *See, e.g.,* Edward Wyatt, *Dodd-Frank Act a Favorite Target for Republicans Laying Blame,* N.Y. Times, Sept. 21, 2011, at B1 J.C. Boggs, Melissa Foxman, & Kathleen Nahill, *Dodd-Frank At One Year: Growing Pains,* 2 Harv. Bus. L. Rev. Online 52 (2011), http://www.hblr.org/wp-content/uploads/2011/ 07/Boggs-Foxman-Nahill-Growing-Pains.pdf.

64) Suzy Khimm, *Paul Ryan Voted for the Bailouts, but Has Since Soured on Them,* Wash. Post Ezra Klein's Wonkblog (Aug. 13, 2012, 3:19 PM), http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/08/13/paul-ryan-voted-for-the-bailouts-but-hes-since-soured-on-them/ Dunstan Prial, *Occupy Wall Street, Tea Party Movements Both Born of Bank Bailouts,* Fox Bus. (Oct. 20, 2011), http://www.foxbusiness.com/ markets/20

Democratic Party,[65] they favor imposing scale restrictions on large financial institutions in an endeavor to eliminate the "Too Big to Fail"(TBTF) status of these banks and thereby reduce pressure for government assistance when such institutions get into difficulties. At the same time, the candidate for President, Mitt Romney, has avoided speaking out against large financial institutions—perhaps because he receives substantial funding from such entities and their employees.[66] In a nutshell, the Republicans place more faith in the ability of markets to regulate modern banking, whereas the Democrats believe there is an additional need for extensive government regulation in order to prevent financial instability, bank failure and customer abuse.

For who will prevail, a lot will turn on the results of the November elections. If President Obama wins another term it is likely, no matter what happens in congressional races, that the current framework will continue, including a continuation of the implementation of both the Volcker Rule and derivatives restrictions.[67] Continuing domestic political pressure might also encourage further unilateral action by the U.S., even if this action creates extraterritorial impacts.

If, on the other hand, Mitt Romney wins the election, and especially if the Republicans win both the House and Senate (an unclear prospect[68]), we

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11/10/19/occupy-wall-street-tea-party-born-bank-bailouts/ Brad Bannon, *Bank Bailout Spawned Obama and Dems' Tea Party Problem,* U.S. News (Sept. 9, 2010), http://www.usnews.com/opinion/ blogs/brad-bannon/2010/09/09/Bank-Bailout-Spawned-Obama-and-Dems-Tea-Party-Problem.

65) *See, e.g.,* the OWS movement and Democratic Senators who have attempted to impose size limits on banks, *supra* text accompanying notes 60-62.

66) According to the Center for Responsive Politics, all five of Romney's top contributors are major banking institutions and Obama's top five list consistsof universities, technology companies, and the federal government. *2012 Presidential Race,* Ctr. for Responsive Politics, http://www.opensecrets.org/pres12/ index.php (last visited Oct. 11, 2012). Furthermore, the Finance, Insurance, & Real Estate sector has contributed $14,573,265 to Obama (3.37% of total raised) and $40,098,729 to Romney (14.35% of total raised). *Id.*

67) It is also likely, however, that if the Republican party secures a majority on one or both houses of Congress, the funding for much of the Dodd-Frank regulatory framework will be restricted by hostile congressional committees, as will the appointments process for heads of the financial agencies.

68) *General Election: Romney vs. Obama,* RealClearPolitics, http://www.realclearpolitics.com/epolls/2012/ pres

will almost surely see a roll back of Dodd-Frank in favor of some kind of deregulation, perhaps along more sophisticated lines than were in place during the deregulatory era of the 1990s and run up to the Crisis.[69] At the same time, because of their continuing political power and their contribution to a Romney win it is unlikely that the very large banks will be dismantled unless another major financial institution failure were to occur and this disaster were to scare politicians into taking more aggressive action.

Given the strength that the Tea Party wing will have gained in an election win, however, one might also expect the debate over bank size to remain as vigorous as ever.[70] The drift toward greater extraterritorial impact is likely to slow down tothe extent that rules such as Volcker and OTC swaps are themselves possibly to lose their force, but any decline in extraterritorial impacts are going to be a by-product of this process, not something treated as a material domestic issue in the U.S..

