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## The Dodd-Frank Wall Street Reform and Consumer Protection Act: A Failed Vision for Increasing Consumer PROTECTION and Heightening Corporate Responsibility in International Financial Transactions

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The Dodd-Frank Wall Street Reform and Consumer Protection Act: A  
Failed Vision for Increasing Consumer PROTECTION and Heightening  
Corporate Responsibility in International Financial Transactions

# THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: A FAILED VISION FOR INCREASING CONSUMER PROTECTION AND HEIGHTENING CORPORATE RESPONSIBILITY IN INTERNATIONAL FINANCIAL TRANSACTIONS

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## I. GLOBALIZATION AND THE DODD-FRANK ACT

The Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>1</sup> is at best an incomplete vision for increasing consumer protection and heightening corporate responsibility. Despite calls from the Obama Administration and the United States Department of the

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1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified at 12 U.S.C. § 5301).

Treasury for a new foundation for financial regulation in the United States,<sup>2</sup> Congress's response failed to satisfy these calls because the foundation created by the Dodd-Frank Act is cracked, fragmented, and incomplete. In many regards, the Dodd-Frank Act is simply an invitation for regulation based on the myriad of studies that it requires to be conducted for purposes of future regulatory action.<sup>3</sup>

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2. See U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 2 (2009), available at [http://www.treasury.gov/initiatives/Documents/FinalReport\\_web.pdf](http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf) (explaining the agenda of the Obama Administration and the United States Department of the Treasury for financial regulatory reform and calling for "a new foundation for financial regulation and supervision that is simpler and more effectively enforced, that protects consumers and investors, that rewards innovation and that is able to adapt and evolve with changes in the financial market").

3. See, e.g., Dodd-Frank Act § 123, 124 Stat. at 1412 (to be codified at 12 U.S.C. § 5333) (requiring a study of the effects of size and complexity of financial institutions on capital market efficiency and economic growth); *id.* § 202(f), at 1449 (to be codified at 12 U.S.C. § 5382) (requiring a study of international coordination relating to the bankruptcy process for financial companies); *id.* § 215, at 1518–19 (to be codified 12 U.S.C. § 5394) (requiring a study of secured creditor haircuts); *id.* § 216, at 1519 (to be codified at 12 U.S.C. § 5394) (requiring a study of the bankruptcy process for financial and nonbank financial institutions); *id.* § 217, at 1519–20 (requiring a study of international coordination relating to the bankruptcy process for nonbank financial institutions); *id.* § 415, at 1578 (to be codified at 15 U.S.C. § 80b-18c) (requiring a study of the criteria for accredited investor status and eligibility to invest in private funds); *id.* § 416, at 1579 (to be codified at 15 U.S.C. § 80b-18c) (requiring a study of a self-regulatory organization for private funds); *id.* § 417 (requiring a study of short selling); *id.* § 526, at 1591 (to be codified to 15 U.S.C. § 8205) (requiring a study of the nonadmitted insurance market); *id.* § 603(b)(1), at 1598–99 (to be codified 12 U.S.C. § 1815) (requiring a study of the treatment of credit card banks, industrial loan companies, and certain other companies under the Bank Holding Company Act of 1956); *id.* § 620, at 1631 (to be codified at 12 U.S.C. § 1851) (requiring a study of bank investment activities); *id.* § 750, at 1748–49 (to be codified at 7 U.S.C. § 25) (requiring a study on oversight of the carbon markets); *id.* § 913, at 1824–30 (to be codified at 15 U.S.C. § 78o) (requiring a study regarding the obligations of brokers, dealers, and investment advisers); *id.* § 914, at 1830 (to be codified at 15 U.S.C. § 80b-11) (requiring a study on enhancing investment adviser examinations); *id.* § 917, at 1836 (to be codified at 15 U.S.C. § 80b-11) (requiring a study regarding financial literacy among investors); *id.* § 918, at 1837 (to be codified at 15 U.S.C. § 80b-11) (requiring a study regarding mutual fund advertising); *id.* § 919A, at 1837–38 (to be codified at 15 U.S.C. § 80b-11) (requiring a study of conflicts of interest within the investment industry); *id.* § 919B, at 1838–39 (to be codified 15 U.S.C. § 80b-10) (requiring a study on improved investor access to information regarding investment advisers and broker-dealers); *id.* § 919C, at 1839–40 (to be codified 15 U.S.C. § 80b-10) (requiring a study on financial planners and the use of financial designations); *id.* § 929Y, at 1871 (to be codified at 15 U.S.C. § 78d-5) (requiring a study on the extraterritorial application of private rights of action under the Securities Exchange Act of 1934); *id.* § 929Z (requiring a study on securities litigation); *id.* § 939C, at 1888 (to be codified at 15 U.S.C. § 78m) (requiring a study on strengthening credit rating agency independence); *id.* § 939D, at 1888 (to be codified at 15 U.S.C. § 78o-9) (requiring a study on alternative business models for compensating statistical rating organizations); *id.* § 939E, at 1888–89 (to be codified at 15 U.S.C. § 78o-9) (requiring a study regarding creating an independent professional organization for rating analysts employed by nationally recognized statistical rating organizations); *id.* § 939F, at 1889–90 (to be codified at 15 U.S.C. § 78o-9) (requiring a study of

Worse yet, the Dodd-Frank Act fails to confront the realities of the emerging global financial markets by focusing almost exclusively on domestic issues, while failing to address new international realities.

Financial markets are now global, which has created new risks for consumers and new loopholes for avoiding corporate responsibility. Globalization has occurred for a variety of reasons. These reasons include the development of new strong national economies around the world in countries such as Brazil, Russia, India, and China, i.e. the “BRIC” nations,<sup>4</sup> and a new excitement for transnational financial opportunities, as demonstrated by the continued development of the European Union.<sup>5</sup> Perhaps, the single biggest factor in the globalization of financial markets has been the creation and

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assigned credit ratings); *id.* § 946, at 1898 (to be codified at 15 U.S.C. § 78o-7) (requiring a study of the macroeconomic effects of risk retention requirements relating to asset-backed securities); *id.* § 967, at 1913–14 (to be codified at 15 U.S.C. § 78d-4) (requiring a study relating to organization reform within the SEC); *id.* § 968, at 1914 (to be codified at 15 U.S.C. § 78d-4) (requiring a study relating to the “revolving door” between the SEC and private sector financial institutions); *id.* § 976, at 1923–24 (to be codified at 15 U.S.C. § 78o) (requiring a study regarding increased disclosure to investors by issuers of municipal securities); *id.* § 977, at 1924 (to be codified at 15 U.S.C. § 78o) (requiring a study of the municipal securities markets); *id.* § 989, at 1939–41 (to be codified at 12 U.S.C. § 1831o) (requiring a study of proprietary trading by various financial institutions); *id.* § 989F, at 1947–48 (to be codified at 5 U.S.C. app. 11) (requiring a study of person-to-person lending); *id.* § 989I, at 1948–49 (to be codified at 5 U.S.C. app. 5) (requiring a study regarding the exemption for smaller issuers from section 404(b) of the Sarbanes-Oxley Act of 2002); *id.* § 1074, at 2067–68 (to be codified at 15 U.S.C. § 1693o-1) (requiring a study on ending the conservatorship of Fannie Mae, Freddie Mac, and reforming the housing finance system); *id.* § 1076, at 2075 (to be codified at 12 U.S.C. § 5602) (requiring a study on reverse mortgage transactions); *id.* § 1078, at 2076 (to be codified at 12 U.S.C. § 5602) (requiring a study on credit scores); *id.* § 1406, at 2142 (to be codified at 15 U.S.C. § 1601) (requiring a study of shared appreciation mortgages); *id.* § 1446, at 2172 (to be codified at 12 U.S.C. § 1701) (requiring a study on default and foreclosure of home loans); *id.* § 1476, at 2200–02 (to be codified at 12 U.S.C. § 2603) (requiring a study on the effectiveness and impact of various appraisal methods, valuation models and distributions channels, and on the Home Valuation Code of conduct and the Appraisal Subcommittee); *id.* § 1492, at 2206 (to be codified at 12 U.S.C. § 5219b) (requiring a study on government efforts to combat mortgage foreclosure rescue scams and loan modification fraud); *id.* § 1494, at 2207 (to be codified at 12 U.S.C. § 1715z-25) (requiring a study on the effect of the presence of drywall imported from China during the period beginning with 2004 and ending at the end of 2007 on foreclosures); *id.* § 1506, at 2222 (to be codified at 15 U.S.C. § 78m-2) (requiring a study of core deposits and brokered deposits).

