

Transparency Is The New Opacity: Constructing Financial Regulation After The Crisis

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Conference Draft: Please do not quote or cite without author's consent.

Many of the main actors constructing financial regulation in the wake of the global financial crisis era have a stated commitment to transparency. However, transparency in financial regulation is undermined because the information disclosed is simultaneously limited and excessive. On one hand, the communications are limited: Transnational standard-setters publish their documents in a small number of languages (or only in English). Some institutions publish the full text of responses to consultations whereas others collate and condense responses (sometimes in ways that the responders regard as inaccurate). The characteristics of the bodies which respond to consultations, and their relationships with those whose interests they claim to represent may be visible or hidden.

On the other hand, the communications are overwhelming. Even partial transparency is of limited usefulness to observers of financial regulation because it is characterized by multiple complexities: financial transactions and the rules which apply to them are complex. Responsibility for financial regulation is shared among public and private bodies, and among transnational, national and sub-national entities. As a result, proposals for new rules and standards multiply among these different entities, creating an information glut.

The inadequacy of transparency mechanisms can be remedied, for example by translating proposals into more languages, or by providing and requiring improved disclosure of responses and responders. But the opacity which results from complexity is much more difficult to remedy and more fundamental. If this problem cannot be solved, transparency alone cannot be relied on to legitimate the new financial order.

Introduction

In this paper I focus on the development of standards of financial regulation,¹ and argue that transparency in financial regulation is undermined because the information disclosed is simultaneously limited and excessive. Transparency is limited because policy-makers who develop the rules of financial regulation could do much more than they do to

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¹ Thus I am focusing essentially on transparency with respect to the process by which standards and rules are generated. This ignores other issues of transparency with respect to financial regulation, such as transparency with respect to compliance and enforcement, and to the costs of the regulatory system; transparency about what the rules require (legal certainty), and the idea that many rules of financial regulation involve requirements of transparency. See, e.g., Christine Kaufmann & Rolf H. Weber, *The Role of Transparency in Financial Regulation*, 13 J. INT'L ECON. L. 779 (2010).

publicize their work. Transparency is excessive because financial regulation is complex, intersectional, multilayered, and transnational:² more disclosure to more people in more effective forms about more proposals for new rules and standards adds to an information glut and undermines the ability to citizens to understand what is happening.

Transparency conceived of as a desirable feature of government is not new. Brandeis noted in 1914 that sunlight was the best disinfectant,³ and Florida is the sunshine state not only as a matter of meteorology but also because of its commitment to shining light on the workings of government.⁴ But although policies to promote transparency are not entirely novel, they are becoming more pervasive, more extensive, and even more controversial⁵ than in the past.⁶ Technological development encourages new modes of transparency as

² Cf. Sheila Jasanoff, *Transparency in Public Science: Purposes, Reasons, Limits*, 69 L. & CONTEMP. PROBS. 21-45, 24 (2006) (“modern societies' increasing dependence on science has proceeded hand in hand with developments that disable most citizens, even the most technically expert, from effectively addressing the larger set of questions: Is it good science; what is it good for; and is it good enough? Science has not only become infused with multiple social and political interests; it is also in danger of escaping effective critical control. Too often scientific knowledge seems to be "sequestered," concealed from those who could benefit from it or who could comment meaningfully on its quality and relevance.”)

³ Louis D. Brandeis, *OTHER PEOPLES' MONEY: AND HOW THE BANKERS USE IT*, 92 (1914) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”)

⁴ See, e.g., Mary K. Kraemer, *Exemptions to the Sunshine Law and the Public Records Law: Have They Impaired Open Government in Florida*, 8 FLA. ST. U. L. REV. 265, 266-7 (1980) (describing the enactment of the Sunshine Law in 1967). Florida has had a Public Records Law since 1909.

⁵ See, e.g., EU struggles with being open about transparency (Mar. 24, 2011) at <http://www.euractiv.com/en/pa/eu-struggles-open-transparency-news-503484>.

⁶ On the relationship between accountability and transparency, see, e.g., Christopher Hood, *Accountability and Transparency: Siamese Twins, Matching Parts or Awkward Couple?* 33 W. EUR. POL. 989 (2010).

governments make available more information online via online databases⁷ and web pages⁸ and blogs.⁹ Governments promote transparency through commitments to access to information,¹⁰ and to consultation about policy.¹¹ International organizations encourage states to adopt policies of transparency¹² as an aspect of good government,¹³ and adopt policies of

⁷ See, e.g., the UK statutes law database at <http://www.legislation.gov.uk/>, Eur-lex at <http://eur-lex.europa.eu/en/index.htm>. See also, e.g., <http://data.gov.uk/>. Cf. UK Cabinet Office, Government ICT Strategy, 6 (Mar. 2011) at http://www.cabinetoffice.gov.uk/sites/default/files/resources/uk-government-government-ict-strategy_0.pdf (“Information and communications technology (ICT) is critical for the effective operation of government and the delivery of the services it provides to citizens and businesses. It offers key benefits by enabling:.. access to online transactional services, which makes life simpler and more convenient for citizens and businesses; and..channels to collaborate and share information with citizens and business, which in turn enable the innovation of new online tools and services.”)

⁸ Government departments and agencies have their own web pages. See, e.g., <http://www.usa.gov/>; <http://www.direct.gov.uk/en/index.htm>; <http://www.bundesregierung.de/Webs/Breg/EN/Homepage/home.html>.

⁹ See, e.g., The White House Blog at <http://www.whitehouse.gov/blog>.

¹⁰ See, e.g., Ben Worthy, *More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government*, 23 GOVERNANCE 561 (2010).

¹¹ See, e.g., Caroline Bradley, *Consultation and Legitimacy in Transnational Standard-Setting* (forthcoming MINN. J. INT’L L (2011)).

