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THE SEC IN A TIME OF DISCONTINUITY

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THIS year the Securities and Exchange Commission celebrates its 75th anniversary.¹ The SEC has achieved historic success in the regulation of securities markets and securities trading. For those who have been associated with the Commission, there will be appropriate cause for pride and celebration.

This Symposium issue will be a memorable part of the celebration.

In Jack Coffee and Hillary Sale's article, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, the authors address the dominant reality today—that “[t]he natural superiority of the U.S. model for securities regulation is no longer an article of faith”²—and analyze whether the Department of the Treasury Blueprint³ provides a wiser structure of financial regulation.

Jim Cox in *Coping in a Global Marketplace: Survival Strategies for a 75-Year-Old SEC* similarly begins, “data bear witness to the

* President, University of Rochester; coauthor, with Louis Loss and Troy Paredes, of the eleven-volume treatise *Securities Regulation* (4th ed. 2006); and author of *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance* (3d ed. 2003).

¹ On the SEC's origins, see generally Joel Seligman, *The Transformation of Wall Street* 73–100 (3d ed. 2003).

² John C. Coffee, Jr. & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 Va. L. Rev. 707, 708 (2009).

³ Dep't of the Treasury, *Blueprint for a Modernized Financial Regulatory Structure* (2008) [hereinafter *Blueprint*].

fact that government agencies come and go,”⁴ but highlights the complexities of creating an international approach to accounting standards.

Judge Easterbrook begins his essay with uncharacteristic insouciance:

My association with the SEC goes way back. In the 1970s, when I was in the Solicitor General’s Office, I helped them lose some prominent cases, including *Blue Chip Stamps* and *Chiarella*; I’m sure that the SEC could have lost them without me, but it was fun to have participated.⁵

But Judge Easterbrook also shares the prevailing uncertain mood: “I assume that there will be a 100th Anniversary conference in 2034, and I’m looking forward to that one too. (Even if the SEC is abolished, as the Treasury has proposed)”⁶

Donald Langevoort warns in *The SEC, Retail Investors, and the Institutionalization of the Securities Markets* that the Commission—founded in part on the concept of protecting the retail investor—has become increasingly irrelevant as “[t]he last thirty years or so have brought a rapid shift toward institutionalization in the financial markets in the United States.”⁷

Even Adam Pritchard and Bob Thompson’s insightful history, *Securities Law and the New Deal Justices*,⁸ brings little relief from the sense of *fin de siècle*. The world they describe, in which the Commission’s interpretations of statutes such as the former Public Utility Holding Company Act were almost invariably judicially upheld,⁹ is now a world long past.

⁴ James D. Cox, *Coping in a Global Marketplace: Survival Strategies for a 75-Year-Old SEC*, 95 Va. L. Rev. 941, 941 (2009).

⁵ Frank H. Easterbrook, *The Race for the Bottom in Corporate Governance*, 95 Va. L. Rev. 685, 685 (2009) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *Chiarella v. United States*, 445 U.S. 222 (1980)).

⁶ *Id.*

⁷ Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 Va. L. Rev. 1025, 1026 (2009).

⁸ A.C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 Va. L. Rev. 841 (2009).

⁹ See Seligman, *supra* note 1, at 251 (“In the 280 judicial proceedings completed under the Public Utility Holding Company Act by June 30, 1952, only two were terminated adversely . . .”).

I too believe that we have reached a moment of discontinuity in our federal and state systems of financial regulation that will require a comprehensive reorganization. Not since 1929–33 has there been a period of similar crisis and such a perceived need for a fundamentally new approach to financial regulation.

The need for a fundamental restructuring of finance is based only in part on the current economic emergency that began in our housing and credit markets, the concomitant collapse of several leading investment and commercial banks and insurance companies, and the dramatic deterioration of our stock markets. Nor does it depend on the significant weaknesses in SEC enforcement exhibited in the much publicized Bear Stearns and Bernie Madoff cases¹⁰ and with respect to other leading investment bank holding companies.¹¹

Quite aside from these dramatic events, finance has fundamentally changed in recent decades while financial regulation has moved far more slowly. For example, in the New Deal period, most finance was atomized into separate investment banking, commercial banking, or insurance firms. Today, finance is dominated by financial holding companies, which operate in each of these, and cognate areas such as commodities. This misalignment between regulators and covered firms creates the most significant reason to restructure financial regulation today.