4. See Eric C. Chaffee, *Finishing the Race to the Bottom: An Argument for Harmonization and Centralization of International Securities Law*, 40 SETON HALL L. REV. 1581, 1590 (2010) (discussing how the rise of the “BRIC” nations has decreased the importance of the United States’ economy in the global market).

5. Robert G. DeLaMater, *Recent Trends in SEC Regulation of Foreign Issuers: How the U.S. Regulatory Regime is Affecting the United States’ Historic Position as the World’s Principal Capital Market*, 39 CORNELL INT’L L.J. 109, 116 (2006) (“The Common Market project that has created today’s European Union has produced a unified, law-making jurisdiction comparable in scale and influence to the United States.”).

development of the Internet, which has allowed financial markets to become interconnected in a manner that was not previously possible.<sup>6</sup>

Although the globalization of financial markets creates many new opportunities, such globalization also generates systemic risks that did not exist before. Financial institutions and other businesses seeking lower levels of regulation can now move from nation to nation seeking weaker regulatory standards, producing a race-to-the-bottom in international financial regulation.<sup>7</sup> Moreover, the interconnectedness of these markets means that financial crises that might have been national or regional events in the past are much more likely to become global.<sup>8</sup> Although a seamless web of regulation for these emerging global markets is likely infeasible, increased international coordination and cooperation is needed.

On July 21, 2010, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law.<sup>9</sup> As stated in the preamble, Congress promulgated the Act “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail’, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.”<sup>10</sup> In short, Congress drafted the Dodd-Frank Act to be an overhaul of the regulation of the United States financial system.<sup>11</sup>

Congress promulgated the Dodd-Frank Act partially in response to the United States Department of the Treasury’s June 2009 white paper report on the financial crisis that began in 2008, *Financial Regulatory Reform: A New Foundation*.<sup>12</sup> In the report, the Obama

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6. See Edward F. Greene, *Beyond Borders: Time to Tear Down the Barriers to Global Investing*, 48 HARV. INT’L L.J. 85, 86 (2007) (discussing how the rise of the Internet has given investors unlimited access to global capital markets).

7. See U.S. DEP’T OF THE TREASURY, *supra* note 2, at 8 (“As we have witnessed during this crisis, financial stress can spread easily and quickly across national boundaries. Yet, regulation is still set largely in a national context. Without consistent supervision and regulation, financial institutions will tend to move their activities to jurisdictions with looser standards, creating a race to the bottom and intensifying systemic risk for the entire global financial system.”).

8. See Howell E. Jackson, *A System of Selective Substitute Compliance*, 48 HARV. INT’L L.J. 105, 112 (2007) (“An interesting challenge in the regulation of foreign investments is the possibility of spillover effects in the United States when things go wrong overseas, like the Parmalat scandal on the Asian financial crisis of 1997.”); Roberta S. Karmel, *The Case for a European Securities Commission*, 38 COLUM. J. TRANSNAT’L L. 9, 33 (1999) (“Stock market crashes and financial firm failures have become international, just like trading markets.”).

9. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified at 12 U.S.C. § 5301).

10. *Id.*

11. *Id.*

12. U.S. DEP’T OF THE TREASURY, *supra* note 2.

Administration, through the Department of the Treasury, laid out its five key objectives for financial regulatory reform:

- Promote robust supervision and regulation of financial firms
- Establish comprehensive regulation of financial markets
- Protect consumers and investors from financial abuse
- Provide the government with the tools it needs to manage financial crises
- Raise international regulatory standards and improve international cooperation<sup>13</sup>

All of these objectives are reflected to some degree within the provisions of the Dodd-Frank Act.

Congress's efforts to raise international regulatory standards and improve international cooperation, however, were limited at best. Congress did not completely ignore the Obama Administration's and the Department of the Treasury's calls for reform. The Department of the Treasury's June 2009 white paper report contained a long list of regulatory objectives to raise international regulatory standards and improve international cooperation, including goals to:

- Strengthen the International Capital Framework
- Improve the Oversight of Global Financial Markets
- Enhance Supervision of Internationally Active Financial Firms
- Reform Crisis Prevention and Management Authorities and Procedures
- Strengthen the Financial Stability Board
- Strengthen Prudential Regulations
- Expand the Scope of Regulation
- Introduce Better Compensation Practices
- Promote Stronger Standards in the Prudential Regulation, Money Laundering/Terrorist Financing, and Tax Information Exchange Areas
- Improve Accounting Standards
- Tighten Oversight of Credit Rating Agencies<sup>14</sup>

Many of these goals were addressed at least in part by the Dodd-Frank Act. With that said, the Dodd-Frank Act falls far short of providing comprehensive reform relating to international regulatory standards

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13. *Id.* at 2–4 (stating the United States Department of the Treasury's five key objectives for financial regulatory reform in the wake of the financial crisis that began in 2008).

14. *Id.* at 80–88 (stating the United States Department of the Treasury's objectives for raising international regulatory standards and improving international cooperation).

and improving international cooperation among national financial regulators.

This Article suggests that the Dodd-Frank Act represents an incomplete vision for financial regulation because of its failure to adequately address the globalization of financial markets. In fairness to Congress, much of the coordination and cooperation that is necessary on the international level will have to be fueled by the executive branch and the administrative agencies charged with regulatory oversight. With that said, however, the Dodd-Frank Act is largely a twentieth century approach to regulating twenty-first century financial markets because it fails to adequately address the globalization of financial markets that has occurred within the past few decades.

My previous scholarship on financial regulatory reform has focused mainly on the need for harmonization and centralization of international securities regulation. In other articles, I have discussed the opportunity that the financial crisis that began in 2008 presents for reforming international securities law,<sup>15</sup> the need for harmonization and centralization of international securities regulation,<sup>16</sup> the need for an evolutionary approach to reforming international securities law,<sup>17</sup> the United States government's role in the harmonization and centralization of international securities regulation,<sup>18</sup> and the need for a centralized global securities regulator.<sup>19</sup>

This Article supplements and extends my previous scholarship in three main ways. First, this Article highlights the failure of the Dodd-Frank Act to adequately address the new realities of the emerging global financial markets. Second, this Article discusses three specific failures and calls attention to the incomplete vision of the Dodd-Frank Act in terms of the regulation of person-to-person lending, the extraterritorial application of United States securities law, and coordination amongst national financial regulators. Third, this

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15. See Eric C. Chaffee, *A Moment of Opportunity: Reimagining International Securities Regulation in the Shadow of Financial Crisis*, 15 NEXUS 29 (2010).

16. See Eric C. Chaffee, *supra* note 4.

17. See Eric C. Chaffee, *Contemplating the Endgame: An Evolutionary Model for the Harmonization and Centralization of International Securities Regulation*, 79 U. CIN. L. REV. 587 (2011).

18. See Eric C. Chaffee, *The Internationalization of Securities Regulation: The United States Government's Role in Regulating the Global Capital Markets*, 5 J. BUS. & TECH. L. 187 (2010).

19. See Eric C. Chaffee, *Evolution, Not Revolution, in International Securities Regulation: A Modest Proposal for a Global Securities and Exchange Commission* (forthcoming).



Article advocates for increased cooperation and coordination among financial regulators in all areas of financial regulation as a means of preventing or lessening any future financial crisis.