¹² Whether the idea of transparency has any universal meaning is a complex question. Cf. Mark Bevir, *Public Administration as Storytelling*, 89 PUB. ADMIN. 183, 188 (2011) (“Our beliefs, concepts, actions, and practices are products of particular traditions or discourses. Social concepts (and social objects), such as ‘bureaucracy’ or ‘democracy’, do not have intrinsic properties and objective boundaries. They are artificial inventions of particular languages and societies. Their content varies with the wider webs of belief in which they are situated.”)

¹³ See, e.g., OECD, Recommendation of the Council on Improving the Quality of Government Regulation, C(95)21/FINAL (Mar. 9, 1995) (These questions reflect principles of good decision-making that are used in OECD countries to improve the effectiveness and efficiency of government regulation by upgrading the legal and factual basis for regulations, clarifying options, assisting officials in reaching better decisions, establishing more orderly and

transparency with respect to their own activities as a way of enhancing their own legitimacy.¹⁴ Courts approve of administrative transparency.¹⁵ Private sector organizations from wikileaks to foundations¹⁶ to newspapers¹⁷ and individuals¹⁸ also contribute to transparency of public sector actions.

During the financial crisis market participants discovered that governmental decisions

predictable decision processes, identifying existing regulations that are outdated or unnecessary, and making government actions more transparent.”)

¹⁴ See, e.g., IMF, Transparency is Key to Accountability (Jan. 11, 2010) at <http://www.imf.org/external/np/exr/cs/news/2010/cso110.htm> (“Greater transparency in the IMF’s policies and decisions makes it more accountable to the people and governments at the center of its work, the organization concluded after a policy review”); IMF, Review of the Fund’s Transparency Policy—Background Paper Prepared by the Strategy, Policy, and Review Department in consultation with other departments, Approved by Reza Moghadam (Oct. 27, 2009) at <http://www.imf.org/external/np/pp/eng/2009/102609a.pdf> .

¹⁵ See, e.g., *Hazelhurst & Others v Solicitors’ Regulation Authority* [2011] EWHC 462 at ¶ 38 (“It is of note that the SDT has not published Indicative Sanctions Guidance. Such guidance identifies the purpose, parameters and range of sanctions. It permits those who appear before it to better understand the proceedings and the thinking of the SDT. It assists the transparency of the proceedings. Such guidance has been used by other regulatory bodies for some years and is a valuable reference point both for the tribunal and for those who appear in front of it, as practitioners or advocates.”)

¹⁶ See, e.g., <http://sunlightfoundation.com/> .

¹⁷ Consider, for example the Guardian’s use of crowd-sourcing with respect to data on MP expense claims. See, e.g., Michael Andersen, Four crowdsourcing lessons from the Guardian’s (spectacular) expenses-scandal experiment at <http://www.niemanlab.org/2009/06/four-crowdsourcing-lessons-from-the-guardians-spectacular-expenses-scandal-experiment/> and How to crowdsource MPs’ expenses at <http://www.guardian.co.uk/news/datablog/2009/jun/18/mps-expenses-houseofcommons>.

¹⁸ See, e.g., <http://openregs.com> : “OpenRegs.com is an alternative to the federal government’s Regulations.gov regulatory dockets database. That site can be confusing and difficult to use for average citizens and experts alike. The goal of OpenRegs.com is to make the proposed and final regulations published in the Federal Register easy to find and discuss, so that citizens can become better informed and more involved in the regulatory process.” <http://openregs.com/about> .

about whether or not to rescue financial institutions in trouble were unpredictable. For example, the decisions of the US Government in September 2008 to allow Lehman Brothers to go into Chapter 11¹⁹ and to rescue AIG²⁰ have been criticized by many commentators as undermining confidence in the financial markets. Opaque financial transactions contributed to the market participants' lack of confidence in their ability to value assets.²¹ Apparent transfers of risk turned out not to be real.²²

¹⁹ See, e.g., Nelson D. Schwartz, Crisis began with Lehman's collapse, Europeans say, New York Times (Oct. 10, 2008) at <http://www.nytimes.com/2008/10/10/business/worldbusiness/10iht-euro.4.16858400.html> (““It was a quiet August,” said Frederic Oudea, the chief executive of Société Générale, one of the biggest banks in France, noting that he had been on vacation in the south of France. But Lehman's failure on Sept. 14 “was a trigger effect for a series of events,” Oudea said, turning an American financial meltdown based on the collapse of the subprime mortgage market into a global crisis.”)

²⁰ See, e.g., Congressional Oversight Panel, The AIG Rescue, Its Impact on Markets, and the Government's Exit Strategy, 230 (Jun. 10, 2010) at <http://cop.senate.gov/documents/cop-061010-report.pdf> (“By providing a complete bailout that called for no shared sacrifice among AIG and its creditors, FRBNY and Treasury fundamentally changed the rules of America's financial marketplace.”)

²¹ See, e.g., IMF, Global Financial Stability Report: Sovereigns, Funding, and Systemic Liquidity, 59 (Oct. 2010) at <http://www.imf.org/external/pubs/ft/gfsr/2010/02/pdf/text.pdf> ; Financial Stability Board, Thematic Review on Risk Disclosure Practices: Peer Review Report 2 (Mar. 18, 2011) at http://www.financialstabilityboard.org/publications/r_110318.pdf (“The financial crisis highlighted that reliable and relevant valuations and disclosures of the risks to which financial institutions are exposed are important to maintain overall market confidence. High quality risk disclosures contribute to financial stability by providing investors and other market participants with a better understanding of firms' risk exposures and risk management practices.”) Cf. House of Commons Treasury Committee, Financial Stability and Transparency, 3 Sixth Report of Session 2007-8, HC 371 (Mar. 3, 2008) at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtreasy/371/371.pdf> (“It is clear that the search for yield and short-termism encouraged many investors to invest in high-yielding and increasingly complex products that it turns out they did not always fully understand.”)