In addition, the challenge of regulating finance in the New Deal period was domestic. Now, our credit markets are increasingly reliant on trades originating from abroad, our major financial institutions trade simultaneously throughout the world, and information technology has made international money transfer virtually instantaneous. The fundamental challenge today is increasingly international.

Modern finance also involves a wider variety of investors and investments. In 1930, only about 1.2% of the American public di-

¹⁰ See, e.g., Press Release 2008-297, U.S. Sec. and Exch. Comm'n, Statement Regarding Madoff Investigation (Dec. 16, 2008), available at <http://www.sec.gov/news/press/2008/2008-297.htm>.

¹¹ See Coffee & Sale, *supra* note 2, at 735–36.

rectly owned stock traded on the New York Stock Exchange.¹² Today, by contrast, a recent report estimated that in the first quarter of 2008 approximately 47% of U.S. households owned equities or bonds.¹³ Furthermore, while in the New Deal period financial investments were limited largely to stock, debt, and bank accounts, today we live in an age of complex derivative instruments, some of which recent experience has painfully shown are not well understood by investors (and on some occasions not even by issuers or counterparties).

Significantly, we have also learned that our system of finance is more fragile than once believed. The web of interdependency that today is the hallmark of sophisticated trading means that when a major firm such as Lehman Brothers goes bankrupt, cascading impacts can have powerful effects on an entire global economy.¹⁴

Against this backdrop, it is indeed uncertain whether the Commission will survive to celebrate its 100th anniversary—at least in a form familiar to us today.

In March 2008, the Department of the Treasury published its *Blueprint for a Modernized Financial Regulatory Structure*.¹⁵ This report proposed a radical reorganization of federal financial regulation, including short-term recommendations, intermediate recommendations, and an optimal long-term regulatory framework for many sectors of the economy, including the insurance industry, the banking sector, the securities sector, and the commodities industry.¹⁶ While it is decidedly unlikely that its full panoply of recommendations will be adopted, as SEC Chair Nominee Mary

¹² See Joel Seligman, *The Obsolescence of Wall Street: A Contextual Approach to the Evolving Structure of Federal Securities Regulation*, 93 Mich. L. Rev. 649, 654 (1995) (citing S. Rep. No. 73-1455, at 9 (1934)).

¹³ Inv. Co. Inst. & Sec. Indus. & Fin. Mkts. Ass'n, *Equity and Bond Ownership in America 1* (2008), available at http://www.ici.org/pdf/rpt_08_equity_owners.pdf.

¹⁴ The day after Lehman Brothers filed for bankruptcy, the Department of the Treasury decided to orchestrate an \$85 billion bailout for insurance giant AIG. *Lehman Brothers Holdings Files Ch. 11 Petition After Gov't Denies Funding*, 40 Sec. Reg. & L. Rep. (BNA) 1476 (Sept. 22, 2008). Congress subsequently passed the \$700 billion Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

¹⁵ *Blueprint*, supra note 3.

¹⁶ The impact of this reorganization would be massive: the U.S. insurance industry held assets totaling \$6 trillion at the end of 2006; the U.S. banking sector had \$12.6 trillion; and the U.S. securities sector was worth \$12.4 trillion. *Id.* at 165.

Schapiro once put it, “This blueprint marks an important beginning to a debate that is critical to the future of investor protection.”¹⁷

In the short term, the Blueprint suggests three ways to modernize the President’s Working Group on Financial Markets to enhance its effectiveness as a coordinator of financial regulatory policy. First, the Blueprint would broaden the Working Group’s focus to include the entire financial sector, rather than just financial markets. Second, it would seek to facilitate better interagency coordination and communication in mitigating systemic risk to the financial system, enhancing market integrity, promoting consumer and investor protection, and supporting capital markets’ efficiency and competitiveness. Third, it would expand the Working Group’s membership—beyond the Secretary of the Treasury and the heads of the Federal Reserve Bank, the SEC, and Commodities Futures Trading Commission (“CFTC”)—to include the heads of the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation (“FDIC”), and the Office of Thrift Supervision.¹⁸ In addition to modernizing the President’s Working Group, the Blueprint recommends the creation of a new Mortgage Origination Commission to address the high levels of delinquencies, defaults, and foreclosures among subprime borrowers in 2007 and 2008 and to develop uniform minimum licensing qualifications for state mortgage market participants.¹⁹