The remainder of this Article is structured as follows. Part II discusses the Dodd-Frank Act and the regulation of the Internet because of the central role that the Internet has played in the globalization of financial markets. Part III examines the Dodd-Frank Act and the extraterritorial application of United States financial regulation, and Part IV discusses the Dodd-Frank Act and the international coordination of financial regulation. Finally, in Part V, this Article concludes that the Dodd-Frank Act is a good beginning for regulatory reform but does not embody a comprehensive vision for regulating the emerging global financial markets. Congress must act quickly to fill in the missing pieces of financial regulatory reform before another crisis ensues.

## II. THE DODD-FRANK ACT AND THE REGULATION OF THE INTERNET

The ubiquity of the Internet in financial transactions and in the globalization of financial markets is beyond peradventure. The Dodd-Frank Act, however, does little to address this reality. Within the voluminous body of the Dodd-Frank Act, the Internet is mentioned only a few dozen times. The two obvious responses to this criticism are (1) that existing regulation allows for the proper regulation of the Internet and (2) that many of the provisions of the Dodd-Frank Act implicitly extend to online financial activities. The United States Securities and Exchange Commission (SEC), for example, has demonstrated little concern about broadening its reach to cover securities transactions occurring online, even in the absence of an edict from Congress to do so.<sup>20</sup>

Coupled with existing regulation, the Dodd-Frank Act, however, does not embody a comprehensive vision for regulating financial activity on the Internet. Congress concedes the limitations of the Act in section 989F in which it commissions the Comptroller General of the United States and the United States Government Accountability Office to conduct a study regarding person-to-person lending to

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20. See, e.g., Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore, Exchange Act Release No. 33-7516, 63 Fed. Reg. 14806 (Mar. 27, 1998) (vowing to take action “whenever [the SEC] believe[s] that fraudulent or manipulative Internet activities have originated in the United States or placed U.S. investors at risk”).

determine what sort of regulatory structure should be imposed upon it.<sup>21</sup>

Person-to-person lending, which is also referred to as “person-to-person investing,” “peer-to-peer lending,” “peer-to-peer investing,” and “lending 2.0,” refers to any online system of matching individual lenders with individual borrowers.<sup>22</sup> Person-to-person lending shares characteristics with Internet auction sites such as eBay in the sense that the purpose of person-to-person lending is to connect individuals to facilitate financial transactions.<sup>23</sup> Person-to-person lending also shares characteristics with Internet dating sites such as match.com in the sense that both are designed to bring individuals together for the purpose of creating a relationship.<sup>24</sup> Person-to-person lending is a small, but growing, segment of the lending industry.<sup>25</sup>

In section 989F, Congress expressly mandates, “[t]he Comptroller General of the United States shall conduct a study of person to person lending to determine the optimal Federal regulatory structure.”<sup>26</sup> Section 989F requires the Comptroller General to consult a wide variety of parties in formulating its response to person-to-person lending, including “Federal banking agencies, the [United States Securities and Exchange] Commission, consumer groups, outside experts, and the person to person lending industry.”<sup>27</sup> In regard to the content of the study, the Act states the following:

The study required . . . shall include an examination of—

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21. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 989F, 124 Stat. 1376, 1947–48 (2010) (to be codified at 5 U.S.C. app. 11) (requiring that the Comptroller General of the United States and the United States Government Accountability Office “determine the optimal Federal regulatory structure” for person-to-person lending).

22. See Ron Lieber, *The Gamble of Lending Peer to Peer*, N.Y. TIMES, Feb. 5, 2011, at B1 (explaining that person-to-person lending connects individual lenders with individual borrowers via the Internet).

23. See *Who We Are*, EBAY INC., <http://www.ebayinc.com/who> (last visited Apr. 3, 2011) (describing the online marketplace site as a way to connect individual buyers and sellers).

24. See *About Match.com Dating*, MATCH.COM, <http://www.match.com/help/aboutus.aspx> (last visited Apr. 3, 2011) (outlining the process of matching single individuals through online profiles with photos and member information).

25. See Alex Brill, *Peer-to-Peer Lending: Innovative Access to Credit and the Consequences of Dodd-Frank*, WASHINGTON LEGAL FOUNDATION (Dec. 3, 2010), at 1, available at [http://www.wlf.org/publishing/publication\\_detail.asp?id=2215](http://www.wlf.org/publishing/publication_detail.asp?id=2215) (reporting that the financial crisis and resulting credit crunch, along with a record number of bank failures, have boosted the budding peer-to-peer lending industry, a “rapidly expanding financial services product . . . that competes directly with traditional bank lines of credit and credit cards”).

26. Dodd-Frank Act § 989F(a)(1), 124 Stat. at 1947 (2010) (to be codified at 5 U.S.C. app. 11).

27. *Id.* § 989F(a)(2).

(A) the regulatory structure as it exists on the date of enactment of this Act, as determined by the [United States Securities and Exchange] Commission, with particular attention to—

(i) the application of the Securities Act of 1933 to person to person lending platforms;

(ii) the posting of consumer loan information on the EDGAR database of the Commission; and

(iii) the treatment of privately held person to person lending platforms as public companies;

(B) the State and other Federal regulators responsible for the oversight and regulation of person to person lending markets;

(C) any Federal, State, or local government or private studies of person to person lending completed or in progress on the date of enactment of this Act;

(D) consumer privacy and data protections, minimum credit standards, anti-money laundering and risk management in the regulatory structure as it exists on the date of enactment of this Act, and whether additional or alternative safeguards are needed; and

(E) the uses of person to person lending.<sup>28</sup>

In addition to determining the “optimal Federal regulatory structure” for regulating person-to-person lending,<sup>29</sup> the goal of the Comptroller General’s and the Government Accountability Office’s study is to generate a report containing “alternative regulatory options . . . [and] recommendations on whether the alternative approaches [would be] effective.”<sup>30</sup> Section 989F mandates that the report must be submitted no later than one year after the enactment date of the Dodd-Frank Act.<sup>31</sup>

Improving the regulatory structure for person-to-person lending is necessary because, despite the benefits of person-to-person lending, it also poses substantial risks. As a result of the ubiquity of the Internet, the sources of these risks can be both domestic and abroad.

The benefits of person-to-person lending are substantial. This type of lending makes more credit available, which helps to generate economic growth.<sup>32</sup> Moreover, this type of lending provides credit to

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28. *Id.* § 989F(a)(3).

29. *Id.* § 989F(a)(1).

30. *Id.* § 989F(b)(2).

31. *Id.* § 989F(b)(1).

32. See Brad Stone, *Lending Alternative Hits Hurdle*, N.Y. TIMES, Oct. 16, 2008, at B1 (reporting that peer-to-peer lending originated as an alternative source of funding at a time when more traditional lending sources were shunning dependable borrowers and increasing interest rates).

populations who are traditionally underserved by the consumer credit industry.<sup>33</sup> This allows capital to flow into economically depressed communities, providing new opportunities for community development and economic growth.<sup>34</sup>

At the same time, the risks of person-to-person lending are also substantial. The underserved populations to which person-to-person lending provides credit are traditionally comprised of individuals who are poor credit risks.<sup>35</sup> Person-to-person lending continues to be marred by high borrower default rates and large lender losses.<sup>36</sup> This reality generates concerns that lenders are making inaccurate risk assessments about their exposure to loss created by person-to-person lending.<sup>37</sup> Additionally, high borrower default rates also generate concerns about effective punishment of delinquent loans and overzealous actions by lenders against borrowers in default.<sup>38</sup> Moreover, person-to-person lending has taken all of the concerns of traditional lending and moved them from the “brick and mortar” world of traditional lending regulation into cyberspace.<sup>39</sup> These concerns include investment fraud, identity theft, consumer privacy and data protection, securities fraud, money laundering, and terrorism financing.<sup>40</sup>

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33. See generally Aleksandra Todorova, *Peer-to-Peer Lending Offers Solution for Strapped Consumers*, SMART MONEY, Oct. 15, 2007, <http://www.smartmoney.com/spending/deals/peer-to-peer-lending-offers-solution-for-strapped-consumers-21978/> (explaining that the recent economic crisis has forced homeowners, small business owners, and credit card users to seek financing from non-traditional lending sources, including person-to-person lending).

