

The Regulatory Landscape- Recent Regulatory Actions and Proposals Affecting the Exchanges and Capital Markets and the Issues Raised



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Overview

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- A. Financial Regulation/Reform
- B. Small Business Capital Formation (JOBS Act)
- C. Market Structure Issues
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A. Financial Regulation/Reform

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- Market Structure/ other SEC-related issues addressed in the financial regulatory reform legislation (H.R. 4173- Dodd-Frank Wall Street Reform and Consumer Protection Act). The legislation became law in July 2010.
- Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) have weighed in and have had a significant influence on market structure issues, as envisioned by the financial reform legislation.
- The major issue going forward in implementing the rules under the Dodd-Frank Act will be whether the financial regulatory agencies have the budget to enforce the new rules. Already, the agencies have faced increased oversight from Congress and received smaller budgets.
- According to the Dodd-Frank Act Progress Report from the firm [DavisPolk](#) (July 15, 2013), regulators have only finalized 39.7% of the required 398 rules under the Dodd-Frank Act, while 127 (31.9%) rulemaking requirements have not yet been proposed.

Financial Regulation (General)

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- Created a Financial Stability Oversight Council (FSOC) to identify and regulate financial firms that are large, interconnected, or systemically risky. (Note that the constitutionality of this regulatory council was challenged in the DC Circuit- *State National Bank of Big Spring, et al. v. Geithner, et al.*, but never ruled on as the case was recently dismissed on other grounds- see slide 14)
- Established an orderly process for dismantling large, failing financial institutions (e.g., dissolution authority and ending “Too Big to Fail”).
- All standardized swap transactions between dealers and “major swap participants” have to be cleared and traded on an exchange or electronic platform.
- In regards to credit rating agencies, there is to be a reduction in conflicts of interest and market reliance. There is some conflict with the Basel Committee requirements.
- Created a Bureau of Consumer Financial Protection within the Federal Reserve, with authority to write consumer rules. The constitutionality of the CFPB was challenged in the DC Circuit (*State National Bank of Big Spring, et al. v. Geithner, et al.*) but the case was recently dismissed on other grounds. The Senate on July 16, 2013, confirmed CFPB Director Richard Cordray following a push by Senate Leadership to change the approval process for Executive Branch appointments.

Financial Reform: Capital Standards

- In the aftermath of the financial crisis, the Basel Committee on Banking Supervision approved stricter capital standards for financial institutions. However, due to the stringent regulatory requirements, there was pushback from many smaller financial institutions. As a result, the U.S. regulators delayed the implementation of these standards and eased regulatory burdens for smaller financial institutions. A number of members of Congress have introduced measures to address this concern.
- Finally in July 2013, U.S. bank regulators approved rules to require banks to maintain stronger capital positions. The rule which is consistent with the international Basel framework and includes a new minimum ratio of common equity tier I capital to risk-weighted assets of 4.5 percent and a common equity tier 1 capital conservation buffer of 2.5 percent of risk-weighted assets that will apply to all supervised financial institutions. In addition, for the largest, most internationally active banking organizations, the final rule includes a new minimum supplementary leverage ratio that takes into account off-balance sheet exposures.
- Meanwhile, at the international level, an April 2013 Basel Committee [report](#) on progress in the adoption of the Basel III regulatory reforms “notes that 14 member jurisdictions have issued final Basel III-based capital regulations, and that 11 of them now have final Basel III capital rules in force. The remaining 13 jurisdictions that missed the 1 January 2013 deadline for issuing final regulations have published their draft regulations. The report calls on these jurisdictions, particularly those that are home to global systemically important banks, to complete the issuance of final Basel III regulations expeditiously and to align their implementation with the internationally agreed transition period deadlines.”

Financial Reform: Orderly Liquidation Authority (OLA)

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- To address the problems associated with the bankruptcy of Lehman Brothers, Dodd-Frank Act developed a process to wind down large financial institutions. However this new process has not been tested on a large scale.
- On July 6, 2011, the Federal Deposit Insurance Corporation (“FDIC”) approved a final rule addressing certain provisions of the Orderly Liquidation Authority (“OLA”) contained in Title II of the Dodd-Frank Act. The Final Rule addresses the powers provided to the FDIC as receiver as well as the process by which creditors may file claims and seek a judicial determination of claims. The FDIC made an effort to follow bankruptcy practices and rights wherever possible, however, in some instances the requirements of Dodd-Frank were contrary to bankruptcy practice and did not permit parallel treatment. The Final Rule is comprised of three subparts: (1) definitions of general applicable terms, provisions concerning the recoupment of compensation, and clarifies the FDIC's, as receiver, power to avoid fraudulent and preferential transfers; (2) sets forth rules regarding the priority of claims, including those relating to administrative expenses and amounts owed to the United States, addresses the treatment of similarly situated creditors; (3) the receivership administrative claims process, addresses secured claims, and sets forth rules concerning the manner in which claims will proceed to court for a final judicial determination.
- In both the U.S. and the U.K., legislative reforms already made or planned in response to the financial crisis provide new powers for resolving failed or failing G-SIFIs. The FDIC and the Bank of England “have developed resolution strategies that take control of the failed company at the top of the group, impose losses on shareholders and unsecured creditors—not on taxpayers—and remove top management and hold them accountable for their actions.” These strategies “provide an efficient path for returning the systemically important parts of the G-SIFI to the private sector by exchanging or converting a sufficient amount of creditor claims from the failed company into capital in the newly resolved entities.” “Because the resolution action is taken at the top of the group and by the home authorities, continuity of all critical services would be maintained and subsidiaries (foreign and domestic) would remain open and operating with access to sufficient liquidity.” ([source](#))
- “The FDIC and the Bank of England continue to work to ensure that their respective resolution strategies will be fully operational. Importantly, the process of cross-border dialogue that has facilitated the above strategies reflects a shared public interest in developing the capacity to resolve a G-SIFI in a credible and effective manner, and offers a model for multilateral resolution planning more broadly.” ([source](#))
- The first FSB peer review [report](#) on resolution regimes “found that the implementation of the FSB Key Attributes for Effective Resolution Regimes for Financial Institutions is still at an early stage, and identifies a number of areas where further enhancement of resolution regimes by national authorities or additional guidance by the FSB is needed.” (April 2013)