²² See, e.g., IMF, Global Financial Stability Report: Containing Systemic Risks and Restoring Financial Soundness, xii (April 2008) at <http://www.imf.org/external/pubs/ft/gfsr/2008/01/pdf/text.pdf> (“a surprising amount of risk has

As a result, many changes and proposed changes to rules of financial regulation in the wake of the crisis have sought to improve transparency.²³ For example, new rules require credit rating agencies to disclose characteristics of the models they use in developing ratings.²⁴ The European Commission has focused on establishing banking regimes that will allow banks to fail, improving market discipline, and reducing moral hazard.²⁵

Many of the main actors constructing financial regulation in the wake of the global financial crisis era have stated commitments to transparency. The members of the Financial Stability Board (FSB) agreed to subject themselves to peer reviews of their implementation of

returned to the banking system from where it was allegedly dispersed.”)

²³ Donald Langevoort points out that whereas transparency may be critical for securities regulation it may not be so critical for risk regulation. Donald C. Langevoort, *Global Securities Regulation after the Financial Crisis*, 13 J. INT’L ECON. L. 799, 805 (2010) (“Separation between the domains of securities regulation and substantive risk regulation also has a second, more normative value. Put simply, those two domains are inherently at odds, and whenever combined under one roof, securities regulation tends to lose. Securities regulation is about truth-telling, and under stressful conditions, risk regulators almost always prefer concealing the truth to exposing it. To be sure, it is far from clear that truth-telling is always the right course, but preserving a regulatory capacity that favors transparency is generally preferable to folding it into the risk regulator’s task with some vague mandate to value disclosure.”)

²⁴ See, e.g., Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies O.J. No. L 302/1 (Nov. 17, 2009). Art. 8(1) of the Regulation provides that a “credit rating agency shall disclose to the public the methodologies, models and key rating assumptions it uses in its credit rating activities”.

²⁵ EU Commission, Communication on An EU Framework for Crisis Management in the Financial Sector, COM(2010) 579 at p. 2 (Oct. 20, 2010) at http://ec.europa.eu/internal_market/bank/docs/crisis-management/framework/com2010_579_en.pdf (“Banks must be allowed to fail, like any other business. Authorities must be equipped with tools that enable them to prevent the systemic damage caused by disorderly failure of such institutions, without unnecessarily exposing taxpayer to risk of loss and causing wider economic damage. Alongside tougher regulation reducing the chances of a bank becoming distressed, a credible regime is needed to re-instil market discipline associated with the threat of failure and to reduce moral hazard – the implicit protection from failure that those in the banking sector currently enjoy.”)

transnational standards of financial regulation,²⁶ and the FSB publishes the reviews.²⁷ The Basel Committee now publishes consultative documents online²⁸ and has even published some responses to consultation.²⁹ The White House has adopted a policy of transparency and open government.³⁰ Open government includes moves to make government datasets, including

²⁶ See Financial Stability Board, FSB Framework for Strengthening Adherence to International Standards (Jan. 9, 2010) at http://www.financialstabilityboard.org/publications/r_100109a.pdf.

²⁷ See, e.g., Financial Stability Board, Country Review of Mexico: Peer Review Report (Sep. 23, 2010) at http://www.financialstabilityboard.org/publications/r_100927.pdf; Financial Stability Board, Peer Review of Italy: Review Report (Jan. 27, 2011) at http://www.financialstabilityboard.org/publications/r_110207b.pdf.

²⁸ See, e.g., Basel Committee on Banking Supervision, Press Release, Pillar 3 disclosure requirements for remuneration - consultative document (Dec. 2010) at <http://www.bis.org/publ/bcbs191.htm> (“The Basel Committee welcomes comments on this consultative document. Comments should be submitted by Friday, 25 February 2011 by email to: baselcommittee@bis.org. Alternatively, comments may be sent by post to the Secretariat of the Basel Committee on Banking Supervision, Bank for International Settlements, CH-4002 Basel, Switzerland. All comments may be published on the Bank for International Settlements's website unless a commenter specifically requests confidential treatment.”)

²⁹ See, e.g., Basel Committee on Banking Supervision, Comments received on the consultative documents "Strengthening the resilience of the banking sector" and "International framework for liquidity risk measurement, standards and monitoring" at <http://www.bis.org/publ/bcbs165/cacomment.htm>.

³⁰ See, e.g., Memorandum for the Heads of Executive Departments and Agencies, Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009); Memorandum for the Heads of Executive Departments and Agencies, Open Government Directive (Dec. 8, 2009) at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf. Moves towards e-government (which is a component of open government) antedated the Obama Administration. See, e.g., the E-Government Act of 2002, Pub.L. 107-347, 116 Stat. 2899 codified at 44 U.S.C. Ch. 36. As of March 2011 future funding for these programs is uncertain. See, e.g., Daniel Schuman, Budget Technopocalypse: Proposed Congressional Budgets Slash Funding for Data Transparency, Sunlight Foundation Blog (Mar. 23, 2011) at <http://sunlightfoundation.com/blog/2011/03/23/transparency-technopocalypse-proposed-congressional-budgets-slash-funding-for-data-transparency/>.

those relating to spending, more visible.³¹ It also involves efforts to make the regulatory process more transparent.³² Administrative agencies have invited the public to make comments about how they should go about making rules, rather than merely responding to specific regulatory proposals.³³ All of these initiatives are facilitated by developments in information technology.

This is a very brief and incomplete description of the ways in which governments and supranational organizations have worked towards transparency. However, it illustrates that transparency is an important element of the way in which policy-making bodies conceive of and describe their roles. Nevertheless, transparency may not achieve effective communication.³⁴

Financial Regulation and Transparency

In many ways domestic initiatives to reform or adjust financial regulation are transparent in the same way as any other domestic changes in the law. The activities of

³¹ See, e.g., <http://www.data.gov/> . Information about how to acquire more information is available at <http://www.foia.gov/> .

³² See, e.g., <http://www.regulations.gov/> .

³³ See, e.g., Sec. & Exch. Comm'n, Press Release, SEC Chairman Schapiro Announces Open Process for Regulatory Reform Rulemaking, Jul. 27, 2010 at <http://www.sec.gov/news/press/2010/2010-135.htm> (“Under a new process, the public will be able to comment before the agency even proposes its regulatory reform rules and amendments.... The new process goes well beyond what is legally required and will provide expanded opportunity for public comment and greater transparency and accountability. The SEC also expects to hold public hearings on selected topics.”)