34. See *id.* (reporting that positive stories have emerged from the rise of person-to-person lending, in which individuals who once were mired in payday loans have been able to pay off their debt and raise their credit scores).

35. See Alan B. Krueger, *In Credit Crisis, Some Turn to Online Peers for Cash*, N.Y. TIMES ECONOMIX BLOG (Oct. 14, 2008, 9:17 AM), <http://economix.blogs.nytimes.com/2008/10/14/in-credit-crisis-some-turn-to-online-peers-for-cash/?scp=7&sq=peer-to-peer+lending&st=nyt> (noting that person-to-person lending sites tend to attract high-risk borrowers who cannot obtain credit from more traditional lending sources, such as banks).

36. See, e.g., Lieber, *supra* note 22, at B1 (noting that more than one-third of loans on the peer-to-peer lending site Prosper.com were in default and the average investor lost 4.95 percent annually).

37. See generally Brill, *supra* note 25 (explaining that rapid growth in peer-to-peer lending has given rise to concerns about its regulation, spurring the Securities and Exchange Commission and Congress to exercise oversight).

38. *Id.*

39. See Ian J. Galloway, *Peer-to-Peer Lending and Community Development Finance 2* (Fed. Reserve Bank of S.F., Working Paper 2009-06, 2009), available at <http://www.frbsf.org/publications/community/wpapers/2009/wp2009-06.pdf> (providing a survey of diverse models for peer-to-peer lending in the United States and explaining specific risks).

40. See *id.* at 11 (explaining various concerns created by person-to-person lending).

Remarkably, despite the myriad of risks generated by person-to-person lending, regulation of it has largely fallen on the SEC. The SEC has taken an interest in person-to-person lending because of the involvement of securities in one of the common models for such lending.<sup>41</sup> Under this model, a bank serves as an intermediary in a person-to-person lending transaction by issuing a loan to an individual borrower.<sup>42</sup> The loan is then sold as a note to the individual lender with a return that is dependent on repayment of the loan by the individual borrower.<sup>43</sup> The note qualifies as a security under section 2(a)(1) of the Securities Act of 1933<sup>44</sup> and section 3(a)(10) of the Securities Exchange Act of 1934,<sup>45</sup> which provide the definition of a security for purposes of federal securities law. Specifically, under these definitional sections, the note in the person-to-person lending transaction qualifies as a security because it is both an investment contract under the test developed by the Supreme

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41. See generally Carl E. Smith, *If It's Not Broken, Don't Fix It: The SEC's Regulation of Peer-to-Peer Lending*, 6 BUS. L. BRIEF 21 (Fall/Winter 2009–2010) (discussing the SEC's regulation of person-to-person lending in the United States).

42. See *id.* at 21–22 (explaining the person-to-person lending models of Prosper Marketplace, Inc. and LendingClub Corporation, two major person-to-person lending platforms that have operated in the United States).

43. *Id.*

44. 15 U.S.C. § 77b(a)(1) (2011) (“The term ‘security’ means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a ‘security’, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.”).

45. 15 U.S.C. § 78c(a)(10) (2011) (“The term ‘security’ means any note, stock, treasury stock, security future, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a ‘security’; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.”).

Court of the United States in *SEC v. W. J. Howey Co.*<sup>46</sup> and a note under the “family resemblance” test developed by the Supreme Court of the United States in *Reves v. Ernst & Young*.<sup>47</sup> Because the notes issued in this model of person-to-person lending constitute securities, they are subject to the registration, antifraud, and other provisions of the federal securities laws.

As a result, the SEC has taken a relatively active role in regulating person-to-person lending. On November 24, 2008, the SEC issued a cease-and-desist order against Prosper Marketplace, Inc., the Delaware corporation based in San Francisco that owns and operates the person-to-person lending website [www.prosper.com](http://www.prosper.com).<sup>48</sup> The SEC asserted that Prosper had violated sections 5(a) and 5(c) of the Securities Act of 1933, which prohibit the sale of unregistered securities, by selling notes to individual lenders that were generated from loans by banks to individual borrowers.<sup>49</sup> In response to the SEC’s order, Prosper Marketplace, Inc. now must register the notes that it sells as part of its person-to-person lending activities.<sup>50</sup>

Relying on the SEC alone, however, to regulate person-to-person lending will not create a sufficient level of regulation. This type of lending implicates a plethora of areas of the law, including lending regulation, securities regulation, consumer privacy and data protection, anti-money laundering and anti-terrorism controls, and fraud prevention. Many of these areas of law are beyond the scope of the SEC’s expertise and regulatory authority. Achieving a proper level of regulation of person-to-person lending is as complex as, if not more complex than, achieving a proper level of regulation of traditional lending.

Congress needs to develop a comprehensive regulatory scheme for person-to-person lending. This type of lending creates significant risks for lenders, borrowers, and society unless it is adequately regulated. The study and report mandated by section 989F of the Dodd-Frank Act is a step in the right direction. Section 989F, however, also reveals that the Dodd-Frank Act does not embody a fully formed vision of regulation for financial activities occurring on

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46. 328 U.S. 293, 301 (1946) (holding that the test for an investment contract, which is a specific type of security for purposes of federal securities law, is “whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others”).

47. 494 U.S. 56, 65–67 (1990) (providing the test for a note, which is a specific type of security for purposes of a federal securities law).

48. Prosper Marketplace, Securities Act Release No. 8984, 2008 WL 4978684 (Nov. 24, 2008) (cease-and-desist order).

49. *Id.* at 2.

50. *Id.* at 6.

the Internet. This incomplete vision creates risks from threats domestic and abroad to the United States financial system.

Congress should work quickly to create a comprehensive system of regulation for person-to-person lending and to ensure that the United States system of financial regulation adequately addresses the risks created by the Internet. In regulating person-to-person lending, Congress should take an approach similar to regulating traditional lending including adopting policies that promote full and fair disclosure and regulations that protect lenders and borrowers. Moreover, Congress must address the special concerns created by using the Internet to facilitate person-to-person lending, e.g., the heightened risk of fraud, the dangers of identity theft, and the possibility that such lending will be used for terrorism financing. Because of the ubiquity of the Internet, Congress must work quickly to stave off threats both domestic and abroad.

### III. THE DODD-FRANK ACT AND THE EXTRATERRITORIAL APPLICATION OF UNITED STATES FINANCIAL REGULATION

The United States has traditionally maintained a high quality system of financial regulation. The globalization of financial markets, however, has fueled a ratcheting down of the level of regulation and enforcement in the United States in an attempt to maintain the competitiveness of its national financial markets. The United States Department of the Treasury in its June 2009 white paper report stated the following in regard to the phenomenon:

As we have witnessed during this crisis, financial stress can spread easily and quickly across national boundaries. Yet, regulation is still set largely in a national context. Without consistent supervision and regulation, financial institutions will tend to move their activities to jurisdictions with looser standards, creating a race to the bottom and intensifying systemic risk for the entire global financial system.<sup>51</sup>

Put simply, unless steps are taken to end the race-to-the-bottom that is occurring in financial regulation, additional and more intense financial crises will occur.

The extraterritorial application of United States financial regulation offers one means of combating the race-to-the-bottom that is occurring because of the globalization of financial markets. The race-to-the-bottom is the result of regulators competing to make their particular jurisdiction appear more attractive to financial institutions

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51. U.S. DEP'T OF THE TREASURY, *supra* note 2, at 8.

by lowering the level of financial regulation. If United States financial regulation is applied extraterritorially, this helps to set a floor of regulation in foreign jurisdictions because foreign regulators may be able to ratchet down their own systems of financial regulation, but they cannot ratchet down the system of the United States. This is not to claim that the United States can and should reach every financial transaction and financial matter around the globe. However, broad extraterritorial application of United States regulation can help to serve as a check against a race-to-the-bottom.