Financial Reform: Financial Stability Oversight Council

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- The Dodd-Frank Act created a Financial Stability Oversight Council (FSOC) and provided the Council with broad authorities to identify and monitor excessive risks to the U.S. financial system arising from the distress or failure of large, interconnected bank holding companies or non-bank financial companies, or from risks that could arise outside the financial system; to eliminate expectations that any American financial firm is "too big to fail"; and to respond to emerging threats to U.S. financial stability. Members of the Council include: Secretary of the Treasury (chairs the Council); Chairman of the Federal Reserve; Comptroller of the Currency; Director of the Consumer Financial Protection Bureau; Chairperson of the U.S. Securities and Exchange Commission; Chairperson of the Federal Deposit Insurance Corporation; Chairperson of the Commodity Futures Trading Commission; Director of the Federal Housing Finance Agency; the Chairman of the National Credit Union Administration Board; an independent member (with insurance expertise), appointed by the President.
- So what has FSOC been up to?
- (1) Designation of non-bank SIFIs - The Financial Stability Oversight Council (FSOC) voted to designate American International Group, Inc. (AIG) and General Electric Capital Corporation, Inc. (GE Capital) as nonbank financial companies SIFIs. (DFA Section 113) Prudential Financial is the only company which has reportedly contested its designation as a "non-bank systemically important financial institution" (SIFI). FSOC also voted to move MetLife closer to a designation as a non-bank SIFI.
- (2) Identify concerns in the system stemming from lack of regulation over shadow banking, cybersecurity, weaknesses in market infrastructure and business continuity, money market funds, tri-party repo market transactions, low interest rates, reliance on reference rates that can be manipulated (such as LIBOR), and excess government support for housing finance system. (FSOC [Annual Report](#)- April 2013)- [See slides 8-10]
- **International:** At the international level, there is the Financial Stability Board (FSB), which coordinates at the international level the work of national financial authorities and international standard setting bodies and develops/promotes the implementation of effective regulatory, supervisory and other financial sector policies. The FSB intends to address the building of resilient financial institutions; improving resolution regimes; completing over-the-counter (OTC) derivatives reforms; strengthening the oversight and regulation of shadow banking; and reforming the setting of interbank and other financial benchmark rates. On July 18, the FSB identified an initial [list](#) of global systemically important insurers (G-SIIs).

Financial Stability Risks: Repo Market

- The tri-party repo market is a large and important market where securities dealers find short-term funding for a substantial portion of their own and their clients' assets.
- The tri-party repo market is now smaller: about \$1.73 trillion in collateral value as of June 2013, according to the NY Fed, compared with a peak of around \$2.5 trillion. There's also been less reliance on wholesale funding in general. As a percentage of total assets, wholesale funding dropped below 25% in the beginning of 2013, compared with a peak of about 40% at the end of 2008, according to Fed stats cited by Barclays.
- "The risks of runs and contagion remain," Daniel Tarullo, a member of the Federal Reserve Board of Governors, said in a [speech](#) in May 2013. "I do not think that the post-crisis program of regulatory reform can be judged complete until a more comprehensive set of measures to address this problem is in place."
- "A stable and well-functioning tri-party repo market is critical to the health and stability of the U.S. financial markets and the U.S. economy" because it creates liquidity, is interconnected with the rest of the system and serves as a "critical source of funding for systemically important broker-dealers," the New York Fed says on its website.
- Fire sales are one of the three systemic risk concerns highlighted in a May 2010 whitepaper by the Federal Reserve Bank of New York on tri-party repo infrastructure reform (Federal Reserve Bank of New York, 2010). These three risks are 1) the market's excessive reliance on clearing-bank provision of intraday credit to complete settlement, 2) poor liquidity and credit risk management practices on the part of various classes of tri-party repo market participants, and 3) the absence of any mechanism to mitigate the risk of fire sales of collateral in the aftermath of a large-dealer default. The FSOC also notes these concerns in its 2013 annual report.

Financial Stability Risks: Money Market Funds

- FSOC has cited concerns raised by money market funds and their vulnerabilities to market runs in its annual reports. FSOC issued a proposal to address money market fund reform in 2012.
- The SEC now has re-proposed this rule (with a comment deadline of September 17, 2013), so it is unclear whether the FSOC will need to act again.
- The SEC proposed two reform alternatives for the money market fund industry (MMF). The first approach would eliminate the stable “net asset value” (NAV) of one dollar for the \$1 trillion institutional prime MMF industry and require a floating NAV instead. Under the second approach, all prime MMFs could be subject to a prohibition on investor redemptions or an imposition of fees for investors who seek to pull their capital out. Specifically, if the fund’s weekly liquid assets were to fall below 15 percent of its total assets, the fund could need to impose a 2 percent liquidity fee on all redemptions. The SEC is considering whether to adopt just one of the two approaches or both of them in a combination of the rule.

Financial Stability Risks: Other

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- **Collateral:** While collateral serves as a core risk mitigation tool for the securities industry, there are growing concerns globally about potential risks associated with a future shortage of high-quality collateral, possible pro-cyclical impacts of collateral requirements, and operational challenges related to collateral management. Some of these risks may be precipitated by new regulatory rules around central clearing of over-the-counter (“OTC”) derivatives, while others represent flaws inherent in the market structure of global collateral management practices. Two important issues related to collateral should be considered in the effort to address these risks: (i) “the potential scarcity of high quality/liquid collateral in the future,” and (ii) “the need for significantly improved transparency and efficiency within the collateral management process.” ([Source](#))
- **Counterparty:** The combination of low returns and increasing appetite for risk warrants continued vigilance by regulators, investors, and lenders to the potential build-up of risks. “Although counterparty risk management in many markets has improved, particularly in the swaps market, concerns remain that funding markets have not taken the necessary steps to appropriately reduce counterparty risk.”
- From 2013 FSOC Annual Report- “Opaque chains of intermediation remain possible risk transmission channels, such as in short-term funding markets, securities lending, and derivative markets.”

Financial Reform: Office of Financial Research (OFR)

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- The OFR is an Office within the Treasury Department established by Congress to serve the Financial Stability Oversight Council, its member agencies, and the public by improving the quality, transparency, and accessibility of financial data and information; by conducting and sponsoring research related to financial stability; and by promoting best practices in risk management. (Note that the Federal Reserve has an office to address these issues too: Office of Financial Stability Policy and Research.)
- OFR Director Richard Berner explained that the financial crisis revealed the deficiencies in the data, in that it was tough prior to the financial crisis to find out where a threat was coming from and how it might arrive. In particular, he cited the opaqueness of shadow banking assets and the threat this posed and still poses to the financial system. To address the lack of understanding of shadow banking, Berner outlined the following “agenda for analysis” by the OFR: (1) “analysis of endogenous relationship between volatility and leverage”; (2) “roles and functioning of secured and unsecured funding markets”; (3) the effect “regulatory arbitrage and financial reform have on these markets and on securitization”; and (4) triggers for runs and fire sales, and what mitigates them.
- **Upcoming Agenda:** OFR Staff explained that the OFR is working on a study related to potential threats from asset management activities, including the ongoing studies related to money market funds (MMFs). Staff explained that one ongoing current analysis project is examining the low level of volatility in the market over the past few years. Staff noted that a recent working paper analyzed contagion in financial networks and how interconnections serve as potential channels for contagion, and that an upcoming OFR working paper focuses on the sources and uses of short-term funding in the U.S. OFR staff also explained that OFR has been actively engaged in the legal entity identifier (LEI) initiative and that the OFR is working to embed the LEI into mortgage industry standards.
- **International—** At the international level, the FSB has moved to create a global LEI system. The LEI system is an alphanumeric code and associated set of six reference data items to uniquely identify a legally distinct entity that engages in financial market activities. This global standard is endorsed by the G-20 and is consistent with the specifications put forward by the International Organization for Standardization.