The Blueprint’s intermediate recommendations are those most likely to inspire serious debate. These recommendations include phasing out the federal thrift charter, requiring thrifts to secure a national bank charter, and closing the Office of Thrift Supervision within the next two years.²⁰ They also call for research to determine the appropriate supervisor for state-chartered banks,²¹ the creation of a new system of federal regulation administered by the Federal Reserve to address payment and settlement systems,²² and the establishment of an optional federal charter for insurers. Insurers

¹⁷ Cyrus Sanati, S.E.C. Nominee Has a Merger on Her Resume, N.Y. Times Deal-Book, Dec. 18, 2008, <http://dealbook.blogs.nytimes.com/2008/12/18/sec-nominee-has-a-merger-on-her-resume/>.

¹⁸ Blueprint, supra note 3, at 5–6.

¹⁹ Id. at 6–7.

²⁰ Id. at 98–99.

²¹ Id. at 99–100.

²² Id. at 100–06.

that opted into the federal charter system would be subject solely to federal oversight and regulation, while insurers that chose not to opt in would remain subject to state regulation.²³

Perhaps the Blueprint's most controversial intermediate recommendation calls for merging the SEC and CFTC, both in structure and regulatory philosophy. To effectuate this merger, the Blueprint recommends a multistep process. First, it would task the President's Working Group with drafting overarching regulatory principles focused on investor protection, market integrity, and overall financial system risk reduction. Second, it would create a joint CFTC-SEC staff task force with equal agency representation to resolve specified differences in the securities and commodities rules. Finally, it would harmonize the regulation of broker-dealers and investment advisers, in part by creating a self-regulatory organization for investment advisers similar to the Financial Industry Regulatory Authority ("FINRA").²⁴

This alone is a breathtaking agenda, but there are even more ambitious proposals for an optimal long-term regulatory structure, inspired by the "objectives based" approach currently used in Australia and the Netherlands.²⁵ One of the ultimate goals is to transform the Federal Reserve into the "market stability regulator" with new responsibilities to supervise federally insured depository institutions, federal insurance institutions, and federal financial services providers.²⁶

The Blueprint would also create two entirely new regulatory agencies. First, the Prudential Financial Regulatory Agency would assume the roles of the Office of the Comptroller of the Currency and the Office of Thrift Supervision and supervise financial institutions backed by explicit government guarantees, including federal

²³ Id. at 126–33.

²⁴ Id. at 106. The Blueprint also recommended that the SEC "use its exemptive authority to adopt core principles to apply to securities clearing agencies and exchanges . . . modeled after the core principles adopted for futures exchanges and clearing organizations under the Commodity Futures Modernization Act." Id. at 12. It further recommended that all clearing agencies and market self-regulatory organizations ("SROs") be permitted to self-certify most rulemakings, which would become effective upon filing (though the SEC would retain its right to abrogate rulemakings later). Id.

²⁵ Id. at 13–14.

²⁶ Id. at 146–56.

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deposit insurance and state-established insurance guarantee funds.²⁷ Second, the Conduct of Business Regulatory Agency would monitor business conduct regulation across all types of financial firms, including federally insured depository institutions, federal insurance institutions, and federal financial services providers. It would be responsible for consumer protection, business practices, standards for entry into the financial services industry, and sales and service practices. The Agency would also monitor broker-dealers, hedge funds, private equity funds, venture capital funds, and mutual funds and would develop standards that address such topics as net capital, public disclosures, testing, training, fraud, manipulation, and such duties to customers as best execution and suitability.²⁸