Remarkably, Congress opted to address the extraterritorial application of federal financial regulation in only two provisions of the voluminous body of the Dodd-Frank Act.<sup>52</sup> Two possible reasons for this may be (1) that existing regulation already allows for extensive extraterritorial application of United States financial regulation and (2) that many of the provisions of the Dodd-Frank Act may implicitly extend the extraterritorial reach of United States financial regulation. Considering the Obama Administration's and the United States Department of the Treasury's calls for comprehensive international financial regulatory reform,<sup>53</sup> however, this limited emphasis on the extraterritorial application of United States financial regulation is surprising to say the least.

The two provisions of the Dodd-Frank Act that do deal with the extraterritorial application of United States financial regulation demonstrate that the Dodd-Frank Act does not embody a comprehensive vision for financial regulatory reform. These provisions focus only on the extraterritorial application of federal securities regulation and provide an incomplete vision for that area of financial regulation because one of the provisions is a mandate for additional study.<sup>54</sup>

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52. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P, 124 Stat. 1376, 1862-65 (to be codified at 15 U.S.C. § 80a-47) (2010) (strengthening the enforcement powers of the United States Securities and Exchange Commission by clarifying the extraterritorial reach of their jurisdiction); *id.* § 929Y, at 1871 (to be codified at 15 U.S.C. § 78d-5) (mandating a study on the extraterritorial application of private rights of action under the Securities Exchange Act of 1934).

53. U.S. DEP'T OF THE TREASURY, *supra* note 2, at 2 ("We must build a new foundation for financial regulation and supervision that is simpler and more effectively enforced, that protects consumers and investors, that rewards innovation and that is able to adapt and evolve with changes in the financial market.").

54. See Dodd-Frank Act § 929P, 124 Stat. at 1862-65 (to be codified at 15 U.S.C. § 80a-47) (clarifying the extraterritorial jurisdiction of the United States Securities and Exchange Commission to enforce the federal securities laws); *id.* § 929Y, at 1871 (to be codified at 15 U.S.C. § 78d-5) (mandating a study regarding the extraterritorial application of the private rights of action under the Securities Exchange Act of 1934).



Section 929P does strengthen and clarify the United States Securities and Exchange Commission's power to extraterritorially enforce the United States securities laws. Specifically, section 929P(b)(1) modifies section 22 of the Securities Act of 1933<sup>55</sup> by adding the following new subsection:

(c) EXTRATERRITORIAL JURISDICTION.—The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 17(a) involving—

(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.<sup>56</sup>

Similarly, section 929P(b)(2) modifies section 27 of the Securities Exchange Act of 1934<sup>57</sup> by adding the following new subsection:

(b) EXTRATERRITORIAL JURISDICTION.—The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title involving—

(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.<sup>58</sup>

Finally, section 929P(b)(3) modifies section 214 of the Investment Advisers Act of 1940<sup>59</sup> by adding the following new subsection:

(b) EXTRATERRITORIAL JURISDICTION.—The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 206 involving—

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55. 15 U.S.C. § 77v(a) (2000).

56. Dodd-Frank Act § 929P(b)(1), 124 Stat. at 1864 (to be codified as 15 U.S.C. § 77v(a)) (modifying § 22 of the Securities Act of 1933).

57. 15 U.S.C. § 78aa (2000).

58. Dodd-Frank Act § 929P(b)(2), 124 Stat. at 1865 (to be codified at 15 U.S.C. § 78aa) (modifying § 27 of the Securities Exchange Act of 1934).

59. 15 U.S.C. § 80b-14 (2000).

- (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the violation is committed by a foreign adviser and involves only foreign investors; or
- (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.<sup>60</sup>

Section 929P of the Dodd-Frank Act is a positive step in addressing the new systemic risk created by the globalization of financial markets because it strengthens the SEC's role in regulating those markets. However, it stands as the lone provision of the Dodd-Frank Act that clarifies the extraterritorial application of the United States system of financial regulation.

Section 929Y of the Dodd-Frank Act requires that the SEC solicit public comment and conduct a study regarding extending the extraterritorial application of the private rights of action under the Securities Exchange Act of 1934.<sup>61</sup> Specifically, Congress charged the SEC with studying whether private rights of action should be extended to "conduct within the United States that constitutes a significant step in the furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors" and "conduct occurring outside the United States that has a foreseeable substantial effect within the United States."<sup>62</sup> In conducting its study, the SEC was charged with considering the following:

- (1) the scope of such a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise;
- (2) what implications such a private right of action would have on international comity;
- (3) the economic costs and benefits of extending a private right of action for transnational securities frauds; and
- (4) whether a narrower extraterritorial standard should be adopted.<sup>63</sup>

The report based on the study is due no later than eighteen months after the enactment of the statute.<sup>64</sup>

Congress's approach to the extraterritorial application of federal securities law is, in a certain regard, laudable. The provisions of the

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60. Dodd-Frank Act § 929P(b)(3), 124 Stat. at 1865 (to be codified at 15 U.S.C. § 80(b)-14) (modifying § 214 of the Investment Advisers Act of 1940).

61. *Id.* § 929Y(a), at 1871 (to be codified at 15 U.S.C. § 78d).

62. *Id.*

63. *Id.* § 929Y(b).

64. *Id.* § 929Y(c).

Dodd-Frank Act demonstrate Congress taking a cautious approach to reforming the extraterritorial application of federal securities law. Such an approach is warranted because of shifting judicial interpretations of the provisions governing the extraterritorial application of federal securities law at the time of the passage of the Dodd-Frank Act.

The Supreme Court of the United States decided *Morrison v. National Australia Bank Ltd.*<sup>65</sup> on June 24, 2010, roughly a month prior to President Barack Obama signing the Dodd-Frank Act into law.<sup>66</sup> In *Morrison*, the Supreme Court took a narrow view of the extraterritorial application of federal securities regulation and held that a general presumption exists against the extraterritorial application of federal securities law.<sup>67</sup> In that case, during February 1998, National Australia Bank Limited (National), an Australian Bank whose “ordinary shares” were not traded on any exchange in the United States, acquired HomeSide Lending, Inc. (HomeSide), a mortgage servicing company headquartered in Florida.<sup>68</sup> From February 1998 until mid-2001, National’s annual reports, public documents, and other public statements asserted that HomeSide was operating successfully.<sup>69</sup> However, on July 5, 2001, National announced that it was writing down HomeSide’s assets by \$450 million and on September 3, 2001, National announced that it was writing down HomeSide’s assets by an additional \$1.75 billion.<sup>70</sup> Russell Leslie Owen, Brian Silverlock, and Geraldine Silverlock (the Plaintiffs), all of whom are Australian, sought to represent a class of foreign purchasers of National’s ordinary shares that were sold outside of the United States in an action brought in the United States District Court for the Southern District of New York against National, HomeSide, and the officers of both companies (the Defendants).<sup>71</sup> The Plaintiffs alleged violations of sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.<sup>72</sup> The Southern District of New York granted the Defendants’ motion to dismiss based upon Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction because the acts in the United States were

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65. 130 S. Ct. 2869 (2010).

66. *Id.*

67. *Id.* at 2879 (rearticulating the principle that cases arising under federal law, including the Securities Act of 1933 and the Securities Exchange Act of 1934, carry a presumption against extraterritoriality).

68. *Id.* at 2875 (recounting the underlying facts of the case).

69. *Id.*

70. *Id.* at 2875–76.

71. *Id.* at 2876.