Financial Reform: Derivatives

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- Most of Title VII of the Dodd-Frank Act falls under the jurisdiction of the CFTC. The CFTC was quick to propose a number of rules, and even finalized some. But problems arose as the order of implementation and it became clear that the speed of implementation overtook the ability for clear and concrete rules. The CFTC (as noted in the legal challenges section) has been challenged on its rulemakings as well as its use and retention of industry data. The CFTC has tried to address some of the problems that arose through the use of staff “no-action” letters but this has not been optimal. Instead of creating clear rules of the road for the market, the CFTC rulemaking process has resulted in regulatory uncertainty.
- CFTC Chairman Gary Gensler also identified a number of issues which the Commission could act on this summer including the commodity pool operator harmonization final rule, final exemptive relief for cooperatives, systemically importance clearinghouses, a proposed rule on position limit aggregation, customer protection rules, a concept release on testing and supervision, and ownership and control rules. He noted that the CFTC is still working on the Volcker Rule with other financial regulatory agencies.
- **International:** Also, as noted on slide 37, the European Commission and the CFTC reached a “[Common Path Forward on Derivatives](#)” on July 11.
- The 5th FSB progress [report](#) on the implementation of OTC derivatives market reforms “found that, while progress has been made toward meeting the G20 commitments through international policy development, adoption of legislation and regulation, and expansion of infrastructure, no jurisdiction had fully implemented requirements by end-2012. Less than half of the FSB member jurisdictions currently have legislative and regulatory frameworks in place to implement the G20 commitments and there remains significant scope for increases in trade reporting, central clearing, and exchange and electronic platform trading in global OTC derivatives markets.” (April 2013)

Financial Regulation: Hedge Funds

- Title IV of the Dodd-Frank Act makes numerous changes to the registration and reporting and recordkeeping requirements of the Investment Advisers Act of 1940. Among these is the requirement that advisers to most private funds (hedge funds and private equity funds) register with the Commission. Only advisers that advise exclusively venture capital funds and advisers solely to private fund with less than \$150 million in assets under management in the United States are exempted. Foreign private advisers and advisers to licensed small business investment companies also are exempted.
- The Dodd-Frank Act provides the SEC with the authority to collect data from registered investment advisers about their private funds for the purposes of the assessment of systemic risk by the Financial Stability Oversight Council. In addition, the Dodd-Frank Act modifies the allocation of responsibility for mid-sized advisers between state regulators and the Commission.
- These amendments under the Dodd-Frank Act took effect on July 21, 2011 (one year from the date of enactment of the Dodd-Frank Act). On June 22, 2011, the Commission [adopted definitional rules](#) and [implementing rules](#), including transitional rules, to implement the Dodd-Frank Act amendments. The definitional and transitional rules became effective on July 21, 2011. The implementing rules generally became effective on September 19, 2011.
- On October 31, 2011, the SEC [adopted rules](#) (jointly with the CFTC for dually-registered advisers) requiring advisers to hedge funds and other private funds to report information for use in monitoring systemic financial risk.
- On July 25, 2013, the SEC released its “[Annual Staff Report Relating to the Use of Data Collected from Private Fund Systemic Risk Reports](#)”. “Each investment adviser registered with the Commission that has at least \$150 million in private fund regulatory assets under management (RAUM) recently completed an initial Form PF filing. The information collected on Form PF is intended to primarily support FSOC and the assessment of systemic risk. Since adoption of the new reporting requirement, the Commission staff has implemented the new electronic form filing requirement, established internal protocols regarding access to the data collected and provided FSOC, through OFR, access to the PF Data. The information collected on Form PF will also support the Commission’s regulatory programs relating to private fund advisers. Commission staff has begun to assess the quality of the data collected and in the coming months the staff will develop and refine data analytics incorporating Form PF data to further the Commission’s mission.”

Financial Reform: Legal Challenges

- For those adversely impacted by the Dodd-Frank Act, many have turned to the courts for a remedy.
- **CFPB/ FSOC Constitutionality**- This suit (*State National Bank of Big Spring et al v. Geithner et al*) challenges: (1) the constitutionality of the formation and operation of the CFPB; (2) the constitutionality of the appointment of CFPB Director Richard Cordray; and (3) the constitutionality of the creation and operation of the Financial Stability Oversight Council. On August 1, 2013, the case was dismissed for lack jurisdiction but an appeal was filed with U.S. Court of Appeals for the District of Columbia Circuit.
- **Position Limits** - The plaintiffs the International Swaps and Derivatives Association (ISDA) and the Securities Industry and Financial Markets Association (SIFMA) challenged a recent rulemaking by the CFTC setting position limits on derivatives tied to 28 physical commodities. (*International Swaps and Derivatives Association, et al. v. United States Commodity Futures Trading Commission*) The CFTC appealed the lower court decision to vacate the rule on November 16, 2012.
- **Swap Data Repositories**- The Chicago Mercantile Exchange (CME) sought an injunction against CFTC rules for reporting private trade information, claiming that submissions to swap-data repositories would be redundant. (*Chicago Mercantile Exchange Inc. v. U.S. Commodity Futures Trading Commission*) Following the CFTC's withdrawal of some guidance on cleared swaps reporting, the CME withdrew its lawsuit on November 29, 2012.
- **Clearing of Swaps/Futures** - Bloomberg (*Bloomberg v. CFTC*) sought to enjoin the CFTC's margin rule for swaps, which Bloomberg alleged creates a bias against the usage of swaps in favor of the usage of futures. The case was dismissed for lack of subject-matter jurisdiction on June 7, 2013.
- **Volcker Rule** - Occupy the SEC plaintiffs (*Taylor and Ekman v. Bernanke et al.*) seek to compel the SEC, CFTC, Federal Reserve, FDIC, Treasury, and OCC to implement the requirements of the Volcker Rule (which are the prohibitions on proprietary trading and certain relationships with hedge funds and private equity funds). The case was filed in federal court on February 26, 2013.

Financial Reform: Legal Challenges

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- **Other SEC Challenges:**
- (a) **Conflict Minerals-** The U.S. Chamber of Commerce, Business Roundtable, and the National Association of Manufacturers brought a court challenge to the SEC's rule that requires companies using gold, tin, tungsten and tantalum in their products to make “reasonable” efforts to determine if those materials came from the Democratic Republic of Congo or an adjoining country. But the SEC rule was recently upheld and beginning on May 31, 2014, companies will have to report if they use these minerals. Note that the plaintiffs filed an appeal with the D.C. Circuit Court of Appeals on August 12, 2013.
- (b) **Resource Extraction Disclosures** – The U.S. Chamber of Commerce and two trade groups successfully brought a court challenge to the SEC’s rule requiring public companies to disclose payments of more than \$100,000 made to foreign governments for commercial development projects. The SEC's rule was vacated and remanded to the SEC for further proceedings. (*American Petroleum Institute v. U.S. Securities and Exchange Commission*)
- **International Court Challenges-** With the U.S. leading the most of the world in implementing financial reform, there have not been any major legal challenges to financial reform measures abroad. Furthermore, it is unclear as to the ultimate result from the litigation concerning the Dodd-Frank Act.