Under this plan, the SEC would be succeeded both by the new Conduct of Business Regulatory Agency and by a new Corporate Finance Regulator to assume the Commission's current responsibilities with respect to corporate disclosures, corporate governance, accounting, and similar issues.²⁹

I am quite skeptical that the proposed long-term regulatory structure will be adopted in the form proposed. This "optimal" solution may achieve the improbable outcome of uniting industries and regulators in common opposition. To put it simply, even during today's economic emergency, this approach may be politically infeasible. Moreover, while the proposal is over 200 pages long, it lacks the serious, detailed policy analysis necessary to support many of its specific proposals. For example, the Blueprint explains neither why different agencies currently follow different regulatory approaches for different industries nor why virtually all of these approaches should be abandoned in the future.³⁰

²⁷ Id. at 17–19.

²⁸ Id. at 170–80. SROs would retain a role. The standards developed by the Conduct of Business Regulatory Agency would apply both to nationally chartered and state-chartered firms.

²⁹ Id. at 21.

³⁰ The Blueprint does include this observation: "In general, margin is a very different concept in the futures and securities worlds." Id. at 116. This was a rare recognition that differences existed, but the Report did not follow through and explain why. Differences in customers, differences in technology, differences in intermediaries, differences in internationalization are contextual factors that may well require differences in regulation.

I am not alone in my skepticism. The general reception of the Blueprint was strikingly critical.³¹ At least some of the intermediate recommendations are likely to receive considerable attention in the next few years, but these recommendations also deserve careful analysis. There are powerful advantages to preserving focused agencies like the Securities and Exchange Commission and the Public Company Accounting Oversight Board (“PCAOB”).

Debates over the proper structure of the financial regulatory system are not new. In 1934, those who sought the most far-reaching federal securities regulation felt strongly that the Federal Trade Commission (“FTC”), which initially enforced the Securities Act of 1933, should remain the federal securities regulator. The attitude of the New Deal advocates was captured by Ferdinand Pecora, who led the legendary Stock Exchange Practices hearings that gave rise to the New Deal’s federal securities laws, when he urged that the new Exchange Act would “be a good or bad law depending upon the men who administer it.”³² The FTC in 1934 was very sympathetic to far-reaching securities regulation and included among its members James Landis, who championed continuing the FTC as the federal securities regulator. Only later would Landis revise his view and come to believe that the administrative expertise of an agency with a narrower jurisdiction, like the SEC, had advantages over an agency with broad jurisdiction, like the FTC.³³

More recent experience has amplified this point. The broader an agency’s jurisdiction, the less likely it is to have the resources or focus to address appropriate priorities. A significant illustration of this phenomenon involved the SEC during the late 1990s. Given a challenging political context and inadequate budget, the Commission’s ongoing review of periodic disclosure documents deteriorated badly. In October 2002, a staff report of the Senate Governmental Affairs Committee found that in FY 2001 the Division of Corporate Finance was able to complete a full review of only 2,280 of 14,600 Form 10-K annual reports. Despite the Division’s stated goal to review every company’s annual report at least once every

³¹ See, e.g., Editorial, *Fear of Regulating*, N.Y. Times, Apr. 3, 2008, at A26 (“[T]he blueprint was mostly developed before the current financial crisis and accordingly comes across as outdated.”).

³² Seligman, *supra* note 1, at 100.

³³ *Id.* at 97.

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three years, the staff report concluded that “[o]f more than 17,300 public companies, approximately 9200, or 53%, have not had their Forms 10-K reviewed in the past three years.”³⁴ Enron, then a notorious example of staff neglect, had last received a partial review of its Form 10-K in 1997 and had not been subject to a full review since 1991.³⁵

The creation of the PCAOB under the Sarbanes-Oxley Act, however, ensured that one federal agency would be solely responsible for audit quality. The PCAOB, unlike the SEC of 1990s, had a narrow and focused agenda that allowed it to concentrate its resources on audit review; it did not have to address the SEC’s broad array of other priorities including market regulation, broker-dealer and investment adviser regulation, new securities offerings, municipal and governmental securities dealers, and enforcement. While the first SEC Chair, Joseph Kennedy, memorably observed in 1935 that “I’d hate to go out of here thinking I had just made some changes in accounting practices,”³⁶ it is reasonable to assume that no one at the PCAOB has ever derogated improving auditing practices.