³⁴ See, e.g., Onora O'Neill, *Ethics for Communication?* 17 EUR. J. PHIL.167, 170 (2009) (“It is all too common for material that is publicly disclosed or disseminated, thereby achieving transparency, not to be read, heard or seen by any or many audiences; even where it is read, heard or seen, it may not to be grasped or understood by those audiences. Transparency counters secrecy, but it does not ensure communication ... Sometimes it is even used to maintain secrecy: one effective way to ensure that information is not communicated is not to keep it secret, but to ‘release’ it with no fanfare.”)

legislative bodies are visible via the internet³⁵ and television³⁶ and sometimes by video over the internet,³⁷ and are reported on by the news media. Regulators publish proposed regulations for public comment.³⁸ But despite policy-makers' efforts to make information about what they are doing available to the public, the public is often not well-informed about the law or proposals for its reform.³⁹

One reason citizens may be under-informed about law and policy is that some policy issues seem as a general matter less salient to them than others. Scandals and crises can increase salience,⁴⁰ but many areas of financial regulation are less salient for citizens, even at times of financial scandal or crisis.⁴¹ Policy networks and entrepreneurs influence the development of regulation by taking advantage of opportunities to promote their own

³⁵ See, e.g., <http://www.house.gov/> ; <http://www.senate.gov/> ; the National Conference of State Legislatures State Legislative Websites Directory at <http://www.ncsl.org/?tabid=17173> ; <http://www.assemblee-nationale.fr/index.asp> ; <http://www.parliament.uk/> ;

³⁶ See, e.g., <http://www.c-span.org/> .

³⁷ See, e.g., http://www.bundestag.de/htdocs_e/press/tv/index.html

³⁸ Cf. Erwin N. Griswold, *Government in Ignorance of the Law--A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 208 (1934-5) ("apart from the United States, it would be very difficult to find a nation of importance which does not use some method to make available and accessible a record of the acts of its executive authorities.")

³⁹ On people's willingness to express views on issues they do not know about, see, e.g., Howard Schuman & Stanley Presser, *Public Opinion and Public Ignorance: The Fine Line Between Attitudes and Nonattitudes*, 85 AM. J. SOC 1214 (1980).

⁴⁰ Cf. Michael D. Jones & Hank C. Jenkins-Smith, *Trans-Subsystem Dynamics: Policy Topography, Mass Opinion, and Policy Change*, 37 POLICY STUD. J. 37, 42 (2009) ("Salience disruption is initiated by large-scale events that focus public attention on specific subsystems (or groups of them) and thereby generates enormous effort, resources, and change in those subsystems, while simultaneously drawing attention and resources away from others.")

⁴¹ Some proposals for rule changes attract significant attention. See, e.g., Debit Interchange Rule Delayed (Mar. 31, 2011) at <http://financialreform.wolterskluwerlb.com/2011/03/debit-interchange-rule-delayed.html> (Noting more than 11,000 comments on a proposed rule).

preferred policy ideas.⁴²

How policy issues are characterized may affect how salient those issues are: issue characterization is key. Policy makers who characterize issues relating to sub-prime lending as “predatory lending” may engage more citizens in discussions about proposals to change the law than if they used some other more neutral characterization.⁴³ Narratives help with characterization: different versions of sub-prime lending narratives would suggest different regulatory responses. If the sub-prime lending problems were caused by inadequate risk management at financial firms, the appropriate regulatory solution would focus on encouraging or requiring financial firms to adopt improved risk management strategies and to engage in responsible lending. If the problems were caused by borrowers who enthusiastically took on “liar loans” they could not afford, the appropriate solution would encourage responsible borrowing.⁴⁴

Statutes and regulations are frequently written in very technical language and one way of improving the transparency of law is to write the law, and proposals to change the law, in language citizens are able to understand.⁴⁵ Policy-makers draft plain language regulations and

⁴² The corporate governance community promotes changes in governance as a solution to a range of issues.

⁴³ Cf. Anne Schneider & Mara Sidney, *What Is Next for Policy Design and Social Construction Theory?*, 37 POLICY STUDIES J. 103, 106 (2009) (“The policy design approach directs scholars to examine who constructs policy issues, and how they do so, such that policy actors and the public accept particular understandings as “real,” and how constructions of groups, problems and knowledge then manifest themselves and become institutionalized into policy designs, which subsequently reinforce and disseminate these constructions”.)

⁴⁴ The EU has attempted to compromise with proposals which focus on “irresponsible lending and borrowing”. EU Commission, Proposal for a Directive on Credit Agreements Relating to Residential Property, p. 2, COM (2011) 142 (Mar. 31, 2011) at http://ec.europa.eu/internal_market/finservices-retail/docs/credit/mortgage/com_2011_142_en.pdf.

⁴⁵ See, e.g., Improving Regulation and Regulatory Review, Executive Order 13563 of January 18, 2011 76 Fed. Reg. 3821 (Jan. 21, 2011) (“Our regulatory system must...ensure that regulations are accessible, consistent, written in plain language, and easy to understand.”)

explanatory documents in simple language to improve communication with citizens. But even where explanations of financial rules are expressed in plain language the rules are often complex,⁴⁶ and the activities they would control are also complex. This layering of complexities produces opacity.