Financial Regulation: SEC

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- On January 22, 2011, the SEC submitted to Congress a staff study recommending a uniform fiduciary standard of conduct for broker-dealers and investment advisers -- no less stringent than currently applied to investment advisers under the Advisers Act -- when those financial professionals provide personalized investment advice about securities to retail investors. On March 1, 2013, the SEC requested data and other information on a uniform fiduciary standard of conduct, and also requested comments on proposed concepts for a uniform standard for broker-dealers and investment advisers. The Request Release also asks for data concerning the effect of rule harmonization between the broker-dealer and investment adviser regulatory schemes.
- Creates a whistleblower program within the SEC to encourage people to report securities violations.
- Mandates a comprehensive outside consultant study of the SEC, an annual assessment of the SEC's internal supervisory controls and GAO review of SEC management. (Boston Consulting Group Study-March 2011)
- Creates the Investment Advisory Committee, a committee of investors to advise the SEC on its regulatory priorities and practices; the Office of Investor Advocate in the SEC, to identify areas where investors have significant problems dealing with the SEC and provide them assistance; and an ombudsman to handle investor complaints.
- Gives shareholders a "say on pay" – an advisory vote on pay practices including executive compensation and golden parachutes.
- Requires almost all advisers to private pools of capital to register with the SEC, and they will be subject to systemic risk regulation by the Financial Stability regulator.

Financial Regulation: SEC

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- **Procedural Rules for SRO Filings:** The Commission adopted new Rules of Practice to formalize the process it will use when conducting proceedings to determine whether an SRO's proposed rule change should be disapproved. The new rules are intended to add transparency to the Commission's conduct of those proceedings, to address the process the Commission will follow to institute proceedings and provide notice of the grounds for disapproval under consideration, and to provide interested parties with an opportunity to submit written materials to the Commission. [See Slide 18]
- **Conflicts of Interest:** Requires a GAO [study](#) on the conflicts of interest between investment banking and equity and fixed income security analyst functions and make recommendations to Congress within 18 months of enactment. (Section 919A) This study was completed in January 2012. The GAO recommended that the SEC formally assess and document whether any of the Global Settlement's remaining terms should be codified and the SEC agreed with the recommendation.
- **Investor Access:** Requires a SEC [study](#) within 6 months of enactment on improving access to information on investment advisers and broker dealers (which was completed in January 2011). The SEC is to implement any recommendations of the study within 18 months of its completion. (Section 919B). The primary recommendation of the study is to enable investors to simultaneously search both databases using either FINRA's BrokerCheck website or the Investment Adviser Public Disclosure (IAPD) website and receive unified search results. In May 2012 FINRA announced that it had added features to BrokerCheck to help users more easily access broker-dealer and investment adviser registration information addressing the recommendations made in the 2011 study. ([source](#))
- **Ownership/Profit Reporting:** The SEC is authorized to adopt rules that would require more timely reporting (10 days or less) when a person acquires more than 5% ownership interest in an issuer ("beneficial ownership") or makes a short-swing profit. (Section 929R).

Financial Reform: SRO Rule Filing

- **Streamlining of Filing Procedures:** Within 45 days from the publication of an SRO proposed rule, the SEC is to approve such rule or institute proceedings to determine whether it should be disapproved. The SEC may still delay its decision for up to 45 days if it determines that a longer period is appropriate (as long as it publishes its reasons) or if the SRO consents. However, if the SEC does not approve the proposed rule change, it shall provide for a notice and hearing within 180 days of publication. The SEC is to issue an order approving or disapproving the proposal (and may still extend this for up to 60 days if it is appropriate or if the SRO consents) within this 180-day period. (Section 916)
- **Standards for Approval and Disapproval:** The SEC shall approve an SRO proposal if it finds that it is consistent with this legislation within 30 days (unless there is good cause for an earlier approval) or conversely, the SEC is to disapprove it if it is not consistent. Should the Commission not begin proceedings within 45 days or issue an approval or disapproval order within 180 days (with an extension of 60 days), the proposed rule will have been deemed approved. (Section 916)
- **Approval/Disapproval Rulemaking:** Not later than 180 days after the date of enactment of the financial reform legislation, the SEC shall issue rules implementing an approval/disapproval process. (Section 916)
- **Conclusion:** The Dodd-Frank Act's imposition of new procedural requirements has increased the volume of annual requests "by over 80 percent in the last five years." Then SEC Chairman Schapiro (April 25, 2012 House Financial Services Committee [testimony](#)) has stated that she hoped the SEC to be in a position "to dedicate additional resources to these approvals" to reduce uncertainty.

Financial Reform: SROs

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- **SEC Commissioner Gallagher Discusses Equity Market Structure and Role of Self-Regulatory Organizations:** On October 4, 2012, SEC Commissioner Daniel Gallagher provided [remarks](#) on: “Time for a Fresh Look at Equity Market Structure and Self-Regulation”. Noting the many changes in the markets and regulation over the years, he called on the SEC to “pursue a new comprehensive study that addresses both market structure and self-regulation” and suggested that this “means revisiting the 1975 Act amendments, and [would] most likely result in recommendations to Congress to amend existing legislation to reflect the realities of today’s markets.”

Financial Reform: SEC Cost/Benefit Analysis

- On March 16, 2012, the SEC's Chief Economist and General Counsel released new [guidance](#) for conducting economic analysis. The new guidance also provides more specific ways to strengthen what the SEC recognizes as the essential components of sound regulatory economic analysis: clearly identifying the justification for the proposed rule; defining the baseline against which to measure the proposed rule's economic impact; identifying and discussing reasonable alternatives to the proposed rule; and analyzing the economic consequences of the proposed rule and the principal regulatory alternatives.
- **SEC Cost-Benefit Analysis:** On May 17, 2013, the House approved [H.R. 1062](#) the "SEC Regulatory Accountability Act" which seeks to require the SEC, before promulgating a regulation or issuing any order, to: (1) identify the nature and significance of the problem that the proposed regulation is designed to address in order to assess whether any new regulation is warranted; (2) use the Office of the Chief Economist to assess the costs and benefits of the intended regulation and adopt it only on a determination that its benefits justify the costs; and (3) ensure that any regulation is accessible, consistent, written in plain language, and easy to understand.
- **Financial Regulator Cost-Benefit Analysis:** Senator Richard Shelby (R-AL) introduced [S.450](#) the "Financial Regulatory Responsibility Act of 2013" on March 5, 2013, which seeks to hold financial regulators accountable for rigorous, consistent economic analysis on every new rule they propose. It requires them to provide clear justification for the rules, and to determine the economic impacts of proposed rulemakings, including their effects on growth and net job creation. This bill also improves the transparency and accountability of the regulatory process and reduces the burdens of existing regulations. In addition, the legislation mandates that if a regulation's costs outweigh its benefits, regulators are barred from promulgating the rule. Note that an [amendment](#) to Senate Budget offered by Senator Shelby related to this bill was not approved on March 23, 2013. On March 5, 2013, Senator Shelby also introduced the "Dodd-Frank Wall Street Reform and Consumer Protection Technical Corrections Act of 2013" ([S. 451](#)) which makes technical corrections to portions of the Dodd-Frank Act.