This point should not be overstated. The narrower an agency’s agenda, the less likely it will be to galvanize White House or Congressional support for its budget and administrative priorities. A narrowly focused agency runs the risk of being lost in the alphabet soup of federal agencies. The SEC, like many agencies, has too often been subject to a boom and bust cycle of budgetary and legislative support, with effective support most likely only in times of crisis. In the heroic early days of the SEC, it is fondly remembered that Chairman William O. Douglas played poker with President Roosevelt and was a favorite because of the way he mixed martinis. More recently, SEC Chair Arthur Levitt rarely saw President Clinton and is certainly not known to have played cards with him. For Levitt, securing White House support was far more difficult

³⁴ Staff of S. Comm. on Gov’t Affairs, 107th Cong., *Financial Oversight of Enron: The SEC and Private-Sector Watchdogs* 11 (Comm. Print 2002), available at <http://hsgac.senate.gov/100702watchdogsreport.pdf>.

³⁵ *Id.* at 31–32.

³⁶ Seligman, *supra* note 1, at 116–17.

than it was for Douglas, and garnering support remains a challenge for the heads of smaller regulatory agencies today.³⁷

The challenge is to strike the right balance between expertise, which is a consequential virtue of a well-run regulatory agency, and political effectiveness, which often can be better achieved by reducing the number of responsible agencies and increasing resources for each. There is no algebraic formula to achieve this balance, but too little weight, in my view, was accorded to agency expertise in the Blueprint.

A quite different justification for the maintenance of separate federal regulatory agencies is less inspiring, but no less powerful. The politics of Congress and the agencies themselves tend to fortify inertia. In the wake of the October 19, 1987 stock market crash, the Report of the Presidential Task Force on Market Mechanisms argued that “the markets for stocks, stock index futures, and stock options—are in fact one market”; accordingly, “one agency must have the authority to coordinate a few but critical intermarket regulatory issues, monitor intermarket activities and mediate intermarket concerns.”³⁸ The Report concluded that the Federal Reserve Board “is well qualified to fill the role of the intermarket agency.”³⁹

Within one month, this proposal was effectively dead. Federal Reserve Board Chair Alan Greenspan testified that he “seriously question[ed] this recommendation”:

To be effective, an oversight authority must have considerable expertise in the markets subject to regulation, something that the CFTC and SEC have developed over some time. Moreover, were the Federal Reserve to be given a dominant role in securities market regulation, there could be a presumption by many that the federal safety net applicable to depository institutions was being extended to these markets and the Federal Reserve stood

³⁷ Cf. William L. Cary, *Politics and the Regulatory Agencies* 4 (1967) (“[G]overnment regulatory agencies are stepchildren whose custody is contested by both Congress and the Executive, but without very much affection from either one . . . Without the cooperation of both Congress and the Executive, little constructive can be achieved. To reemphasize the point, an agency is literally helpless if either branch is uninterested or unwilling to lend support.”).

³⁸ Report of the Presidential Task Force on Market Mechanisms 55, 59 (1988).

³⁹ *Id.* at 69.

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ready to jump in whenever a securities firm or clearing corporation was in difficulty.⁴⁰

Beyond the Federal Reserve's lack of enthusiasm, there were other fundamental reasons for rejecting the single regulatory proposal as initially formulated. The intermarket coordinator could be criticized for being overly general. In effect, the coordinator would have been expected to perform three quite distinct tasks: (1) control the liquidity of the banking system in making available credit to stock brokers, futures, commodities merchants, and clearing agencies; (2) coordinate stock markets, options, and index futures via circuit breaker mechanisms, information systems, market surveillance, enforcement, and emergency planning; and (3) harmonize margin requirements across markets. The first task was already addressed by the Federal Reserve Board; the second and third might have been best addressed by consolidating in the SEC all financial futures then overseen by the CFTC that were part of what correctly had been labeled "one market."