72. *Id.*

arguably only steps in a fraud that occurred abroad.<sup>73</sup> The United States Court of Appeals for the Second Circuit affirmed on similar grounds.<sup>74</sup>

The Supreme Court affirmed the opinions of both the lower courts. Writing for the majority, Justice Scalia began the Court's analysis by stating that the issue should be decided as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, rather than a motion to dismiss under Rule 12(b)(1), because the issue in the case was whether the Plaintiffs could state a claim under which relief could be granted.<sup>75</sup> The Court went on to hold that a presumption exists against extraterritorial application of the federal securities laws, unless a "clear indication" of such application is stated in the particular statute.<sup>76</sup> The Court rebuked the Second Circuit and courts in other circuits for their case law departing from his presumption.<sup>77</sup> Justice Scalia wrote, "Rather than guess anew in each case we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects."<sup>78</sup> The Court also clarified that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States."<sup>79</sup>

The provisions of the Dodd-Frank Act show Congress struggling with the Court's holding in *Morrison* and responding to the Court's call for Congress to legislate. In section 929P of the Dodd-Frank Act, Congress clarifies the scope of the SEC's extraterritorial jurisdiction by adopting a conduct and effects approach,<sup>80</sup> and in section 929Y, Congress demonstrates a willingness to consider extending extraterritorial application of the private rights of action under the Securities Exchange Act of 1934 by mandating a study of the issue by the SEC.<sup>81</sup> Thus, the Dodd-Frank Act reflects Congress's willingness

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73. *Id.*

74. *Id.*

75. *Id.* at 2876–77.

76. *Id.* at 2878.

77. *Id.* at 2878–80.

78. *Id.* at 2881.

79. *Id.* at 2884.

80. See Dodd-Frank Act, § 929P(b), 124 Stat. at 1864–65 (to be codified at scattered sections of 15 U.S.C.) ("strengthening and clarifying the United States Securities and Exchange Commission's power to extraterritorially enforce the United States securities laws").

81. *Id.* § 929Y(a), at 1871 (to be codified at 15 U.S.C. § 78d) (requiring that the SEC solicit public comment and conduct a study regarding extending the extraterritorial application of the private rights of action under the Securities Exchange Act of 1934).

to allow broader extraterritorial application of United States securities regulation in the face of the Court's holding limiting such extraterritorial application.

Congress's failure to focus on the extraterritorial application of other sorts of financial regulation, however, is remarkable. At minimum, Congress should have required a study of the extraterritorial application of United States financial regulation in general, rather than just requiring a discrete study on extraterritorial application of the private rights of action under the Securities Exchange Act of 1934. With the globalization of financial markets, Congress should have taken a more aggressive approach to the extraterritorial application of financial regulation as a means of policing those financial markets and reducing system risk.

#### IV. THE DODD-FRANK ACT AND INTERNATIONAL COORDINATION OF FINANCIAL REGULATION

The internationalization of financial markets creates the need for greater coordination and cooperation among financial regulators. The Obama Administration, through the United States Department of the Treasury's June 2009 white paper report, acknowledged the need for greater coordination and cooperation by making one of its five key objectives for financial regulatory reform the raising of international regulatory standards and improvement of international cooperation.<sup>82</sup> Congress's response in the Dodd-Frank Act does show some promise, but it remains weaker than necessary to properly regulate the emerging global financial markets.

Section 175 of the Dodd-Frank Act governs international policy coordination. Specifically, section 175(a) of the Act allows the President or the President's designees to "coordinate through all available international policy channels, similar policies as those found in United States law relating to limiting the scope, nature, size, scale, concentration, and interconnectedness of financial companies, in order to protect financial stability and the global economy."<sup>83</sup> Section 175(b) of the Act requires the Chairperson of the Financial Stability Oversight Council to "regularly consult with the financial regulatory entities and other appropriate organizations of foreign governments

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82. See U.S. DEP'T OF THE TREASURY, *supra* note 2, at 2–4 (listing "[r]aise international regulatory standards and improve international cooperation" as the Obama Administration's and United States Department of the Treasury's "five key objectives" for financial regulatory reform).

83. Dodd-Frank Act § 175(a), 124 Stat. at 1442 (to be codified at 12 U.S.C. § 5373).

or international organizations on matters relating to systemic risk to the international financial system.”<sup>84</sup> Finally, section 175(c) requires that the Board of Governors of the Federal Reserve System and the Secretary of the Treasury “consult with their foreign counterparts and through appropriate multilateral organizations to encourage comprehensive and robust prudential supervision and regulation for all highly leveraged and interconnected financial companies.”<sup>85</sup> Although the mandates of section 175 are vague, Congress’s acknowledgement of the need for international coordination is admirable.

Moreover, section 112(a)(2)(D) of the Act expressly charges the Financial Stability Oversight Council with a duty “to monitor domestic and international financial regulatory proposals and developments, including insurance and accounting issues, and to advise Congress and make recommendations in such areas that will enhance the integrity, efficiency, competitiveness, and stability of the U.S. financial markets.”<sup>86</sup> Assuming that this mandate is met, the Financial Stability Oversight Council should prove a valuable resource for monitoring international regulatory proposals and developments, which may potentially lead to greater coordination among United States financial regulators and foreign financial regulators.

The Dodd-Frank Act, however, fails to embody a fully formed vision of international coordination of financial regulation as demonstrated by the studies it requires for purposes of future regulation. Notably, section 202(f) of the Act requires that “[t]he Comptroller General of the United States shall conduct a study regarding international coordination relating to the orderly liquidation of financial companies under the Bankruptcy Code.”<sup>87</sup> In regard to the bankruptcy process, the Comptroller General is specifically charged with evaluating the following:

- (i) the extent to which international coordination currently exists;
- (ii) current mechanisms and structures for facilitating international cooperation;
- (iii) barriers to effective international coordination; and
- (iv) ways to increase and make more effective international coordination.<sup>88</sup>

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84. *Id.* § 175(b).

85. *Id.* § 175(c).

86. *Id.* § 112(a)(2)(D), at 1395 (to be codified at 12 U.S.C. § 5322).

87. *Id.* § 202(f), at 1449 (to be codified at 12 U.S.C. § 5382).

88. *Id.* § 202(f)(1)(B).

The report based on the study is due no later than one year after the enactment of the Dodd-Frank Act.<sup>89</sup> Section 217 of the Act requires that a substantially similar study be conducted for nonbank financial institutions by the Board of Governors of the Federal Reserve System.<sup>90</sup>

Congress's lack of a coherent vision for the bankruptcy of transnational financial institutions, which is evidenced by the studies required in section 202(f) and section 217 of the Act, is disturbing for two reasons. First, it demonstrates that the Dodd-Frank Act does not embody a comprehensive vision for regulating the emerging global financial markets. Second, it evidences that Congress has likely failed to meet one of its stated purposes of the Dodd-Frank Act, i.e., to put an end to financial institutions that are "too big to fail," because these institutions are likely to exist transnationally, and the Act does not embody an orderly plan for transnational reorganization or dissolution.

In addition to Congress's lack of a coherent vision for the bankruptcy of transnational financial institutions, Congress's efforts in the Dodd-Frank Act are inadequate to ensure a proper level of regulation of the emerging global capital markets. The Dodd-Frank Act contains a few provisions requiring coordination among regulators regarding securities-related issues. For example, section 752 requires the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the prudential regulators to

consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps, security-based swaps, swap entities, and security-based swap entities and may agree to such information-sharing arrangements as may be deemed to be necessary or appropriate in the public interest or for the protection of investors, swap counterparties, and security-based swap counterparties.<sup>91</sup>

The Dodd-Frank Act, however, by no means contains a comprehensive vision for regulating the emerging global capital markets.

A new vision is needed for international cooperation and coordination among securities regulators because, within the past few

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89. *Id.* § 202(f)(2).

90. *See id.* § 217, at 1519–20 (to be codified at 12 U.S.C. § 5394) (requiring a study of international coordination regarding the bankruptcy process for nonbank financial institutions).