Financial Reform: SEC Funding

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- **SEC Funding:** The SEC is to collect transaction fees and assessments that are designed to recover the costs to the Government of the annual appropriation to the SEC by Congress. The SEC is to adjust, by order, the fee rates for a fiscal year to a uniform adjusted rate that is reasonably likely to produce aggregate fee collections that are equal to the regular appropriation to the SEC by Congress for such fiscal year. The SEC may adjust this rate, as needed, by March 1st of such fiscal year. This takes effect on the later of October 1, 2011 or the Date of Enactment making a regular appropriation to the SEC for fiscal year 2012. A separate fund, known as the “Securities and Exchange Commission Reserve Fund” is established in the U.S. Treasury, where the SEC is to deposit any registration fees collected, but not in excess of \$50 million for any one fiscal year. The balance of the account shall not exceed \$100 million. Any excess amounts are deposited in the General Fund of the Treasury and are not available for obligation by the SEC. The Reserve Fund is to be effective on October 1, 2011. (Section 991)

The Dodd-Frank Act authorizes appropriations to the SEC as follows:

- Fiscal year 2012: \$1.5 billion
- Fiscal year 2013: \$1.75 billion
- Fiscal year 2014: \$2.0 billion
- Fiscal year 2015: \$2.25 billion

But the SEC was actually appropriated:

- Fiscal year 2012: \$1.321 billion
- Fiscal year 2013: \$ 1.321 billion. However by October 2013, the SEC is required under sequestration to cut its budget by an additional 5% (\$66 million) to about \$1.255 billion. The recently approved continuing resolution (which required further cuts to many government agencies) appears to not have required further budgetary cuts for the SEC.
- For Fiscal Year 2014, the House Appropriations Committee has approved \$1.371 billion for the SEC, while the Senate Appropriations Committee has approved \$1.674 billion for the SEC. Still, there has been no agreement on the FY 2014 SEC budget.

Financial Reform: SEC Funding

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A few key takeaways of the SEC funding provisions in the Dodd-Frank Act:

- Section 31 fees will be dedicated solely to paying for the entire regular budget of the SEC (the amount appropriated to the SEC by Congress).
- Authorized funding for the SEC significantly increases to \$2.25 billion by fiscal year 2015.
- The new SEC funding process in the Dodd-Frank Act provides little incentive for legislators to keep SEC funding low since all funding would be recovered by Section 31 fees collected from the industry and no excess Section 31 fee collections could be used by appropriators.
- If Congress appropriates to the SEC an amount comparable to the authorized funding included in the Dodd-Frank Act, Section 31 fees are likely to increase substantially.

B. Small Business Capital Formation (JOBS Act)

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- The [Jumpstart Our Business Startups \(JOBS\) Act](#) was signed into law on April 5, 2012.
- Title I (“IPO On-Ramp”), and Titles V and VI (Increased registration/reporting triggers under the Securities Exchange Act of 1934 for non-bank issuers and bank holding companies; easier exit for bank holding companies) are effective immediately.
- Some SEC rulemaking is required on Title II (Lift ban on general solicitation/advertising in Rule 506 and 144A) due 90 days from enactment (July 4, 2012), Title III (Crowdfunding) due 270 days from enactment, and Title IV (Regulation A+) no deadline.
- Prior to the adoption of the JOBS Act, the SEC in 2011 established the Advisory Committee on Small and Emerging Companies to advise the SEC on its rules, regulations and policies as they relate to emerging companies or privately-held small businesses and publicly traded companies with less than \$250 million in public market capitalization. The Advisory Committee has made recommendations on: improving access to public markets for small companies; registration requirements and reporting obligations; and modifying restrictions on general solicitation in certain private offerings.
- SEC Chairman Mary Jo White has stated that there is “no higher priority” than moving on the Dodd-Frank Act (DFA) and JOBS Act rulemakings as soon as possible. Overall, with the inability of the SEC to move forward with JOBS Act rulemakings, Congress, notably House and Senate Republicans have looked to move forward on JOBS Act II measures that could address the shortcoming of the JOBS Act.

JOBS Act: Title I

(Emerging Growth Companies)

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- Streamlines the IPO process and relaxes post-IPO requirements for a new category of issuer- the “emerging growth company.” (EGC)
 - EGC has less than \$1 billion in total annual gross revenues
 - EGC will remain so until the earliest of: last day of the fiscal year during which it had total gross revenues less than \$1 billion, the last day of the fiscal year following the fifth anniversary of its IPO, date on which it has over a rolling three year period issued less than \$1 billion in non-convertible debt securities, or date on which it is deemed to be a large accelerated filer.
 - Reduces the level of IPO registration statement disclosure
 - Allows for “confidential submissions”
 - Allows for “testing the water” communications with qualified institutional investors (QIBs) or institutional accredited investors (IAIs).
 - The SEC has issued FAQs on General Applicability of Title I (September 28, 2012), Draft Registration Statements Required to Be Submitted and Filed Using EDGAR (October 11, 2012), Draft Registration Statements to Be Submitted and Filed on EDGAR (September 26, 2012), Research Analysts and Underwriters (August 22, 2012), FAQ: Confidential Submission Process for Emerging Growth Companies (April 10, 2012).

JOBS Act: Title II

(General Solicitation / General Advertising)

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- The SEC is to eliminate the ban on general solicitation and advertising in connection with certain private offerings provided that all purchasers are accredited and the issuer took reasonable steps to verify this fact. (Rule 506 of Regulation D). The SEC is to revise rules to provide that securities sold under the revised exemption may be offered to persons other than QIB, by means of general solicitation or general advertising provided certain conditions are met. (Rule 144A)
- SEC Issues Frequently Asked Questions About the Exemption from Broker-Dealer Registration in Title II of the JOBS Act (February 5, 2013)
- At a July 10, 2013 [open meeting](#), the SEC adopted a final [rule](#), by a vote of 4-1, to “eliminate the prohibition on general solicitation and general advertising in certain offerings” provided that the issuer takes “reasonable steps” to verify that the investors are accredited investors. Commissioner Luis Aguilar, who voted against the rule, argued in a dissenting [statement](#), that the lengthy process will not benefit investors with greater protections in a timely manner. Then Commissioner Elisse Walter stated in [remarks](#) that “lifting the ban on general solicitation” in private offerings “may have unintended consequences”, and stressed the need to continue to monitor and evaluate the market. To address some of these concerns, the SEC also [proposed amendments](#) to the “private offering rules” to provide the SEC with more ability to evaluate the market after elimination of the ban on general solicitation. The proposal requires issuers to file an advance notice of sale 15 days before and at the conclusion of an offering; provide additional information about the issuer and the offering; disqualify issuers who fail to file Form D for one year; require issuers to include legends and disclosures in written general solicitation materials; request public comment on whether other manner and content restrictions should apply to written general solicitation materials used by private funds; and extend guidance about misleading statements to private funds. Then Commissioner Troy Paredes [commented](#) that “the proposal provides for a regulatory regime that would unduly burden and restrict the capital formation process” and Commissioner Daniel Gallagher explained in a [statement](#) that the proposed amendments will “undermine the purpose of the JOBS Act.”