Indeed, consolidating the responsibilities of the SEC and the CFTC could eliminate a considerable degree of duplicative effort in light of the fact that the SEC currently reviews petitions for approval before the CFTC. This overlapping authority has in the past led to protracted litigation to determine which agency has jurisdiction over various hybrid financial instruments.⁴¹ But the consolidation argument, though advanced by SEC Chair David Ruder in 1988⁴²—and others before and since⁴³—has not received serious Congressional consideration for the simple reason that the SEC

⁴⁰ "Black Monday," The Stock Market Crash of October 19, 1987: Hearings before the S. Comm. on Banking, Hous. & Urban Affairs, 100th Cong. 98–99 (1988) (testimony of Alan Greenspan, Chairman of the Fed Reserve).

⁴¹ 2 Louis Loss, Joel Seligman & Troy Paredes, *Securities Regulation* 1103–40 (4th ed. 2007).

⁴² See David S. Ruder, Chairman, Sec. Exch. Comm'n, Paper Delivered Before the Economic Club of Chicago, *October Recollections: The Future of the U.S. Securities Markets* 20–28 (Oct. 20, 1988), available at <http://www.sec.gov/news/speech/1988/102088ruder.pdf>.

⁴³ For recent discussions on this sort of proposal, see Rachel McTague, *Casey Hails Congress' Consideration of Possible SEC-FTC Combination*, 39 *Sec. Reg. & L. Rep.* (BNA) 1657 (Oct. 29, 2007) and Rachel McTague, *SIFMA Advocates SEC-CFTC Merger Under Treasury's Reg Reform Initiative*, 39 *Sec. Reg. & L. Rep.* (BNA) 1840 (Dec. 2, 2007).

and the CFTC are subject to separate Congressional oversight committees.

The most likely way to achieve serious consideration of an SEC-CFTC consolidation would be to give Congressional committees specific oversight responsibility for all stocks, stock options, and financial futures (or even all futures). Similarly, mature consideration of broader types of financial regulatory consolidation today would involve vesting one committee in each house with oversight responsibility for all relevant financial agencies. This may sound easy, but anyone who has attempted to remove jurisdiction from a Congressional committee in Washington can well appreciate how difficult this can be.

For the sake of argument, let us suppose that questions of agency expertise could be addressed effectively through some form of agency consolidation and that Congressional oversight issues could be resolved. Changes in regulatory structure inevitably reopen long-settled policy debates. What appear to be the norms of regulation before a merger may end up quite different after the consolidation. For example, until quite recently, proposals to consolidate regulatory agencies were often accompanied by calls for broader exemptions for smaller firms, as suggested by a 2006 SEC Advisory Committee,⁴⁴ or by proposals to restrict private litigation.⁴⁵

A current and frequently expressed theme involves replacing detailed financial regulation with a more principles-based approach.⁴⁶ Indeed, a leitmotif of the Blueprint is its strong preference for “core principles” rather than more detailed legal standards. Core principles are an inspiring aspiration. All of us would like to make regulation simpler and more efficient.

⁴⁴ Advisory Comm. on Smaller Pub. Cos., Final Report to the United States Securities and Exchange Commission 1–8 (2006), available at <http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf>.

⁴⁵ See, e.g., Michael R. Bloomberg & Charles Schumer, Sustaining New York’s and the U.S.’s Global Financial Services Leadership 100–04 (2007), available at http://schumer.senate.gov/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20FINAL.pdf; Comm. on Capital Mkts. Regulation, Interim Report 5, 12–13 (2006), available at http://www.capmksreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.

⁴⁶ See, e.g., Richard M. Kovacevich et al., Fin. Servs. Roundtable, The Blueprint for U.S. Financial Competitiveness 29–43 (2007), available at <http://www.fsround.org/cec/pdfs/FINALCompetitivenessReport.pdf>.

There is no serious question that some rules are historical artifacts or have grown longer and more expensive than is wise. That said, core principles are only part of what a mature regulatory system requires. For example, the Commodity Future Modernization Act Core Principles, which the Treasury Department has repeatedly praised,⁴⁷ include the broad, general requirements that the board of trade “list on the contract market only contracts that are not readily susceptible to manipulation” and “maintain records of all activities related to the business of the contract market in a form and manner acceptable to the Commission for a period of 5 years.”⁴⁸ While these core principles may be helpful, they are inadequate without an enabling statute, often detailed regulation, case law, and agency interpretative guidance. What, for example, is manipulation? It is not a self-defining term. What records must be retained? What form and manner will be acceptable to the Commission?