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ident/us/general_election_romney_vs_obama-1171.html (last visited Oct. 11, 2012) (showing a historical gr aph of polls which indicates that Obama had been increasing his lead throughout September but then lost that lead in early October).

69) Even if unable to repeal Dodd-Frank because it cannot muster a sufficient majority to defeat an almost certain filibuster, the majority party in either house of Congress can substantially impede the implementati on and enforcement of the legislation by denying the necessary funding. For example, the Securities and Exchange Commission has struggled to implement its own mandates under the Dodd-Frank Act because it has not received the appropriations authorized in the legislation. Mark Schoeff Jr., *SEC Gets Low-Balled by Appropriations Committee,* Inv. News (June 21, 2012, 3:30 PM), http://www.investmentnews.com/articl e/20120620/FREE/120629991. On the other hand, one should also not underestimate the degree of imple mentation that has already taken place, as well as the momentum within the agencies for completing their mandates and the fact that financial firms have already adapted to much of the change.

70) Congressman Paul Ryan, Governor Mitt Romney's running mate, was opposed to the financial bailouts in 2008 and has, until recently, declared his strong opposition to banks that are "too big to fail." *See, e.g.,* Sorkin, *supra* note 57.

V. Dilemmas of Modern Global Banking and Financial Regulation

Irrespective of ideological and political divisions within the U.S., in many ways the controversies and conflicts regarding extraterritorial impact and the disagreements concerning such restrictions as the Volcker Rule are the inevitable consequence of the globalization of finance.

This globalization is manifested by many factors. Global networks enable transactions to occur almost seamlessly and instantly across borders; yet these same networks create the danger of contagion and cascading failures, which can in turn quickly lead to regional and even global financial instability. Giant financial institutions have combined most types of financial services within single overarching conglomerates and they now also conduct their operations on a global scale; yet this makes it very difficult to impose domestic restrictions on the forms and activities of such institutions without impairing their competitiveness and, to the extent that foreign financial institutions compete directly within those very jurisdictions, without creating extraterritorial effects as a result of such domestic restrictions. Governments raise debt in financial markets throughout the world; yet this makes any effort to privilege specific domestic sovereign debt, as is the case with the Volcker Rule, inevitably (and probably correctly) perceived to be extraterritorial discrimination. Finally, banking conglomerates consist of large corporate entities headquartered in many parts of the world; yet this makes any failure, as we saw with Lehman Brothers,[71] a matter for multiple jurisdictions, each of which presently has a separate bankruptcy regime so that the application of any one regime over

71) Sam Mamudi, *Lehman Folds with Record $613 Billion Debt,* MarketWatch (Sept. 15, 2008, 10:11 AM), http://www.marketwatch.com/story/lehman-folds-with-record-613-billion-debt?siteid=rss.

others inevitably favors classes of creditors differently.

This leads one to ask whether there is any way out of this dilemma? Various solutions have been proffered.

The most far reaching has been carefully and elegantly developed by Emilios Avgouleas in his recently published book, *Governance of Global Financial Markets*.[72] He sees no alternative but to develop a global regulatory system to match the global reach of banks within a world of globalized finance. Professor Avgouleas'concept is complex: he suggests the creation of new international institutions and the modification of some others existing ones. He proposes a new governing council representing the World Bank, United Nations, the European Union and members of the G20. This council would oversee four new entities:

- a macroprudential (financial stability) regulator;
- a microprudential (safety/soundness and market conduct) regulator;
- a knowledge-gathering and policy-development organization; and
- a global resolution authority for dealing with large-scale financial bankruptcies.[73]

An intermediate position has of course been developed by the European Union and, until recently, consisted essentially of home country regulation with home country rules being exportable to host countries on the basis of a single, European "banking passport."[74] With the difficulties now faced by banks in the Eurozone, however, the European Commission has announced

72) Emilios Avgouleas, Governance of Global Financial Markets (2012).

73) *Id.* ch.8.