JOBES Act: Title III (Crowdfunding)

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- Exempts offerings designed to harness the power of the “crowd” and mass social communication from 1933 Act registration requirements and state blue-sky laws.
- Under “crowdfunding”, non-reporting issuers are permitted to raise up to \$1 million in reliance on the exemption within any 12 month period, with a maximum investment per investor of: the greater of \$2,000 or 5 percent of the investor’s annual income or net worth within any 12 month period; and 10 percent of the investor’s annual income or net worth, not to exceed a maximum amount of \$100,000.
- In addition, the transaction would need to be conducted through an SEC-registered broker or “funding portal”. A funding portal is defined as a crowdfunding intermediary that does not: (i) offer investment advice or recommendations; (ii) solicit purchases, sales, or offers to buy securities offered or displayed on its website or portal; (iii) compensate employees, agents, or others persons for such solicitation or based on the sale of securities displayed or referenced on its website or portal; (iv) hold, manage, possess, or otherwise handle investor funds or securities; or (v) engage in such other activities as the SEC, by rule, determines appropriate.
- Lastly, the issuer is to file with the SEC and provide to investors and the intermediary information on itself.
- SEC staff has conducted industry outreach and claims that “ironing out” investor protections will take some time.
- On May 7, 2012, the SEC released FAQs on crowdfunding intermediaries and on April 23, 2012 issued a release reminding market participants that until rules are implemented “any offers or sales of securities purporting to rely on the crowdfunding exemption would be unlawful under the federal securities laws.” The Financial Industry Regulatory Authority (FINRA) filed with the SEC a proposed rule change regarding an “Interim Form for Funding Portals” (IFFP), which is “an online form for prospective intermediaries that intend to apply for membership with FINRA as funding portals”.
- SEC had 270 days to issue rules (by January 2013), but has not met its deadline to finalize this provision nor even its goal (according to the SEC’s most recent semi-annual regulatory agenda) to propose such rules by December 2012.
- At a July 30, 2013 Senate Banking Committee hearing, Chairman Mary Jo White suggested that this rule is a high priority for the SEC and that she hopes to have the rule implemented by the fall.

JOBS Act: Titles V and VI

(Increased Threshold for SEC Registration)

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- Create a new exemption from registration with an increased offering amount and additional conditions (Regulation A). First, it raises the cap in the exemption for small public issuances of unrestricted debt, equity, or convertible securities to \$50 million from \$5 million in any 12 month period. These issuers are to file and distribute to prospective investors an offering statement containing specified disclosures. Lastly, the SEC is to review and increase biennially such offering amount limitation as appropriate; and report to certain congressional committee on its reasons for not increasing the amount.
- Overall, the JOBS Act raises the current 500-shareholder threshold for registration with the SEC to 2,000 shareholders so long as not more than 499 shareholders are not accredited investors.
- On February 15, 2013, Representative Patrick McHenry (R-NC) introduced H.R. 701, legislation providing the SEC with an October 31, 2013 deadline to finalize Regulation A rules.
- **July 2012 GAO study of the impact of state securities laws (“Blue Sky Laws”) on public offerings** by private companies under Regulation A found that “even with the increased attractiveness of the \$50 million ceiling, blue sky requirements may still dampen small business” interest in Regulation A.”
- **JOBS Act Section 504 Report to Congress:** On October 16, 2012, the SEC staff released a study on JOBS Act Section 504 that concluded that the current enforcement tools available to the SEC are adequate to enforce the anti-evasion provision of Rule 12g5-1 (which requires an issuer of a certain size to register under the Exchange Act and file periodic and current reports).
- SEC issues FAQ dealing with issues of registration for equity securities and the deregistration or suspension of reporting requirements for bank holding companies (April 11, 2012).
- At a July 30, 2013 Senate Banking Committee hearing, SEC Chairman Mary Jo White suggested that this rule is a high priority for the SEC and that she hopes to have the rule implemented by the fall.

JOBS Act: Miscellaneous

- On April 11, 2012, the SEC issued a notice requesting comment on the provisions listed under the JOBS Act, including the study to review minimum tick size (Representative Schweikert (R-AZ) Amendment) and possible changes to the trading increment. On July 20, 2012, the SEC released its staff [report](#) on decimalization, which recommended that the SEC “not proceed with the specific rulemaking to increase tick sizes...but should consider additional steps that may be needed to determine whether rulemaking should be undertaken in the future.” The SEC then has 180 days to increase the trading increment for emerging growth companies. That increase would be greater than 1 cent but less than 10 cents.
- On February 5, 2013, the SEC held a roundtable on decimalization (in conjunction with this JOBS Act report) to discuss “how to best study its effects on IPOs, trading, and liquidity for small and middle capitalization companies, and what, if any, changes should be considered.” Some participants at the roundtable expressed differing views on whether a pilot program for tick sizes would be helpful to investors and for the provision of research coverage for smaller capitalization companies.
- SEC Division of Trading and Markets Acting Director John Ramsay suggested in recent press reports that the SEC was looking at how a pilot program (of varying tick sizes) could be structured, noting that there seems to be a lot of support for such a pilot.
- At a March 12, 2013 Senate Banking Nomination hearing, then SEC Nominee Mary Jo White stated that she has to examine a potential pilot program for increased tick sizes before she can draw a conclusion. But she stated that it will be a priority to focus on this issue and suggested that “one size does not fit all.” SEC Chairman White also noted at a May 16, 2013 House Financial Services Committee hearing that the SEC is considering a pilot.

JOBs Act: Miscellaneous

- On May 18, 2012, Facebook the leading social networking site, launched its IPO. The IPO was plagued by a series of issues such as its listing exchange Nasdaq suffering from computer malfunctions during the first hours of the IPO which led to tens of millions of dollars in trades being wrongly placed; JP Morgan who was underwriting the IPO is accused of placing the initial share price too high with too many share available; and Facebook executives are accused of alerting industry insiders to Facebook's earnings before they were made public. Lawsuits by shareholders have accused Facebook and its underwriters of hiding the company's weakened growth forecasts ahead of the May 18 IPO. The SEC is probed the role of Nasdaq, which suffered a technical breakdown that delayed trading for 30 minutes. On May 29, 2013, the SEC charged NASDAQ with securities laws violations "resulting from its poor systems and decision-making during the initial public offering (IPO) and secondary market trading of Facebook" to which NASDAQ agreed to settle the SEC's charges "by paying a \$10 million penalty." ([source](#))
- In the 112th Congress, Representative Patrick McHenry (R-NC) introduced the Liquidity Enhancement for Small Public Companies Act, ([H.R. 6127](#)). The legislation would allow stock exchanges to develop incentive programs for market makers to support small company stocks. Commonly referred to as Market Quality Incentive Programs, the option is already available to small-capitalization stocks on European exchanges.
- On May 13, 2013, Representative David Schweikert (R-AZ) , introduced "Spread Pricing Liquidity Act of 2013" ([H.R.1952](#)), which would amend the securities laws to require the SEC "to allow publicly traded companies with a certain sized public float to change their stocks' tick sizes to increase liquidity by incentivizing capital commitment, research coverage, and brokerage support, thereby increasing the stocks' liquidity and investor interest."