And there are sometimes quite negative consequences of an overemphasis on core principles. To the extent that this may result in ambiguity in legal requirements, core principles may inspire greater litigation. The history of the SEC further suggests that without detail and customizing by type of trade, a principle or rule itself (for example, the net capital rule) can be undermined by unexpected SRO or industry initiatives (as in the late 1960s during the so-called back office crisis).⁴⁹

Does this mean that proposals to consider a new structure for financial regulation are unwise? No, I believe such proposals have merit, but we must keep our eyes open to the complexities they involve.

It is very difficult to rationalize a system of financial regulation today that involves five separate federal institutions, including the Federal Reserve System, the Office of the Comptroller of the Currency, the FDIC, the Office of Thrift Supervision, and the National Credit Union Administration, as well as fifty state systems, to ad-

⁴⁷ See, e.g., *Blueprint*, supra note 3, at 215–18.

⁴⁸ *Id.* at 215, 216.

⁴⁹ See Seligman, supra note 1, at 457–58 (describing different approaches to net capital at the New York Stock Exchange and the SEC and how then NYSE Rule 325 permitted withdrawal of capital during a shorter period of time than SEC Rule 15c-3-1).

dress depository institutions. We are also one of the few countries in the world that separately regulates securities and commodities. Securities regulation, like banking, occurs both at the national and state level. Insurance regulation, by contrast, occurs solely at the state level.

The Federal Reserve Bank often has stepped up and played a lead role in crisis management. This occurred after the October 1987 Stock Market Crash, in the 1990s in Asia and Russia, and during the Stock Market Crash of 2008. But the Fed's role, like that of the Department of the Treasury before the adoption of the Emergency Economic Stabilization Act of 2008,⁵⁰ has typically been ad hoc. Would our economy be more stable over time if ongoing risk management responsibilities were legislated more clearly? An affirmative answer to this question is probably the most widely supported consensus that has emerged from the current economic emergency.⁵¹

To formalize one agency or council as unequivocally in charge during times of crisis is wise. It has become all the more appropriate as financial firms increasingly participate in multiple sectors of the securities, insurance, commodities, and banking industries. But electing to have a single crisis manager is quite different from choosing to have one agency alone address all aspects of financial regulation.

The existing federal financial regulatory agencies have quite different purposes and scopes. Bank regulation, for example, has long been based on safety and solvency priorities; its scope covers consumer protection. By contrast, securities regulation largely focuses on investor protection, so it addresses disclosure obligations, accounting standards, audit quality, broker-dealer and investment advisor regulation, the regulation of stock and option exchanges, and fraud enforcement. Insurance and commodities regulation have similarly distinctive purposes and scopes. These differences in purpose and scope, in turn, are often based on distinctive patterns of investment (retail versus institutional, for example), different

⁵⁰ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

⁵¹ To be sure, the Blueprint raises other questions that are not fully addressed. For example, would greater reliance on the Federal Reserve mean less reliance on the Presidential Working Group?

degrees of internationalization, and different risks of intermediation in specific financial industries.

The political structures of the existing agencies are also strikingly different. The Department of the Treasury is part of the Executive Branch. The Federal Reserve System and SEC, by contrast, are independent regulatory agencies. Independence as a practical reality is quite different at the Fed, which is self-funding, from at the SEC and most other “independent” regulatory agencies, whose budgets are presented as part of the administration’s budget.⁵² In creating the SEC, however, Congress stressed the need to depoliticize leadership by requiring that “[n]ot more than three of such commissioners shall be members of the same political party.”⁵³

A cogent case can be articulated that the Federal Reserve Bank should be designated as a crisis manager with appropriate powers to address systemic risk management. This reasoning, however, requires significant analysis. There needs to be considerable thought on how best to harmonize these new risk management powers with the ongoing roles of other financial regulatory agencies. The Fed, for example, is not an enforcement agency, and the current emergency seems to further underscore the need for specialized agencies to address enforcement.⁵⁴

Consolidation of the agencies discussed by the Blueprint also should be considered. But it should be noted that the case for consolidation would in fact be weakened if the Federal Reserve or another agency or council were unequivocally given the role of crisis manager. Each proposed consolidation should be analyzed on its individual merits. It is highly likely that some of the proposed mergers will prove wiser than others.

