ON THE DODD-FRANK ACT

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I am greatly honored to have been asked to author a preface to the inaugural volume of the *Harvard Business Law Review*. Of the 17 student-edited journals that the highly-esteemed Harvard Law School publishes, none will speak more capably or authoritatively than the *Review* on a number of contemporary and timely legal and commercial issues and matters. This volume focuses deservedly on the Dodd-Frank Wall Street Reform and Consumer Protection Act, which embodies our nation's legislative response to the series of destabilizing events that plunged the world's financial markets and the U.S. economy into depths of financial decline and weakness unseen in over eighty years.

America's painful collapse into a deep recession, the United States' plan for recovery from that collapse, and our nation's "come-back" strategy to continue as the world's leading economy have all greatly impacted my prerogatives on the health of our financial and insurance industries. My paramount goals for Dodd-Frank included spreading more transparency across complex financial transactions and instruments,[1] holding institutions and investment advisers more accountable for their misdeeds and foreseeable investor harms, and curbing exorbitant executive pay and incentive compensation.[2] Going forward, it will be incumbent upon us in Congress to regularly oversee the U.S. financial regulatory system as well as to monitor overall U.S. economic health and investor capacity to interpret and measure risk more precisely.

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* U.S. Rep. Bobby L. Rush served as a House conferee on the Committee of Conference that helped to reconcile differences between the House bill, H.R. 4173, and the Senate amendment, S. 3217, which was ultimately passed as the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and signed into law by President Obama on July 21, 2010. During the 110th–111th Congresses, Mr. Rush chaired the Subcommittee on Commerce, Trade & Consumer Protection of the Energy and Commerce Committee. He is currently the Ranking Member for the Subcommittee on Energy & Power, which is a major subcommittee of the Committee on Energy and Commerce.

[1] Transparency will promote better consumer, investor, and borrower understanding of the serious complexities and true risks of financial instruments and transactions. Consequently, they will have more "perfect" information to facilitate prudent investment, capital finance, personal investment, and business and credit-related decisions.

[2] It was also extremely important to me that the Committee on Energy and Commerce assert, as strongly as possible, its shared jurisdiction (with the Committee on Financial Services) over the new Bureau of Consumer Financial Protection, which was ultimately authorized and established in the U.S. Department of Treasury. Draft and actual legislation creating the Bureau in late spring 2009 (which at the time was being called the Consumer Protection Financial Agency) sought to transfer some financial regulatory functions and powers from the Federal Trade Commission to the Bureau. A major cause for the American economy's financial collapse related back to indiscriminate offerings by non-banks of toxic, subprime mortgages and other forms of securitized debt, some of whose practices are and were regulated to varying extents by the FTC, and not by the banking agencies. Considering this, I saw fit to convene a hearing in July 2009, before the subcommittee on Commerce, Trade and Consumer Protection, to consider the Bureau's composition, powers, and its functions, among other things.

The regulations effectuating Dodd-Frank have generated considerable anxiety permeating all corners of the financial services marketplace. Some stakeholders and analysts have argued that the new rules of the road governing exchange registration, trading restrictions, and the remapping of jurisdictional boundaries among banking, insurance, and consumer protection agencies are contributing to uncertainty in the markets.[3] This uncertainty, which has been partly compounded by the inability of many large financial institutions to release loan loss reserves, has chilled potential investment incentives.[4] Consequently, investors and institutions have become more averse to risk than actual market conditions warrant.

Stakeholder and industry anxiety is neither uncommon nor is it unprecedented in cases of comprehensive reform. These responses are inevitable by-products of sweeping reform. This haziness is momentary and will last for only a finite time. With a steady stream of rulemakings, regulations, and studies implementing the Dodd-Frank Act now well underway, that haze is beginning to dissipate.