Financial regulation is increasingly a transnational, rather than a merely domestic, phenomenon. For many years, regulators have worked with their counterparts in other jurisdictions to develop standards for financial regulation.⁴⁷ Securities regulators have worked together in the International Organisation of Securities Commissions (IOSCO),⁴⁸ insurance supervisors work through the International Association of Insurance Supervisors (IAIS), and central banks and bank regulators form the Basel Committee on Banking Supervision.⁴⁹ These groups are essentially collaborative, technocratic networks of regulators with the power to develop recommendations, principles and standards which are not, as a formal matter, legally binding. However, although the principles and standards are not legally binding as such, states whose regulators participate in their articulation may feel obliged to implement them domestically. And states which depend on the IMF's⁵⁰ financial resources will be subject to

⁴⁶ Andrew Haldane has suggested that simple rules might be appropriate for complex activities. Andrew Haldane, Executive Director, Financial Stability, Bank of England, Capital Discipline, based on a speech at the American Economic Association, Denver (Jan. 9, 2011) at <http://www.bankofengland.co.uk/publications/speeches/2011/speech484.pdf> (“As a thought experiment, imagine instead we were designing a regulatory framework from scratch. Finance is a classic complex, adaptive system. What properties would a complex, adaptive system such as finance ideally exhibit to best insure about future crises? Simplicity is one. There is a key lesson, here, from the literature on complex systems. Faced with complexity, the temptation is to seek complex control devices. In fact, complex systems typically call for simple control rules. To do otherwise simply compounds system complexity with control complexity.”)

⁴⁷ See, e.g., Anne Marie. Slaughter, *A New World Order*, 36 (2004) (describing regulators as “the new diplomats.”)

⁴⁸ See <http://www.iosco.org/>

⁴⁹ See <http://www.bis.org/bcbs/index.htm> .

⁵⁰ The IMF is a treaty-based international organization which was founded in 1944 to govern the international monetary system to assure exchange rate stability and encourage IMF

the IMF's examination of their economies, including their bank regulatory systems.⁵¹ The global financial crisis increased demand for funds from the IMF. The IMF's interest in monitoring the financial soundness of its members, especially of its borrowers, gives it an interest in regulation as a mechanism for promoting financial stability. In response to criticism, the IMF has recently been working to address some of the concerns about its role by emphasizing transparency as an accountability mechanism.⁵²

Transnational standard-setters have incentives to be transparent about their work partly because regulated firms wish to express their views on proposed standards, and partly in order to legitimate their work to critics. The Basel Committee and IOSCO, as networks of regulators, co-operate across territorial boundaries partly in order to be more effective domestically. But their activities have an impact on the competitiveness of financial firms. Financial firms which are subject to relaxed regulation in their home state may benefit from a competitive advantage with respect to firms based in jurisdictions with more demanding regulatory regimes. Governmental support for financial firms may function as a subsidy. The original Basel Accord which was introduced in 1988 provided for states to impose capital adequacy requirements on international banks, even if those states addressed risks to financial stability in other ways (such as through governmental guarantees). The Accord was agreed after the US and the UK announced they would apply stringent capital adequacy requirements to foreign banks doing business in their jurisdictions.⁵³

This example with respect to the genesis of the original Basel Accord illustrates that the interests of private firms have an impact on regulation - at the transnational level as well as

members to do away with exchange restrictions. The Articles of Agreement of the International Monetary Fund are at <http://www.imf.org/external/pubs/ft/aa/index.htm> .

⁵¹ See, e.g., IMF, Iceland: Financial System Stability Assessment—Update, IMF Country Report No. 08/368 (Dec. 2008) available at <http://www.imf.org/external/pubs/ft/scr/2008/cr08368.pdf> .

⁵² See, e.g., IMF, Transparency is Key to Accountability, *supra* note [14](#).

⁵³ See, e.g., Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 HARV. INT'L L. J. 447, 500-503 (2008).

at the domestic level.

Thus whereas the multi-level governance model of regulation focuses on the idea of levels of regulation I prefer to think about intersections between different spheres of regulation: intersections between governmental and non-governmental or private spheres; between the spheres of expertise and of politics; and between the domestic and foreign or international spheres. These spheres are interconnected. Governmental authorities work together across territorial borders. There is some overlap between the private sphere and the sphere of expertise, and the market-based sphere of expertise is transnational, rather than being entirely domestic. The intricacies of the interconnections between the different spheres of financial regulation form an additional layer of opacity over the complexities of the markets and transactions which occur on those markets. Thus financial regulation involves complex activities and markets, intricate and diffuse processes for assessing and deciding on rules and standards, and many complicated rules.

Before the crisis financial firms had considerable success in persuading governments and the networks of regulators to defer to a large extent to the expertise of the private sector. Before the crisis IOSCO said that the “regulatory regime should make appropriate use of Self-Regulatory Organizations.”⁵⁴ When the crisis hit, the idea of self-regulation seemed suddenly less attractive. For example, in late 2008 Christopher Cox, then Chairman of the SEC, said that it had become “abundantly clear that voluntary regulation does not work.”⁵⁵

⁵⁴ IOSCO, Objectives and Principles of Securities Regulation, i (Feb. 2008) at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD265.pdf> .

⁵⁵ Sec. & Exch. Comm’n, Press Release, Chairman Cox Announces End of Consolidated Supervised Entities Program (Sept. 26, 2008) *available at* <http://www.sec.gov/news/press/2008/2008-230.htm> . See also, e.g., Sec. & Exch. Comm’n, Office of Inspector General, SEC’s Oversight of Bear Stearns and Related Entities: Consolidated-Supervised Entity Program, Report No. 446-A (Sept 25, 2008) *available at* <http://www.sec.gov/about/oig/audit/2008/446-a.pdf> . Contrast Chairman Cox’ statement with the SEC’s July 2008 New Guidance Release on SRO rule filings, expanding the range of SRO rule changes which would become immediately effective and stating that “Self-regulation, with oversight by the Commission, is a basic premise of the Exchange Act.” Sec. & Exch. Comm’n, Commission Guidance and Amendment to the Rules Relating to Organization and Program Management Concerning Proposed Rule Changes Filed by Self-Regulatory Organizations, 73

The language of the IOSCO Objectives and Principles was amended to reflect this new nervousness about self-regulation - the 2010 version backtracks from the earlier exhortation to make appropriate use of self-regulation and merely refers to the possibility that the regulatory system will involve self-regulation.⁵⁶

In another example of public reliance on private regulation, Basel II allowed regulators to permit sophisticated banks to use their own models for credit risk.. Adair Turner has argued forcefully since the crisis began that everyone put too much faith in these models:

Mathematical sophistication ended up not containing risk, but providing false assurance that other prima facie indicators of increasing risk (e.g. rapid credit extension and balance sheet growth) could be safely ignored.⁵⁷

The crisis disturbed the complacency with which policy-makers viewed self-regulation in the financial markets. But the private sector reacted by developing new self-regulatory principles and practices. Industry groups have focused on the securitization process, for example by developing guidelines for limiting reliance on credit ratings,⁵⁸ and addressing issues of transparency.⁵⁹ ISDA, the International Swaps and Derivatives Association, has developed protocols for novations of credit derivatives and interest rate transactions to address

Fed. Reg. 40144, 40144 (Jul. 11, 2008).