C. Market Structure Issues

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- Throughout the implementation of the Dodd-Frank Act, the Securities and Exchange Commission (SEC) continued to examine market structure issues, particularly since the May 6 market events.
- Note that many equity market structure issues were addressed in the SEC's Equity Market [Concept Release](#) in 2010. The failed BATS IPO, the issues with the Facebook IPO by NASDAQ, and the Knight Capital issues have again pressured the SEC to act.
- As such, the SEC has examined some key market structure issues, looking at dark pools, high frequency trading/co-location, large trader reporting, flash orders, trade-at issues, and internalization.
- The SEC has also moved forward with rules to address market technology issues such as:
 - (1) a consolidated audit trail (CAT) though full implementation of CAT might not be completed until early 2017. On May 7, 2013, SEC Chairman Mary Jo White in [testimony](#) before the Subcommittee on Financial Services and General Government, House Committee on Appropriations stated: "We also plan to use the SEC Reserve Fund toward the development of the capability to intake, store and analyze data from the upcoming Consolidated Audit Trail (CAT) that the Commission has mandated the SROs create to increase the data available to regulators. A CAT repository would enable the SEC to intake CAT data and store it in the EDW, as well as to develop analytical tools and a single software platform that will allow the SEC to identify patterns, trends, and anomalies in the CAT data. The tools and platform will allow seamless searches of data sets to examine activity to reveal suspicious behavior in securities-related activities and quickly trace the origin.
 - (2) Regulation Systems Compliance and Integrity (Regulation SCI), which "would require entities [known as 'SCI entities'] essential to the smooth functioning of the U.S. securities markets to have comprehensive policies and procedures regarding their technological systems." The SEC extended the comment period until July 8, 2013.
- In addition, the SEC has met with the NYSE, NASDAQ, and BATS on most of these issues and members of the House Financial Services Committee held a roundtable on this subject.
- Further information on these issues may be accessed from the April 2013 [presentation](#) to the ISEEE.

House Financial Services Committee Members Hold Roundtable on Market Structure

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- On May 13, 2013, Representative Scott Garrett (R-NJ) hosted a roundtable discussing Market Structure issues. At the roundtable, academics, traders, regulators, exchange officials, and members of Congress discussed several market issues, including whether Congress should consider an overhaul to current market rules, such as, Regulation NMS. Some of the highlights from the roundtable included:
- (1) Broker-dealers prefer dark pools because dark pools are less expensive and allow broker-dealers to avoid exchange fees
- NYSE Retail Liquidity Program (RLP) creates dark pools, but also allows differentiation by customer for the first time on the exchange
- (2) Retail limit orders sit on exchanges, and do not interact with retail market orders.
- (3) Maker-taker model incentivizes liquidity, and removing it without creating an alternative incentive will cause markets to continue to “go dark”
- (4) The options markets represent an example of a good balance between the “light and dark” regulations by the SEC
- (5) Piecemeal reform structure will not work, due to interconnectedness of the markets.
- (6) Some consensus that a pilot program consisting of a trade-at rule with lower access fees would be effective, with arguments posed that the trade-at rule should have a minimum price improvement component for off-exchange trading
- (7) Another suggestion included making FINRA’s Alternative Display Facility (ADF) operational to provide another off-exchange option that isn’t “dark”

SEC Meets with Large Exchanges

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- On May 1, 2013, SEC Chairman White met with several representatives from NYSE, NASDAQ and BATS to discuss market structure issues. The [memo](#) generated from that meeting is outlined below:
- TRF at Record Levels
 - Significant growth in recent years, and especially recent months from 15 percent of total trading to 35 percent of total trading
 - Detrimental implications for the public markets – foreign markets taking action
 - Average dark pool order size similar to Exchanges at approx. 200 shares
 - Less than 30 percent of shares executed away from lit exchanges received a price improvement
- Why is This Occurring?
 - Economics a significant driver
 - Regulatory landscape facilitates/encourages off-exchange trading
 - Non-Exchanges are able to utilize different practices including, but not limited to:
 - ✦ Customer segmentation
 - ✦ Ability to offer de minimis price improvement
 - ✦ IOI structure and selectivity
 - ✦ Less regulatory oversight
 - ✦ Reduced transparency
- Impact on Market Quality
 - In the U.S., deterioration in displayed liquidity; wider spreads/more volatility in securities with higher TRF
 - In Canada, restrictions result in market quality improvement
 - ✦ Quoted spread down 25 percent
 - ✦ Volatility down 17 percent
 - In Australia, regulatory taskforce sees market quality erosion from dark trading
- NASDAQ, NYSE and BATS are in favor of introducing Trade-At Rule.

D. Market Data Fees

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- Since 2008, an industry group called “NetCoalition”, which is a collection of internet companies and other companies such as Bloomberg and trade groups such as the Securities Industry and Financial Markets Association (SIFMA), have challenged the Securities and Exchange Commission’s (SEC) policy on market data fees in court over policies that institutionalize market data as an exchange product. This coalition received a favorable outcome from the D.C. Circuit Court of Appeals in 2010.
- In an April 2013 decision on this issue, the D.C. Circuit Court of Appeals directed the SEC to consider fee complaints under a “denial of access” process. As such, SIFMA filed two such petitions with the SEC in May 2013.
- These challenges over market data fees are far from over.
- With \$400 million in market data fees at stake, the issue is closely being watched by industry in view of its impact on market structure issues.

E. Financial Transaction Tax

- Senator Tom Harkin (D-IA) and Representative Peter DeFazio (D-OR) introduced identical bills in the Senate and House in 2013 that would impose a securities transaction tax (STT) on securities transactions at 3 basis points. The bills, ([S. 410](#)) and ([H.R. 880](#)) would raise \$350 billion over 10 years according to Senator Harkin. The 3 basis point tax would be imposed on most non-consumer financial trading including stocks, bonds and other debts, except for their initial issuance. The tax would also cover all derivative contracts, options, puts, forward contracts, swaps and other complex instruments at their actual cost.
- On September 14, 2012, Representative Keith Ellison (D-MN) introduced “The Inclusive Prosperity Act,” [H.R. 6411](#), legislation that would impose a financial transaction tax on all transfers of ownership with respect to trading securities. As stated in his [press release](#), the bill would raise up to \$350B.
- **Whitehouse Sequester Replacement Bill Raised FTT**- On February 11, 2013 Senator Sheldon Whitehouse (D-RI) introduced two bills, both named the “Job Preservation and Economic Certainty Act of 2013.” [S. 277](#) is the nine year option and [S. 278](#) is the one year option- to replace the sequester which took effect March 1. The Nine-Year Option included a provision that would impose a FTT on the purchase of any security, specifically: stock; partnerships interest/trust; note/bond/debenture; and derivatives. The rate of tax is 3 basis points on the transaction. This bill was significant because FTT was brought up as a revenue raiser for an alternative to sequestration but clearly will not be considered further.
- **Representative Price H.R. 2546, “Protect American Investments Act of 2013” and Senator Roberts S. 1257, “Protect American Investments Act of 2013”** - On June 27, 2013, Representative Price (R-GA) introduced [H.R. 2546](#), and Senator Roberts (R-KS) introduced [S. 1257](#), related bills known as the “Protect American Investment Act of 2013.” This bill would prohibit a U.S.-based company, entity, or person from paying a financial transaction tax imposed by a foreign country on any covered financial transaction.