74) According to the European Commission, "the 'single passport,'[is] a system which allows financial services operators legally established in one Member State to establish/provide their services in the other Member States without further authorisation requirements." *Banking,* Eur. Comm'n, http://ec.europa.eu/internal_market/bank/index_en.htm (last visited Sept. 20, 2012). In 2010, the European Parliament passed reforms designed to improve assessment of trading risks, raise capital requirements, and address compensation that incentivizes taking high risks. Directive 2010/76/EU, of the European Parliament and of the Council of 24 November 2010 Amending Directives 2006/48/EC and 2006/49/EC as Regards Capital Requirements for the Trading Book and for Re-securitisations, and the Supervisory Review of Remuneration Policies, 2010 O.J. (L 329) 3.

a new framework that will be implemented in part by the beginning of next year. In terms of this announcement there will be a single, European bank regulator with direct authority over all 6000 European banks irrespective of where they are headquartered.[75] Whether this proposal is accepted remains to be seen. For example, it is possible that the U.K. might not fully participate.[76]

The approach that has generally prevailed to the present has been a broad system of consolidated home country supervision, subject to default provisions applied by host countries where home country action is deemed insufficient.[77] This is the system developed at the international level by the BCBS and it is largely enshrined in the U.S. by the Foreign Bank Supervision Enhancement Act of 1991,[78] enacted in reaction to the scandal surrounding the Bank of Credit and Commerce International (BCCI), a global criminal enterprise that masqueraded as a banking organization but was able to evade detection for some time because it could engage in regulatory arbitrage at a time when international coordination and standards were very informal.[79]

Such a system of host country deference to home country primacy, together with a host country override, always carries the potential for

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75) *See* Press Release, Eur. Comm'n, Commission Proposes New ECB Powers for Banking Supervision as Part of a Banking Union (Sept. 12, 2012), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/953.

76) For growing tensions over the proposal, *see, e.g., David Cameron: We Won't Take Part in EU Banking Union - It's Not Our Currency,* Telegraph (June 7, 2012, 5:00 PM) (U.K.), http://www.telegraph.co.uk/news/politics/david-cameron/9317418/David-Cameron-We-wont-take-part-in-EU-banking-union-its-not-our-currency.html John O'Donnell, *European Lawmakers Warn of Banking Union Split,* Reuters (Sept. 26, 2012, 7:24 AM), http://www.reuters.com/article/2012/09/26/us-eu-banks-idUSBRE88P0NM20120926 John O'Donnell, *Regulator Warns Banking Union Could Split Europe,* Reuters (Sept. 19, 2012, 11:20 PM), http://in.reuters.com/article/2012/09/19/eu-eba-ecb-banks-idINDEE88I0F320120919. See also Gareth Jones, *ECB Should Only Supervise Big Banks: Schaeuble,* Reuters (Sept. 3, 2012, 1:20 PM), http://www.reuters.com/article/2012/09/03/us-eurozone-banks-schaeuble-idUSBRE88204U20120903 (stating Germany's reservations about including smaller banks within the banking union's supervision).

77) Foreign Bank Supervision Enhancement Act (FBSEA) of 1991, Pub. L. No. 102-242, §§ 201-15; Basel Committee on Banking Supervision, supra note 27.

78) FBSEA §§ 201-15.

79) S. Rep. No. 102-140 (1992).

unilateral action, with potential extraterritorial effect, by a host country whenever it deems the actions taken by home countries to be inadequate to meet its concerns. The FATCA, AML and Volcker provisions represent just such a judgment.

In my view, none of these solutions is satisfying. Professor Avgouleas' proposal would take many years to negotiate, let alone bring into effect. It would also rely on a complicated bureaucratic apparatus of which many might be skeptical as to whether it would be any more efficient and trustworthy than the complicated chaos we have now.

The European bank regulator proposal, like the Dodd-Frank framework, places its faith in the ability of traditional, command and control regulators, governing through detailed rules, to react effectively to rapidly changing market conditions. While it is a reaffirmation of the importance of vigorous government regulation and supervision, given the cumbersome responses of the Eurozone authorities to their own current crisis it is something of a leap of faith to assume that a large agency would improve the situation—at least across a wider region than the Eurozone—even if it had more direct powers. Furthermore, given the closeness many banks in many countries have to their governments, it is hard to avoid the suspicion that the actions produced by such a regulator would not have a substantial range of biases in favor of individual sovereign stability.[80)]

My own view is that the best hope for effective global action is actually the path already being followed, albeit with fewer, simpler rules and standards.[81)] Though slow and frustrating, the work being done by the FSB