We are already seeing a more understandable and navigable regulatory landscape for financial and insurance services beginning to take shape. Various financial regulatory agencies, including but not limited to the Federal Reserve, Office of the Comptroller of the Currency, Securities and Exchange Commission, Commodities Futures Trading Commission, Federal Deposit Insurance Corporation, and the new Bureau of Consumer Financial Protection, will be very influential. These regulators are framing pertinent legal and commercial issues, analyzing a voluminous diversity of views and proposals filed in rulemaking comments, and defining decisional factors (and according them appropriate weight) to help rationalize their orders and rules. In addition to these rulemaking activities, stakeholders will also be taking important cues from early enforcement stances taken by government to protect free and open markets and to discipline and penalize violators.[5]

Investors and broker-dealers, for example, need to know which sets of boundaries apply to their actions and in which specific markets and contexts

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[3] *See* Brendan Cooney, *Claims of "Uncertainty" Nothing More Than Orwellian Ploy by Republicans*, Am. Ideal (Mar. 19, 2011), http://theamericanideal.wordpress.com/2011/03/19/claims-of-uncertainty-nothing-more-than-orwellian-ploy-by-republicans/; James Lardner, *Playing the "Regulatory Uncertainty" Card*, USW Blog (Apr. 9, 2011), http://blog.usw.org/2011/04/09/playing-the-regulatory-uncertainty-card/; *The Uncertainty Principle*, Wall St. J., Jul. 14, 2010, *available at* http://online.wsj.com/article/SB10001424052748704288204575363162664835780.html.

[4] Additionally, the state of liquidity in both the public and private markets has been declining due to a de-leveraging trend, and the extraordinarily tight availability of credit in the global capital finance and debt markets has created additional market friction and barriers.

[5] *See, e.g.*, Suzanne Kapner & Paul J. Davies, *US Watchdogs Line Up 100 Cases Against Executives of Failed Banks*, Fin. Times, Apr. 11, 2011, at 15 (US regulators, including the FDIC, expected to file up to 100 lawsuits in the next two years against executives and directors of failed banks); Press Release, U.S. Securities and Exchange Commission, SEC Proposes New Whistleblower Program under Dodd-Frank Act, (Nov. 3, 2010) http://www.sec.gov/news/press/2010/2010-213.htm.

they are applicable. What are their rights and responsibilities with respect to their transactional partners and affiliates? And, with whom could they be deemed to have a relationship or affiliation that is cognizable under Dodd-Frank, thus triggering added duties, responsibilities and requirements? Answers to these questions and many other important ones will inevitably surface in court opinions, agency orders, consent decrees, Executive branch agency opinions and rules, and disciplinary actions issued by self-regulatory organizations having oversight of the broker-dealer regulatory system. Over time, a reliable body of law and regulatory guideposts will materialize to inform broad and important investment, operations, and other business decisions and implications. This landscape will offer actionable guidance for financial institutions, brokers, dealers, investors, traders, and financial and insurance services consumers and borrowers.

The global climate for investment and capital formation will continue to improve, spurring more deal making and increased trading and banking services profits. Economic news and indicators are already flashing promising signs in the form of increased investment banking fees, higher trading profits, recent record inflows into junk bonds, and increased hiring in certain segments of the economy. These developments will help the financial services industry rebound and recover while yielding some valuable complementary benefits, including a rise in longer-term investor confidence, which should produce greater market resilience and resistance to future market melt-down-inducing stresses and shocks.

Accordingly, the U.S. will find itself better positioned to turn its securities, commodities, and credit markets and exchanges into powerful key drivers of domestic economic growth enabling the general U.S. economy to recover more quickly. As lawmakers and public officials, we can then better champion the safety and attractiveness of U.S. markets. These developments will also help us, as public servants, to assert the quality and leadership of our U.S. financial services and insurance companies as they seek to grow their books, balance sheets, and shareholder wealth, while competing for international business in foreign markets everywhere.

I earnestly hope that in this volume, and in future volumes, the *Review* will advance ideas and opinions to foster constructive discussions that will not only restore but also sustain investor and consumer confidence in our highly interconnected financial system. I have no doubt that the dedicated scholarship, ingenuity, and resolve of contributors to the *Review* and the keen minds, eyes, and ears of student editors, reviewers, and readers of the *Harvard Business Law Review* will move us toward more meaningful and thoughtful consideration of these topics and resolution of the important legal issues and matters they raise.

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