Financial Transaction Tax

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- **Internationally:** On June 22, 2012 at a [conference](#) in Brussels, eleven E.U. member states voiced support for a financial transaction tax (FTT).
- In January 2013 there was a vote taken by 27 EU finance ministers to allow a group of 11 European governments to implement a FTT. The action allows for a tax of 10 basis points on stocks and 1 basis point on derivatives on financial transactions by the following countries: Germany, France, Italy, Spain, Belgium, Austria, Greece, Portugal, Slovakia, Slovenia, and Estonia. Several months ago, countries involved in negotiations for the proposed tax on financial transactions began struggling to agree on the implementation timeline, possible exemptions and the scope of the levy.
- At the end of June 2013, it was reported that the plan by 11 European countries to tax financial transactions was delayed by at least six months as participating governments have been unable to come to a consensus on key components of the tax. The European Commission said in June that the financial transactions tax “could still enter into force towards the middle of 2014,” provided that “agreement is found before the end of 2013, and there is a speedy transposition into national law by the participating member states.” EU officials have expressed that the reason for the delay is that countries are concerned about the impact the tax might have on Europe's economy and sovereign bond markets, as well as on pension funds and personal savings.
- At the last meeting in early July 2013, reports indicate that the 11 member states are beginning to agree that the tax should be a more limited tax on share trades, similar to Britain's stamp duty, that could be expanded later. Until more information is provided, it is uncertain when the tax will be implemented. Still, support for the FTT could wane, if more countries see the drop that France has experienced, about 25% loss in market share since the FTT's implementation last year. ([Source](#))

F. Mutual Recognition

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- In some instances, SEC cooperation with its foreign counterparts takes place pursuant to a supervisory MOU. The SEC's comprehensive supervisory MOUs create mechanisms designed to ensure that the SEC and its counterparts will have access to the information necessary to oversee global firms, including broker-dealers, investment advisers, stock exchanges, clearing firms, and, more recently, hedge fund investment advisers, and entities that clear derivatives transactions. These MOUs also provide procedures for cooperation in on-site inspections and establish important confidentiality and other safeguards to ascertain the appropriateness of sharing non-public information in each circumstance.
- For example, the SEC has entered into comprehensive supervisory MOUs with the UK Financial Services Authority (March 2006), the German Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) (April 2007), the Australian Securities and Investments Commission (August 2008), and, most recently, the Quebec Autorité des Marchés Financiers and the Ontario Securities Commission in Canada (June 2010). The SEC has also concluded more tailored arrangements with some of our counterparts, including an MOU with the College of Euronext Regulators relating to the oversight of NYSE Euronext (2007), and an MOU with the Hong Kong Securities and Futures Commission (1995) regarding investment advisor oversight. In addition, the SEC has a number of protocols with our European counterparts which provide for the sharing of issuer-specific information.
- Further information on these issues may be accessed from the April 2013 [presentation](#) to the ISEEE.

Mutual Recognition

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- In March 2012 the SEC and the ESMA entered into a [memorandum of understanding](#) concerning cooperation and exchange of information related to the supervision of cross-border regulated entities. The MOU states the parties anticipate the cooperation will primarily be achieved through ongoing, informal, oral consultations.
- On July 11, 2013 the CFTC and European Commission (EC) announced a “Path Forward” relating to their joint understandings on a package of measures addressing how to approach cross-border derivatives. The “Path Forward” reflects the CFTC and EC’s common objective to implement the commitment of the G20 to “lower risk and promote transparency in the over-the-counter (OTC) derivative markets.” The CFTC and EC have expressed their view that jurisdictions and regulators should be allowed to defer to each other when it is “justified by the quality of their respective regulation and enforcement regimes.”
- On July 18, 2013 the US Securities Exchange Commission and the European Securities and Markets Authority finalized a [supervisory cooperation agreement](#) to allow regulators to share and access supervisory information about investment advisers and investment fund managers doing business internationally. The new MOU establishes new mechanisms for the flow of supervisory information related to the oversight of global firms and markets.
- The [International Organization of Securities Commissions](#) (IOSCO) met in Madrid in July 2013. Among the topics discussed was the challenges faced by securities regulators globally and the role of IOSCO in addressing them. At the meeting the Task Force on Cross-Border regulation was discussed which was approved at the Board meeting in Montreal earlier this year.

Mutual Recognition

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- **The Future of Mutual Recognition**

- **International:** On June 27, 2012, at a keynote speech at the International Derivatives Expo held in London, David Wright, secretary general at the International Organization of Securities Commissions (IOSCO), issued a “rallying call” for greater global cooperation on financial standards, to help investors trade anywhere in the world with greater confidence.
- **SEC Chairman Mary Jo White (Investment Company Institute (ICI) May 1, 2013)** – “One-on-one negotiations, membership in global organizations, participation in bilateral and multilateral discussions, domestic regulatory recognition of foreign reporting and accounting practices – these are a few of the ways the SEC is integrating itself into the global financial system.” “Remarkably, there are now 94 signatories to the IOSCO Multilateral MOU, which creates a seamless web of securities authorities that are empowered to use their respective enforcement tools on each other’s behalf. Additionally, the SEC has 35 bilateral agreements that facilitate enforcement cooperation, cooperation in conducting examinations, and technical assistance.”
- **CFTC Chairman Gary Gensler (Testimony before the Senate Banking Committee- July 30, 2013)** - The CFTC over the next five months “will be reviewing submissions from the six jurisdictions (Australia, Canada, the European Union, Hong Kong, Japan and Switzerland) to assess their regulatory regimes with regard to possible substituted compliance determinations. We also are working with foreign regulators on memoranda of understanding to ensure that we will be able to exercise our respective supervisory responsibilities in an efficient, coordinated manner. I now anticipate that the final set of international standards, which are nearing completion, will not call for margin for non-systemic, non-financial entities. After the international standards are published, the CFTC will further propose margin rules likely later this year and seek to finalize those rules in the first half of 2014.”

Conclusion

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- **Future of the SEC:** On August 1, 2013, the Senate approved Senate staffers Kara Stein and Michael Piwowar to be Members of the Securities and Exchange Commission. The Senate also extended Mary Jo White's term to June 5, 2019. This may temporarily slow some progress on SEC initiatives, but in the longer term, this could help to smooth progress on Dodd-Frank and JOBS Acts implementation.
- **Other Concerns:** Because of the aggressive approach of the Federal Reserve since the financial crisis, the U.S. faces a possible shortage of treasury bills. This of course resembles the risk faced in the U.S. prior to the financial crisis.
- Though efforts under the Dodd-Frank Act to address risks and problems have "stemmed the bleeding", other risks still remain. In particular, the repo market is an area that regulators seem to have not fully addressed.
- One possibility to address some risks in the financial markets could be shortening the settlement cycle for transactions (from T+3 to T+2 or T+1) to "reduce market risk associated with trades between trade date and settlement date as well as reduce liquidity and collateral requirements."

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