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80) Several countries have expressed opposition because the banking union as proposed would carry an obvi ous bias to voting members of the EU. *See* Alex Barker & Richard Milne, *Eurozone 'Outs' Fear Banking Union Plan,* Fin. Times (Oct. 1, 2012 6:56 PM) (U.K.), http://www.ft.com/cms/s/18afcedc- 071f-11e2-92ef-00144feabdc0,Authorised=false.html?i_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2F18afcedc-071f-11e2-92ef-00144feabdc0.html&_i_referer=#axzz283vyLDRs *Sweden Skeptical on EU Banking Union Pla ns,* Reuters (Sept. 15, 2012, 12:48 PM), http://www.reuters.com/article/2012/09/15/ us-sweden-nordea-idUS BRE88E0DW20120915 Adéla Zábražná, *Banking Union Plans Irk ČR,* Prague Post (Sept. 26, 2012) (Czech), http://www.praguepost.com/business/14373-banking-union-plans-irk-cr.html.

and Basel Committee, coupled with that of the IMF and World Bank,[82] can gradually produce a set of meaningful standards for all nations to follow in their own way. These standards will not be the types that are immediately enforceable; indeed, they would take years to acquire strong normative force. In the mean time, I would argue that it is only realistic to accept the fact that there will be considerable variations from country to country, except in those areas where emergency contingency planning between nations is essential.

The absence of a global authority with executive powers and the ability of each national jurisdiction to adopt variations on such standards do indeed make regulatory arbitrage possible. Such situation also carries the inevitable likelihood of complaints about extraterritoriality, not to mention complaints by global financial institutions that their compliance and operating costs are higher because of uneven requirements in each jurisdiction.[83] But the diversification that such an approach permits is, in this commentator's view, politically more realistic than tighter efforts at integration and harmonization. Such diversification might also offer the hope that better jurisdictions will demonstrate their superiority when the next financial crisis occurs.

In other words, I would still favor a degree of regional differentiation and adaptation as something more suitable for constantly evolving markets, as well as something more manageable from a political point of view. Such a result might understandably not be palatable to some regulators, who are left to deal with transnational inconsistencies, or some global financial

81) Andrew G. Haldane, Exec. Dir. for Fin. Stability, Bank Eng., Address at the Federal Reserve Bank of Kansas City's Economic Policy Symposium: The Dog and the Frisbee (Aug. 31, 2012).

82) Financial Assessment Program, World Bank, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ EXTFINANCIALSECTOR/0,,contentMDK:22142161~menuPK:6459396~pagePK:210058~piPK:210062~theSitePK:282885,00.html (last visited Oct. 11, 2012). *See also* Chris Brummer, *How International Financial Law Works (And How It Doesn't),* 99 Geo. L.J. 257, 281-81 (2011).

83) Note that this does not necessarily imply greater "efficiency" because some of the true costs are externalized if no local compliance requirements are imposed.

organizations, which also have to manage regional differentiations in their operations. At this point, however, the notion of a seamless global regulator and harmonious global rules seem to be an ideal and not a realistic immediate prospect, if it will ever be.

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〈ABSTRACT〉

A Current Assessment of Some Extraterritorial Impacts of The Dodd- Frank Act with Special Focus on The Volcker Rule and Derivatives Regulation

Lawrence G. Baxter

As the world struggles to emerge from the Global Financial Crisis the vision of a harmonious framework of global financial regulation seems as distant as ever. Important progress made by international committees such as the Basel Committee on Banking Supervision and the Financial Stability Board notwithstanding, there seem to be increasing signs of unilateral, extraterritorial action by major jurisdictions, including the United States. This paper reviews the framework created by the US financial reforms, in particular anti money laundering provisions, the Volcker Rule and the proposed OTC derivatives margin requirements, and considers some of the dilemmas presented by modern global banking and its concomitant regulation. The conclusion is that we are likely to see more regional reforms that are not necessarily uniform, and that this might not be a bad result, given the complexity of the financial markets and the need to respond flexibly to evolving circumstances.

Key Words : Global financial regulation, international banking regulation, financial reform, extraterritoriality, anti-money laundering; Volcker Rule, OTC derivatives regulation, Dodd-Frank Act, US Presidential election