91. *Id.* § 752(a), at 1749–50 (to be codified at 15 U.S.C. § 8325).

decades, capital markets have transformed from being national or regional in nature to being global.<sup>92</sup> Many of the reasons for the globalization of capital markets are the same or similar to the reasons for the globalization of financial markets in general, e.g., the development of new strong economies around the world in countries such as Brazil, Russia, India, and China, and a new excitement for transnational financial opportunities, as demonstrated by the continued development of the European Union.<sup>93</sup> Moreover, the Internet and other forms of communication have helped sew together the world's capital markets in a way that has not previously been possible.<sup>94</sup>

The globalization of capital markets also has occurred for a variety of other reasons. Issuers now look beyond the borders of their home countries for opportunities to raise capital,<sup>95</sup> and many retail and institutional investors search for investment opportunities worldwide as a means of portfolio diversification and to offset currency

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92. See Greene, *supra* note 6, at 85 (contending that there is “no argument that the securities markets are now global” and that the SEC must take action because other securities markets and regulators are as sophisticated as the United States and “the dominance of the United States as the leading player in the global marketplace is being challenged”).

93. See DeLaMater, *supra* note 5, at 117 (noting that not only have non-U.S. securities markets “grown in breadth and depth of their own over the past twenty years and now afford issuers in their home countries significant opportunities for financing that did not previously exist” but that European markets have become viable alternatives to U.S. markets because they are more receptive to equity offerings and longer-term debt offerings than they were in the past).

94. See Greene, *supra* note 6, at 86 (reporting that the Internet provides investors with “almost limitless information,” which, along with increasingly sophisticated investors and the need for financial diversification outside of the United States, has fueled a growing desire to interact directly with non-U.S. market participants); Susan Wolburgh Jenah, *Commentary on A Blueprint from Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT'L L.J. 69, 69–70 (2007) (characterizing globalization as “a fact,” citing (1) technologies that are creating more efficient trading across the globe, (2) capital market participants who are expanding their activities into foreign markets, and (3) investors who are searching for international investment opportunities); George W. Madison & Stewart P. Greene, *TIAA-CREF Response to A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT'L L.J. 99, 99 (2007) (“The rapid pace of technological advances is bringing us closer to the reality of a seamless global capital market. In such a world, investors would have access to increased liquidity, greater diversification, and a wider range of investment options regardless of their location.”); Ethiopis Tafara & Robert J. Peterson, *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT'L L.J. 31, 33 (2007) (stating that technological advances have contributed to the possibility of having a “truly global capital market” by reducing “structural barriers” to global trade in services and goods).

95. See Roberta S. Karmel, *The EU Challenge to the SEC*, 31 FORDHAM INT'L L.J. 1692, 1711 (2008) (explaining that the SEC cannot assume that the U.S. markets will continue to be the leading capital markets, as “U.S. investors are buying foreign securities in record numbers and foreign issuers no longer believe they need to make offerings in the U.S. to raise capital”).



fluctuations.<sup>96</sup> Additionally, the transformation of many securities exchanges into for-profit institutions as a result of demutualization has caused those exchanges to eschew previous nationalistic and protectionist tendencies in favor of searching for profit-making opportunities globally.<sup>97</sup> Demutualization has created a wave of exchange consolidation.<sup>98</sup> On April 4, 2007, the merger between the New York Stock Exchange and Euronext gave birth to the world's first global stock exchange,<sup>99</sup> and the ensuing push for consolidation continues to fuel globalization.<sup>100</sup>

The globalization of capital markets creates new systemic risks. In the absence of a harmonized and centralized system of monitoring, regulation, and enforcement, concerns linger about a race-to-the-bottom in international securities law as national and regional regulators ratchet down their securities laws in an attempt to attract

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96. See Donald C. Langevoort, *U.S. Securities Regulation and Global Competition*, 3 VA. L. & BUS. REV. 191, 195 (2008) (detailing the world's most recent wealth gains, which have occurred in areas like the Middle East, Russia, India, and China, and concluding that "[a]s global markets improve, U.S. investors, both institutional and retail, have expanded their geographic reach so as to be almost as willing and able to trade in those markets as in New York"); Tafara & Peterson, *supra* note 94, at 31 ("Investors now search beyond their own borders for investment opportunities and, unlike the past, many of these investors are not large companies, financial firms, or extremely wealthy individuals.").

97. See Jenah, *supra* note 94, at 71 (reporting that the conversion of securities exchanges into for-profit entities has "unleashed pressure from shareholders to increase profits through expansion, investment in new technology, and cost cutting, forcing these for-profit entities to eschew nationalistic or protectionist tendencies in the bid for value maximization"); Roberta S. Karmel, *The Once and Future New York Stock Exchange: The Regulation of Global Exchanges*, 1 BROOK. J. CORP. FIN. & COM. L. 355, 356 (2007) ("Another factor in the inevitable globalization of exchanges is that the exchanges have demutualized and become public companies. They need to please their shareholders as well as their customers.").

98. See Eric J. Pan, *A European Solution to the Regulation of Cross-Border Markets*, 2 BROOK. J. CORP. FIN. & COM. L. 133, 136 (2007) (reporting that Euronext joined together exchanges in Amsterdam, Brussels, Lisbon, and Paris and that OMX joined exchanges in Copenhagen, Helsinki, Iceland, Riga, Stockholm, Tallinn, and Vilnius).

99. See generally Bo Harvey, Note, *Exchange Consolidation and Models of International Securities Regulation*, 18 DUKE J. COMP. & INT'L L. 151, 152 (2007) (discussing exchange demutualization, international regulatory standards ("or lack thereof") between the United States and the European Union, and "international regulatory coordination as illustrated by the merger between NYSE and Euronext"); Sara M. Saylor, Note, *Are Securities Regulators Prepared for a Truly Transnational Exchange?*, 33 BROOK. J. INT'L L. 685 (2008) (examining the New York Stock Exchange and Euronext merger in detail and calling for additional harmonization between the United States and the European Union securities regulatory agencies).

100. See Jenah, *supra* note 94, at 71 ("This chess game of proposed exchange mergers, capital tie-ups, and alliances being played out on the global stage bears witness to the truism that capital markets are global."); Tafara & Peterson, *supra* note 94, at 31 ("Today, mergers and talks of mergers among the world's stock exchanges make obvious what financial professionals have long known: capital markets are global. Greater investor wealth and education have created the demand for such markets, and technology, in particular, has made globalized markets feasible."). See generally *supra* note 99 (detailing the merger between the NYSE and Euronext).

issuers, investors, and other market participants to their jurisdictions.<sup>101</sup> Moreover, the existing fragmented system of regulation creates concerns about regulatory and enforcement gaps and various collective action problems in determining which regulators should address particular issues.<sup>102</sup>

The vague mandates of sections 175 and 112 of the Dodd-Frank Act offer little to no guidance as to the United States' role in regulating the emerging global capital markets. Ideally, regulators from around the globe should join together to create a harmonized and centralized system of securities law that would provide a seamless web of monitoring, regulation, and enforcement.<sup>103</sup> However, this type of cooperation is unrealistic in the short-term.<sup>104</sup> At minimum, Congress should have provided some guidance as to the United States' role in regulating the emerging global capital markets. The United States does participate in transnational organizations such as the International Organization of Securities of Commissions (IOSCO), which do provide some coordination among national and regional securities regulators.<sup>105</sup> The United States, however, has traditionally been a leader in the area of securities regulation, and

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101. See also Langevoort, *supra* note 96, at 193 (arguing that the financial crisis that began in 2008 demonstrates "that other countries have been too lax as well, so that there should be a ratcheting up of securities regulation not only in the United States, but worldwide").

102. See Karmel, *supra* note 8, at 39 (acknowledging that because many securities violations are transnational, national laws need to be given extraterritorial effect; however, if those laws are given extraterritorial effect, that would create "conflict between regulators and confusion on the part of regulated persons as to what are the proper rules"); Langevoort, *supra* note 96, at 204 (articulating the "classic free rider problem" that "[w]hen trading is heavily fragmented, no nation is able to capture enough of the benefits from investments in quality regulation"); Tafara & Peterson, *supra* note 94, at 32 (explaining that the current regulatory gaps in foreign markets present risks to U.S. investors that do not exist in United States markets).