Underlying any potential financial regulatory consolidation are important policy questions. What should be the fundamental purpose of new legislation? Should Congress seek a system that effectively addresses systemic risk, safety and solvency of intermediar-

⁵² See Joel Seligman, *Self-Funding for the Securities and Exchange Commission*, 28 *Nova L. Rev.* 233, 253–58 (2004).

⁵³ Securities Exchange Act of 1934 § 4(a), 15 U.S.C. § 78d(a) (2006).

⁵⁴ See, e.g., Eric Lichtblau, *Federal Cases of Stock Fraud Drop Sharply*, *N.Y. Times*, Dec. 25, 2008, at A1 (noting that a dramatic decline in prosecutions for securities fraud in 2008—133 prosecutions in first eleven months compared to 513 cases in 2002—contributed “to make the federal government something of a paper tiger in investigating securities crimes”).

ies, investor or consumer protection, or other objectives? If there are multiple objectives, as is likely, how should they be harmonized?

How should Congress address such topics as the coordination of inspection, examination, conduct and trading rules, and the enforcement of private rights of action? Should the same approach be used in all financial industries, or should the underlying context of different industries justify different rules?

Should new financial regulators be part of the Executive Branch or remain independent regulatory agencies? If they are independent, should they follow the self-funding model of the Federal Reserve Board or rely on annual budget review like the SEC and most other independent agencies? To put this in different terms, should the emphasis in a new financial regulatory order be on command and control, to avoid economic emergency, or on depoliticization, to ensure that financial regulators consider all relevant views before making decisions?

How do we analyze the potentialities of new regulatory norms in an increasingly global economy? What role should self-regulatory organizations like FINRA play in a new system of financial regulation?⁵⁵

Two lessons seem particularly evident from recent history. First, the scope of any systemic reorganization of our financial regulatory scheme should be comprehensive. In a world in which financial holding companies can move resources internally with breathtaking speed, a partial system of federal oversight runs an unacceptable risk of failure. This means not only that obvious areas of omission like credit default swaps and hedge funds should be addressed; it also means that our historic system of state insurance regulation should be reexamined. The fact that the federal government provided over \$100 billion to insurance giant AIG alone suggests that insurance regulation cannot remain a matter of purely state concern.⁵⁶

Second, the fragility we have seen in global financial markets in recent months will inevitably reduce, for a time, the willingness to

⁵⁵ See, for example, the discussion in *Coffee & Sale*, *supra* note 2, at 768–73.

⁵⁶ See Fed Again Invokes Emergency Powers with \$37.8 Billion in New Loans to AIG, 40 *Sec. Reg. & L. Rep.* (BNA) 1643 (Oct. 13, 2008) (reporting an additional \$37.8 billion in loans on top of an initial \$85 billion lending facility).

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rely solely on free markets to provide optimal results. As SEC Chair Christopher Cox memorably said when the Commission disbanded the Consolidated Supervisory Entity system that previously had regulated the five largest independent investment banks, “voluntary regulation does not work.”⁵⁷ The challenge in the new order will be to avoid the tendency to over-regulate. Independent regulatory agencies such as the SEC have shown some talent in customizing Congressional financial regulatory enactments, usually adopted in times of crisis, to achieve the best balance between investors and industry.

So happy birthday, SEC. The Commission on balance should feel justly proud of its past. Its expertise should prove indispensable to financial regulation in the future.

⁵⁷ Press Release 2008-230, Sec. Exch. Comm’n, Chairman Cox Announces End of Consolidated Supervised Entities Program (Sept. 26, 2008), available at <http://www.sec.gov/news/press/2008/2008-230.htm>.