⁵⁶ IOSCO, Objectives and Principles of Securities Regulation (Jun. 2010) at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf> .

⁵⁷ Financial Services Authority, The Turner Review: A Regulatory Response to the Global Banking Crisis, 22 (Mar. 2009) at http://www.fsa.gov.uk/pubs/other/turner_review.pdf (“Turner Review”).

⁵⁸ European Fund and Asset Management Association, European Securitisation Forum & Investment Management Association, Asset Management Industry Guidelines to Address Over-Reliance upon Ratings (Dec. 11, 2008).

⁵⁹ *See, e.g.*, Industry Initiatives to Increase Transparency: Issuer and Investor Transparency Initiatives (June 2008) at <http://www.europeansecuritisation.com/Communications/Archive/Current/Issuer%20and%20Investor%20Transparency%20Initiatives.pdf>.

backlogs.⁶⁰

Industry groups have actively negotiated and lobbied over changes to the financial regulatory structure and rules. They have done so with the knowledge that circumstances have changed, and earlier habits of deference to industry views have been disrupted. For example, SIFMA - the Securities Industry and Financial Markets Association - a trade group formed after the merger of the Securities Industry Association and the Bond Market Association, submitted a 71- page response to the SEC's proposals for new regulations on issues of asset backed securities.⁶¹ The response included this passage:

SIFMA's members have directly experienced the pain of the recent financial crisis and the collapse of the structured finance markets, and are acutely sensitive to what is at stake as both government and the private sector work to rebuild these vital markets. There is a long way to go.

The development of financial regulation involves conversations and negotiations between market participants and the networks of regulators which develop standards for their behavior: conversations and negotiations which take place across territorial borders. But it is not enough for these processes to be transparent to the regulators and market participants. They should also be transparent to citizens.

The financial markets and the regulations that apply to them are impenetrable for most citizens who are not involved in activities related to the financial markets. Citizens' lack of understanding of financial matters leads governments and international organizations to work to improve financial literacy.⁶² Although citizens may need to make decisions about their own mortgages and investment for retirement they do not need to participate in developing rules of financial regulation. This activity remains in the hands of the experts. But the experts are not always right about what needs to be done, and when they are wrong it is others, including the

⁶⁰ See <http://www.isda.org/isdanovationprotII/isdanovationprotII.html>.

⁶¹ SIFMA, Re: Asset-Backed Securities, Release Nos. 33-9117; 34-61858; File No. S7-08-10 (Aug. 2, 2010).

⁶² See, e.g., OECD, IMPROVING FINANCIAL LITERACY: ANALYSIS OF ISSUES AND POLICIES (2005).

taxpaying citizens, who pick up the pieces.⁶³

The following sections of the paper examine ways in which the processes for development of transnational standards of financial regulation are both insufficiently and excessively transparent.

Critique Part 1: Insufficient Transparency

The Basel Committee and IOSCO both publish documents denominated consultation documents.⁶⁴ But merely publishing a document on the standard-setter's web pages does not ensure that anyone reads it.⁶⁵ Financial crises may be front page news, but the technical details of rules and standards are not. Online newspapers do not consistently provide links to government reports and consultation documents on transnational standards. Individuals, firms, and organizations of firms do respond to the consultation documents, although the

⁶³ See, e.g., Toby Helm & Daniel Boffey, *Ministers Admit Family Debt Burden Is Set to Soar*, The Guardian (Apr. 2, 2011) at <http://www.guardian.co.uk/politics/2011/apr/02/family-debt-burden-government-figures>. The effects of financial crises may be felt far away from the markets where they occur. See, e.g., Sophie Chauvin & André Geis, *Who Has Been Affected, How and Why? The Spillover of The Global Financial Crisis To Sub-Saharan Africa And Ways to Recovery*, p. 8, European Central Bank Occasional Paper No. 124 (Mar. 2011) at <http://www.ecb.int/pub/pdf/scpops/ecbocp124.pdf> (“the first wave of the crisis, characterised by the rapid spread of financial turmoil in the United States to other developed economies and some emerging markets via their closely interconnected financial systems, left Sub-Saharan Africa, with the exception of South Africa, comparatively unscathed.... However, the second wave of the turmoil, when the disorder in the financial sector began to have an impact on the real economy, had profound consequences for the continent..”)

⁶⁴ See, e.g., Basel Committee on Banking Supervision, *Capitalisation of Bank Exposures to Central Counterparties*, Consultative Document (Dec. 2010) at <http://www.bis.org/publ/bcbs190.pdf>; Report of the Technical Committee of IOSCO, *Issues Raised by Dark Liquidity*, Consultation Document CR05/10 (Oct. 27, 2010) at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD336.pdf>.

⁶⁵ Cf. Onora O’Neill, *supra* note 34, at 173 (“The activity by which information is made transparent places it in the public domain, but does not guarantee that anybody will find it, understand it or grasp its relevance.”)

responses of firms and organizations are more numerous than those of individuals.⁶⁶ Trade associations draw their members' attention to consultations on issues about which those members might have views.⁶⁷ When trade associations publicize consultations to their members they draw attention to the consultations and they also show that they are working on behalf of their members. Such publicity does help to increase the number of people who are aware of the proposals in consultation documents, but the people who learn about consultations from trade associations are within the zone of expertise. Those who do are not members of trade associations or who do not subscribe to newsletters which track proposed new standards are less likely to find out about the proposals. The proposals may be transparent in the sense that they are available, but this transparency has limited impact in terms of informing citizens in general about standards which may affect them.