103. See *supra* notes 15–19 (arguing in favor of the creation of a harmonized and centralized system of international securities regulation).

104. See Langevoort, *supra* note 96, at 205 (arguing that a global securities and financial services regulator will not come into being any time soon, "[e]ven in the face of crisis and scandal," until countries take "small steps" toward coordinating enforcement efforts and the idea of a permanent regulatory institution becomes less politically threatening"). But see Karmel, *supra* note 8, at 40 ("Securities regulators do not have a long history of mutual cooperation and the coordination of investigative activities that bank regulators have long enjoyed. Nevertheless, many securities regulators now have exchanged Memoranda of Understanding (MOUs) and cooperate extensively with regard to their investigative activities.").

105. See *IOSCO Historical Background*, OICV-IOSCO <http://www.iosco.org/about/index.cfm?section=background> (last visited Mar. 28, 2011) ("[IOSCO's] membership regulates more than 95% of the world's securities markets and it is the primary international cooperative forum for securities market regulatory agencies. IOSCO members are drawn from, and regulate, over 100 jurisdictions and its membership continues to grow.").

Congress's lack of vision in the Dodd-Frank Act regarding international securities regulation is remarkable to say the least.

The Dodd-Frank Act fails to embody a fully formed vision of international coordination of financial regulation, especially in regard to international bankruptcy law and international securities regulation. Congress may have touted the Dodd-Frank Act as comprehensive regulatory reform, but it should really be viewed as just a beginning. Congress must act quickly to provide greater coordination and cooperation among the world's financial regulators in regard to international bankruptcy law and international securities regulation. Moreover, Congress must implement a regulatory regime that encourages coordination and cooperation among the world's financial regulators in general.

#### V. THE NEED FOR A NEW VISION FOR INTERNATIONAL FINANCIAL REGULATORY REFORM

Financial markets are now global, which has created new risks for consumers and new loopholes for avoiding corporate responsibility.<sup>106</sup> As evidenced by the crisis that began in 2008, the globalization of financial markets has yielded new systemic risks and weaknesses.<sup>107</sup> Despite the globalization of markets, financial regulation remains set largely in the national context. The globalization of financial markets has resulted in regulatory and enforcement gaps, collective action problems, and market inefficiencies.<sup>108</sup>

Despite calls by the Obama Administration and the United States Department of the Treasury for a new foundation for financial regulation,<sup>109</sup> the foundation created by the Dodd-Frank Act is cracked, fragmented, and incomplete. Congress has failed to deliver a comprehensive vision for regulatory reform within the voluminous body of the Dodd-Frank Act. This incomplete vision for financial regulatory reform is evidenced by the myriad of studies required to be conducted for purposes of future regulation<sup>110</sup> and Congress's

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106. See *supra* notes 4–6 and accompanying text (discussing the globalization of financial markets).

107. See *supra* notes 7–8 and accompanying text (analyzing the risks created by the globalization of financial markets).

108. See *supra* notes 101–02 (discussing the issues created by the globalization of capital markets).

109. See *supra* note 14 and accompanying text (detailing the Obama Administration's and the United States Department of the Treasury's objectives for raising international regulatory standards and improving international cooperation).

110. See *supra* note 3 (listing the numerous studies that Congress mandated under the provisions of the Dodd-Frank Act).

lackluster efforts to raise international regulatory standards and improve international cooperation.<sup>111</sup>

As highlighted in this article, the Dodd-Frank Act does not embody a comprehensive vision for international financial regulatory reform. First, the Dodd-Frank Act contains little to address the role of the Internet in financial transactions and in the globalization of financial markets.<sup>112</sup> Congress's lack of regulatory vision for person-to-person lending is especially troubling because this type of lending remains largely unregulated and presents all of the risks of traditional lending.<sup>113</sup> Second, the Dodd-Frank Act contains little to address the extraterritorial application of United States financial regulation.<sup>114</sup> Congress does clarify the jurisdiction of the SEC in enforcing federal securities law.<sup>115</sup> However, Congress studies only the potential extraterritorial application of private rights of action under the Securities Exchange Act of 1934,<sup>116</sup> and it ignores the extraterritorial application of United States financial regulation in a plethora of other contexts. Third, the Dodd-Frank Act does not provide for sufficient coordination of international financial regulation.<sup>117</sup> Although the Dodd-Frank Act supplies general mandates about coordination among financial regulators,<sup>118</sup> the lack of a fully formed vision for international coordination and cooperation in regard to

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111. See *supra* Parts II–IV (detailing the shortcomings of the Dodd-Frank Act in regard to the regulation of the Internet, the extraterritorial application of United States financial regulation, and international coordination of regulation).

112. See *supra* Part II (analyzing the Dodd-Frank Act and regulation of the Internet).

113. See *supra* Part II (discussing the study of person-to-person lending mandated by § 989F of the Dodd-Frank Act and the failure of Congress to provide any additional guidance or indication as to how person-to-person lending should be regulated).

114. See *supra* Part III (analyzing the Dodd-Frank Act and the extraterritorial application of United States financial regulation).

115. See *supra* notes 55–60 and accompanying text (detailing Congress's clarification in § 929P of the Dodd-Frank Act of the SEC's power to extraterritorially enforce the United States securities laws).

116. See *supra* notes 61–64 and accompanying text (noting Congress's mandate under § 929Y that the SEC solicit public comment and conduct a study regarding extending the extraterritorial application of the private rights of action under the Securities Act of 1934).

117. See *supra* Part IV (analyzing the Dodd-Frank Act and international coordination of financial regulation).

118. See *supra* notes 83–85 and accompanying text (discussing § 175, which governs international policy coordination); *supra* note 86 and accompanying text (noting that § 112(a)(2)(D) of the Dodd-Frank Act charges the Financial Stability Oversight Council with a duty to monitor international financial proposal and developments).

international bankruptcy law<sup>119</sup> and international securities regulation is troubling to say the least.<sup>120</sup>

Although the Dodd-Frank Act represents a good first step in financial regulatory reform, Congress must acknowledge that it is only a first step and work to address the numerous issues that are left open by the Dodd-Frank Act. Congress's focus should be to create a comprehensive system of financial regulation that focuses on coordination and cooperation in the international realm. In the wake of the Great Depression in the 1930s, coordination and cooperation on the national level ushered in an era of relative financial stability in the United States that lasted for the remainder of the twentieth century.<sup>121</sup> Because of the globalization of financial markets that has occurred in the past few decades, coordination and cooperation must become the norm on the international level in the wake of the Great Recession that began in 2008. Congress must supply a new vision for international financial regulatory reform to supplant the incomplete vision embodied in the Dodd-Frank Act.

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119. See *supra* notes 87–90 and accompanying text (discussing the failure of the Dodd-Frank Act for failing to provide a fully formed vision of international coordination relating to international bankruptcies).

120. See *supra* notes 91–105 and accompanying text (describing the failure of the Dodd-Frank Act to provide a proper level of regulation for the emerging global capital markets).

121. See, Eric C. Chaffee, *Standing Under Section 10(b) and Rule 10b-5: The Continued Validity of the Forced Seller Exception to the Purchaser-Seller Requirement*, 11 U. PA. J. BUS. L. 843, 851 (2009) (discussing the creation of a harmonized and centralized system of securities regulation in the United States in response to the stock market crash of 1929 and the ensuing Great Depression); see also Eric C. Chaffee, *Beyond Blue Chip: Issuer Standing to Seek Injunctive Relief Under Section 10(b) and Rule 10b-5 Without the Purchase or Sale of Security*, 36 SETON HALL L. REV. 1135, 1138 (2006) (noting that the Securities Act of 1933 and the Securities Exchange Act of 1934 “represent the first major federal attempts at securities regulation”).