Transnational consultations on proposed standards suffer from a further lack of effective transparency in that they are usually conducted in a limited number of languages, and sometimes only in English. In contrast to the EU's commitment to multilingualism, international organizations and standard-setters which focus on financial regulation have not been committed from the outset to publicizing their work in multiple language versions. This fact suggests some limits to those organizations' commitment to effective, rather than to formal, transparency. Successful trade associations can operate across borders and communicate in many languages, but processes for the development of transnational standards which are carried out in English, or in a limited number of other languages, have the effect of excluding some people from participation. This issue is being identified, if not resolved: for example, commentators on the IMF's transparency policy suggested that the IMF should

⁶⁶ The Basel Committee's listing of responses to its consultative document cited in note [64](#) above shows responses from two individuals. *See* <http://www.bis.org/publ/bcbs190/cacomments.htm> .

⁶⁷ See, e.g., AFME, Global Weekly Update (Aarch 28 - April 1, 2011) at http://www.sifma.org/blastemails/Global_Weekly_Update/Global_Weekly_Update-04-01-11.html (noting, for example the 14 April deadline for comment on HMT consultation on financial reform).

translate more of its documents into languages other than English.⁶⁸ The BIS publishes all of its documents in English and some in German, Spanish, French, and Italian.⁶⁹ IOSCO relies more on publication in English. At the same time, some trade associations communicate with domestic regulators in the regulators' own languages. For example, ISDA writes some of its comment letters in Romanian as well as in English.⁷⁰ It is not generally apparent how many different languages ISDA uses in its comment letters, as not all of these are publicly available. For example comments to the China Banking Regulatory Commission are referred to on ISDA's website, but the text of such comments is not visible to non-members of ISDA.

Trade associations are frequent commentators on proposed standards of financial regulation, but, unsurprisingly their comments are designed more to further their own institutional interests and those of their members than to divine truth. They seek to shape the debate about standards. In doing so they frequently submit comments at the last minute to prevent others from responding effectively to their claims. Trade associations co-ordinate their responses with each other and with their members. The behavior of trade associations is often not fully transparent to outside observers.

Nor are the relationships between trade associations and those they claim to represent always transparent. Policy-makers have begun to focus on this issue and ask organizations that respond to consultations to explain how they decided to adopt the positions they take in their responses.⁷¹

⁶⁸ Consultation Roundtable on IMF Transparency, Summary of Comments from Civil Society Organizations, at <http://www.imf.org/external/np/pdr/trans/2009/052809.htm> .

⁶⁹ See <http://www.bis.org/> .

⁷⁰ See, e.g., ISDA comments on Draft Amendments to Romanian Implementation of EU Collateral Directive (Mar. 28, 2011) at http://www.isda.org/speeches/pdf/ISDALetter_NBR_25march2011_EnglishRomanian.FINAL.pdf.

⁷¹ See, e.g., Department for Business, Innovation and Skills, Call for Evidence: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment p. 4 (Jul. 2010) at <http://www.bis.gov.uk/assets/biscore/corporate/docs/c/10-1032-call-for-evidence-mobile-aircraft->

Another aspect of transparency with respect to the development of standards involves the publication of responses to consultations. Different organizations have adopted different approaches to this issue. Until recently the Basel Committee did not publish individual comment letters on its website⁷² IOSCO tends to characterize rather than to publish the full text of comments it receives,⁷³ although it does sometimes refer to commentators by name⁷⁴

[equipment.pdf](#) (“When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents, and how the views of your members were assembled. It would also be useful to know whether you are a small, medium or large size enterprise.”); Department for Business, Innovation and Skills, Disclosure of Loans to Directors in Company Accounts, Consultation p. 2 (Aug. 5, 2009) at <http://www.berr.gov.uk/files/file52466.pdf> (“When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.”)

⁷² See, e.g., BIS, Comments Received on the Consultative Documents "Strengthening the Resilience of the Banking Sector" and "International Framework for Liquidity Risk Measurement, Standards and Monitoring" at <http://www.bis.org/publ/bcbs165/cacomment.htm>.

⁷³ See, e.g., Technical Committee of the International Organization of Securities Commissions, Hedge Funds Oversight Final Report, 8 (Jun. 2009) available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD293.pdf> (“Having considered the public comments received on the Consultation Report, the IOSCO Technical Committee has developed the six high level principles below which should be applied to the regulation of hedge funds.”) In addition the document has an annex reporting on the results of the consultation. Id. At 17-22 and conclusions in light of responses at 23. In some cases the Report refers to the responses of specific entities with attribution. See, e.g., at p 19 “Considering the international dimension of the hedge funds activities, all respondents supported the need for more convergence on the regulation of hedge fund managers in order to minimise the risk of regulatory arbitrage and ensure better level playing field. See, e.g., International Council of Securities Associations’ Public Response to the IOSCO Consultation Report on Hedge Funds Oversight.” But comments are not always attributed to particular respondents. See e.g., at p 20 “One respondent challenged that the wider publication of details on business plan and fees charged could create commercial problems for the managers.”

⁷⁴ See, e.g., Technical Committee of the International Organization of Securities Commissions, Hedge Funds Oversight Final Report, 19 (Jun. 2009) available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD293.pdf> (“Considering the international

(which means that those who are interested may be able to read the comments on the commentators' own web pages). Where standard setters collate and condense responses they sometimes do so in ways that the responders regard as inaccurate.

Critique Part 2: Excessive Transparency

Although in some ways citizens may find it difficult to know when standard setters are proposing new standards and what those standards and their implications are, at the same time, the volume of information about standard setting published by different organizations is overwhelming.⁷⁵

The previous section of this paper focused on transparency deficits in transnational standard-setters, but, as noted earlier, financial regulation is developed in multiple fora: responsibility for financial regulation is shared among public and private bodies, and among transnational, national and sub-national entities. Proposals for new rules and standards multiply among these different entities, together with the responses of trade associations and their members, creating an information glut. Making transnational standard-setting processes more transparent risks making this problem worse, rather than better.

Some of the participants in transnational standard-setting may have an interest in opacity similar to the interest of lawyers who engage in discovery abuse, but part of the excessive transparency problem derives from the fact of different institutional actors carrying out their own institutional missions without considering that better co-ordination might improve the transparency of the process as a whole. Conceptualizing the transparency issue as the need to make everything visible to those who choose to look can lead to practices which are counter-productive viewed from the perspective that useful transparency enables citizens

dimension of the hedge funds activities, all respondents supported the need for more convergence on the regulation of hedge fund managers in order to minimise the risk of regulatory arbitrage and ensure better level playing field. See, e.g., International Council of Securities Associations' Public Response to the IOSCO Consultation Report on Hedge Funds Oversight.”)

⁷⁵[This section requires significant development and will include examples, for example illustrating the large volume of proposals since the financial crisis began].

to understand, and not merely to find when they look.⁷⁶

Final Thoughts : Resolving Transparency

Transparency in standard-setting suffers from two weaknesses: at the same time there is insufficient transparency and too much. The insufficiencies are clearly remediable, although to do so would be expensive. The paper focuses on three aspects of transparency insufficiency: limited translation of consultation documents; limited information about the identity and agendas of participants in the process and limited information about the results of consultations.

With respect to the first issue, the EU has half a century of experience in managing the costs and benefits of multilingualism, although in a space where the number of relevant languages is limited. The United Nations, which has six official languages: Arabic, Chinese, English, French, Russian, and Spanish,⁷⁷ has recently been discussing multilingualism as an aspect of its work.⁷⁸ Resolving the tensions between allowing for full participation by the world's citizens through multilingualism and making decision-making affordable and efficient by limiting the number of languages of decision is one of the critical problems of global governance, and is an issue which implicates all areas of policy, not merely the setting of standards of financial regulation. .

The second and third sets of limitations to transparency could be resolved by requiring improved disclosure about those who respond to consultations and what they say. But the

⁷⁶ Cf. Schneider & Sidney, *supra* note 43, at 111 “Policy designs need to be transparent rather than opaque, straightforward rather than deceptive, contain positive constructions of all social groups and points of view even of those who are “losing,” logical connections between means and ends, implementation processes that grant equal access to information and subsequent points of contestation, and arenas for discourse that engage multiple “ways of knowing” the issue.”

⁷⁷ Not all aspects of the UN's work involve all of these languages. *See, e.g.*, Report of the Secretary General, Multilingualism, UN Document A/65/488 (Oct., 4, 2010) at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/566/15/PDF/N1056615.pdf?OpenElement>.

⁷⁸ *See, e.g.*, General Assembly Resolution 61/266, Multilingualism (Jun. 8, 2007) at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/510/33/PDF/N0651033.pdf?OpenElement>.

opacity which results from complexity is much more difficult to remedy and more fundamental. If this problem cannot be solved, transparency alone cannot be relied on to legitimate the new financial order. And all of the methods this paper suggests to address the insufficiencies of transparency exacerbate problems of excessive transparency. Making more information available to more people worsens problems of information glut.

Smart uses of technology could ameliorate this problem.⁷⁹ The US government has worked to improve the accessibility and manageability of the data in the federal register system, and transnational standard-setters (whose members are after all based in domestic systems of governance) could learn from this and similar work. At the same time the standard-setters should recognize this problem of excessive transparency and try to co-ordinate with other standard-setters working on similar issues. A third possible solution may be to try to tap into the wisdom of the crowd.⁸⁰ Crowd-sourcing has been used to track radiation levels in Japan after the earthquake and tsunami,⁸¹ and to pore over the details of expense claims by Members of Parliament in the UK,⁸² and academics propose crowd-sourcing to improve

⁷⁹ But *cf.* Robin Gault, Shaun Goldfinch & Simon Horsburgh, *Do they want it? Do they use it? The 'Demand-Side' of e-Government in Australia and New Zealand*, 27 GOVERNMENT INFORMATION QUARTERLY 177, 184 (2010) (“Much of the literature on e-government suffers from an overly technological focus. It is assumed that once the correct technology is developed and in place, and citizens given access, benefits will be delivered in terms of reduced costs and technical efficiency, greater access and greater accountability and transparency, the transformation of government operations, and even greater ‘e-participation’ and ‘e-democracy’... The downsides and limitations of e-government are often downplayed or ignored altogether.”)

⁸⁰ For a critique of this idea see, e.g., Dan Woods, *The Myth of Crowdsourcing* (Sept. 29, 2009) at <http://www.forbes.com/2009/09/28/crowdsourcing-enterprise-innovation-technology-cio-network-jargonspy.html> .

⁸¹ See, e.g., Steve Lohr, *Online Mapping Shows Potential to Transform Relief Efforts*, *New York Times* (Mar. 28, 2011) at B3.

⁸² See, e.g., *supra* note [17](#).

machine translation.⁸³ It is one thing to note that crowd-sourcing can effectively address some collective action issues and another to conclude that we can rely on crowd-sourcing to manage excess information about proposed financial standards. Making crowd-sourcing work requires some effort to motivate and manage the crowds.⁸⁴

A more radical solution, which is less likely to be adopted, would be to focus on eliminating some unnecessary complexities from standards of financial regulation.⁸⁵

⁸³ Vamshi Ambati, Stephan Vogel, Jaime Carbonell, Active Learning and Crowd-Sourcing for Machine Translation, Proceedings of LREC (2010).

⁸⁴ Harvard Humanitarian Initiative, Disaster Relief 2.0: The Future of Information Sharing in Humanitarian Emergencies. Washington, D.C. and Berkshire, UK: UN Foundation & Vodafone Foundation Technology Partnership (2011) at http://www.globalproblems-globalsolutions-files.org/gpgs_files/pdf/2011/DisasterResponse.pdf.

⁸⁵ Cf. Haldane, supra note 46.